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MERCANTILE LAW

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I INTRODUCTION

THIS PART of the survey covers leading cases decided by the different high courts and Supreme Court on the subjects of Law of Contract, Partnership Act and Negotiable Instruments Act. No important case has been decided on the subject of the Sale of Goods Act. Some significant principles have been added to the existing corpus of the literature on the surveyed subjects but some principles enunciated by the appellate courts need either further fine tuning or have to be substituted by some alternative principles that would ensure good governance, timely execution of the government projects and above all instil transparency and accountability in the system.

II LAW OF CONTRACT

Construction of contract

The courts are generally called to determine scope of any statutory provision and in that process different rules of construction of the statutes have been formulated but in a dispute involving nature and scope of any contract executed between the parties, courts are engaged in the construction of the language used in the contract in dispute. This was seen in *Transmission Corpn. of A.P Ltd.* v. *GMR Vemagiri Power Generation Ltd.*[1]

The apex court in the above cited case had to resolve the controversy as to whether the word "fuel" as used in the Power Purchase Agreement (PPA) meant natural gas only in its natural form or includes Regasified Liquidified Natural Gas (RLNG) also. A general rule has been enunciated by holding that the terms and conditions contained in the commercial document have to be construed in such a way as to ensure no violence is caused to the language used in the contract. The context in which the contract came into existence cannot be ignored and has to be necessarily taken into account. The plain meaning, deducible from the language of the contract, has to be preferred as against technical view torn out of the context. The apex court cautioned by stating that the no new words should be injected in the language of the contract and hyper technical interpretation cannot be resorted to reinterpret the agreement and arrive at the new findings with regard to the intendment of the parties

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1 AIR 2018 SC 2965.

by including something which was never intended to be included to the determent of the party to the contract.[2]

Business efficacy test

The courts have coined 'business efficacy test' to fill the gaps in a poorly drafted agreement having ambiguous language. The apex court sounded a word of caution in *Transmission Corpn. Of A.P Ltd.* v. *GMR Vemagiri Power Generation Ltd.*,[3] by stating that the 'business efficacy test' should be applied only in cases where the term that is sought to be read as implied is such that could have been clearly intended by the parties. A commercial document requires interpretation when its true meaning is not quite clear but that does not mean that it is to be interpreted in such a manner as to reach altogether different meaning that was not originally intended by the parties. The 'business efficacy test' can be invoked only when it becomes necessary to read implied term in order to lend efficacy to the terms of the contract. Where the terms and conditions in a contract are clear and free from ambiguity with regard to true intention of the parties, it will not be prudent to read implied terms on the understanding of the parties or by the court by applying 'business efficacy test'. This test is essentially a rule of construction of a contract. It is applied only when clear meaning cannot be culled from the terms and conditions of the contract to know the true intention of the parties. It is to be read as an implied term in the contract which admits such reading. Where the language of a contract is clear the 'business efficacy test' need not to be invoked.[4]

Law on tenders (online)

There is as such no separate provision relating to tenders in the Contract Act,1872 though, it has emerged, over the period of time, a convenient mode for executing contracts through mass participation, more particularly, for government contracts where codal procedures have to be followed which require floating of tenders through a transparent manner for assigning tenders. Now the e-tenders are emerging as a convenient and transparent mode of allotment of government works. The governments, both at national as well as state level, have through notifications made use of e-tendering process mandatory for the works involving prescribed amount of money. This is bound to crop up new generation of legal issues, both on facts as well as on law, for the courts to resolve.

The Supreme Court was called in *Maharastra Hsg. Devpt. Authority* v. *Shapoorji Pallonji & Co.Pvt Ltd.* [5] to decide the case only on its competing facts and not on law, nevertheless, the decision handed down by the court is significant for subsequent courts as and when they are called to decide such matters. In the present case, the appellant, Maharashtra Housing Development Authority (MHDA), through its chief officer issued an e-tender notice inviting proposal for the work of technical designing, coordination and construction for rehabilitation/sale/commercial/amenities along with

2 *Id.* at 2969.
3 *Id.* at 2975.
4 *Id.* at 2974.
5 AIR 2018 SC 945.

construction of habitable temporary transit camps and other various works in respect of re-development projects. The bid was to be submitted in two stages *i.e.,* technical and financial. The respondent contended that he had uploaded his technical bid at the nick of the last date for submission of the bid[6] and had pressed the "freeze button" as required but could not get the acknowledgement of the bid. The respondent then made correspondence with the appellant who directed him (the respondent) to approach to the National Informatics Centre (NIC) engaged for designing and maintaining the e-portal on which bids were submitted. The NIC took the stand that the website was properly working upto the last date and time. The respondent might have not pressed the "freeze button" due to which he has not got acknowledgement of the submission of the bid so he is not entitled to any consideration of its otherwise defective bid.

The present respondent had filed a writ petition earlier in the High Court of Bombay challenging this decision of NIC. The High Court of Bombay had issued a direction to NIC to search the bid files of the present respondent and make them available to present respondent no.2 MHADA which would decrypt the files and consider the bid documents of the petitioner (present respondent) as a valid bid and open the technical bid forthwith along with other bidders and if the technical bid is found in order, his financial bid can be considered along with the other three bidders who are already in the fray.

This order of the high court was assailed by the appellant in the present appeal before the apex court. The apex court distilled two questions from the rival contentions to be answered. (i)Whether the bid documents uploaded by the first respondent – (original writ petitioner) can be retrieved or are irretrievably lost? (ii) Assuming that these documents can be retrieved, does that entitle the first respondent to be considered for participation in technical bid process?

The apex court issued a direction to the NIC to file an affidavit clarifying its stand on the retrieval of the lost bid documents. The NIC on affidavit stated that the data cannot be retrieved by the NIC and MHADA jointly and severally under any circumstances in the present e-tendering system with prevailing Government of India guidelines.

The NIC also contested the averments of the 1st respondents on the ground that the bid uploaded was invalid as its representatives have not pressed the "freeze button" as required which alone could have completed the bid process. There was also no problem in the server at the relevant time as claimed by the 1st respondent. This is buttressed by the records which show that somewhere during the same time around 427 bid documents have been uploaded as is evinced by the records. Even if the contention of the 1st respondent that his representative pressed the "freeze button" but did not get acknowledgement is for argument sake considered true, his representatives had still time to report the matter to the NIC for help which is known to the 1st respondent as he has been participating in e-tendering process earlier also and as such shall be presumed to know the entire process.

6 The last date for submission of the bid was 1300 hours of July 27, 2017 and the respondent contended that he had submitted the technical bid at about 12.10 hours of July, 27 2017.

The apex court rightly sided with the NIC but deeper analysis will show that the apex court created many nebulous issues for the future courts to decide. The apex court ruled that if the NIC which had developed the e-portal stated on affidavit that the bid documents cannot be retrieved, there is no reason to accept the repeated requests of the first respondent that the bid documents can be still retrieved, if required, by travelling beyond the Government of India Guidelines. The question arises; if the retrieval of the bid documents was possible what would have been the response of the court? Would the apex court have ordered the retrieval of the bid papers and directed the appellant to consider them for technical bid as was done by the Bombay High Court while hearing the original petition? The discussion undertaken by the apex court above on the issue leads to the conclusion that the court would have asked the appellant to accept the documents. Does this mean that the E-tenders will have to be accepted even without following the technical procedure like pressing the "freeze button"? This will be too much to ask for, especially when E-tenders are going to stay and will be with the passage of time the only mode of inviting tenders as we are heading towards paperless offices. Thus the discussion should have been confined to only whether the e-portal was in order at the relevant time or not. NIC had shown that the e-portal was properly functioning at the relevant time with sufficient evidence. So the decision should have rested on that point alone and not on whether the information could be retrieved or not.

Nevertheless, the apex court made some pertinent observations by overturning the opinion of the lower appellate court that had directed the NIC to provide the bid documents to MHADA that will decrypt the said files and consider the bid document of the petitioner (1st respondent here) as valid. The observations of the apex court would prove good guide for the courts in future. It was observed: [7]

> Lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the "freeze button;" the generation of acknowledgements in respect of other bidders and absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not valid bid.

Law on tenders (offline)

The law is now settled on the status of the notification inviting tenders, which have been repeatedly called by the courts as invitations to float offers. The other provisions of the contract law relating to offer and acceptance have been applied by the courts to the tenders where ever they could be applied.

General notion is that the lowest tenderer is the winner of the contract but this is not so. Even the lowest tenderer cannot claim the contract as a matter of right. The High Court of Madhya Pradesh in *MEIL Prasad (JV)* v. *State of Madhya Pradesh*[8] further strengthened this position which is bound to help the government instrumentalities engaged in private contracts in pursuance to the mandate of the government.

7 *Supra* note 5 at 947.

8 AIR 2018 MP 230.

The High Court of Madhya Pradesh decided two writ petitions through a common order as the facts were quite similar. A common constitutional question of far reaching importance was raised for the court to answer. The Government of Madhya Pradesh had issued 11 tenders in 2018 inviting public participation in the government works. There was uniform clause in the tender documents stating that the contractor whose contract has been terminated and security deposit forfeited for non performance of the contract need not to apply as he stands disqualified from participating in the tender. The petitioners challenged this disqualification clause on the ground that it seriously affects their right to carry on their business. The petitioners were earlier allotted government works but they had defaulted with the result their security deposits were forfeited and their Bank guarantees were invoked. The petitioners had challenged this action and the matter was pending before the Madhya Pradesh Arbitral Tribunal.

It was contended by the petitioners that their challenge against the action of forfeiture and invocation of bank guarantee is pending before the tribunal. Till the time of formal adjudication of the issues between the parties, the petitioners cannot be said to be disqualified from participating in future tender process. It was contested that the forfeiture of security deposit and to disqualify a tenderer from participating in the tender process is nothing but deemed blacklisting of the contractor which cannot be resorted to. This clause is arbitrary and unreasonable which oust the petitioners from participating in the tender process though they satisfy all the eligible criteria. Hence, violative of articles 14 and 19 (1) (g) of the Constitution of India.

The High Court of Madhya Pradesh has made two pertinent observations. (i) The past experience of a contractor is a relevant fact for the state to take into consideration whether the state should enter into the contract or not with such contractor whose performance has not been found satisfactory in the past. Where there is no allegation that such decision is actuated by malice no right accrues to invoke the writ jurisdiction. (ii) Whether the decision to forfeited the security money and encashment of Bank guarantee was justified or not is a subject matter of adjudication before the competent arbitral tribunal but that does not mean that even though the security deposit has been forfeited, which is not disputed, the petitioner cannot be said to have not incurred disqualification as per the tender conditions.

The judgment of the high court will help in good governance, enforce accountability and will considerably improve timely execution of the government contracts. The court has succeeded in establishing a new norm in government tenders. Normally status of an individual is not determined by the government officials where the matter involving his status is *sub judice*. However, in the instant case, the court had to balance between the individual interest and the public interest. There was no dispute that the petitioners had defaulted by their non performance. Had the court lifted the bar of disqualification of the petitioners, pending formal adjudication of the forfeiture order, this would have not only diluted efficacy of the forfeiture clauses but would have given handle to such contractors to circumvent these forfeiture clauses. Such contractors would then routinely go to the court for the interim stay order on the forfeiture order so that they could participate in future tenders. This would have put government in a tizzy position and rendered it helpless in such situations. For instance;

where court had ruled that the tenderer is eligible to participate in the tender till he is declared disqualified by the arbitral tribunal, then the government had only two options left; one, to wait till the final verdict comes from the arbitral tribunal; this would have delayed the project as both the parties were free to go in appeal against the decision. Second option was to allot the tendered work. In that case, the litigant tenderer (who had earlier defaulted) was also eligible to get the work had he emerged as a lowest tenderer. This would have made forfeiture clause in a tender document meaningless.

Revocation of tender

In *Sabroop F.and D.F., Ludhiana* v. *Punjab State Co-op.S. and M.F.Ltd*,[9] the petitioner filed writ of certiorari to quash the order of the respondent for forfeiture of earnest money deposited as required for a tender.

The respondent invited e-tenders for purchase of lot wise damaged wheat which was unfit for human consumption. The tenderers had to quote rates in their financial bid for any lot separately or jointly. The rates quoted were to remain valid for 30 days extendable upto 15 days from the date of opening of the tender. The tenderers were required to pay the earnest money through RTGS/NEFT. Where the tenderer after submitting the tender does not keep his tender open or does not deposit the requisite security within a week's time from the date of acceptance of the offer or modify the terms and conditions thereof in a manner not acceptable to the respondent, then the same shall be rejected and the earnest money shall be forfeited.

Admittedly, the petitioner had submitted bids for two lots (lot no.s 383 and 384) through a common tender. The tendered amount for lot no. 383 was found lower than the other tenderers and hence rejected. The petitioner then on March 3, 2017 informed the respondent that the rate offered for the lot no. 384 was quoted by mistake, hence it may not be considered and the offer be treated as withdrawn. Similar letter was issued on April 7, 2017 by the petitioner reiterating earlier request for cancellation of his offer. Incidentally, on the same date the respondent had sent a communication to the petitioner informing him that his bid was accepted and an amount of rupees 2,20000/ deposited as an earnest money was converted into the security money and the balance security money of rupees 3,01,554/ be deposited by means of demand draft. A reminder on April 17, 2017 was also issued by the respondent to the petitioner repeating the earlier decision with an additional condition that the balance amount be deposited within a period of two days, failing which action in terms of the tender notice will be taken.

The petitioner did not make any payment and the respondent vide letter dated November 10, 2017 informed the petitioner that due to his non payment of the balance amount, the security money of rupees 2,20,000 deposited stands forfeited and lot no. 384 has been included in the next tender to be opened on November 15, 2017. This communication of the respondent was impugned in the present petition.

9 AIR 2018 Punjab and Haryana 210 .See also *Steel Authority of India Ltd*. v. *Tejas Construction, Daltonganj*, AIR 2018 Jhar. 129

The P&H high court, without offering its own reasons, cited two decisions[10] of the apex court and upheld forfeiture of security money. In both these decisions the apex court, after dissecting section 5 of the Contract Act, opined that right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of the agreement. A person may have a right to withdraw his offer, but if he has made his offer on a condition that the bid security amount can be forfeited in case he withdraws his offer during its validity; he has no right to claim that the bid security should not be forfeited and it should be returned to him.

The High Court of Punjab and Haryana while delving on the language of section 5 of the Contract Act, 1872 observed: [11]

> Section 5 of the Contract Act, 1872 provides that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer. Admittedly, in the case in hand, the petitioner while offering the bid had agreed to keep his bid open for acceptance for a period of 30days from the date of opening of the tenders. There is no dispute that the tender was opened on 27-03-2017 and the acceptance was communicated to the petitioner vide letter dated: 07-03-2017, within 30 days from the opening of the tender. Whether the forfeiture in such a situation is legally justified is no more res-integra and stands settled by the decision of the Hon'ble apex court.

The above rulings of the apex court followed in the instant writ petition have not examined the positive and plain meaning language of section 5, instead have laid emphasis on the likely fall out of the opposite interpretation. In the words of the apex court observed[12]

> Forfeiture of such bid security amount does not, in any way, affect any statutory right under section 5 of the Act. The bid security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bids validity period of 90 days and a contract comes into existence. Such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who donot have the capacity or have intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.

It is quite clear that plain language of section 5 of the Contract Act gives right to the offeror to withdraw his offer at any time before its acceptance is communicated to him. Section 4 being a supplementary provision to section 5 further elucidates when communication of offer and acceptance is complete against the respective parties.

10 *National Highways Authority of India* v. *Ganga Enterprise* ; 2003(7) SCC 410 and *State of Haryana* v. Malik Traders 2011(13) SCC 200.

11 *Id.* at 212.

12 *Ibid.*

The right of the offeror to revoke his offer at any time before its acceptance is complete is absolute and admits no exception. Section 5 starts with a positive language and no where common phrases like "subject to the contract to contrary" or "save as otherwise provided" are used in section 5. Furthermore, a right is a right when it can be exercised without any pain of penalty. How can it be justified that person can exercise his right to withdraw his offer yet he has to pay the penalty for its exercise. To pay penalty for withdrawal of the offer as permitted by the provisions of law before a contract comes into existence is one proposition and to pay penalty after the contract comes into existence is altogether a different proposition.

Black listing of the contractor

The P&H high court in *Sukhdev Singh and Co*. v. *Food Corporation of India*[13] has made government contracts more onerous that is bound to work to the advantage of the private parties intending to enter into the work contracts with the government.

In the present petition, the respondents issued tenders for the appointment of handling contractors and the petitioner also applied. His tender was accepted on April 24, 2017 and was asked to deposit 50% of the amount within 15 days in terms of the tender which he paid on May 19, 2017 eight days beyond the prescribed date. The respondents terminated the contract and earnest money deposited was forfeited. The petitioner was blacklisted for five years as per the terms of the contract. The order of the respondent was impugned by the petitioner in the present petition.

The court upheld the termination of the contract and declared that the decision is neither arbitrary nor irrational[14] but questioned other orders that stem from the terms and conditions of the tender notice. In the words of the court: [15]

Merely because an order of termination is upheld, it does not necessarily follow that a party is also liable to be blacklisted. In other words, a valid termination of a contract does not necessarily justify blacklisting of party.

The court also objected to the reliance given by the respondent to clause IX(f) which reads, "the contractor will also be debarred from participating in any future tenders of the corporation for a period of five years. While commenting on this clause, the court said: [16]

> We would readily read the word "Will" as "May" in the above clause. There are no compelling or special circumstances which indicate that the respondents intended blacklisting a contractor merely on account of a breach irrespective of the nature and extent of the breach or the circumstances in which it occurs. We do not rule out the possibility of extreme cases where compliance with every term and condition is so imperative that the breach must result in blacklisting. We, however, do not express any opinion in this regard. It is sufficient to hold that the present matter does not indicate such a case. If for instance the respondents have suffered no loss or prejudice and if the nature of

13 AIR 2018 P&H 46.

14 *Id* at 48.

15 *Id*. at 49.

16 *Ibid.*

> breach is such that it does not indicate that it is not desirable for the party inviting their bid to deal with such a bidder, an order of blacklisting would not necessarily follow.

The court also questioned forfeiture of the earnest money by the respondent by holding that the validity of the decision to forfeit the earnest money deposit would depend upon a variety of facts and circumstances. It would, for instance, require a determination as to whether it amounts to penalty or not. Moreover, if the official respondents have suffered any damage on account of having issued the work to another contractor, they will be entitled to adjust the amount towards such claim.

It is submitted that the court attempted to import words in a private contract in the same way as the courts do while interpreting a statute. A contract is a private legislation voluntarily executed by the parties knowing well the implications of their breach. The court upheld the termination of the contract but did not allow consequence of breach of the contract to follow. The tender document was clear that in case of breach by the tenderer his earnest money will be forfeited and he will be blacklisted for five years. The court tried to add words in the tender document that neutralized their force. The strong terms in a contract like forfeiture of security money or blacklisting would have compelled the future tenderers to comply with the terms of the tender and would have also ensured timely execution of the Government works.

Breach of contract

The Supreme Court in *Maharashtra State Electricity Distribution Co. Ltd*. v. *Data Switchgear Ltd.,*[17]made a sweeping statement by endorsing opinion of the court below by holding that once it is established that the party was justified in terminating the contract on account of fundamental breach thereof, then the said innocent party is entitled to claim damages for the entire contract, *i.e.,* for the part which is performed and also for the part of the contract which it was prevented from performing[18].

The above opinion of the apex court, it is submitted, requires further explanation as it is not mentioned how to work out the loss which a party would be supposed to have suffered when the performance of the contract is prevented by the opposite party. Is it loss of profit which the aggrieved party has suffered or the loss of money which the aggrieved party had spent for the performance of the contract which is prevented by the opposite party?

The apex court has further said that if the fundamental breach is established the next question is to what effect, if any, that has on the applicability of other terms of the contract. The apex court opined that this question has often arisen with regard to clauses excluding liability in whole or in part of the party in breach. The apex court did not find any difficulty in determining the effect of exclusion clauses in case of fundamental breach and invoked the ratio of *Suisse Atlantique Societe* [19] in which it was laid down that where the innocent party has elected to treat the breach as repudiation that brings contract to an end and sue for damages, the whole contract has ceased to exist, including the exclusion clause. The exclusion clause cannot be then

17 AIR 2018 SC 529.

18 *Id*. at 553.

19 1966 A.C 361 at 397-398.

invoked to exclude an action for loss which will be suffered by the innocent party such as a loss of profit which would have been accrued if the contract had run its full term.

Damages for breach of contract

The apex court in *M/s Fortune Infrastructure* v. *Trevor D' Lima*[20] has added some important qualifications to the exiting corpus of compensatory jurisprudence. The Contract Act is a mother law on contractual obligations including measure of damages in case of breach of a contract. It was made clear that even under the Consumer Protection Act, 1986 the damages for breach of commercial contracts need to be determined as per the relevant provisions of the Contract Act. Every breach of contract gives rise to an action for damages. The amount of damages must be proved with reasonable certainty. The apex court has not, however, further elaborated this principle as to whether mere breach of contract will give rise to damages or actual damage has to be proved before claim for compensation can be made. The new expressions used by the apex court, *i.e.,* "actual loss based damages" and not the gain based remedy" drives the above point home that actual loss has to be proved.[21]

Reciprocal promise

Whether the promise in a contract is reciprocal or independent is generally debated before the courts as it becomes at times difficult to determine on casual reading of the terms of the contract. Section 51of the Contract Act deals with reciprocal promises. It lays law on the subject in simple words by stating that where a contract consists of reciprocal promise to be simultaneously performed, it is not obligatory on the promisor to perform his part of the promise unless the promisee is ready and willing to perform his reciprocal promise. This provision in simple words negatively lays down contractual obligation of a promisor who has received reciprocal promise as a consideration for his promise.

While dissecting language of section 51, the High Court of Calcutta in *Khem Chand Dhingra* v. *Prabir Roy Chowdhury,*[22] has laid down that in the first part of this section the word "simultaneously" has been used to denote concurrent conditions and gives security to such performance.The second part of this section absolves the promisor from his contractual obligation and he need not to perform his promise unless the promisee is ready and willing to perform his part of the obligation.

The court further laid down that the contract has to be ready as a whole in order to ascertain whether a contract contains reciprocal promise or not. Each term in the contract has to be given effect and it is to be found out whether these terms are independent or dependent on each other? Whether they are separable or inseparable? This section is inapplicable to a covenant that is independent of the reciprocal promise, but applies where the covenants constituting promises are so interwoven or related to one another that the performance on one side is a condition precedent to claim for performance on the other.[23]

20 AIR 2018 SC 2975.

21 *Id.* at 2980.

22 AIR 2018 Cal . 86.

23 *Id*. at 92.

Unjust enrichment

Doctrine of unjust enrichment has been applied to a variety of situations by the courts from time to time in order to meet the ends justice. Section 72 covers one of the species of unjust enrichment which obligates a person to return the money paid either by mistake or under coercion. In *Union Bank of India* v. *G K Engineering Works, Aluva,*[24] the Union Bank contested the claim of the respondent on flimsy ground by contending that the money has been given by the respondent voluntarily though that was not due to the bank and this situation is not covered under section 72 which would apply only to the money that is paid by mistake.

In the present case the bank had made wrong calculation of the amount due under the decree and the respondent paid that amount voluntarily without any murmur. This was contended by the bank as a defence for non return of the excess amount as this situation is not covered in section 72. The court rightly rejected this contention by holding that section 72 is comprehensive enough to cover the payments made voluntarily or under protest but has been made by mistake or coercion. From this ruling one can easily infer that the payment made by mistake would cover mistake on the part of the respondent as well. Where an amount has been demanded by the respondent under his mistaken belief that the plaintiff owes him and he pays (plaintiff) him (respondent) without any enquiry but later on discovers that he (plaintiff) was not supposed to make that payment, he is entitled to recover that money under section 72, though he had not made payment by mistake but had made payment because of the mistake of the respondent.

Banker's general lien

The Kerala high court in *Radhakrishnan C* v. *Chief Manager, State Bank of India*[25] was called to resolve apparent conflict between section 171 of the Contract Act which deals with Bankers' general lien and section 11 of the Pension Act. In the instant writ petition the petitioner had taken car loan from the respondent but defaulted in the payment. The bank proceeded against him and sold his car in auction but still fell short of rupees 2,96,118. The petitioner was informed about this short fall and also about the decision of the bank to set off the credit balance and future credits in the pension account against his said liability. The petitioner was also informed that the operation of the pension account will not be permitted under these circumstances.

The precise question for judicial determination was whether the bank is entitled to exercise general lien over the amounts received by the bank on behalf of their customers towards disbursement of pension to them?

The high court instead of making deeper analysis of the nature and scope of section 171 of the Contract Act, which provides for bankers lien, stretched the discussion too far by invoking human rights jurisprudence. In the words of the court:[26]

> It is trite that pension is granted as a social security measure for sustenance at the old age. Social security is declared as a human right

24 AIR 2018 Ker. 73.

25 AIR 2018 Ker. 79.

26 *Id*. at 80.

> in all major human right instruments of the United Nations. The salutary features forming part of the international covenants and the Universal Declaration of Human Rights are deep rooted in our constitutional scheme. The right to receive pension granted is, therefore, an integral part of the basic human rights of the citizens recognized under the constitutional scheme. The issue needs to be considered in the aforesaid back ground.

The high court, while analysing section 11 of the Pension Act, 1871, observed that the bank is precluded from proceeding against the pension amount deposited for realisation of the amounts covered by the decree obtained by the bank. On the same analogy the bank must be precluded from exercising its general lien also over the said amount. If the bank is permitted to exercise its general lien over the pension amount, that would defeat the provisions of section 11 of the Pension Act.

Elaborating the discussion on the subject further, the court held that the general lien provided under section 171 of the Contract Act can be invoked by the bank only against the securities and negotiable instruments deposited by the customer in the ordinary course of the banking business and that too only in the absence of an agreement to the contrary. The bank while permitting opening of the pension account, it facilitates parking and disbursement of pension to the customer released by his employer. The amounts received in such accounts cannot be treated as amounts received by the bank on behalf of its customer in the ordinary course of the banking business. The court read an implied agreement between the bank and the pensioner who had opened bank account exclusively for his pensionary benefits to the effect that the amount credited in the account will be disbursed to the customer. The bank cannot, therefore, exercise its right of general lien over the amounts available to the credit of the customer in the pension account.

The court has made debatable observations in the above ruling, first by invoking human rights principles, and then by reading an implied agreement between the bank and the pensioner. It is true that pension is one of the guaranteed social security measures and would fall in the realm of human rights jurisprudence but that will not give pensioner right to do wrong. No human right will permit breach of promise. The petitioner had taken loan from the bank for purchase of car which he could have easily avoided. It is trite that he who seeks equity must do equity and it is to be remembered that banking business is life line of the country's economy. The court has put depositors money at risk by this interpretation which is neither required nor befits to the language of section 171 of the Contract Act and need not to be followed by the future courts on this point.

The court has also wrongly read implied contract between the pensioner and the bank where by the bank has undertaken to disburse the pension amount to the pensioner received in the ordinary course of banking business.

The words "ordinary course of banking business" have also been wrongly imported by the court in section 171 by opining that the amount received in pension accounts cannot be treated as an amount received by the bank on behalf of the customers in ordinary course of banking business. These words are absent in section 171.

The court did not analyse section 171[27] of the Contract Act which deals with the issue in hand. The right given under section 171, commonly called as general lien, is in fact a privilege conferred on the following bailees only.

(i) Banker,
(ii) Factor,
(iii) Wharfingers,
(iv) Attorney's of High Court, and
(v) Policy Broker.

The above listed bailees have a right, in absence of contrary contract, to retain any goods bailed to them as a security for general balance of account. The general lien can be exercised only in respect of goods. Section 2(7) of the Sale of Goods Act, 1930 excludes money from the definition of the goods. Thus the money deposited by the borrower in the separate account cannot be retained by the bank by exercising general lien as it cannot be categorized as goods. The reasoning given by the court is not correct, though the decision *per se* is correct.

Pledge

The High Court of Calcutta has delineated scope of conjoint reading of sections 173 and 176 of the Contract Act in *Sanjay Khemani* v. *NPR Finance Limited.*[28] It was rightly held that the ownership of the goods remains with the pawnor even when he has pledged the goods and this legal position is not in any way changed by section 173. However, pawnee is within his rights to retain such goods as a security for the loan, interest and incidental expenditure, if any, incurred by him. When pawnor makes default in the payment of the debt, section 176 of the Act gives right to the pawnee to retain the pledged goods as a collateral security. He can also sell the pledged goods but for that he is required to give reasonable notice of the sale to the pawnor. Where sale proceeds received by the pawnee are found less than the amount due, the pawnor remains liable to pay the balance to him, failing which pawnee is free to recover the same through the process of law.

It can be said that where section 173 ends, section 176 commences. So long as goods remain under the operation of section 173, the pawnor continues to be the owner of the goods which he can take back once he fulfils the terms and conditions of the contract of pledge but where the goods come under the operation of section 176,the pawnor (original owner) is substituted by the pawnee who can sell the pledged goods as an original owner (Exception to the principle Nemo Dat Quid Non Habet) as mandated by exception to section 27 of the Sale of Goods Act.[29]

27 Contract Act, 1872, S. 171: Bankers, factors, wharfingers, attorneys of high court and policy brokers, may , in the absence of the contract to the contrary , retain as a security for a general balance of account any goods bailed to them, but no other persons have a right to retain as a security for such balance goods bailed to them, unless there is an express contract to them

28 AIR 2018 Cal.49.

29 Emphasis Supplied by the author.

III PARTNERSHIP ACT

Dissolution of firm

In *Yogendra N. Thakkar* v. *Vinay Balse,*[30] a very flexible interpretation came to be seen to section 44(g) of the Partnership Act. This provision empowers the court to dissolve a partnership firm when it appears just and reasonable. The High Court of Bombay was called to answer the question; would word "court" include "arbitral tribunal?" Elevating the status of the "arbitral tribunal" to court for the purposes of section 44(g), the high court opined that the arbitral tribunal can dissolve partnership firm under section 44(g) when it is just and equitable. The court further elaborated that the arbitral tribunal has jurisdiction to dissolve partnership firm on all grounds mentioned in section 44, including just and equitable ground. However the action would be in *personam* and not *in rem*. The decision to dissolve the firm under section 44(g) by the arbitral tribunal would be binding upon the parties to arbitration agreement only and not to the world at large. This ruling is bound to cause an anomalous situation. Does this mean that a firm between the partners of arbitration agreement would stand dissolved as and when declared so by the arbitral tribunal but will remain as a firm for third parties?

Effects of non registration of firm

The debate over the effects of non registration of a firm as laid down in section 69 of the Partnership Act has occupied judicial mind ever since the enactment of this legislation because of its far reaching implications on the business to be carried out in partnerships.

The High Court of Allahabad has very rightly laid down in *Subash Chand* v. *Mahesh Chandra Agarwal* [31] that the bar of filing a suit under section 69 by a non registered firm applies only to suits arising out of the contract executed by the firm with the third party. Where a right sought to be enforced is a statutory right or a common law right, the statutory bar would not be attracted. Thus, non registration of a firm cannot be a defence available to such firm against a suit for trade mark infringement.

IV NEGOTIABLE INSTRUMENTS ACT

Presumption of execution of negotiable instrument

The High Court of Madras has considerably diluted the rule of presumption in favour of negotiable instruments in *Vasantha* v. *Sekar.*[32] The brief facts of the case are; the plaintiff had advanced an amount of rupees 40,000 to the defendant who in turn executed a promissory note in favour of the plaintiff but later on refused to make the payment. The execution of the promissory note was disputed by the defendant simply on the ground that he is a poor man with no tangible means to repay the loan amount that should weigh in favour of his contention that he did not execute the note. As against this, the evidence of the scribe of the note in support of the contention of the plaintiff was dismissed on the ground that he did not know the purpose for which

30 AIR 2018 (NOC) 919(BOM).

31 AIR 2018 (NOC)701(All.).

32 AIR 2018 Mad. 208.

the promissory note was executed and the evidence of the third person produced by the plaintiff was also rejected on the ground that the witness had animosity with the defendant.

The court ruled that based on the pleadings set forth by the rival parties the burden is heavy on the plaintiff to establish that the defendant borrowed a sum of Rs. 40,000/ from her. This observation of the high court is against the spirit of section 138 which raises a presumption in favour of the promissory note which is to be dispelled by the defendant.

As against this, the apex court in *Kishan Rao* v. *Shankagouds*[33] endorsed the ratios of the earlier judgments[34] from which the following principles can be deduced.

(i) Presumptions as a matter of principle enable and entitle the courts to adjudicate on an issue notwithstanding that there is no evidence or insufficient evidence. Presumption literally means "taking as true without examination or proof;

(ii) Conjoint reading of the definition of the word "proved" in section 3 of the Evidence Act with the provisions of sections 118 and 139 of the NA Act, it becomes evident that in trial under section 138 of the NA Act a presumption will have to be made that every negotiable instrument was made or drawn for consideration and that it was executed for discharge for debt or liability once the execution of negotiable instrument is either proved or admitted.

(iii) The presumption raised under sections 118 and 139 read with the definitions of "may presume" and "shall presume" makes it clear that this presumption is rebuttable.

(iv) Section 139[35] of the NA Act is an example of reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments

V CONCLUSION

The rule that is generally invoked for interpretation of the statutes has been applied for construction of the statutes and it has been held that the terms and conditions agreed by the parties and reflected in the written contract must be constructed in such a way as to ensure that the true effect is given to the language used in the contract. The background and the circumstances in which the contract came into existence have to be considered. The plain meaning culled from the language of the contract has to be preferred as against technical view devoid of the context in which the contract came into being. The gaps can be filled in a contract by invoking "business efficacy rule" but that is possible only when implied reading of the terms of the contract admit such construction. Where the language of the contract is plain and free from ambiguity, the business efficacy rule has no application.

33 AIR 2018 SC3175.

34 See; *Kumar Exports* v. *Sharma Carpets*, AIR 2009 SC 1518; *Rangappa* v. *Shri Mohan* , 2010 (11) SCC 441; *Krishna Janardhan Bhat* (2008) 4 SCC54.

35 Negotiable Instruments Act, S.139 reads as: It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in s. 138 for the discharge, in whole or in part, of any debt or any other liability.

The rules relating to tenders are more or less settled but e-tenders are bound to spawn new generation of legal as well as technical issues. Those who participate in e-tendering process should be supposed to know the technical as well legal aspects involved in it. The tenderers are required to follow the prescribed procedure, failing which their tenders will not be accepted.

The courts have allowed withdrawing of tenders before their acceptance at the pain of forfeiture of the earnest money deposited by the tenderer at the time of submission of the tender documents. While doing so, no court has dwelled on the scope of sections 4 and 5 of the Contract Act that deal with the communication of offer and acceptance and revocation of offer and acceptance, respectively. Both these sections are positive and do not admit any exceptional situation like "subject to the contrary contract" or "save as otherwise provided."The combined reading of these two sections permits the tenderer to withdraw his tender even without the pain of getting earnest money forfeited. The earnest money may be forfeited only after the tender is accepted but the tenderer has failed to fulfil his commitment.

It has been ruled that an innocent party is entitled to claim damages for the entire contract, *i.e.,* for the part which is performed and also for the part of the contract which it was prevented from performing but this ruling requires further clarification as to whether claim by the aggrieved party will be for loss of profit which he would have earned or the money spent for performing the remaining part of the contract which the opposite party prevented.

The theory of unjust enrichment attempts to do justice in such situations where a person can become rich at the cost of another. This is the reason that the courts in India have not confined the language of sections 68 to 72 to narrow limits but have given the words incorporated in these sections widest possible amplitude. It has been rightly ruled that the payment made voluntarily but on demand would fall within section 72 as it would qualify for the payment made under mistake.

The court has not appreciated real scope of section 171 of Contract Act which deals with the banker's lien. This section gives right, *inter alia*, to banks to exercise general lien over the goods bailed to it for general balance of the account. This section has been extended to the money deposited in a separate bank account in ignorance of the fact that the goods do not include money as expressly excluded from the definition by section 2(7) of the Sale of Goods Act which defines sale.

A wide interpretation has been given to section 44 (g) of the Partnership Act. This provision is for the dissolution of a firm on just and reasonable ground. The question to answer was; would the word "court" include "arbitral tribunal also?"This was answered in affirmative and the court held that the "arbitral tribunal" is a court for the purposes of section 44(g), and very rightly opined that the arbitral tribunal can dissolve partnership firm under section 44(g) when it is just and equitable. The court, however, made a debatable observation by stating that action taken by the arbitral tribunal under section 44 will result into an action that would be in *personam* and not *in rem*. The decision to dissolve the firm under section 44(g) by the arbitral tribunal would be binding upon the parties to arbitration agreement only and not to the world at large. This observation is bound to result into an anomalous situation. In such

situation a firm may stand dissolved between the partners of an arbitration agreement as and when declared so by the arbitral tribunal but will remain as a firm for third parties.

The negotiable instruments have been always viewed by the courts favourably for their far reaching implications, especially on commercial trading. This is the reason that a rebuttable presumption is always in favour of the instrument and its holder. The onus of rebuttal of the presumption is on the signer and not on the holder.