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MERCANTILE LAW

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I INTRODUCTION

THE SURVEYED year saw a number of pronouncements from high courts and the Supreme Court on different aspects of mercantile law, mainly on the subjects of contract law, partnership and negotiable instruments. Numerous principles of law have been enunciated. These principles have fine tuned the existing law to bring more clarity on the subject. In some judgments, altogether new principles have been laid down. It has been found that some of these principles do not find any place in the existing corpus of law and some conflict with each other, though laid down by the courts of coordinate jurisdictions. All these legal developments have been revisited and analysed in this part of survey.

II CONTRACT LAW

Statutory contracts

The term 'statutory contract' is nowhere defined in the Indian Contract Act, 1872 (ICA) but has been coined by the courts over the period of time. When a contract is entered by a statutory or public body in line with the prescribed terms and conditions as laid down under a statute, then the contract to that extent is a statutory contract. A contract would not be called a statutory contract merely because its object is to further public good and/or it has been granted by a statutory or public body carrying on any business involving public utility service. This explanation of statutory contracts has been further clarified in *Sajal Kumar Mandal* v. *Indian Oil Corporation Limited*[1] as follows: [2]

> It is settled law that a contract would not become statutory simply because it is for construction/setting up of a public utility and it has been awarded by a statutory or public body carrying on any business involving public utility service. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the settled principle thatthe dispute about the meaning of the covenant in

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1 AIR 2019 Cal. 304.

2 *Id*. at 307.

> a contract or its enforceability has to be determined according to the law of contract and merely because a contract is entered into in exercise of an enabling power conferred that by itself cannot rendered a contract a statutory contract.

The statutory contracts can be called as special contracts in the sense that they are not only required to fulfil the conditions as laid down under the ICA but also the statutory conditions enabling the formation of that contract together with the constitutional requirements as and when applicable. The conditions laid down in the Indian contract are the minimum conditions which have to be fulfilled and the other statutory requirements are the additional requirements.

Concluded contract

In *Chanda Cables* v. *Dakshin Haryana Bijli Vitran Nigam,*[3] the court attempted to draw a line between formal acceptance and letter of intent and laid stress on the actual language used in the contract, instead of relying on accepted principles of law governing the conclusion of the contract.

In the instant case, the respondent (state electricity board) had floated a tender enquiry No.NIT 59 on August 8, 2005 for supply of LT PVC cable of various sizes. The appellant also submitted required documents and deposited earnest money. The papers were accepted and the appellant emerged as the lowest bidder. The bid was to remain valid for 120 days from the date of opening of the notice as per the tender notice. There was delay in finalizing the contract, a letter was sent to the appellant requesting to extend the validity of its offer that was to expire on January 15, 2006. The validity of the offer was extended by 15 days. The respondent issued a letter of intent on January 27, 2006 and after receiving it, the appellant addressed a letter on February 3, 2006 to the Chief Engineer UHBVNL expressing its inability to accept the letter of intent that has been received after the expiry of the validity period of its offer. The appellant asked for refund of earnest money deposited at the time of its offer. The respondent issued the purchase order in-spite of the withdrawal of the offer by the appellant. On receiving this order, the appellant informed the respondent that the validity period of its offer had expired on January 31, 2006 and was thus unable to comply with the purchase order. The respondent was un-moved by the contention of the appellant. The letter of intent was treated as an acceptance of the offer that ripened into a binding contract between the parties. The respondent invoked "Risk Purchase Clause" of their agreement. The matter was referred to arbitration wherein the respondent claimed rupees 7,51,820/ together with interest @18% per annum from the date of purchase of cable treating letter of intent as acceptance. The appellant denied that any concluded contract was executed with the respondent. The arbitrator accepted the claim of the respondent and awarded an amount of rupees 22,95,020/ against the appellant. An appeal was filed by the appellant before the additional district judge against the decision of the arbitrator that was dismissed. Hence the present appeal.

3 AIR 2019 P and H 72.

Precisely, the court was asked to determine whether the letter of intent issued by the respondent during the validity period of the offer was equivalent to acceptance of the bid that has resulted into a concluded contract. The court answered it in negative on the basis of the following observation:[4]

> Section 5 of the Indian Contract Act pertains to revocation of proposal and acceptance. Section 6 of the Act deals as to how the proposal can be revoked, while section 7 of the Act stipulates that an acceptance must be absolute and in order for the proposal to be concluded into a contract, the acceptance must be absolute and unqualified. If the proposal is partially accepted it can be considered as a counter offer and cannot be said that the contract has been concluded. The acceptance has to be absolute and unqualified and in case it is at variance with the initial proposal/offer, then such acceptance does not culminate into a binding contract.

The court did not dwell deep into the difference between letter of intent and acceptance but it appears that the formal letters of the above cited provisions, and the language used in the tender document weighed heavily in reaching this conclusion. Clause 5 of the tender document specified that tenders will be processed and finalized by UHBVN but acceptance by way of purchase order will be issued by UHBVN/ DHBVN individually as per their respective requirements. Since the purchase order was not issued, it means that the offer was not accepted.

Undue influence

In *Paramount Coaching Centre Pvt. Ltd.* v. *Rakesh Ranjan Jha,*[5] the respondent averred that his agreement with the appellant was the result of undue influence. The respondent was working as a tutor in the appellant's coaching centre. He was not paid his huge remuneration over the period of time that forced him to take the loan and sign the contract on blank paper agreeing to work in the coaching centre till the expiry of the contract. The respondent committed breach of this contract and the appellant sought an injunction to prevent the breach to which respondent contended that the contract was caused by undue influence. The court did not accept the contention of the respondent and held that the contract has not been executed under undue influence and is therefore not void. It is in place to mention here that a contract which comes into existence due to undue influence is voidable and not void. There is a well established difference between void and voidable contracts with far reaching legal implications.

The Supreme Court in *Raja Ram* v. *Jai Prakash Singh*[6] has revisited doctrine of burden of proof in case of undue influence alleged to have been exercised in eliciting consent for contract. In that process, the apex court has not only taken sheen from this doctrine but has to a great extent diluted it.

4 *Id*., para 10.

5 AIR 2019 (NOC) 256 (Del.)

6 AIR 2019 SC 4374.

Section 16 of the Indian contract defines undue influence which can be precisely said as dominating position of one over the other and use of that position to extract consent for the contract in question. Where the relations substituting between the parties are such that one of them is in a position to dominate the will of another and, thereby, use that position to obtain unfair advantage over the other. The person alleging undue influence by invoking this provision has a burden to prove not only that his existing relationship with another party was such that he (dominating party) was in a position to dominate his position (weaker party) and then used that dominating position to lure him (weaker party) into the contract in question.

It shall be deemed that one party was in a position to dominate the will of another party where he holds real or apparent authority over the other or where he stands in a fiduciary relation to the other or makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. Thus in the first situation, the person who alleges undue influence has to prove that the opposite party was in a position to dominate his will and used that position to secure that contract. But in the second situation, the person alleging undue influence has to prove that the opposite party was holding real or apparent authority or fiduciary relation or due to old age, infirmity or distress, he executed that contract. The burned of proof in the above two cases vary. In the first case, the burden to prove is dominating relationship and its use and in the second case burden to prove is real or apparent authority, fiduciary relationship or mental or bodily distress. The burden to prove in the first situation is based on subjective facts whereas in second situation, it is based on objective facts.

The apex court overlooked above legal position which can be inferred from the following observation: [7]

> There can be no doubt that the original defendants were in a fiduciary relationship with the deceased. Their conduct in looking after the deceased and his wife in old age may have influenced the thinking of deceased but that per se cannot lead to the only irresistible conclusion that the original defendants were therefore in a position to dominate the will of the deceased or that the sale deed executed was unconscionable. The onus would shift upon the original defendants under section 16 of the Contract Act read with section 111of the Evidence Act, only after the plaintiff would have established a prima facie case.

The Supreme Court did not appreciate the fine dichotomy of burden of proof required under section 16 as discussed above. The apex court admitted that the 'original defendants were in a fiduciary relationship with the deceased and their conduct may have influenced the thinking of the deceased but wrongly observed, "that per se it cannot lead to irresistible conclusion that the original defendants were in a position to dominate the will of the deceased".[8] This is not, it is submitted, correct exposition of

7 *Id.* at 4375.

8 *Id.* at 4378.

section 16(2) which in so many words makes it clear that the courts are not required to search out what the apex court calls as "irresistible conclusion." Once it is established (and admitted by the apex court in the instant case) that "A" was having fiduciary relation with "B", then "B" shall be deemed to have a dominating position over "A".

The apex court seems to have been influenced by the changing social structure where elders are neglected and considered as a burden. The apex court showed reluctance to hold otherwise that would, in the opinion of the apex court, make their position (elders) more precarious and vulnerable. In the words of the apex court: [9]

> In the changing times and social mores, that to straightway infer undue influence merely because a sibling was looking after the family elder, is an extreme position which cannot be countenanced in absence of sufficient and adequate evidence.

The court made whole interpretation of section 16 as a case specific forgetting that it will be now on a general rule applicable to all the contracts falling within the four corners of this section. Section 16 is meant to protect the interest of the weaker party who because of old age, infirmity, and distress mental or bodily cannot make fair decision. This section also aims to protect the interest of the weaker party who reposed trust in another but he betrayed that trust. So law should favour here weaker party but the Supreme Court's ruling has tilted scales of justices towards the opposite party. It was laid down: [10]

> Any other interpretation by inferring the reverse burden of proof straightway on those who were taking care of elders, as having exercised undue influence, can lead to very undesirable consequences. It may necessarily lead to neglect, but can certainly create doubts and apprehensions leading to lack of full and proper care under the fear of allegations with regard to exercise of undue influence. Law and life run together. If certain members of the family are looking after the elderly and others by choice or by compulsion of vocation are unable to do so, there is bound to be more affinity between the elder members of the family with those who are looking after them day to day.

Void contract

In *Pearls Dream Palaces Construction (P) Ltd, Jaipur* v. *Vikas,*[11] the High Court of Punjab and Haryana was called to decide validity of a contract in which one of the co-owners of the land was a minor. The original plaintiff was the co-owner of the land that was sold to the original defendant by his brother. The plaintiff successfully challenged it at the trial and first appellate stages. The high court did not find any fault in their findings. The plaintiff was proved to have been minor at the time of execution of sale deed of the property to which he was a co-owner. The court declared the sale deed as void *ab initio* to the extent of the share of the minor in the immoveable property.

9 *Id*. at 4379

10 *Id.* at 4379.

11 AIR 2019 P and H 164.

The case has been decided as per the established law on this subject. However, one issue that still eludes answer is the fate of the contract in which one of the transferors is a minor and nature of the property is such that minor's share cannot be separated from the rest. This issue may become more complicated where one co-owner who is a major supports the sale deed and is not interested in challenging it but the minor co-owner is and the property is inseparable. In such case the contract has to be declared void and restitution has to be applied as the whole contract has to be free from any legal vice that affects its validity.

Agreement in restraint of trade

In *Paramount Coaching Centre Pvt. Ltd.* v. *Rakesh Ranjan Jha,*[12] the court had to answer whether the contract in question is void under section 27 for being agreement in restraint of trade or not.

The contract was executed between the appellant coaching centre and the respondent tutor that was challenged by the respondent (plaintiff) on the ground that he was debarred from taking tuition of the students of other coaching centres that amounted to restraint of trade and his contract with the appellant was the result of the undue influence. The contentions of the respondent were not accepted.

The law on agreement in restraint of trade in India is different from English law and the precise difference is that an agreement restraining any person from exercising lawful profession, business or trade is valid in England if the restraint is for a reasonable period and falls in the judicially created exceptions. As against this, an agreement in restraint of trade is void in India only if it falls under any of the statutory exceptions.

The agreement in question does not fall under any one of the recognized statutory exceptions and thus can be called an agreement in restraint of trade. There are, however, judicially created exceptions in India also where negative covenants on employment contracts have been upheld, provided they are to protect trade secrets or where investment on the employee has been made on his training or improvement of knowledge. The agreement under question does not fall under any of these accepted exceptions. Furthermore, section 14 (b) of the Specific Relief Act, 1963 provides that those contracts cannot be specifically enforced where the performance of the contract involves the performance of a continuous duty which the court cannot supervise. Similarly section 14 (c) of the same Act provides that a contract that is so dependent on the personal qualification of the parties that the court cannot enforce specific performance of its material terms. Both these provisions were not taken into account by the court to decide the issue in question. Thus, in all, the agreement in question was hit by section 27 and the appellant was not entitled to the benefit of the agreement by way of injunction against the respondent.

The court has not, it is submitted, taken the benefit of a very illumination judgment on the same subject handed down by the High Court of Gujarat in *Lalbhai*

12 *Supra* note 5.

Dalpatbhai and Company v. *Chittaranjan Chandilal Pandaya,*[13] After having threadbare discussion on different facets of the negative covenants, it was laid down:[14]

> Now if there is one principal more than any other recognized and enforced by courts of equity in England on grounds of public policy, it is this that no specific performance should be granted in respect of contract of personal service. It is against public interest to compel an employee to work for particular employer against his will. To compel an employee to work against his will for a particular employer whom he did not wish to serve would smack of slavery and ever since the year 1771 when Lord Mansfield set free a coloured slave James Somerset who was held in irons on a ship lying in themes and bound by Jamaica the English, law always set its face against all forms of slavery. Consistent with this attitude the courts of equity in England said that they would not specifically enforce any contract of personal service for they felt that if they did so they might turn contracts of personal service into the contract of slavery.

The court concludes:[15]

> There is one rule which has been always recognized by courts of equity in England and which has also found favour with courts in India. The rule is that the courts will not grant an injunction to restrain the breach of a negative stipulation in a contract of personal service where effect of doing so would be to compel the defendant to specifically enforce the contract. The court cannot for reasons which have been pointed out above grant a decree for specific performance of contract of personal service.

Damages

In *Mahanagar Telephone Nigam Ltd.* v. *Tata Communications Ltd.,*[16] the Supreme Court was called to delineate the scope of sections 73 and 74 of the ICA but while doing so the apex court has created an avoidable confusion.

The present appeal was filed by the Mahanager Telephone Nigam Limited (MTNL) against the decision of the Telecom Disputes Settlement and Appellate Tribunal ND [TDSAT]. The MTNL had adjusted an amount of INR 1, 1057268 from the dues payable to the Tata Communications Ltd (respondent) by deducting from the bills raised by the respondent. The Tata Communications had filed the petition before TDSAT against this decision of MTNL that was accepted with modification. Against this decision the present appeal was filed by the MTNL.

The precise legal question raised in the present appeal for judicial determination was which provision of the ICA is to be applied for resolution of this dispute. Sections 70, 73, and 74 of the Indian contract are relevant for the present decision.

13 AIR 1966 Guj 189.

14 *Id*., para 4.

15 *Ibid.*

16 AIR 2019 SC 1233.

Section 70 of the ICA is based on the principle popularly called as the principle of *quantum meriut*. This section applies where there is no contract between the parties but one person has lawfully done something or delivered something to another not intending to do so gratuitously and such other person enjoys benefit thereof, the later is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. This section is one of the species of the contracts falling under the general heading of "certain relations resembling with contract" and in England popularly known as "quasi contracts".

The apex court very rightly, following the long line of precedents,[17] held that this section applies only when there is no contract and benefit has been extended not gratuitously and the latter has enjoyed that benefit. This section does not apply to the facts of the present case as the dispute has roots in the contract executed between the parties.

Section 73 provides a provision for compensation for loss or damage caused by the breach of contract. It has two parts; part one provides that where a contract is executed between the parties which is broken by one of them and another party has suffered loss due to such breach, that party is entitled to such compensation for loss or damage suffered by him as naturally arose in the usual course of things from such breach or which the parties knew when they made the contract, to be the likely result from the breach of it.

Part two provides for compensation for failure to discharge obligation resembling those created by the contract. Where an obligation resembling those created by the contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

The apex court while expounding the scope of the above two parts of section 73 laid down as follows: [18]

> This section makes it clear that damages arising out of a breach of contract are different from damages resulting from obligations resembling those created by contract. When a contract has been broken, damages are recoverable under paragraph I of section 73. When, however, a claim for damages arises from obligations resembling those created by contract this would be covered by paragraph 3 of section 73.

The above distinction made by the apex court, it is submitted, was neither required for the final decision of the case nor is it based on any plausible reasoning. It is true that Paragraph III of section 73 deals with the compensation recoverable for

17 *Moselle Solomon* v. *Martin &Co*., ILR (1935) 62 Cal.612; *Kanhayalal Bisanayal Bhiwapurkar* v. *Indarchandji Hamirmalji Sisodia*; AIR 1947 Nag 84; *Alopi Parshad and Sons Ltd*. v. *Union of India* (1960) 2 SCR 793; *Mulamchand* v. *State of MP* (1968) 3 SCR 214.

18 *Supra* note16 at 1238.

failure to perform quasi contractual relationship but this provision puts quasi contracts at par with the formal contracts when it comes to the question of recovery of compensation. This is plainly made clear in paragraph III of section 73 which states that where a person is injured by the failure of another person to discharges obligation resembling those created by the contract, he *is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken it.*[19]

Contract of indemnity

A very important question was raised in *United India Insurance Company Ltd* v. *Pepsu Road Transport Corporation.*[20] In this case the issue was whether contract of indemnity once executed can be terminated? The plaintiff (respondent), a company engaged in transport business having a fleet of vehicles had invited expression of interest for setting insurance of large number of buses from various insurance companies. The negotiation finally resulted into agreements with two major insurance companies, namely, appellant that was given 60% of business and New India Assurance Company, Patiala that was given the remaining 40% of business. An amount of rupees 64,93,222/ as premium was paid through cheque to the appellant company for insurance of 1050 buses from August 20, 1991 to August 27, 1992 that was accepted by the insurance company and cover note dated August 27, 1991was issued giving details of the buses insured and the period of insurance. The insurance was for third party as required under the MV Act and for property and passengers travelling in these buses. The insurance company soon after effecting insurance contract, decided to revoke the contract and informed the respondent about its decision on September 18, 1991. It was further conveyed by the appellant insurance company that the cover note issued earlier shall stand cancelled and was informed that the premium on prorate basis for unexpired period of cover note shall be refunded for which a refund voucher was forwarded that was to be signed so that company could issue the cheque.

This communication of the insurance company revoking the insurance contract was challenged by the respondent on the ground that the decision of cancellation of the insurance contract by the insurance company is unilateral, arbitrary, illegal and therefore null and void. This was contested by the insurance company on the ground that the contract has been cancelled in line with the terms of the contract and the suit is not maintainable. The trial court dismissed the suit which was reversed by the first appellate court on the following grounds;

(i) Motor Vehicle Act prescribes mandatory third party insurance for motor vehicles and therefore a statutory insurance cannot be permitted to be terminated in between the period for which insurance contract was entered into.

(ii) Public interest must prevail over the interest of the insurance company.

(iii) Cancellation of the contract was not justified.

(iv) The suit for declaration is maintainable.

19 Indian Contract Act, 1872 s.73 para III.

20 AIR 2019 P and H 77.

All the above observations of the first appellate court were turned down one by one by the present court as follows

(i) No doubt third party insurance is compulsory under section 147 of the MV Act, 1988, it is not compulsory that the insurance cover must be purchased from the Appellate Company only. The appellate company is not the only company dealing with the insurance of the motor vehicles. The respondent was free to enter into the contract with any of the four companies that were in insurance business at the given point of time. The respondent was free to enter into the insurance contract with any company once it was conveyed to it that the insurance contract made with the appellate company has been rescinded by it.

(ii) The first appellate court erred by dragging public interest –individual interest debate in to the discussion. It is true that a large number of passengers would be travelling through these buses whose interest has to be safeguarded by taking insurance cover for them but the insurance contract is like other such contracts, commercial in essence. Once options are available to the insured to go to another company and get the vehicle insured, the public interest would not come into play. The court has no jurisdiction to ask the insurance company to continue it against its wishes.

(iii) The company is free to rescind its contract as stipulated in the insurance agreement by giving proper notice.

(iv) At the most, the insured (respondent) would be alleged to have violated the terms of the contract and could be held guilty for non performance of the contract that would result in the award of damages as well as compensation. An insurance contract is a contract of indemnity wherein compensation can be claimed for non performance of the contract. The declaratory suit cannot be filed because that would be indirect way of praying for specific performance of the contract which is not permissible under section 14 of the Specific Relief Act which bars enforcement of the contract where money is an adequate relief.

(v) An insurance contract is like any other contract and such contract can be revoked or cancelled as per the terms provided therein. A word of caution is required; there can be a situation when the court may declare a particular clause to be arbitrary or against the public interest. However, in the present case, such declaration was neither prayed nor any argument on this aspect was raised. This court is conscious of the fact that in case of health insurance/ medical insurance, the courts have intervened and declared certain clauses to be bad and even mandated the insurance company to renew the policy. However those cases are entirely in a separate category.

(vi) It is declared that the insurance contracts are contracts of indemnity as defined in section 124 of the contract and as such these contracts can be terminated and the insurance company or the owner has option to walk out of the contract by giving sufficient notice enabling the other party to take appropriate steps. The

insurance contracts cannot be held to be terminable before the expiry of the term.[21]

The above judgment has placed insurance contracts at par with other general contracts so far as their revocation is considered. There is still a point that needs clarification. The insurance contracts can be equated with the continuing guarantee contracts so far as determination of liability is considered. The indemnity contracts are also called special contracts like contract of guarantee. The contract of guarantee once executed cannot be revoked unless it is a continuing guarantee which is revocable only for future transactions. The contract of guarantee cannot be unilaterally revoked by the surety. Similarly, contract of indemnity can be revoked only for future liability and not for the liability that has already incurred and has become due.

Bankers' general lien

Section 171 of the ICA provides for general lien of bankers, factors, wharfingers, attorneys and policy brokers. They can in absence of any contract to the contrary, retain as a security for general balance of account, any goods bailed to them; but no other person has a right to retain , as a security for such balance, goods bailed to them. This general lien of the bankers has raised a host of issues that have been resolved by the courts from time to time.

Interplay of right of general lien as provided in the ICA with the rights of banks as provided under the SARFEASI Act, 2002 (Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act) came for judicial resolution in a number cases. Multiple issues were raised with the result new corpus of law on this subject was formulated with the help of decided cases.

The SARFEASI Act gives right to the bank to exercise lien over the secured assets. The question raised before the Supreme Court in *Kut Energy Pvt. Ltd* v. *A.O.PNB, Large Corporate Branch Ludhiana,*[22] was whether the bank can exercise its right of lien over the amount deposited to maintain an appeal against the decision of the appellant. The appellant had taken a loan from the consortium of Punjab National Bank, Corporation Bank and Central Bank of India for setting 24 MW "KUT Hydro Electro Project" in District Shimila but was later on declared as NPA and demand notice for rupees 106,07 91644.26/ was issued. The appellant proposed one time settlement at different times with varying amount and finally offered rupees 140 crores out of which deposited rupees 40 crores in the registry as directed by the court. The bank attempted to exercise right of general lien over this amount. The apex court rejected the claim of the bank on ground that the deposited amount is neither "secured debt nor secured asset" which could be proceeded against.

The apex court qualified bankers general right of lien and maintained that bank can claim right of lien on any and every amount deposited and more particularly deposited for effecting a settlement. The court further clarified that the amount in question was deposited by the appellant at the instruction of the high court that had directed it to deposit in the registry of the high court.

21 *Id.* at 81.

22 AIR 2019 SC 4994.

It is not, however, clear whether bank could have exercised general lien if the court had directed to deposit this money in the bank, instead of registry of high court. The moot question is: Is it the nature of amount deposited or the place where the amount is deposited that is critical in determining the banker's right of general lien?

III PARTNERSHIP ACT

In *Manohar Daulatram Ghansharamani* v. *Janardhan Prasad Chaturvedi,*[23] the disputed question was whether the partnership in question was partnership at will[24] or partnership for a project. The distinction was critical for determining validity of dissolution of the firm. The original plaintiff contended that there was no provision for determination of the Firm so it was partnership at will and was dissolved under section 43 of the Partnership Act, 1932 by giving a notice of dissolution as provided under this section. Whereas the defendants have claimed that the partnership was till the completion of the project and was dissolved on the death of one of its partners as provided under section 42[25] of the Partnership Act, 1932.

While expounding nature of the partnership at will, the court elaborated that where partnership deed does not provide any express provision for duration of the firm or for the determination of their partnership, only then the partnership is partnership at will. If either of the two conditions exists, the partnership would not be partnership at will.

The high court dissected the language of the partnership deed and found that there is a clause 27 of the deed that specifically provides that the partnership shall be dissolved in the event of the death or insolvency of any of the partners. Furthermore, it was found that the deed provides that in case one particular partner, namely J.P Chaturvedi dies, then if so desired by the other coparceners or the members of J.P Chaturvedi Hindu Undivided family, they shall be taken as partners of the firm upon the same term but this option was not given to other partners. These facts alone will not, however, deny a partnership the status of partnership at will, especially when court itself found that the partnership deed does not expressly spell out a fixed term of duration.

The court, however, found that the terms and conditions in the partnership deed indicate that the partnership would come to an end after the completion of the project which means that it is not a partnership at will. Righty, the court said, "As a corollary, thereof, the partnership that is not a partnership at will cannot be legally terminated by a notice under section 43 of the Partnership Ac."[26]

23 AIR 2019 Bom. 283.

24 Partnership Act, 1932, s. 7 reads: where no provision is made by contract between the partners for the duration of their partnership , or for the determination of their partnership , the partnership is partnership at will.

25 *Id.*, s.42. Dissolution of the firm on the happening of certain contingencies: subject to contract between the partners a firm is dissolved— (a) if constituted for a fixed term , by the expiry of that term ; (b) if constituted to carry out one or more adventures, by the completion thereof; (c) by the death of a partner; (d) by the adjudication of a partner as an insolvent.

26 *Id*. at 288.

Thus, from this ruling, many legal principles can be distilled out. (i) The nature and duration of the firm may be either expressly provided in the deed or it can be read from the language used in the partnership deed. (ii) The partnership at will can be dissolved by giving notice under section 43 of the Partnership Act, 1932 and not under section 42. (iii). A converse rule can be also deducted that a partnership at will cannot be dissolved by the death of a partner, if there is a term in the partnership deed suggesting so.

IV NEGOTIABLE INSTRUMENTS ACT

A purpose oriented interpretation of section 138 of the Negotiable Instruments Act (NI Act) was given by the Supreme Court in *Sicagen India Ltd* v. *Mahindra Vadineni*[27] by overturning judgment of the High Court of Madras in the same case that had quashed criminal complaint filed by the appellant –complainant under section 138.

The appellant had business with the respondent and in the course of the business the respondent had issued three cheques of different amounts at three different dates. These cheques were presented in the bank for collection but were returned for want of funds. The appellant had issued first notice to the respondent on August 31, 2009 demanding repayment of the amount. The cheques were again presented and returned with the endorsement "insufficient funds."The appellate issued another statutory notice to the respondent for payment of money on January 25, 2010 but money was not paid that compelled the appellate to file the complaint under section 138 of the N I Act based on the second statutory notice. This was challenged by the respondent (accused) before the High Court of Madras under section 482 of the Cr PC on the ground that the appellant –complainant had not filed criminal complaint on the basis of the first statutory notice dated August 23, 2009 and complaint filed on the basis of the second statutory notice is not maintainable. The high court accepted the contention and held:[28]

> The amount has been specifically mentioned in the first notice and, thereafter , the complaint himself has postponed the matter and issued the second notice on 25-01-2010 and the complaint filed on the same cause of action was not maintainable

The above ruling of the High Court of Madras was not only against the purpose for which section 138 was enacted but also foreclosed the option of presenting the cheque for collection more than once. This is bound to increase number of litigations with no apparent benefit. This judgment was reversed by the Supreme Court in the present appeal by invoking the real purpose for which section 138 was enacted. It was laid down: [29]

> We have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impressible simply because no prosecution based on the first default

27 AIR 2019 SC 205.

28 Cri. O.P No. 20401 of 2011, D/ 14-11-2011 and Cri. O.P.S No. 55782 of 2014 D/ 15-12 -2014

29 *Supra* note 27 at 504.

> which was followed by statutory notice and failure to pay had not been launched.

The apex court went beyond the letters of section 138 and tried to find the real purposed behind this section. It was held: [30]

> If the entire purpose underlying section 138 of the NI Act is to compel the drawer to honour their commitments made in the course of their business or other dealings , there is no reason why a person who has issued a cheque which is honoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such fault or simply because the drawer has made the holder defer prosecution promising to make arrangement for funds or for any similar reason.
>
> Though section 138 is silent on this issue, the apex court has very rightly held that there is no real or quality difference between a case where a default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time.[31]

It is submitted that the second option has many advantages and should not be discouraged as it gives another opportunity to the accused to make the payment; instead to face prosecution, punishment and then to make payment. This, though, is not expressly mandated by law, nevertheless, present law is not averse to it also. Keeping in view its inherent advantages, where ever a complainant presents the cheque to the designated bank for collection more than once and is dishonoured for want of funds, the limitation period should be reckoned from the date when the cheque was lastly presented for collection.

Legally enforceable debt

Neither the judgment of high court nor that of the Supreme Court appears quite convincing in the case of *Ripudaman Singh* v. *Balkrishna*.[32] In this case, appellants (spouses) claim to be owners of certain agricultural land for which an agreement to sell was executed with the respondent for rupees 1.75 crores. It was mentioned in the agreement that an amount of rupees 1.25 crores was paid in cash and for balance amount of rupees 50 lakhs two cheques of rupees 25 lakh were issued in the name of two spouses.

Clause 4 of the agreement to sell mentions that there is no family dispute of any type nor is any case pending in the court. If due to any reason any dispute arises then all its responsibility would remain on the selling party and payment of cheques would be after the resolution of the said dispute

30 *Ibid*.

31 *Ibid*.

32 AIR 2019 SC 1625.

This clause 4 was critical in deciding the present case but both these courts, it is submitted, messed it up in such a way that their decisions were contrary to one another as high court did consider this clause but misread its effect and Supreme Court did not consider this clause at all.

The high court found that a suit in respect of the land is pending before the XIVth Additional Sessions Judge, Indore since September 2, 2011 in which the complainants are arraigned as parties. On the basis of this finding, the high court made curious observation by holding that under the terms of clause 4 of the agreement the cheques should not have been presented for payment. The cheques according to high court have not been issued for creating any liability or debt but for payment of balance consideration. The high court held that the respondent did not owe any money to the complainant and thus quashed complaint under section 138. The finding of the high court, it is submitted, *dehores* any logic and the difference maintained between any liability or debt and balance consideration is without any difference and more an artificial than any real difference. The court should have handed down the same decision but with more cogent reason and the reason was that the parties had themselves agreed that the balance payment would be released through cheques only when it is established that there is no dispute pending relating to the property for which agreement to sell was executed or if the land is disputed then the payment will be released only when that dispute is resolved by the complainant. The payment through cheques was conditional and the condition under which the payment through cheque was to be released was not yet fulfilled as it was found by the high court that there is a dispute of the land pending in which complainant was also a party.

The Supreme Court's decision is also not quite convincing as it attempted to reverse the artificial distinction between any liability or debt and balance consideration maintained by the high court but did not lend any weight to clause 4 of the agreement to sell which forms the basis of the whole dispute. In the words of the Supreme Court:

> We find ourselves unable to accept the findings of the learned single judge of the high court that the cheques were not issued for creating any liability or debt but 'only' for the payment of balance consideration and then in consequence, there was no legally enforceable debt or other liability . Admittedly, cheques were issued in pursuance of the agreement to sell. Though, it is well settled that an agreement to sell does not create any interest in immovable property, it nevertheless, constitutes a legally enforceable contract between the parties to it. A payment which is made in pursuance of such an agreement is hence a payment made in pursuance of a duly enforceable debt or liability for the purposes of section 138. To this extent the judgement of the apex court represents true position of law.

While referring to clause 4 of the agreement to sell, the apex court very summarily held that whether there was a dispute as contemplated in clause 4 of the agreement to sell, which obviated the obligation of the purchaser to honour the cheque, which was furnished in pursuance of the agreement to sell to the vendor, cannot be the subject

matter of a proceeding under section 482[33] and is matter to be determined on the basis of the evidence which may be adduced at the trial.[34]

It is not quite clear what prompted the apex court to make this observation as the high court below had not only cited clause 4 of the agreement to sell but also recorded the land dispute in which the complainant was a party.

Presumption in favour of holder

The Supreme Court in *Rohitbhai Jivanlal Patel.* v. *State of Gujarat*[35] has laid down many principles of law relating to negotiable instruments. These principles will enhance the credibility of the negotiable instruments which is so critical for the business community and in turn economy of the country.

The complainant (respondent), the accused and one Jagdish bhai were business men of the same locality and had developed friendship over the period of time. The accused requested the complainant for a short term loan of rupees 22,50,000 for his immediate business requirements which he did to the knowledge of Jagdish bhai. The accused made a reciprocal promise that he would repay the loan in instalments for which cheques of different dates were issued and also gave acceptance for repayment on stamp paper.

The complainant alleged (respondent) that the cheques issued by the accused were not honoured by the bank either for want of sufficient funds or that the account was closed. The complainant got served legal notices as required to the accused but the complainant did not receive any money, instead in response to some notices, the accused has denied the transaction as alleged.

The trial court , after examining the records found that the accused had admitted his signature on the cheques and drew the presumption as provided in section 139 but found several facts in favour of the accused which include (i) that there was no documentary evidence to show the source of income for advancing the loan to the accused; (ii) the complainant failed to record the transaction in the form of receipts, promissory notes and even Kaccha notes (iii) the witness had more knowledge of the transaction than the complainant (iv) the complainant alleged to have paid rupees 22,50,000 as loan but has cheques worth rupees 21,00000 only with no explanation for the balance amount. On the basis of these facts, the trial court held that the accused has successfully rebutted presumption to the requisite level of preponderance of probabilities' and observed that the complainant had failed to prove beyond doubt that the cheques were issued in part payment. The accused was acquitted from any liability by the trial court that was successfully challenged before the High Court of Gujarat. The high court without asking for more than what is required under sections 118 and 139 of The NI Act observed that the cheques were issued for consideration

33 This s. provides as: Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

34 *Supra* note 32 at 1627.

35 AIR 2019 SC 1876.

and until contrary was proved , such presumption would hold good; that the complainant had proved legally enforceable debt in the oral as also documentary evidence, including the written acknowledgement by the accused on stamp paper and except bare denial, nothing was brought on record by the accused to dislodge the proof adduced by the complainant.

A very potent argument was made by the high court against the findings of the trial court by stating 'if the transaction in question was not reflected in the accounts and income tax returns that would at the best hold the assessee or lender liable for action under the income tax laws but if the complainant succeeds in showing the lending amount, the existence of legally enforceable debt cannot be denied.' This decision was challenged in the Supreme Court.

The apex court preferred the decision of high court as against the trial court and while doing so, it has laid down the following principles of law.

(i) Ordinarily the appellate court will not reverse the judgement of acquittal, if the view taken by the trial court is one of the possible views of the matter and unless the appellate court arrives at a clear finding that the judgment is perverse, i.e, not supported by evidence on record or contrary to what is regarded as normal or reasonable; or is wholly unsustainable in law. Such general restrictions are essentially to remind the appellate court that an accused is presumed to be innocent unless proved guilty beyond reasonable doubt and judgment of acquittal further strengthens such presumption in favour of the accused.

(ii) The apex court, however, hurriedly added that such restrictions need to be visualised in the context of the particular matter before the appellate court and the nature of inquiry therein.

(iii) The apex court further qualified above stated rule by holding that the same rule cannot be applied with the same rigour in a matter relating to the offence under section 138 of the NIA Act, particularly where a presumption is drawn that the holder has received the cheque for the discharge, wholly or partly, of any debt or liability.

(iv) The accused is entitled to bring on record the relevant material to rebut such presumption and to show that preponderance of probability are in favour of his defence but the appellate court has to examine the evidence produced by the accused to ascertain whether he has brought about a probable defence so as to rebut the presumption. The appellate court is certainly entitled to examine the evidence on record in order to find if preponderance indeed leans in favour of the accused.

(v) Mere denial of debt would not fulfil requirements of rebuttal as envisaged under sections 118 and 139 of the Act.

(vi) The test of proportionality should guide the construction and interpretation of reverse onus and the accused cannot be expected to discharge an unduly high standard of proof.[36]

36 *Id*. at 1886.

(vii) The principle of presumption in negotiable instruments would require that once the complainant has proved that the instrument has been signed by the accused, onus shifts to the accused and unless he has discharged the onus by bringing on record such facts and circumstances as to show the preponderance of probabilities titling in his favour, any doubt on the complainant's case could not be raised for want of evidence regarding the source of funding for advancing loan to the accused.[37]

The above principles will strengthen the credibility of the negotiable instruments which are not infrequently used in present day business transactions. These principles have put law of presumption in negotiable instruments in right perspective. The apex court has coined 'regulatory offences' as a new term to describe offence under section 138. This section provides a penal route to enforce civil wrong whose impact is usually confined to the private parties in a commercial transaction. The object of this provision will be defeated if the presumption in favour of an instrument is diluted by disallowing the claim of the complainant even where preponderance does not lean in favour of the accused.

The judgment in *Bir Singh* v. *Mukesh Kumar*[38] is yet another landmark decision on NI. The decision is on the appeal filed against the judgment passed by the High Court of Punjab and Haryana allowing the criminal revision petition filed by the respondent-accused challenging the order passed by the first appellate court.

The case of appellate –complainant was that he had paid rupees 15 lakhs to the accused as "friendly loan" against which he issued a cheque in the name of complainant to be drawn on Aix Bank. The appellant had presented the cheque that was returned by the bank with an endorsement "insufficient funds."This fact was brought into the notice of the accused who assured to the appellant that he (accused) would ensure sufficient funds in the bank next time when he would again present the cheque for collection. The appellant again submitted his cheque but it was again returned unpaid with the remarks "insufficient fund." A legal notice was served to the accused to which he neither replied nor paid the money. The appellant –complainant filed a case under section 138 of the NI Act. The trial court and first appellate court convicted the accused under section 138 but the high court reversed the order on grounds other than the applicable law.

The high court observed that the complainant had fiduciary relationship with the accused as the complainant is an income tax expert and the accused is his client. The tax expert knows that whenever loan is advanced to anybody, receipt has to be obtained and such heavy amount is to be advanced only through a cheque or demand draft or RTGS. There is no reason why the complainant, who is an income tax practitioner, will advance such a heavy loan to his client without any close relationship and without obtaining any writing to this effect. On the basis of these facts the high court cast a very heavy burden on the complainant to prove that he had advanced a

37 *Id.* at 1887.

38 AIR 2019 SC 2446.

loan of rupees 1500000 to his client without obtaining anything in writing. The high court concluded that the courts below erred in convicting the accused as the case of the complainant becomes highly doubtful and is not beyond all reasonable doubts .Therefore no presumption under section 138 of the NI Act is available.

The apex court not only turned down the observation of the high court but also laid down many principles to infuse credibility in negotiable instruments. The apex court laid down.

(i) The revisional jurisdiction under section 482 cannot be exercised by the revisional court in absence of perversity. The revisional court has not to re-interpret and re-analysis the evidence on record.[39]

(ii) The object of section 138 of the NI Act is to instil confidence in the negotiable instruments and to promote and encourage the use of negotiable instruments, including cheques. The penal provision has been added to deter to callous issuance of negotiable instruments such as cheques without serious intention to honour the promise so intimately associate with these instruments.[40]

(iii) The presumption contemplated under section 139 of the NI Act is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque. This presumption is a presumption of law and that of a fact. Presumptions are rules of evidence and do not conflict with the presumption of innocence which require the prosecution to prove the case beyond a shadow of doubt. The obligation on the prosecution may be discharged with the help of the presumption of law and presumption of fact unless the accused adduced evidence showing the reasonable probability of non existence of the presumed fact.[41]

(iv) A combined reading of sections 20, 87 and 139 makes it quite clear that the author of the cheque makes himself liable to the payee till he rebuts the presumption that the cheque has been issued for payment of debt or discharge of a liability.

(v) The blank cheque is as valid as any other cheque so long it bears the signature of the drawer and is otherwise valid and has been voluntarily presented to a payee. The payee may fill the blank cheque and other details and the onus would continue to be on accused to prove that the cheque was not in discharge of a debt or any other liability. The subsequent filling of an unfilled signed cheque is not an alteration.

(vi) The existence of fiduciary relationship between the payee of a cheque and its holder would not disentitle the payee to the benefit of the presumption under section 139 in the absence of evidence of exercise of undue influence or coercion.

39 *Id*. at 2452.

40 *Id* at 2450.

41 *Supra* note 39.

The apex court has cleared mist of confusion on many issues relating to cheques changing hands between the parties having fiduciary relation and the cheques signed but without having amount details.

Limitation period

The Supreme Court in *Birendra Prasad Sah* v. *State of Bihar*[42] missed an opportunity to deliberate on a very important point of period of limitation for filing a criminal complaint under section 138 of the NI Act.

In the instant case, the complainant had got two cheques of different sums from the accused that were presented to the State Bank of India under a memo issued by the UCO Bank, Begusarai on November 20, 2015. The appellate-complainant received the memo on 4th December 2015 and informed the respondent- accused that the cheques have been dishonoured. The appellant contended that he made frequent queries between February 14 to 23, 2016 about the delivery of the legal notice but no proof was provided to him by the postal department which prompted him to serve second legal notice to the respondent accused on February 26, 2016 that was replied by the respondent accused on March 2, 2016 with the result a complaint was filed against the respondent accused on May 11, 2016.

The complaint was contested on being barred by time but the chief judicial magistrate condoned delay in filing the complaint that was confirmed by the first appellate court while exercising revisional jurisdiction. The condoned delay was not upheld by the high court and the FIR was quashed under section 482 by opining that the complaint under section 138 was not filed within the prescribed statutory period of 30 days.

The apex court without dwelling deep into the issue upheld the condonation of delay by the trial court that was subsequently affirmed by the first appellate court. The apex court opined that the courts below were within their rights while condoning the delay in filing the complaint that should not have been overruled by the high court.

The seminal point that did not attract attention of the apex court was whether the second notice served under the mistaken belief that the first notice has not been served will revive original cause of action? The answer to this question should be in affirmative as discussed above because of its inherent advantages.

Purposive versus technical interpretation of amended section 148

Two cases, namely *Surinder Singh Deswal* v. *Virender Gandhi*[43]*and G.J Raja* v. *Tejrarj Surana*[44] reflect lack of coordination among the coordinate benches of the Supreme Court and consequent loss of precious judicial time. These two cases have been decided by the two different division benches of the Supreme Court on the same subject matter of law but with diametrically opposite judicial findings, leaving subordinate courts to decided in their own wisdom which way they would like to go.

42 AIR 2019 SC 2496.
43 AIR 2019 SC 2956.
44 AIR 2019 SC 3817.

The Supreme Court was called to determine scope of amended section 148 of the NI Act in *Surinder Singh Deswal*.[45] This amended section gives power to the appellate court to pass an order pending appeal to direct the appellant accused to deposit the sum which shall not be less than 20% of the fine or compensation awarded by the trial court to be deposited within 60 days from the date of the order or within such period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the appellant and this amount shall be in addition to any interim compensation paid by the appellant under section 143A which is refundable with interest on the acquittal of the accused.

The precise issue raised in the present appeal was that the above amendment came into force on September 9, 2018 and before that the criminal complaint was lodged against him under section 138 and, therefore, this amendment shall not be applicable to him. Couple of potent arguments were put forward in support of this contention. (i) legal proceedings whether civil or criminal have to be decided on the basis of law applicable on the date of filling of the suit or alleged commission of offence by the trial court or the appellate court, unless the law is made expressly retrospective, subject to the provisions of article 20(i) of the Constitution of India. (ii) the appellate court has interpreted the word "may" as "shall" in section 148 of the NI Act and proceeded on the basis that it is mandatory for appellate court to direct deposit of 25% of the fine or compensation awarded by the trial court for suspension of sentence.

The apex court first invoked statement of objects and reasons as outlined in section 148 of the NI Act which justified amendment, which in the opinion of the apex court, was enacted to meet long pending representations of the business community relating to pending cases of dishonour of cheques which is because of delaying tactics of unscrupulous traders who issued checks without having sufficient funds and then obtain frequent stay for criminal prosecution under section138. This causes considerable pain to a trader who has parted his goods and services but has not received his due and then he is compelled to spend considerable time and resources in court proceeding in getting value of the cheque which defeats the purpose of negotiable instruments.[46] The parliament has thought it fit to amend section148 of the NI Act by which the first appellate court, in an appeal challenging the order of conviction under section 138 of the NI Act, is conferred with the powers to direct the convicted accused appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court. The apex court opined that by this amendment in section 148 of the NI Act, it cannot be said that any vested right of appeal of the accused-appellant has been taken away and / or affected. It was laid down: [47]

> Therefore, considering the statement of objects and reasons of the Amendment in section 148 of the NI Act as amended, we are of the

45 *Supra* note 43.

46 *Id*. at 2963.

47 *Ibid*.

> opinion that section 148 of the NI Act as amended, shall be applicable in respect of the appeals against the order of conviction and sentence for the offence under section 138 of the NI Act even in a case where the criminal complaints for the offence under section 138 of the NI Act were filed prior to amendment Act No 20/2018 i.e prior to 1-9-208. If such purposive interpretation is not adopted, in that case, the object and purpose of the amendment in section 148 of the NI Act would be frustrated.

While dwelling on the language of section 148, the apex court laid down:[48]

> Considering the amended section 148 of the NI Act as a whole to be read with the statement of Objects and Reasons of the amending Section 148 of the NI Act, though it is true that in amended Section 148 of the NI Act, the word used is "may", it is generally to be construed as a rule "shall" and "not to direct to deposit by the appellate court" is an exception for which special reasons are to be assigned. Therefore, if the amended section 148 of the NI Act is purposely interpreted in such a manner, it would serve the objects and reasons of not only amendments in section 148 of the NI Act, but also section 138 of the NI Act.

The ruling of the apex court is for sure going to enhance credibility of the negotiable instruments and will give some relief to the holder of the instrument who has performed his part of promise and in return he has received a bare promise through the instrument which is not being honoured.

The apex court has walked an extra mile in the instant case by reading "may" as "shall" to give a life to the amended provision of section 148 so that the purpose behind the amendment is achieved. The apex court has preferred purposive justice over technical justice.

As against the above opinion, the apex court in *G.J Raja* v. *Tejraj Surana* [49] laid down: [50]

> The provision contained in section 143-A has two dimensions. First, the section creates liability in that an accused can be ordered to pay over upto 20% of the cheque amount to the complainant. Such an order can be passed while the complaint is not yet adjudicated upon and the guilt of the accused has not been yet determined. Secondly, it makes available the machinery for recovery, as if the interim compensation were arrears of land revenue. The coercive methods could also, as is evident from provision like S.183 of the Maharashtra Land Revenue Code, in some cases, result in arrest and detention of the accused. It must be stated that prior to the insertion of section 143-A in the Act, there was no provision on the statute book where under even before the pronouncement of the guilt of the accused, or even before his

48 *Supra* note 43 at 2964.

49 *Supra* note 44.

50 *Id*. at 3822-3823.

> conviction for the offence in question, he could be made to pay or deposit interim compensation. The imposition and consequential recovery of fine or compensation either through the modality of section 421 or section 357 of the Code could also arise only after the person was guilty. That was the status of law which was sought to be changed by the introduction of section 143 in the Act. It now imposes a liability that even before the pronouncement of his guilt or order of conviction, the accused may, with the aid of machinery for recovery of money as arrears of land revenue, be forced to pay interim compensation. The person would therefore be held subjected to a new liability or obligation. Applicability of section 143-A of the Act must, therefore, be held to be prospective in nature and confined to cases where offence were committed after the introduction of section 143-A in order to force an accused to pay such interim compensation.

Thus the above two conflicting opinions of the coordinate benches of the apex court demonstrate lack of coordination. The former is favouring purposive interpretation and the latter one is more inclined to technical interpretation, forgetting the fact that the amendment made in section 143-A does not as such impose any fine or corporeal punishment but only require deposition of 20% of the sum awarded against the accused. It aims to implement one fourth of the decision handed down by a court so that some relief is given to a person who has fulfilled his promise but in return has received a worthless cheque. The scales of justice are tilted towards the complainant and not in favour of the accused. The former opinion of the apex court is more balanced and achieves the purpose for which amendment in section 143 was made as against the latter one that has yanked on technicalities and missed the purposed for which amendment in section 143-A was carried out.

Quashing of criminal complaint filed under section 138

The opinion of the apex court in *Anil Khadkiwala* v. *State (Govt. of NCT of Delhi),*[51] falls short of the desired outcome of the decision. In the instant case, the respondent had filed a criminal complaint against the appellant for issuing two cheques, dated February 15, 2001 and February 28, 2001, in the capacity of the director of ETI Projects Ltd, that were dishonoured on presentation. An application was moved by the appellant before the high court for quashing this criminal complaint under section 482 of the Cr PC on the ground that he had resigned before issuing the cheques but for want of proof his application was dismissed by the high court. He then preferred another application with a fresh proof under section 482, Cr PC to quash summons issued in complaint case no. 3403/1/2015. It was again dismissed by the high court on the ground that the earlier criminal miscellaneous complaint no.877 of 2005 for the same relief had been dismissed; therefore, the concerned application was not maintainable.

The Supreme Court reversed the opinion of the high court on the ground that due to change of the circumstance, fresh application for quashing of the criminal complaint can be filed. The change of the circumstances, in the opinion of the Supreme

51 AIR 2019 SC 3583.

Court, were that the applicant had brought form 32 issued by the registrar of companies under the Companies Act , 1956 in proof of his resignation prior to issuance of the cheques. The apex court held that from the tenor of the order of the high court on the earlier occasion, it does not appear that form 32 issued by the Registrar of Companies was brought on record in support of the resignation. The high court dismissed the quashing of application without considering the contention of the appellant that he had resigned from the post of the director of the company prior to the issuance of the cheque.

The apex court ruled that the company, of which the appellant was director, is a party respondent in the complaint. The interests of the complainant are therefore adequately protected.

The important question that was left unanswered was the liability of the director for posted dated cheques. The court gave much importance to form 32 as a proof of resignation of the director prior to issuance of the cheques. It is not disputed that the director had signed the cheques. The director had in-fact resigned before the date when the cheques could be cashed that is a sufficient proof that these cheques were posted dated. The crucial question that requires answer is the liability of the director for posted dated cheques. It is submitted that the liability of the director for post dated cheques cannot change simply because he has resigned from the company. His liability for post dated cheque should continue even after his resignation or retirement as the third part having a post dated cheque cannot be presumed to have knowledge of the internal arrangement of the party issuing the post dated cheque.

V CONCLUSION

The concept of statutory contract has been bequeathed by the courts but *Sajal Kumar Mandal*[52] court added a clarification to this concept by holding that theses statutory contracts are also required to fulfil the conditions prescribed under section 10 of the ICA. The Contract Act is mother legislation. All the contracts derive their validity from the Contract Act and conditions laid down under any other enactment for execution of the contract are additional conditions specific to the contract concluded under that enactment.

It is a well established principle of the law of contract that the offer as well as acceptance may be either express or by conduct. To determine whether an offer or acceptance or both have been concluded by conduct, regard shall be had to the surrounding circumstances including the language used in the document. The *Chanda Cables*[53] court has not shown willingness to treat letter of intent equivalent to implied acceptance but read express acceptance in the language used in the tender document. This principle should not be made applicable to a situation where the language in the document reflects express acceptance but surrounding circumstance strongly favour implied acceptance that has been acknowledged by the offeror. The implied acceptance can be dispensed with only where express acceptance is required under the relevant enactment.

52 *Supra* note 1.

53 *Supra* note 3.

The re-reading of section 16 made by the apex court in *Paramount Coaching Centre Pvt.*[54] resulted into reversal of the age old interpretation of section 16 of the ICA. The Supreme Court did not take the notice of the requirements of burden of proof under section 16. The apex court accepted that there was a fiduciary relationship between the 'original defendants and the deceased that might have in all probabilities influenced the thinking of the deceased but even then observed that it cannot per se lead to irresistible conclusion that the original defendants were in a position to dominate the will of the deceased. Instead of asking the original defendants to lead more evidence to dispel this strong burden of proof, the apex court imposed burden on the original plaintiff to lead to irresistible conclusion which is beyond the provisions of section 16.

Negative covenants on employment agreement can be saved under section 27 only when employee holds trade secrets of his employer or where employer has invested some money on the employee and in return the latter has given a bond to his employer that he will serve him for some period of time which the court considers reasonable. This is an established legal position which has not been adopted by the *Paramount Coaching Centre Pvt. Ltd* court.

The question of revocation of indemnity contract has been debated in *United India Insurance Company Ltd* (supra) and the court has held that it can be revoked without qualifying this legal principle. The revocation of Indemnity contract is possible but only for future liabilities. Where the liability has already incurred, the indemnity bond cannot be revoked to evade the liability.

Moreover in *Manohar Daulatram Ghansharamani*[55] court held that the duration of a firm can be determined either from the express language of the partnership deed or from the inferences drawn from the language of the partnership document. Where a partnership deed does not provide any express provision for duration of the firm or for the determination of their partnership, the partnership shall be presumed to be at will. Where the terms and conditions in the partnership deed indicate that the partnership would come to an end, after the completion of the project, then it is not a partnership at will. As a corollary thereof, the partnership that is not a partnership at will cannot be legally terminated by a notice under section 43 of the Partnership Ac."

Thus, from the above ruling, many legal principles emerge (i) The nature and duration of the firm may be either expressly provided in the deed or it can be read from the language used in the partnership deed. (ii) The partnership at will can be dissolved by giving notice under section 43 of the Partnership Act and not under section 42. (iii) A converse rule can be also deducted that a partnership at will cannot be dissolved by the death of partners, if there is a term in the partnership deed suggesting so.

The Supreme Court in *Sicagen India Ltd.,*[56] gave a purposive interpretation to section 138 of the N I Act which makes bouncing of a cheque a criminal offence. This

54 *Supra* note 5.

55 *Supra* note 23.

56 *Supra* note 27.

provision enables the complainant to file a complaint against the accused within the prescribed time after the cheque is dishonoured. The apex court has ruled that where the complainant presents the cheque second time and it is again dishonoured, the period of limitation shall be reckoned from second presentation. This interpretation has many advantages.

The Supreme Court in *Rohitbhai Jivanlal Pate* and *Bir Singh*[57] has laid down a number of principles on the presumption in favour of holder of the instrument that are bound to strengthen his position. These principles are grounded in practical realities of life where friendly loans are given and in returned signed cheque without mentioning the amount is received. There is no formal paper work for a loan amount except signed cheque. The private loan is generally exchanged for cheque between the parties having fiduciary relationship or relation of trust. The ruling of the apex court has covered all these instances which are not expressly covered by the relevant provisions of law.

The conflicting opinions of the coordinate benches of the Supreme Court and consequent loss of precious judicial time *in Surinder Singh Deswal and G.J Raja* reflect lack of coordination among the different benches of the Supreme Court. The two benches of the apex court expressed divergent opinions on the retrospective effect of the SARFEASI (Amendment) Act, leaving the subordinate courts where they were before the pronouncement of these conflicting judgments. This is a high time for the courts of record to put all efforts to make full use of information communication technology so that relevant case law is placed before the benches by the judge clerks well before the pronouncement to ensure uniformity, consistency and certainty in the judgments.

57 *Supra* note 38.