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MERCANTILE LAW

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I INTRODUCTION

THIS YEAR witnessed a good number of landmark judgments handed down by the high courts and Supreme Court of India on different aspects of law of contract, sale of goods, Indian partnership and negotiable instruments. The judgments that have reiterated already established principles of law have not been given space in this part of survey. Only those judgments have been discussed that have either deviated from the settled principles of law or have not taken lead to facilitate real as against the technical justice. It has been found that the courts have in some cases sided with the letters of law than its spirit and in that process holistic approach in some cases was wanted and in some cases though the outcome was as per the law covering the subject but that was not invoked. It has been also found that the aid of fundamental rights have been taken but available statutory principles have been ignored and vice versa also. In the former case, the decision remained the same but in latter case the cherished wish of the parties to solemnize their marriage by exercising 21st Century fundamental right to chose was eaten away by the early 20th Century (1903) principle of *Mohori bibee.*

II LAW OF CONTRACT

Concluded contract

The principle that documentary evidence has to be preferred as against oral evidence has roots in evidence law but where two documentary evidences are in conflict with each other then supplementary evidence is required. This rule has to be now extended to the documents which are in conflict with each other but one is offline and the other is online. This has not been expressly stated by the High Court of Kerala in *C.A George* v. *State of Kerala.*[1]The high court was called to resolve a tricky question of law. Whether a contract can be concluded on the terms and conditions set in the Notice Inviting Tenders (NIT) or Bill of Questions (BOQ) when these two documents issued by the government contain contradictory terms.

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1 AIR 2021 (NOC) 77 (KER): AIR OnLine 219 Ker. 713.

In the instant case, NIT provided that price should be quoted inclusive of all taxes but in BoQ words "without taxes" were missing. The petitioner, a registered contractor of the Public Work Department (PWD), was awarded work of improving the *Rajakkad Rajakumary Pooppara Road (RRP)* to riding quality. The approximate value of work was 11,29,06,076/- and the petitioner had submitted an EMD of 22,60,00/-.The petitioner had quoted 7,99,99,990/- which was 29.14% less than the estimated cost. The petitioner was called upon by the chief engineer as required under rules to furnish rate analysis of every item which he did. Then he was asked to submit an undertaking in a prescribed format. The petitioner found that the prescribed format is not in accord with the NIT as the format required the petitioner to give an undertaking that the price quoted by him includes all sorts of taxes, levies, statutory fees etc. The petitioner informed the ssuperintendent engineer that he cannot submit such an undertaking as the rates quoted by him are as per the terms and the conditions stipulated in NIT. Pursuant to this, the superintendent engineer informed the petitioner that his bid has been accepted for the price mentioned which is inclusive of taxes and was called to execute necessary papers. The petitioner again brought it to the notice of the Superintendent Engineer that as per online tender at column 53, he was called upon to quote total amount without taxes and, therefore, his quoted rate was without taxes.

The petitioner contended that he cannot be forced to enter into the contract and petitioned for refund of the EMD that was heard by the single bench that initially issued notice to the superintendent engineer for consideration of the representation of the petitioner. The superintendent engineer in turn terminated the contract after considering the representation of the petitioner. Later on, the petitioner informed the superintendent engineer that he is willing to execute the agreement and start the work with 14% tax amount but nothing was heard from the superintendent engineer.

The termination of the agreement was challenged before the single judge bench which upheld the termination order not on the legal grounds but simply on the ground that the petitioner is an "A" class contractor and he is supposed to know that rates quoted are always inclusive of taxes.

The petitioner impugned the order of the single bench in the instant appeal. The main legal issues, though not expressly raised and resolved in the appeal are; what is the status of bidding document? When there is a discrepancy between these two documents, which one will form the basis of contract, if the bid is accepted? What is the status of BOQ when it is not in line with the bidding documents but is in consonance with online tender document? These issues have not been specifically discussed. The court admitted that the bidding document forms part and parcel of the online bidding contract and will, therefore, govern the contract but did not discuss fall out of conflicting terms in these two documents. The court rightly took the note of BOQ which expressly provided that the rate quoted should be "without taxes and template BOQ further provided that it cannot be modified/replaced by the bidder and the same should be uploaded after filling the relevant columns, else the bidder is liable to be rejected for this tender.

The court further said that the superintendent engineer has to either accept the tender or to reject it and acceptance should be absolute and unqualified *as stipulated*

under section 7 of the Indian Contract Act. He cannot accept the bid with the conditions that were not in the online bid contract, though the court has not made it clear in un-ambiguous terms as to the status of bidding document being in conflict with online bid contract and BOQ, yet it appears that the court considered latter two documents together which contain similar conditions as against the bidding document and very rightly directed the respondent to refund the earnest money. The court has given equal weight-age to these three documents and decided the petition on the basis of the two consistent documents. However, the fundamental question still remains the same and that is if there had been only bidding document and online bid contract with conflicting terms which one would then prevail?

Termination of contract

In *Khushee Construction Patna* v. *State of Bihar,*[2] the order for termination of contract was impugned on many grounds, including failure to observe principles of *audi alteram partem* and non speaking order.

The petitioner is a registered firm of class-1 contractors that had submitted bids in response to the tenders floated by the Executive Engineer, Saharsa Division, Bihar. The petitioner emerged as a lowest bidder for 11contacts. His bid was accepted and work order was issued in his favour. The petitioner had submitted earnest money in the form of certificate of deposit in the post office that was adjusted against 2% performance security submitted at the time of agreements. These papers of the post office were sent for verification but were found in-genuine. The executive engineer informed the petitioner about the same and he replaced these papers by the fixed deposits in the IDBI Bank and the postal securities were returned by the executive engineer to the petitioner. These bank papers were got verified and the same were found genuine.

Thereafter, a show cause notice was issued to the petitioner that was responded but in spite of that response all the above mentioned 11 contracts were canceled mainly on the ground that the petitioner had obtained the contract by producing false papers of postal deposits which was against the provisions contained in the scheme of tender and affidavit of the petitioner.

The same petitioner had earned another 26 agreements from Purnee Division, Bihar under the similar circumstances and similar methods of substitution of documents and their verification was followed. New documents were accepted but show cause notice was issued and subsequently these contracts were also canceled on the above stated ground.

The cancellation of contracts at both these divisions were challenged in the present petition on the plea of estoppel by conduct that was accepted by the high court by adding further grounds to declare action of the respondent arbitrary and devoid of observance of rule of *audi alteram partem.*

The respondent raised a potent argument that the papers reflecting earnest money were not genuine. The petitioner has obtained the contract by playing fraud "and it is

2 AIR 2021 Pat. 5.

a well settled principle that fraud vitiates every solemn act and as soon as the fraud was detected "the contract was cancelled by the competent authority in pursuance of the mandate of the rules of tender. It was contended that "loss or no loss" to the respondent is immaterial when wrongful gain to the petitioner is well established, had he not played the foul.

The petitioner contended that he had deposited money with the official of the post office who had played fraud by not depositing that against the papers issued to him. He also contended that once in-genuineness of the papers was brought to his notice, he immediately replaced them by other set of papers that were verified and found in order.

The high court decided the petition precisely on the grounds. (i) estoppel by conduct (ii) lack of foul play on the part of petitioner (iii) respondent not availing opportunity to examine the records and detect fraud.

The court observed that the estoppel by conduct includes act or omission of one party that gives reasonable assumption to the other party to believe that such act or omission amounts to acceptance. The court found that the contractor had submitted documents unknowingly false along with the tender papers. Inaction on the part of respondent to verify the papers and then to accept lowest bid of the contractor and issue work order would amount to conduct of giving reasonable belief that the papers submitted by the contractor were in order and would fall within section 115 of the Evidence Act. The respondent is too late to rescind the contract.

The court found that the plaintiff has not played any fraud that would justify cancellation of the contract. It is true that the papers submitted by the contractor were not genuine but he believed honestly that the postal papers submitted by him as earnest money were genuine. The petitioner was issued a show cause notice followed by the cancellation of the contract. The order of cancellation of contract was not a speaking order and the petitioner was not given any hearing. Hence, there was violation of principle of natural Justice reflected in the Latin maxim, *audi alteram partem.* The court laid much emphasis on non-observance of this principle of natural justice. It is submitted that the observance of this rule would not have changed the decisions of the case because of the reason, as rightfully, but briefly, mentioned by the court that the instant case falls in the exception of section 19 of the Indian Contract Act that reads as follows:

> If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

The court rightfully pointed out that the respondent had means to discover the truth but those means were utilized only after the contract was accepted and the progress work was midway. Neither section 19, read with its explanation, nor section 115 of the Evidence Act favours the respondent. The cancellation of contract by the respondent is illegal and arbitrary and hence quashed.

The opinion of the court hinges on three points. The respondents did not verify the documents at the earliest opportunity. The intention of the petitioner from the surrounding circumstances appears to be honest and the respondent's conduct gave a reasonable belief to the petitioner that his papers are in order, or at least satisfying the requirements of the respondent. The court also laid stress on non-observance of principles of natural justice and absence of reasoned order but these two grounds would not have tilted scales of justice, even if they had been found otherwise.

Battle of forms

The contractual claims give birth by the conclusion of a contract but at times it becomes difficult to declare in precise terms whether a contract has been concluded or still pre-contract negotiations are on. The Common Law principle that a contract comes into existence only when an acceptance is a mirror image of offeror's offer[3] has been accepted as a thumb rule in India and is reflected in section 7 of the Indian Contract Act. The rule in India is that a proposal will ripen into contract only when acceptance is absolute and unqualified. An acceptance with some variation is not an acceptance but a counter proposal which must be accepted by the original promisor before a contract is made.[4] The courts have added an important condition to this rule by stating that where an acceptance to a proposal is conditional, the proposer may be bound where by his subsequent conduct it is known that he has accepted additional conditions laid down by the acceptor in his acceptance[5]. In that event, the contract is concluded on the terms of the counter proposal. The courts have, however, found it difficult at times to conclude with authority whether a communication is a counter offer or not.[6] At times, it is not clear from the communication of the offeree whether he is making a counter offer or is merely seeking further information.[7]

The Uniform Commercial Code of America has attempted to address this issue commonly known as battle of forms[8] by modifying this mirror image rule that is based on the essence of article19(2) of the Vienna Convention on Contracts for the International Sale of Goods. This Convention provides that a purported acceptance containing additional or different terms that do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he fails to do so, then it will be presumed that he has accepted the new terms. The material alteration includes among other things, the price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes.

3 This is known as mirror image rule. See Fransworth on Contract 3.21 (1st Ed.1990).

4 *Chanda Cables* v. *Dakshin Haryana Bijli Vitran Nigam*, AIR 2019 PandH P.72;*Vedanta Ltd*. v. *Emirates Trading Agency* LIC, AIR 2017 SC 2035.

5 *Jawahar Lal Burman* v. *Union of India*, AIR 1962 SC 378;*Hargopal* v. *Peoples Bank of North India*, AIR 1935Lah.691.

6 *MC Pheron* v. *Appane,* AIR 1951 SC 184; *Badri Prasad* v. *State of MP*, AIR 1970 SC 706.

7 *Stevenson* v. *Mclean,* (1880) 1. Q B 346.

8 "Battle of forms" is a term used where parties exchange incompatible set of standard terms.

Similar difficulties, as envisaged by the courts in other jurisdictions, were experienced by the Supreme Court in *Padia Timber Co. (P) Ltd v. Board of Trustees of Visakhapatnam Port Trust,*[9] here, an appeal against a common judgment passed by the high court of Judicature at Hyderabad was filed. The challenge was against confirming the judgment and order of the additional senior civil judge allowing the suit filed by the respondent- port trust against the appellant for damages and disallowing refund of earnest money.

The brief facts of the case are here under:

The respondent – Port Trust floated a tender for supply of wooden sleepers. The tenders were due to be opened on August 1, 1990. It was mentioned in the tender that Post Trust will not pay separately for transit insurance and the supplier will be responsible till the arrival of sleeper in good condition at destination. The supplier has to intimate any loss or damage to sleepers during transit within a period of 30 days and in the event of any defect or damage to sleepers, the trust port reserves the right to reflect the material and recover the freight.

The appellant submitted his tender with a condition that the sleeper will be inspected only at his depot and deposited Rs.75000 as an earnest money on or about August 2, 1990.The Controller of Stores of the respondent – Port Trust informed the tenderers on 08/08/1990that the opening of tenders has been rescheduled.The appellant submitted on the same day revised quotations and reiterated his earlier condition about inspection of sleepers in his depot. A discussion was held between the appellant and the tender committee after the tenders were opened on October 11,1990.The appellant agreed to supply wooden sleepers and the same was conveyed to the respondent through a letter in which price was also quoted. The earlier demand of inspection of sleeper at his depot was also repeated as this would facilitate re-transit of rejected goods to the depot of the appellant without any financial burden. The appellant had put additional conditions by stating that he will charge Port Trust 25% of the rates quoted if it insists on the inspection of sleeper at their stores. This statement was repeated by the appellant through subsequent correspondence made by him with Port Trust.

The Port Trust informed the appellant *vide* letter dated October 29, 1990 that his offer has been accepted at the rates quoted by him and inspection committee would inspect the sleepers at the site of the appellant. However, final inspection would be made at the general Stores of the Port Trust. The appellant was also requested to extend the delivery period of the sleeper till November 15,1990. Immediately in response to this letter, the appellant informed port trust on October 30, 1990 that the terms and conditions conveyed to him *vide* letter dated October 29, 1990 are not acceptable. The appellant refused to extend validity of his offer because of price escalation. He also requested for refund of Rs. 75000 which he had deposited as earnest money. It appears that on October 30, 1990 itself that the Controller of Stores of Port Trust put an office note, seeking sanction of the Chairman for placing purchase order to the appellant. After the approval of Chairman, a purchase order was issued

9 AIR 2021 SC at 341.

on 31/10/1990 stating that the sleepers be supplied on the terms and conditions specified in the purchase order and the special conditions of purchase appended thereto together with the specific conditions and the rates mentioned in the purchase order. This was followed by another letter dated, November 12, 1990 stating that the material be supplied as per the purchase order that has been placed within the pre-issued timeline and on the price quoted by the appellant, after issuing a letter of intent to the appellant accepting its offer. The appellant was also warned that if supply was not made as per the purchase order, his earnest money of Rs. 75000/- will be forfeited and risk purchase would be made at the cost of appellant. Further correspondence was also made by Port Trust with the appellant on similar times and a letter on November 19, 1990 by the Port Trust to the appellant requesting to commence supply of sleepers was responded by the appellant by stating that there was no concluded contract between them and again requested for refund of earnest money. Almost ten months later (03/03/1991), the Port Trust placed an order for purchase of sleepers to another firm at higher rates. The Port Trust not only forfeited earnest money but also claimed damages for loss on the basis of the concluded contract that had resulted by the purchase order placed to the appellant together with special conditions of purchase. The appellant contended that the negotiations between them did not result into a concluded contract as his conditions were not fully accepted by the Port Trust, particularly the conditions of final inspection at the General Stores of the appellant. The Port Trust filed a suit against appellant for seeking damages to the tune of Rs. 33, 19,991/- for breach of contract and appellant filed a suit for refund of earnest money together with an interest @ 24% per annum.

These two suits were clubbed together for a common order for which the following issues were formed:

i. Whether the appellant had committed breach of contract?

ii. Whether Port Trust was entitled to recover loss from the appellant?

iii. To what relief Port Trust was entitled to?

The trial court held that the appellant has committed breach of contract as there was a concluded contract between the parties. This conclusion was drawn by the trial court on the ground that the tender submitted by the appellant was accepted by the Port Trust within its validity period. The trial court did not accept contention of the appellant hat he had revoked his offer before its acceptance by the Port Trust. The trial court invoked section 4 of the Indian Contract and held that there was a concluded contract and appellant has committed its breach. The trial court also dismissed the suit of appellant for recovery of earnest money as the rescission of the contract and consequential forfeiture of security deposit was proper and within the terms of the contract. The trial court cited a number of judgments handed down by the apex court[10] and high courts[11] furnished by the appellant as well as respondent to reach this decision.

10 *Fateh Chand* v. *Balbishan Das*, AIR 1963 SC 1405; *Murlidhar Chiranjclal* v. *Harishchandra Dwarkadas*, AIR 1962 SC 366; *State of Maharashtra* v. *Sigambar Balwant Kulbarni*, AIR 1979 SC 1339; J*amal* v. *Moola Dawood and Sons*, AIR 1915 PC48.

11 *Rajasthan State Electricity Board* v. *Dayal Wood Works*, AIR 1998 AP 381; *G.M.T. A.P Co-op Mkts. Ltd* v. *Dy. Registrar Cooperative Socities, Raichur*, AIR 1998 Kar., 354; *Saraya Distillery, Sardarbagga* v. *Union of India,* AIR 1984 Delhi 360.

The appellant went to the high court against both the orders of the trial court; one decreeing the suit filed by the Port Trust and other dismissing the claim of the appellant. The high court cited a number of judgments but without any discussion on them[12]

The high court concurred with the trial court and held that a series of negotiations and correspondence have resulted into a contract. It is not open to appellant to fall back and say that there was no acceptance at all nor there was any concluded contract. The high court also made it clear that the claim of appellant for refund of earnest money also falls squarely to ground with the same self reasons. Hence, there is no merit in these appeals. Thus, the trial court and the high court made concurrent findings but an appeal was filed against this decision before the Supreme Court. This court overruled concurrent findings of the courts below and pointed out that section 7 of the Indian Contract Act that squarely covers the present appeal has been overlooked by the courts below and the high court has not even discussed the cases that have been cited on behalf of the appellant.

The apex court heavily relied on section 7 of the Indian Contract Act and laid down that it is a cardinal principle of law of contract that acceptance to an offer must be absolute for which there is no room for doubt. The apex court laid down: [13]

> The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication. However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition

The apex court followed its own earlier rulings[14] while overturning concurrent decisions of the high court and trial court by holding that both these courts overlooked section 7 of the Contract Act and also ignored the crucial fact that the appellant had submitted a conditional offer subject to inspection of sleepers at his depot but the condition was not accepted by Port Trust up to the last. Therefore, there was no concluded contract and consequent damages or any risk purchase at the cost of the appellant.

This battle of forms has resulted in to vertical division of judicial opinion between the Supreme Court on the one head and high court and trail court on the other hand. The Supreme Court juxtaposed facts of the case with the ingredients of section 7 of the Indian Contract and came to the conclusion that a conditional offer in response to a tender will result into a concluded contract only when the conditions stipulated in the offer are met. However, the courts below gave importance to the acceptance of the Port Trust within the validity period of the offer by overlooking that the acceptance of the Port Trust was not a mirror image of the appellant's offer as is the spirit of section 7 of the Indian Contract.

12 This was held by the Supreme Court also by observing that "with great respect, the high court has cursorily dealt with the contentions of the appellant". *Supra* note at 9 at 351.

13 *Id*. at 352.

14 *Haridwar Singh* v. *Bagun Sumbruti* AIR 1972 SC 1242; *Union of India* v. *Bhim Sen Walaiti Ram*, AIR 1971 SC 2295; *Jawahar Lal Burman* v. *Union of India*, AIR 1962 SC 378

Pertinent to mention here that this mirror image rule contained in section 7 of the Indian Contract Act had parallel in American contractual law but has been now modified by the Uniform Commercial Code of America and by article 19(2) of the Vienna Convention on contract for the International Sale of Goods. These instruments have is now coined the "last short" doctrine which gives desired flexibility of accepting a counter proposal where an offer has been addressed to an offeree who has put his own conditions and returns it to the original offeror who accepts it, the contract is clinched on the terms of original offeree. Thus, the original offeror in these cases becomes an offeree. This rule is being followed in America and will suit to e-commerce transactions which are based on series of negotiations and quite often are trans-border.

Elucidation of cross offers

The High Court of Madhya Pradesh in *Amar Goods Transport* v. *MP State Cooperative Marketing Federation*[15] has discussed law on cross offers and in that process even ignored express language used by the government authority by declaring that language as misnomer.

The petitioner had submitted an offer in response to NIT which emerged as *L1* but was not accepted as it was found on higher side with the result the respondents floated a cross offer by reducing initial bid from 119% above SOR to 110% above SOR. The petitioner communicated his acceptance to this cross offer which was not accepted by the respondents. The respondents informed the court that even cross offer was found on higher side by the District Procurement Committee that would result into the loss to state exchequer and would not be in the interest of public. The committee had also found that in the adjoining area of Sector Gadarware within the same district of Narsinghpur, *L1* offer of 60% above SOR was accepted. These observations of district procurement committee were placed before the state level committee that concurred with the district committee and it was decided that the fresh tenders will be issued on the analogy of the tenders issued in Narsinghpur sector. Consequently, fresh tenders were issued and Pankajam Enterprises was awarded the contract that was impugned in the present petition.

The petitioner precisely raised three challenges.

i. Once the reduced cross offer of 110% above SOR was accepted by the petitioner that resulted into a binding contract that would prevent the respondents from unilaterally canceling the contract and issuing of fresh NIT.

ii. The reason assigned for cancellation of contract for being on a higher side cannot hold water as in the sectors like Jhabua Dindori cross offer as high as 127% above SOR were accepted by the official respondents.

iii. The lowest bid of the petitioner and acceptance of cross offer cannot be rejected/ ignored for untenable reasons.

The high court first addressed the public policy issue that weighed heavily in the minds of judges. The court observed: [16]

15 AIR 2021 MP 157.

16 *Id*. at 160.

> The decision to re-tender was a conscious decision taken by the official respondents by keeping public interest in mind. The facts reveal that if the petitioner had been allotted work based even on the cross offer of 110% above SOR, the public exchequer would have incurred considerable financial loss.
>
> One of the paramount considerations in matters of commercial transactions involving state or its instrumentality, is that of public interest.
>
> The official respondents have assigned cogent reasons which render the impugned decision immune from judicial review."

The court did not accept the argument that a concluded contract had come into existence on the acceptance of cross offer of official respondents that was also lower one. The court rightly said that NIT is not an offer as defined in the Contract Act but it is an invitation to make an offer. The court add further that if any cross offer is made by the NIT issuing authority during tendering process then that "cross offer yet again assumes the character of an invitation for an offer. If the cross offer made by the authority issuing NIT is accepted by the tenderer, it is not an acceptance but is essentially an offer/proposal, either to be accepted or rejected by the authority issuing NIT". [17]

The court was not impressed by the word "cross offer" used in tender document when issued second time and called it misnomer used by the official respondents and opined that the cross offer with reduced rate was infact a fresh invitation to the petitioner to make its proposal /offer. When the petitioner accepted the so called cross offer that is not accepted by the official respondents and, therefore,there is was no concluded contract.

The court however, it is submitted, used the word "counter offer" instead of "cross offer" incorrectly and concluded that the acceptance by the petitioner of the counter offer floated by the respondent is not an acceptance at all. In the words of the court: [18]

> What comes out loud and clear is that the acceptance by the petitioner of the counter offer made by official respondents was not actually an acceptance in the eyes of law but a fresh proposal/offer for the official respondents to accept or not to accept. The official respondents took a conscious decision on relevant and cogent considerations by keeping in mind the public interest thereby saving their decision from being scarified at the alter of Article 14 of the Constitution of India

It is submitted that the above ruling of the high court is not legal tenable for more reasons than one. The high court did not accept wording of the second tender as cross offer that was expressly mentioned by the officials of respondents stating that it is a misnomer. It is true that there is an established principle of law that a tender is not an offer but an invitation to treat but where first tender is withdrawn and second tender

17 *Ibid.*

18 Id. at 161.

uses the word "cross offer" at that time, then it is difficult to label the word "cross offer" as invitation to treat.

The court by its inventive interpretation interchanged the word "cross offer" used by the officials of the respondent in second NIT with the word "counter offer" and then observed that the acceptance of counter proposal by the petitioner is not an acceptance in the eyes of law. This observation is against accepted principle of law relating to offer and acceptance. There is a plethora of English[19] Indian[20]and United States[21]cases that have made it clear that an acceptance of counter proposal is possible and the contract once made is based on the terms and conditions set out in the counter proposal.[22]

The court should have restricted its opinion simply by holding that the second NIT referred as "cross offer" by the officials of respondent was also in fact invitation to treat open to all to float their offers and then again it was up to the officials of the respondent to accept it or not like the first NIT. The court erred by holding that second NIT was a counter offer and its acceptance by the petitioner was not actually an acceptance in the eyes of law but a fresh proposal/offer because by saying so the counter offer was open for petitioner to accept or reject but he had opted for its acceptance that would result into a complete contract.

Public policy

In *Muhammad Siyad* v. *Jasne,*[23] the moot point that the High Court of Kerala was called to dwell upon was; whether a wife can relinquish her claim of maintenance after the end of her martial relationship with her husband? The respondent was married to the appellant and then they terminated their marital relationship. They executed an agreement wherein wife relinquished her claim for future monthly maintenance. The wife then approached to family court with a maintenance application that directed husband to pay monthly maintenance of Rs. 10,000/- to wife. This direction was impugned by the appellant in the instant case. The high court held that the right of maintenance to a divorced wife is provided under section 125 of the C r PC. It is a statuary right that cannot be waived or relinquished by a private contract between the divorced wife and her former husband. The court declared this agreement opposed to public policy under section 23 of the Contract Act and would not act as estoppel.

It is submitted that this decision of the High Court of Kerala is correct but the support of law taken by the court is not so. Section 23 has been invoked by the court to take the support of public policy doctrine but the provision more relevant in the

19 *Hyde* v. *Wrench* (1840) Beav 334.

20 *Haji Mohamed Haji jiva* v. *E. Spinner*, (1900) 24 Bom. 510523; *Badan Lahkar* v. *State of Assam*, (1996) AIHC 4632Gau; *Nihal Chand* v. *Amar Nath*, AIR 1926 Lah. 645.

21 *Simbia Steel and Building Supplies* v. *James Clerk and Eaton Ltd.* (1986) 2 Lloyds Rep 225; See also UCC ss. 2-207 (1)(2).

22 This principle in American Contract Law Jurisprudence is called "Last Shot doctrine" which means that where conflicting communications are exchanged, each is a cross offer, so that if contract comes into existence, it must be on the terms of the final document in the series leading to the conclusion of the contract.

23 AIR 2021 (NOC) 691 (Ker.)

same section has been ignored. Section 23 *inter alia* provides that the consideration or object of an agreement is lawful, unless…, it is such a nature that, if permitted, it would defeat the provisions of any law.

The above provision of section 23 is squarely governing the contract in question. If it is permitted, it would defeat the provision of section 125 of Cr PC and hence void.

Void contract

The High Court of Allahabad in *Sadhna Kumari* v. *State of UP* [24] had to answer somewhat unusual question; whether a marriage contract executed between a boy and a girl is valid where the girl is underage? Whether this contract can be ratified by the parties after girl attains the age of majority? In the instant case, a habeas corpus writ petition was filed on behalf of *Sadhna Kumari* aged about 18 years, through her next friend allegedly the husband namely *Shekhar alia's Shekhar Pandey* aged about 19 years for a direction to the parents of *Sadhna Kumari* to release her from their unlawful detention.

The ground for issuance of direction detailed in the petition included that *Sadhna Kumari* is a legally wedded wife of *Shekhar Pandey* and their marriage is based on an agreement executed by them with their free consent on July 31, 2020 on a notarized affidavit and were living together like husband and wife. The court, it is submitted, erroneously based its whole decision on this agreement. The court framed a question for its decision in the following words: [25]

The question is whether on attaining the age of majority a minor is competent to ratify his/her agreement executed in the age of minority.

The court provided three pronged answer to the above question by holding (i) that the contract with a minor is void and it cannot result into any legal obligation. (ii) A minors contract cannot be ratified on attaining majority unless any law specifically provides so. (iii) No court can permit specific performance of a contract in which one party is minor.

The court provided three pronged answer to the above question by holding (i) that the contract with a minor is void and it cannot result into any legal obligation. (ii) A minor's contract cannot be ratified on attaining majority unless specifically provided so (iii) No court can permit specific performance of a contract in which one party is minor

The court made it clear that *Sadhna Kumari* had not, at the time of marriage contract, reached to marriageable age under the Hindu Marriage Act, 1955 and Child Marriage Restraint Act, 1929 and Juvenile Justice (Care and Protection of Children) Act, 2015 consider such a person a child.

24 AIR 2021 All. 150 However, the same high court had different reasoning for almost similar facts in in *Smt. Safiya Sultana Thru. Husband Abhishek Kumar Pandey* v. *State of U.P. Thru. Secy. Home, Lko. Habeas Corpus no.* - 16907 of 2020 decided on Jan. 12, 2021.

25 *Id*. at 154.

The court further held that the minor's contract can be ratified only when it is entered by a lawful guardian on behalf of the minor. Such a minor can ratify this contract after attaining the majority. The court did not accept the argument of the petitioner's counsel that the petitioner is now a major and is willing to ratify her contract and declared it legally not tenable.

The above decision is mainly based on sections 10 and 11 of the Indian Contract Act, supplemented by the privy council's decision in *Mohori Bibee* v. *Dharmodas Gosh,*[26] and relevant provisions of the Hindu Marriage Act, 1954, Child Marriage Restraint Act and Juvenile Justice Act.

It is submitted that the general statement of law that minor's contract cannot be ratified is not correct. There are decisions laid down by the High Courts of Calcutta[27] and Allahabad[28] where ratification of minor's agreement, under given circumstances, after attaining the age of majority was considered lawful. There is also an old English case of *Ditcham* v. *Worrall* [29]squarely relevant to the case in hand. The case was decided in England when breach of promise of marriage was actionable. The court held that a minor's promise of marriage, though void under the Infant Relief Act, 1874, became binding on him when, after attaining majority, he fixed a date for the marriage. This was a new promise and, therefore, he was liable for breach.

The court heavily relied on the marriage contract of the parties ignoring that the petitioner had filed writ of *heabus corpus* that in essence claims restoration of fundamental right, that was breached by her illegal detention. The court should have taken it a case of violation of fundamental right in light of various Supreme Court rulings recognizing live-in relationship[30] and right to choose[31] as fundamental rights. The live -in relationship has been now statutorily recognized under the Domestic Violence Act, 2005 also.

The petitioner was major and willing to ratify her marriage contract at the time of filing of her petition but the court did not take its notice, instead the court banked upon the marriage contract and its validity on the ground that one of the parties was a minor at the time contract was executed and out rightly rejected the argument that the minor has now attained the majority and is willing to ratify her contract.

26 (1903) ILR 30 Cal. 539 (P.C) wherein minor's contract was held void *ab initio*.

27 *Kundan bibi* v. *Shree Narayan* (1906) II Cal WN135.

28 *Narain Singh* v. *Chiranjilal*, AIR 1924 All730; *Anant Rai* v. *Bhagwan Rai*, 1939 All LJ 935.

29 (1880) 49 LJQB 688.

30 See for instance: *K.S. Puttaswamy* v. *Union of India* (2017) 10 SCC 1; *Khushboo* v. Kanmiammad Cri. appeal no. 913 decided on April 28, 2010; *Indra Sarma* v. *V.K.V Sarma* Criminal Appeal No. 2009 of 2013,decided on Nov 26,. 2013; *Dhannulad* v. *Ganeshram* Civil Appeal No. 3410 of 2007, decided April 8, 2015; S.PS Balasubraman man and women live together under the same roof and cohabiting for some years, there will be presumption under s. 114 of the Evidence Act that they live as husband and wife and the Children born to them will not be illegitimate.

31 See for instance: *Shakti Vahini* v. *Union of India* 7(2018) 7 SCC 192 8AIR 2018 SC 1933; *Laxmibai Chandaragi* v. *State of Karnataka,*WP (Criminal) No. 359/202, decided on Feb.8, 2021.

Intersection of Arbitration Act with section 28 of the Contract Act

The Supreme Court in *PASL Wind Solution Pvt. Ltd* v. *GE Power Conversion India Pvt. Ltd*[32] was called to decide *inter alia* the scope of sections 23 and 28 of the Contract Act with reference to the provisions of Arbitration and Conciliation Act, 1996 on the basis of which the parties agreed to refer dispute to arbitrator of the foreign country. This agreement was challenged on the ground that it is against public policy as contemplated under section 23 as the impugned agreement allows the parties to escape the alternative remedy available to them and thus violates section 28 of the Contract Act as well. It was argued that two Indian parties cannot opt out of the substantive law of India and therefore ought to be confined to arbitration in India. Indian public policy, as reflected in these two sections, ought to prevail. In other words, it was argued that a new head be added to the public policy doctrine that was enunciated by the Common Law Courts and followed by the Indian Courts from time to time. The public policy doctrine was confined to several heads and it has been unanimous opinion of the courts expressed from time to time that this list stands exhausted and the courts should not invent new heads. Even then, it was argued that the present arbitration clause allowing the parties to use neutral forum outside India in third country is against the public policy. Rejecting this argument, the apex court made the following pertinent observation.

> Freedom of contact needs to be balanced with clear and undeniable harm to the public, even if the facts of a particular case do not fall within the crystallized principles enumerated in well established "heads" of public policy. The question that then arises is whether there is anything in the public policy of India, as so understood, which interdicts the party autonomy of two Indian persons referring their disputes to arbitration at a neutral forum outside India

Invoking exception 1 to section 28 of the Indian Contract Act, the apex court advanced its opinion further on the following lines: [33]

> It can be seen that exceptions 1 to section 28 of the Contract Act specifically saves the arbitration of disputes between two persons without reference to the nationality of persons who may resort to arbitration. It is for this reason that this court in Atlas case referred to the said exception to section 28 and found that there is nothing in either section 23 or section 28 which interdicts two Indian parties from getting their disputes arbitrated at a neutral forum outside India.

The object of section 28 of the Contract Act is to ensure that the parties to a contract do not barter away their remedies and should not be without any remedy. Where any alternative remedy is provided to resolve the dispute arising out of a contract, section 28 is not averse to such remedy. Where this arbitration will take place and who will conduct that arbitration? Section 28 is silent on these issues which

32 AIR 2021 SC P. 2517.

33 *Id*. at 2564.

means parties are free to choose the remedy and the place of forum for alternative remedy. However, it is to be noted that the parties cannot confer jurisdiction on the court which does not have it.

Quasi contract

In *Khumukcham Sylvester* v. *State of Manipur,*[34] the high court rightly decided the case but without invoking relevant law on the subject. In the instant petition, the jeep of the petitioner was hired by the Power Development Department of Manipur for official use for which work order was issued without the approval of the competent authority. The jeep was used by the department, initially for a period of six months, which was extended from time to time on the same terms and conditions. Undisputedly, the vehicle was used for a period of eleven years (January 1, 2003 to September 30, 2013) without any break and without any breach from the petitioner but without the payment of the approved hiring charges.

The total amount of hiring charges came to be Rs. 16, 73,499/- out of which an amount of Rs. 2,50,000/- was paid in two installments, leaving an outstanding amount of Rs.14,23,499/-. The petitioner made then repeated representations without any success. He filed a petition but was asked to approach the competent authority within one week with a direction that the petitioners claim be duly considered within six weeks. The claim of petitioner was not considered in spite of repeated requests which compelled him to file a contempt petition. It is during the contempt petition that the managing director issued the order rejecting the claim of the petitioner and thus contempt petition was closed.

Aggrieved by the order of the managing director, the present petition was filed that was contested on the ground that the work orders were issued without following due procedure of law, they were therefore null and void.

The court, instead of invoking relevant provisions of law for granting relief to the petitioner, tried to scan facts of the case. The court found that the contract was approved by the in-charge chief engineer and subsequent works for hiring were approved by the superintendent engineer. The court observed that they were expected to know their duties and functions and were required to follow the relevant rules in discharge of their duties. There is no record to show that the petitioner was in any way responsible for the irregularity or illegality committed by the executive engineers. The state government, being an institution, ought to act fairly and responsibly. The state government has taken undue advantage of the services rendered by the petitioner by abusing their official power that is unreasonable and in violation of article 14 of the Constitution. The court not only quashed the impugned order and directed the payment of outstanding amount to the petitioner but also ordered the recovery of this amount from the executive engineer. The court has no where taken support of section 70[35] of the Indian Contract Act that applies lock, stock and barrel to the dispute in hand.

34 AIR 2021 (NOC) 156 (MPR).

35 S. 70 reads as follows: where a person lawfully does anything for another person or delivers anything to him, not intending to do gratiutoulsy, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the farmer in respect of, or to restore, the thing so done or delivered.

Section 70 has been invoked by the Supreme Court[36] and other high courts[37]in a good number of such cases by holding that one of the purposes of this section is to ensure payment to a person who has done something for another voluntarily and yet with the thought of being paid. The section will apply to government contracts also even where mandatory requirements of article 299 have not been met.

The requirements of section 70 are fully met in the instant case. The petitioner had rendered services at the request which means that these services were lawfully rendered and with this hope that he will be paid. He never intended to do service gratuitously and the government enjoyed benefit thereof.

The court also hold executive engineer personally liable for showing slackness in getting approval of the competent authority to the work order in question. Though this type of orders are required to stem the corruption or corrupt practices from public offices, yet in the present case no allegation of collision or corruption was made out. The services of the jeep were provided and the government used it and enjoyed its benefit. No loss was caused to the government. exchequer. The direction of the court to recover the balance amount of Rs. 14,23,499/- from the Executive Engineer would cause unjust enrichment to the government as no loss was caused to it otherwise.

The decision of the court, it is submitted, is in tune with the law that was not invoked, instead, the court heavily relied on article 14 of the Constitution of India by declaring action of the government. arbitrary and unreasonable. This interpretation is not possible where the plea is that the claim made out is not in resonance with the requirements of law. Instead of deciding the case on article 14 of the Constitution, the court should have invoked section70 of the Indian Contract Act that is squarely applicable to the instant case.

Contract of indemnity

In *UPL Limited Mumbai* v. *Standard Chartered Bank,*[38] the High Court of Bombay was called to answer the question; whether a promise in the nature of indemnity to the bank would insulate it from loss caused to it by making payment to the beneficiary of letter of credit in utter disregard of the term in the indemnity contract that the bank will release payment only after examining documents. The court answered this question in negative on the ground that the bank should have first examined the documents (letter of credit) with a reasonable care.

The court found that the bank had received letter of credit on July 8, 1996 but the payment was released on July 4,, 1996. This clearly indicates that the bank had not at all examined and scrutinized the documents before releasing the payment.[39] The court held*:* [40]

36 *State of West Bengal* v. *B.K Mondel*, AIR 1962 SC 779; *Pillo Sunjishaw Sidhwa* v. *Muncipal Corporation of the City of Ponna (*1970) I SCC 213; *Pannalal* v. *DC Bhandare* (1973) I SCC 639

37 *Muncipal Council, Rajgarh* v. *MPSRTC,* 1991 MPCJ 910;*Food Corporatoin of India* v. *Alleppey Muncipality*, AIR 1996 Ker 241; *Federal Bank* v. *Joseph* (1990) I KLT 889.

38 AIR 2021 Bom.227.

39 *Id*. at 245.

40 *Id*. at 246.

> Where the evidence indicates that the banker was negligent in making the payment in as much as the documents tendered did not conform with the terms and conditions of the letter of credit and were *ex facie*, discrepant, the aforesaid indemnities do not insulate the bank. In other words, where the evidence establishes that the payment was wrongfully made by the bank, the latter is not entitled to fall back upon the aforesaid indemnities

The above ratio of the decision has been handed down by the court without analyzing any relevant provision of the Contract Act. The head note (C) of the cases merely mentions sections 124 and 125 of the Contract Act without making any threadbare discussion on the application of these two sections. It is submitted that these two sections though dealing with the contract of indemnity in general are not applicable to the case in hand. When a customer makes a contract with the bank for release of payment on letter of credit, a principal agent relationship is created which is covered under section 223 of the Contract Act and not under sections 124 and 125 of this Act.

III PARTNERSHIP

Effects of non registration of a firm

In the case of *Desari Sambasiva Rao* v. *Srinivasa Service Station*,[41] the High Court of Andhra Pradesh was called to declare the decree null and void that was passed by the trial court without appreciating implications of non observance of the requirements of section 58, 59 and 69(2) of the Partnership Act read with Order 30 Rule 1 of CPC.

The cause of action arose on February 1, 2002 when the petitioner executed two promissory notes in favour of the first respondent which were not honoured and consequently a legal notice was issued on 13/11/2003. The first respondent then filed a suit on behalf of a partnership firm for recovery of Rs. 2,66,672/- as detailed in the promissory notes. The suit was decreed on the basis of the material produced by the first respondent as the present petitioner did not choose to participate in the trial.

In the execution proceedings for recovery of decretal amount, attachment and sale of immovable property was sought, that was objected by the present petitioner but his objections were overruled. The petitioner's son filed a claim petition that was dismissed on contest by the executing court and thereafter the execution petition was posted for sale of the property on August 6, 2018.

The execution petition was dismissed for want of sale papers that were not filed on October 23, 2017. Then the first respondent filed a restoration application that was allowed. It is at this stage that the present petitioner raised objections in terms of section 69(2) of the Indian Partnership Act as to maintainability of the suit and thus questioned the decree. The court below mentioned that this issue should have been raised either before the trail court or should have been at least raised in the execution

41 AIR 2021 AP. 73.

proceedings. This civil revision petition was dismissed and present appeal is against this dismissal.

The high court made it clear that a partnership firm is required to be registered under section 59 of the Partnership Act and then it should be entered into the register which is called the Register of Firms by the Registrar of Firms. Section 58 prescribes the details that have to be entered into the Register of firms. The registration of firm is optional but effects of non registration provided in section 69 are so serious that partners of firm invariably prefer to register their firm. Section 69(2) provides that the suit by firm against third party can be instituted only through the partner of the registered firm and the name of the partner suing must be in the Register of Firms. The court opined that the combined effect of section 69(2) of the Partnership Act and order XXX Rule 1 of CPC makes it amply clear that on the date of cause of action for institution of suit the requirements of sections 59 and 69(2) have to be met. Admittedly, the respondent firm was not registered on the date of suing and this critical fact was not considered by the executing court. The high court ruled: [42]

> In as much as very institution of the suit by an unregistered firm suffers bar on account of infraction of section 69(2) of Indian Partnership Act, which in terms should be the requirement to institute a suit by a partnership firm following order XXX Rule 1 CPC, any inaction or absence of defense in that respect cannot be a measure to make the decree passed, acceptable or valid. The question relating to this bar in failing to follow the mandatory provision of the statute, which clearly bars right to enforce the claims by an un-registered partnership firm against third parties, a decree so passed remains a nullity and is void.

The court after declaring the decree passed in violation of section 69(2) as null and void, assigned itself the task of determining whether the bar of section 69(2) can be taken up at the later stage *i.e,* in executing proceeding when it was not supposed to take up. The court summarized its opinion in the following words: [43]

> It cannot be stated that the petitioner cannot make an attempt to re-open this issue under the garb of section 47 CPC when he did not choose to raise such defense or question, during early stage of litigation. The prohibition under section 69 (2) of the Indian Partnership Act is penal and plenary when such is its impact, mere omission or silence on the part of the petitioner to raise such defense at the early stage of litigation cannot benefit the first respondent. This serious omission as to want of registration of the firm goes to the root of the matter affecting the very institution of the suit. Therefore, when this objection is with reference to very maintainability of the suit, a decree passed thereon is not only void but also improper exercise of Jurisdiction amounting to an illegality. It is well known that there cannot be contracting out of the statutory provisions and a decree passed in derogation of the terms

42 *Id*. at. 76.

43 *Id*. at. 78.

> of section 69(2) of the Indian Partnership Act cannot be legally sustained. A decree of this kind can indeed be questioned at any stage.

The above ruling has delivered technical justice but failed to achieve true spirit of justice. Whether to allow re-opening of a plea at a later stage of executing decree that bars institution of suit is a discretionary power vested with the court that has to be exercised with an avowed object of delivering real justice instead of technical justice.

It has been nowhere contended by the petitioner that the promissory notes signed do not belong to him or have not been signed in due discharge of any claim of the present respondent. The present petitioner has not also responded to the suit filed against him for recovery of amount mentioned in the promissory notes and *ex parte* decree was passed against him. He tried to pre-empt execution proceedings by falsely contesting that the property put in execution belongs to his son.

The petitioner was not before the high court with clean hands. He did not deserve favour of discretionary power that was exercised by the court benefiting him and in the end delivered justice based on technicalities of law at the cost of genuine claim of the present respondent that was neither contested nor objected on the ground of being untrue.

It is submitted that pleas like the present one if not taken at the appropriate stage should not be entertained at the later stage where it has a potential to cause injustice than to result in true Justice.[44]

In order to neutralize implications of non registration of firm, the High Court of Bombay in *Ankit vijaykumar Khandelwal* v. *Aarti Rajkumar Khandelwal*[45]*and Telangana High Court in Ajay Tiwari* v. *Vijayendra Bajpai*[46] gave a very purposive interpretation by holding that an arbitration clause in a partnership deed of an unregistered firm will not cease to take effect after the dissolution of a firm. The disputes can be resolved in accordance with the arbitration clause even where firm is unregistered and suit is barred by section 69 (2). The non-registration of Partnership firm is not mandatory, its registration cannot bar court from referring dispute to arbitration. The two high courts exercised their jurisdiction judiciously in order to achieve ends of justice. As against these two judgments, *Desari Sambasive* court (supra) preferred technical justice over real justice.

44 The High Court Calcutta in *Md. Mofazzular Rahman* v. *Md. Sarfaraz Alam*, (AIR 2021 Cal. 148) showed agreement with the decision of the AP high court but the objection of the firm being non registered was raised at the initial stage as the plaint was silent about the registration of the firm. The high court held that in order to defeat a challenge under O.7, R. 11, the plaint has to contain the Jurisdictional fact with regard to section 69 like any other Jurisdictional fact so as to ensure that the plaint is not rendered void due to lack of such pleadings. In the instant case, plaint is silent with regard to the registration of the partnership firm. The jurisdictional fact of registration of the Partnership firm when the plaintiffs are claiming reliefs emanating out of a contract of Partnership being absent in the Plaint, the same is required to be treated as void. *Id*. at 154.

45 AIR 2021 Bom. 151.

IV SALE OF GOODS

Definition of goods

In *Skill Lotto Solutions Pvt Ltd.* v. *Union of India,*[47] the Supreme Court was called to resolve the conflict of definitions of "Goods" in different enactments. It was contended that the definition of "goods" in the Sale of Goods Act, 1930,[48] Central Goods and Services Act, 2017[49] and definition of an actionable claim[50] in Transfer of Property Act, 1882 must conform to the definition of goods as provided in Sub clause (12) of article 366 of the Constitution of India.[51]

The whole debate rested on the term "actionable claim" and its scope. Interestingly, the "actionable claim "does not fall in the definition of "goods" as provided in the Sale of Goods Act, 1930.

The main contention in the instant writ petition was that the expression goods is a well known concept and is also defined in the Constitution of India. The constitutional definition of goods has to be adopted and not departed by the Legislature.[52] It was argued that the definition of goods as provided in the Sale of Goods Act, 1930 is in conformity with the constitutional definition. As against this, the definition of goods as provided in the CGST Act, 2017 is not in harmony with these definitions.

While responding to the above argument, the apex court banked upon the canons of interpretation in the following words: [53]

> Definition of goods as occurring in article 366 (12) is inclusive definitions and does not specifically exclude actionable claim from its definition.

The apex court further held that the framers of the Constitution were well aware of the definition of the goods that was in the Act that was enacted before the adoption of Constitution of India. They provided inclusive definition of goods by adding the word "includes" which in no stretch of imagination could restrict the meaning of goods.

46 AIR 2021 (NOC) 491 (Tel.)

47 AIR 2021 SC 366.

48 S. 2(7) defines goods as every kind of movable property other then actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

49 S. 2 (52) of the Central Goods and Services Tax Act, 2017 the term goods has been defined to mean every kind of movable property other than money and securities but includes actionable claims. The term actionable claim has the same meaning that has been assigned to it in s. 3 of the Transfer of Property Act, 1882.

50 S. 3 defines actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property, not in the possession, either actual or constructive of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

51 Sub-Cl. (12) of art. 366 provides, "In this Constitution, unless the context otherwise requires, the following expression has the meaning hereby respectively assigned to them, that is to say goods include all materials, commodities, and articles''.

52 *Supra* note 47 at 376.

Furthermore, the definition of goods provided in the constitution of India is prefaced by the expression unless context otherwise requires. The framers of the Constitution were not oblivious of the fact that there cannot be uniform definition of goods across different enactments that have different context and purpose. As rightly put by the apex court in another case,[54] "interpretations must depend on the text and the context. They are the bases of interpretation. One may say if the text is texture; context is what gives the colour. Neither can be ignored, both are important. That interpretation is best which makes the textual interpretation match the contextual. A statue is best interpreted when we know why it was enacted".

The Supreme Court has very rightly opined that the definition of goods in the Constitution of India is itself inclusive and would vary from context to context. It cannot be called as a standard definition applicable to different enactments having different purposesand field of operation. This is the reason that even the definition of goods provided in the Constitution of India is prefaced by the common expression "unless the context otherwise requires" which clearly means that this definition will be inapplicable to a situation where context requires otherwise.

V NEGOTIABLE INSTRUMENTS

Hybrid nature of offences: A civil sheep in criminal wolf's clothing[55]

In *Mohanraj* v. *Shah Brothers Ispat Pvt. Ltd.,*[56] the Supreme Court discussed the nature of offence committed under section 138 by reading sections, 139, 140,141, 142, 143, and 144 of Negotiable Instruments Act (NI Act) together. The apex court ruled that there is a presumption in favour of the holder of negotiable instruments that he has received it in discharge of whole or any part of the debt or other liability of the drawer of the instrument. The presumption is not akin to the presumption of criminal offence. The presumption envisaged under section 139 is possible by adducing facts that could be proved by preponderance of probabilities and not beyond reasonable doubt as in the case of criminal offences. The position of the holder of instrument is further strengthened by section 140 which provides that it shall not be a defense in a prosecution for an offence under section 138 that the drawer had no reason to believe that the cheque may be dishonored on presentation which makes it clear that section 140 lays down strict liability rule and *mens rea* has no application to the offence made out under section 138.

The apex court called relief available under section 138 for dishonor of the instrument as "hybrid" for the reason that the courts are empowered to impose fine on the defaulter that may be twice the amount of the cheque that is payable as compensation to the party aggrieved by the dishonor of the instrument and that would include amount of the cheque, interest accrued and cost incurred provided it is otherwise enforceable in civil law.

53 *Id*. at 379.

54 *Reserve Bank of India* v. *Peerlers Genreral Finance and Investment Co. Ltd*., 1978 (1) SCC 424.

55 AIR 2021 SC 1308 at 1344.

56 *Ibid.*

The apex court also very rightfully made it clear that the object of section 138 is not to penalize the wrongdoer but to compensate the victim that is amply demonstrated by the second opportunity that is given to wrongdoer who commits offence under section 138, yet he is given 15 days more time after he receives the notice that the cheque issued by him has bounced and then fails to make payment.

Various provisions added by the Amendment Act, 2002 buttresses the above view point further as many of the requirements of relevant provisions in Cr PC have been dispense with. For instance, Magistrate is within his rights under section 143 to pass a sentence of imprisonment for a term not exceeding one year and fine exceeding Rs.5000/- summarily. The upper limit of the fine amount is not fixed. Any amount can be awarded by way of summary trial, thus making sky as its limit. As against the unlimited power to impose fine, section 357 of the Cr PC limits it to the twice the amount of the bounced cheque. The mode of service of summons as provided under section 144 is similar to civil cases by following the mode contained in sections 62 to 64 of the Cr PC.

The Amendment Act, 2018 further leans in favour of the hybrid nature by providing provisions for interim compensation as envisaged under sections 143A and 148. The apex court opined that criminal proceedings are stated to be proceedings in which the larger interest of the state is involved but section 138 protects the interest of victim and the larger interest of the state is subsumed in this sense that victim alone can move to the court under section 138 as against the State as is the rule in the criminal proceedings. It can be said that the proceedings under section 138 are a *civil sheep in a criminal wolf's clothing*.

Nature of liability

Mohanraj v. *Shah Brothers Ispat Pvt. Ltd*.,[57] is a landmark judgment of the apex court in which many legal issues were discussed and a mist of confusion was cleared on many aspects involving negotiable instruments.

The apex court dissected the ingredients of section 138 and held that the expression "shall be deemed to have committed an offence" makes it amply clear that the legislature has deliberately used this deeming provision by making an offence out of pure commercial transaction between the two contracting parties, out of which one party has issued a cheque for discharge of his liability towards another but that cheque has not been honored for want of funds. The apex court explained the scope of this liability by re-declaring that section 141 makes directors and other persons statutorily liable as and when its ingredients are satisfied and explanation attached to this section defines company as anybody corporate and includes a firm or other association of individuals.

The apex court further opined that section 142 also indicates that the procedure prescribed under Cr PC to deal with such matters has been departed with as no court can take cognizance of the offence under section 138 based on the complaint made in writing by the payee or the holder in due course of the cheque. The civil nature of this

57 *Id* at. 1308.

criminal complaint is further reflected by the use of expression "cause of action" in section 142 (1) (b) which provides that the complaint must be made within one month of the date on which the cause of action under clause(c) of the proviso to section 138 arises. This expression of cause of action is alien to criminal Jurisprudence and reflects hybrid nature of this liability as expression is used in civil cases to recover money. This is corroborated by the fact that sections 177 to 189 of Chapter XIII of the Cr PC confer jurisdiction on criminal courts relating to inquires and trials.

Joint liability in negotiable instruments

The supreme court had to overrule in *Alka Khandu Avhad* v. *Amar Syamprasad Mishra*[58] decision of the high court calling it a grave error and made correct exposition of law but missed an opportunity to further elaborate on the expression, "other association of individuals" by applying *ejusdem generis* rule of interpretation and also the situation where husband can be liable for discharging debt or liability of his wife. In the instant case, the dishonored cheque was signed and issued by the husband to be drawn from his account. His wife was neither signatory to the cheque nor was it drawn from her account in the bank. In-spite of this factual position, the criminal complaint was not quashed by the Bombay high court against the wife.

The apex court made many pertinent observations. It was rightly said that section 138 of the NI Act does not provide for joint liability. Only the person who has signed the cheque to be drawn from his bank account can be prosecuted under section 138. Even in case of joint liability prosecution will lie only against the signer of the dishonored instrument. The apex court carried this explanation further which can be explained on mathematical terms. The joint liability will result only when there is a joint account on which jointly signed instrument was drawn in discharge of whole or a part of any debt or other liability but that instrument was dishonored.

The apex court had to neutralize potent argument of the respondent based on section 141 of the NI Act that deals with the offences committed by the companies. It was contended by the respondent that the "company means anybody corporate and includes a firm or other association of individuals" and the joint liability of two or more persons will fall within this expression, "association of individuals" and two or more persons jointly liable for a debt can be prosecuted under section 141 even where only one of them has signed and issued the cheque in due discharge of this debt. The apex court very precisely dismissed this argument for being unacceptable and ruled that two private individuals cannot be said to be "other association of individuals". The liability is not joint but individual for which section 141 is in- applicable. In the instant case, liability is not for an office that is committed by the company, firm or other association of individuals. The appellant herein is neither a director nor a partner in any firm who has issued the cheque and cannot be therefore convicted under section 141of the NI Act. The apex court very rightly held that section 141 is envisaging liability for corporate debtor and not for individuals. The husband and wife cannot fall within the expression of association of individuals which has to be understood *ejusdem generis* with the company.

58 AIR 2021 SC 1616.

It is to be, however, clarified here that the signer of the dishonored instrument will be liable no matter this instrument was issued in discharge of his own debt/ liability or the debt/liability of any other person as the words "any debt or liability" used in section 138 of the NI Act permits this interpretation. On this analogy, husband can be held liable for the debt or liability of his wife or vice-versa where husband has signed the instrument to be drawn from his bank account for discharging debt or liability of his wife but for their joint liability the Supreme Court has very correctly enunciated above mentioned requirements.

Burden of proof

The Supreme Court in *Sumeti Vij* v. *Paramount Tech Fab Industries*[59]got an opportunity to deliberate on many issues surrounding negotiable instruments. The apex court made it clear that the proceeding under section 138 of the NI Act is quasi criminal in nature. The object of introducing this section is to enhance acceptability and sanctity of cheques. A balanced approach has to be adopted that calls for prosecution of drawer of cheque in case of dishonor of his cheque but at the same time it is to be ensured that honest drawer is not unnecessarily harassed. Section 138 essentially makes a case for civil wrong that has been made compoundable by the amendment that was carried in the year, 2000.

The combined reading of sections 118 and 139 of the NIA Act result into a formidable presumption that every negotiable instrument when accepted, endorsed, negotiated or transferred has been so for considerations and its holder has received it in discharge, in whole or in part, if any debt or other liability, unless the contrary is proved.

In view of the above said provisions, the burden of proof is on the accused and the standard of proof is of preponderance of probabilities not beyond reasonable doubt as in the case of criminal offences. There is a presumption of consideration as mandated by the provision of section 118 and the onus shifts to the accused once it is proved that he has issued the cheque and the accused has to rebut this presumption by establishing that the instrument in question was issued not for discharge of any debt or liability as stipulated in section 13 of the NI Act.

The apex court further clarified what would constitute rebuttal of presumption in the following words:[60]

> When the complainant exhibited all these documents in support of his complaint and recorded the statement of three witnesses in support thereof, the appellant has recorded her statement under section 313 of the Code, but failed to record evidence to disprove or rebut the presumption in support of her defense available under section 139 of the Act. The statement of the accused recorded under section 313 of the Code is not a substantive evidence of defense, but only an opportunity to the accused to explain the incriminating circumstances

59 AIR 2021 SC 1281.

60 *Id*. at 1288.

> appearing in the prosecution case of the accused. Therefore, there is no evidence to rebut the presumption that the cheque was issued for consideration.

The supreme court in *APS Forex Services Pvt. Ltd.* v. *Shakti International Fashion Linkers*[61] overruled the concurrent findings of the trial and high courts by holding that section 139 of the NI Act lays down reverse burden that means once it is admitted that the cheque has been issued there is a presumption in favour of the complainant that there exists legally enforceable debt or liability and then it is up to the accused to rebut that presumption with the help of his evidence.

The argument of the appellant that the cheque issued was a security for debt and not in discharge of liability of debt was simply dismissed by the apex court as unbelievable but can this be an argument to rebut the presumption? In other words, is there any difference between the cheque in discharge of debt or liability and cheque as a security for payment of debt or discharge of liability. The apex court did not discuss any such issue but mentioned it in the following lines without taking it to any logical conclusion: [62]

> Even as per the statement of the accused, which was recorded at the time of framing of the charge, he has admitted that some amount was due and payable. However, it was the case on behalf of the accused that the cheque was given by way of security and the same has been misused by the complainant. However, nothing is on record that in reply to the statutory notice it was the case on behalf of the accused that the cheque was given by way of security.

It may be argued that the cheque as a security for payment of money may be different from the cheque for discharge of any debt or liability and the former may invite civil action for breach of contract and the latter may invite quasi criminal action as envisaged under section 138 of the NI Act and the evidence establishing cheque as a security may rebut presumption as envisaged in section 139 of the NI Act.

However, the Supreme Court in *Sripati Singh* v. *State of Jharkhand* [63]used cheque and security interchangeable. In the words of Supreme Court: [64]

> A cheque issued as a security pursuant to a financial transaction cannot be considered as a worthless piece of paper under every circumstance. 'Security' in its true sense is the state of being safe and the security given for a loan is something given as a pledge of payment. It is given, deposited or pledged to make certain the fulfillment of an obligation to which the parties to the transaction are bound. If in a transaction, a loan is advanced and the borrower agrees to repay the amount in a specified time frame and issues a cheque as a security to

61 AIR 2021 SC 2014.

62 *Ibid.*

63 AIR 2021 SC 5732.

64 *Id.* at 5740.

> secure such repayment; if the loan amount is not repaid in any other form before the due date or if there is no other understanding or agreement between the parties to defer the payment amount, the cheque which is issued as a security would mature for presentation and the drawee of the cheque would be entitled to present the same. On such presentation, if the same is dishonored, the consequences contemplated under section 138 and the other provisions of NI Act would flow. When a cheque is issued and is treated as "Security" towards repayment of an amount with a time period being stipulated for repayment, all that it ensures is that such cheque which is issued as a "Security" cannot be presented prior to the loan or installment maturing for repayment towards which such cheque is issued as security.

The above opinion of the Supreme Court has not accepted the difference between the cheque received in discharge of any debt or liability as provided in section 138 of the NI Act and the cheque received as a collateral security for any debt or liability. This opinion has made the drawer of the cheque more accountable as instead of being made answerable in a civil action, he will have to face criminal action under section 138 of the NI Act as and when the cheque is dishonoured for want of funds.

Intersection of Insolvency and Bankruptcy Code with Negotiable Instrument Act.

In P. *Mohanraj* v. *Shah Brothers Ispat Pvt. Ltd.,*[65] a very contentious issue was debated; whether the institution or continuation of a proceeding under section 138/ 141 of the N I Act can be said to be covered by the moratorium as provided in section 14 of the Insolvency and Bankruptcy Code (IBC) which *interalia* provides.

Section 14 Moratorium (1) subject to provisions of sub-section (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely

a) The Institution of Suits or continuation of pending suits or proceedings against the corporate debtor including execution of any Judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

b) .

c) …

d) ….

In order to answer the above raised questions, the apex court discussed at length nature of proceedings contemplated under section 138/141 and concluded with the help of cogent reasons that proceedings under these sections are quasi criminal in nature which is hybrid inspirit with civil liability leanings. The proceedings under section 138/141 of the NI Act are not akin to the proceedings as mentioned in section 14 of the IBC.

65 *Supra* note 55.

The court accepted that moratorium envisaged under section 14 would apply to Judgment debtor but then posed another question to answer, i.e., whether natural persons are covered by section 14 of the IBC[66]? In other words; can proceedings be initiated under section 138/141 against natural persons mentioned in section 141 in spite of moratorium against corporate debtor?

In order to answer this question, the apex court had to travel through various conflicting opinions of the high courts[67]and Supreme Court[68] and finally concluded:[69]

> The legal impediment contained in section 14 of the IBC would make it impossible for such proceedings to continue or be instituted against the corporate debtor. Thus for the period of moratorium, since no section 138/141 proceeding can continue or be initiated against the corporate debtor because of the statuary bar, such proceedings can be initiated or continued against the person mentioned in section 141 (1) and 2 of the NI Act. This being the case, it is clear that the moratorium provision contained in section 14 of the IBC would apply only to the corporate debtor, the natural persons mentioned in section 141 continuing to be statutorily liable under Chapter XVII of the NI Act.

The apex court discussed at length the object sought to be achieved by section 14 of the IBC with the help of the report of the Insolvency Law Committee of February, 2020.[70] The report outlines the object behind moratorium as envisaged in section 14 which primarily stresses on keeping assets of corporate debtor together during the insolvency resolution process and to ensure its orderly competition so that the company may not come to grinding halt but continues as a going concern against the interest of the creditor to settle their accounts. This may ultimately prove beneficial for all stakeholders as keeping the corporate debtor going during CIRP helps in achieving resolution. The court emphasized that this policy is not India specific but is being followed in other jurisdictions as well. Moratorium may be put in place on the advent of formal insolvency proceedings, including liquidation and re-organization proceedings. This is reflected in the UNCITRAL Guide notes that a moratorium is critical during re-organization proceedings since it facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, wherever appropriate.

The apex court has attempted to satisfying sections 14 of the IBC as well as section 141 of the NI Act without bringing them head on and without reading a conflict

66 *Supra* 55 at 1340.

67 The apex court did not agree with the opinion expressed by the high courts in *Tayal Cotton Pvt. Ltd*. v. *State of Maharashtra,* SCC Online Bom. (2019) P. 2069: (2019) I Mah LJ 312; *MBL Infrastructure Ltd*. v. *Mank Chand Somani*, CRR 3456/2018 (Cal. HC) decided on April 16, 2019.

68 See for instance *Sheoratan Agarwal* (1984) 4 SCC 352; *CM Parek* (1970) 3 SCC 491; *Anil Hade* (2000 SC 145); *Modi Distillery* (1987) 3 SCC 684.

69 *Supra* note 55 at 1372.

70 See para 8.2 of the report cited by the Supreme Court in *supra* note 55.

in them by holding that there shall be no proceedings against corporate debtor in view of section14 of the IBC but this immunity could not be extended to the natural persons as mentioned in section 141 of the NI Act. However, the apex court has not made it clear whether liability of the natural persons can be vicariously extended to the company on whose behalf those natural persons were working at least in civil action. If it is so, then the purpose of section 14 of IBC will be defeated by bring the claim in a roundabout way.

Expeditious resolution of section 138 cases

The Supreme Court in *re-expeditious Trial of cases under section 138 of the NI Act*[71] came up with a slew of measures to lesson the burden of the courts from pendency of cases that has swelled to 5 crores, and out of which sizeable number is on section 138. The guidelines are:-

i. Mechanical conversion of summary trial to summons trial: The Supreme Court from the responses of the high court found that the trial courts are converting summary trials envisaged under section 138 into summons trials mechanically without assigning reasons that has resulted into delay in disposal of cases.

Further, section 143 imposes a duty on the Magistrate to record reasons for such conversion. The very purpose of section 143 is to ensure quick disposal of the complaints filed under section 138 by following the procedure prescribed for summary trial under the Code to the possible extent. This direction has to be exercised by the Magistrate with an abundant care and caution and after recording reasons, otherwise the purpose of section 143 would be defeated. The Supreme Court issued directions to all the high courts to issue practice directions to the Magistrates to record reasons before converting Trials of complaints under section 138.

ii. Joint complaint: The supreme court suggested that the high courts should issue practice direction to the trial courts that they should treat service of summons in one complaint forming part of a transaction as a deemed service in respect of all the complaints filed before the same court relating to dishonor of cheques issued as a part of the said transaction.

iii. Inherent powers of the magistrate: The apex court confirmed that section 143 after 2002 amendment confers implied power on the Magistrate to discharge the accused where he is ready to appropriately compensate the complainant to the satisfaction of the court. This interpretation is in line with the intention of the legislature to bring amendment in section 143. This order of the court is different from compounding of the offence with the consent of the parties. The object of law is not to punish drawer of the dishonored cheque but to enhance credibility of the cheque by providing speedy remedy to the complainant.

iv. Application of summary trial: The Supreme Court made it clear that the expression "as far as may be" used in section143 mandates application of provisions of summary trial as contemplated in the Code to trial of complaints under section 138. The magistrate is within his rights to stop the proceedings at any stage after

71 AIR 2021 SC1957.

recording reasons in writing under section 258 of the Code and acquit the accused in any summons case that is filed otherwise than upon complaint.Section258 of the Code does not apply to a summons case instituted on a complaint.

v. Transfer of the Case: Where a trial court is informed that it lack jurisdiction to initiate proceedings under section 138 of the NI Act, it shall stay the proceeding forthwith and refer the case to the Chief Judicial Magistrate or such other Magistrate having jurisdiction.

vi. No inherent power: The trial court does not have inherent powers to review or recall the order of issuance of process for which appropriate amendment can be thought of by the parliament on the recommendation of the committee constituted for this purpose. This does not in any way limit the power of the trial court under section 322 of the Code where it is brought to the notice of the court that it lacks Jurisdiction to try the complaint.

vii. Amendment in the NI Act: The suitable amendments be made in the NI Act to provide room for one trial for multiple offences committed within a period of 12 months, falling under section 138 of the NI Act, notwithstanding the restrictions in section 219 of the Code.

viii. Mediation in pending revision applications: The high courts have been directed to identify the pending revisions arising out of complaints under section 138 and refer them to mediation. However, this direction of the apex court cannot be one off but should be continuous exercise in order to address the large pendency of the cases on section 138.[72]

In its anxiety to cut down large number of pending cases under section 138 before different courts which roughly comes to more than 40 lakhs, the supreme court has come up with guidelines from time to time but pending goes unabated. Instead of making cosmetic changes within the system, the time has reached to suggest out of box solution that could be supplementary to the system but outside to it. The mediation of the pending cases before the high courts could be extending to all complaints that are to be instituted under section 138 of the NI Act. The offences under NI are compoundable and it is now almost settled by the courts that action under section 138 is quasi criminal with more tilt towards civil action. All these complaints could be compulsorily referred to mediation and only then could be instituted under section 138, where mediation fails.

VI CONCLUSION

The increasing use of online communications for executing commercial transactions have resulted into new legal issues for the courts to resolve. The courts have at times struggled to harmonize contractual terms that are conflicting. Where offline document contains terms and conditions that are not resonating with the terms and conditions with the online document, then the courts have to invoke principles of

72 It is reported that around 40 lakh cases are pending before various courts on section 138 of the NI Act. See *available at*:http://m.timesofindia.com(last visited on June 22, 2022).

equity and good conscience as the solution cannot be found in the express provisions of law.

The competing interests between the state and individual have to be viewed only through the lens of law and where law favours individual, justice should also tilted towards him, no matter that may result loss to the state.

The courts in India have been strictly following mirror image rule as incorporated in section 7 of the Indian Contract Act, 1872 and have not shown readiness to follow its modification that has been witnessed in this rule in other jurisdictions, including international instrument of Vienna Convention. Now the rule of "last short doctrine" is found more convenient and flexible. On the basis of this rule, even a contract can be concluded on the basis of the counter offer which otherwise can be considered as the rejection of the first offer, if section 7 is literally applied.

The court in *Muhammad Siyad* (super) has wrongly invoked public policy doctrine incorporated in section 23 of the Contract Act to give relief to a wife who was divorced and had contracted out her claim for maintenance. The same section declares a contract void that if permitted would defeat the provisions of law and the contract in question would squarely fall under this provision and therefore is void and unenforceable but court has preferred public policy doctrine to give relief to the aggrieved wife and ignored the relevant provision in the same section.

The High Court of Allahabad came up with the conflicting opinions on the identical issues with a difference that in one case marriage contract was executed and one of the parties was minor at the time of the contract but was willing to ratify it on attaining the majority at the time when her habeas corpus petition was being heard and in another case there was no such marriage contract and habeas corpus petition was allowed. Where parties had signed marriage contract, the status of their marriage was strictly decided on the basis of that contract but it resulted in the violation of fundamental right to choose that could be exercised at any time after attaining the age of majority and its exercise cannot be precluded merely on the ground that there was void contract between the parties. Can *habeas corpus* petition for exercising fundamental right to choose be denied only on the ground that the marriage contract between the parties was void at the initial stage but could have been ratified by the minor party at the time of petition ? Pertinently, the courts have now given legal recognition to live -in relationship where no marriage contract is required.

Another equally important point is; Can article 14 of the Constitution of India be invoked to declare action of the government authority arbitrary and unreasonable when statutory remedy is available? It may not be always helpful to invoke article 14 when the accrued right is regulated by the statutory remedy and mere declaration of action of the government as arbitrary may not be the solution for the claim. The accrued right may be further regulated by the statutory mechanism to address the competing interests or to invoke mitigating factors that may not be available by the blanket application of article 14 of the Constitution of India.

The registration of the partnership firm serves as a proof of the existence of a firm. It has no other inherent advantage to the firm but its absence proves a big handicap

to the firm as it cannot sue third party but third party can sue it. It is in the interest of the partners of the firm to get it registered, though its registration is not mandatory. The court have given relief to the unregistered firms by holding that this legal bar will not apply to arbitration proceedings provided there is a stipulation in the contract to this effect executed with the third party.

It is, however, not expressly mentioned in the provisions as to when this plea of non-registration of the firm can be raised. Is it to be raised at the initial stage or at any stage to the liking of the party being benefited by this plea, especially in case of dishonour of cheque under section 138 of the NI Act. The courts have not shown any unanimity on this point. The interest of justice will be served when a party accused of issuing of a dishonoured cheque is not allowed to re-open the plea of non-registration of firm at the later stage when he failed to take it up at the appropriate stage as he himself is guilty of breach of promise which he had made by issuing a cheque and has not come up before the court with clean hands. He does not deserve the favour of the discretionary power of the court in this regard.

The liability under section 138 is unique in many respects and one of its uniqueness is that it is hybrid in nature with leaning towards civil action with second opportunity to the accused to make payment with a threat of imprisonment in case of failure to make payment. It imposes reverse burden and has been declared as a*civil lamb in criminal wolf's clothing.*

The Supreme Court has extended benefit of section 138 to the person who has received cheque as a security which has not been received directly for discharging debt or any liability which is bound to enhance credibility of the cheques and security of the drawee. The supreme court has further explained the concept of joint liability under section 138 but has not clarified whether husband can be held liable for dishonour of the cheque which he has issued for discharging debt or liability of his wife and vice versa. Section 138 uses the words " any debt or liability" which makes it amply clear that the drawer will be liable for dishonour of the cheque, no matter the dishonoured cheque has been issued for discharge of his own debt/liability or debt/liability of any other person.

The Supreme Court has come with Guidelines for reducing present pendency of cheque dishonour cases under section 138 and has recommended amendment in the NI Act for facilitating one trial for multiple dishonour cheque cases if they arise within a span of 12 months. It has been also suggested that the high courts should identify revision cases under section 138 that could be referred to mediation. However these cosmetic changes are not going to reduced huge backlog of cases under section 138 alone. There has to be some out of box solution for this lingering problem and one such solution could be for compulsory mediation in the first instance and then only one appeal provision in case any party is aggrieved or mediation fails.