22

MERCANTILE LAW

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I INTRODUCTION

THIS YEAR a number of decisions were pronounced by the supreme court and high courts on different aspects of mercantile law that cover cases on law of contract, partnership, sale of goods and negotiable instruments. Some of these decisions are conflicting and some conforming with the established principles of law and some of them have laid down new principles of law by stretching relevant statutory provisions. The conflicting decisions and the decisions on new principles have been mostly covered in this part of the survey by appraising them critically, and where ever require, moot points have been raised.

II LAW OF CONTRACT

Coercion, threat and undue influence

In *N Vaidyanathan* v. *Anantha Krishnan,*[1] the appellant challenged the order of the trial court on the plea that the sale deed executed by him in favour of the defendant is vitiated by threat, coercion and undue influence. His version of the facts was that seven persons claiming to be officials of central crime branch trickily barged in to his house at around midnight and took his father for interrogation in connection with some case filed against him. He was tortured and threatened by the police and was later on confined at some hotel. The mother of the plaintiff filed a criminal complaint against three persons through e-mail to the Commissioner of Police and chief minister's cell but nothing happened.

The plaintiff further contended that with the help of police the first defendant kidnapped him and his father and took them to court for execution of sale deed in his favour. The court rejected the contention of the plaintiff and held that the sale deed is valid and does not suffer vice of illegality. The court, however, admitted that the appellant and his father might have been placed in some inconvenience/ hostile/compelling circumstances to sell away the suit property in favor of the first defendant but that cannot be courted as threat, coercion or undue influence. Even though the plaintiff/appellant was a college student and for whom there may not have any personal need or necessity to sell the suit property, there may be

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1 AIR 2022 Mad. 230

compelling circumstances for his father because of which, both the appellant and his father wanted to part away their property.[2]

It is clear from the above observation that the court was not sure about the competing contentions, yet court has ruled in favour of the defendant against whom court has admitted that he may have used threat or coercion or undue influence. The court has overlooked that threat, coercion or undue influence defined in sections 15 and 16 of the Contract Act, respectively do not call for penal action but their breach would result in a civil action which must be proved by preponderance of evidence and not beyond a shadow of doubt as is the rule in penal actions. The acceptance of the court that the plaintiff may have been put to inconvenience/hostile/ or compelling circumstance was sufficient to declare the sale deed as voidable because of being vitiated by coercion.

Waiver of a statutory right

The Supreme Court in *Arce Polymers Private Limited* v. *Alphine Pharmaceuticals Private Limited*[3] has made an observation on the doctrine of waiver which has far reaching implications. The apex court observed: [4]

> Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like by wanting to take a chance of a favorable decision. The fact that the other side has acted on it is sufficient consideration.

The apex court very rightly added a note of caution to the above observation by stating that "it is not correct that waiver, being an intentional relinquishment, is not to be inferred by mere failure to take action. The court inspite of this caveat allowed the waiver of statutory right that too against the stringent provisions of SARFAESI Act simply on the ground that the borrower had not challenged the action of the bank conveyed by the repeated notices under section 13(2) (4) of this Act. The court also read against the borrower its request to the concerned bank official to compromise, alter the contractual terms and re-structuring of loans. These requests, in the opinion of the court, were considered by the bank by giving indulgence, time and opportunities. The court did not take note of the fact that the borrower asked for re-structuring of loan that was not considered, instead time for repayment of loan was extended. This cannot be construed as a waiver of statutory right on the part of borrower. The court inferred from the facts that the borrower was aware and conscious of its rights but chose to abandon the statutory claim and took its chance and even procured favourable decisions. The apex court

2 *Id*. at 233.

3 AIR 2022 SC 545.

4 *Id*. at 554.

weighed heavily the conduct of the borrower that had put the bank in a position where they have lost time and suffered on account of delay.[5] The court, however, did not take into account lackadaisical approach of the bank official in delaying the response and proper decision on the request of the borrower.

Validity of agreement based on mediation

The High Court of Kerala was called in *Mathew Daniel* v. *Leena Mathew*[6] to determine the validity of a compromise based on mediation resulted out of criminal proceedings under the Domestic Violence Act, 2005 (DV Act) . The court invoked statement of object and reasons of the DV Act wherein it was clearly mentioned that there was no civil remedy available to the victims of domestic violence. This DV Act has been enacted to fill this void and different provisions framed under this Act predominantly contain remedies of civil nature. The provisions contained in sections 18 to 22 of the DVAct provide relief of civil nature which can be sought in any legal proceeding pending before a civil court[7]. Thus, the court made a case for valid civil remedy through criminal proceedings which was bone of contention in the instant case. The respondent in the present case had alleged domestic violence against her husband. The court order mediation which resulted into a compromise. The petitioner unilaterally withdrew from mediation/settlement on the ground that he was compelled to sign the mediation settlement without understanding the consequences of its terms.

The court rightly ruled: [8]

> Law presumes, *prima facie*, in favor of agreement deed duly executed. Normally when execution of a document is either admitted or proved and no disabling factor or vitiating circumstances is alleged or proved, admission or proof of signature with necessary formalities, if any, will be proof of execution with the knowledge of the contents at least *prima facie* for the purpose of shifting the burden. The burden of proving the vitiating factors is on the person who alleges them.

The court further elaborated the effect of chapter II of the Indian Contract Act that deals with voidable and void agreements by stating that an agreement cannot be enforced when a party to it satisfies the court that the agreement was vitiated by any one of the grounds mentioned in chapter II of the Contract Act. The court further held that these grounds cannot be satisfied merely on the basis of vague allegations. The contention of the petitioner that he was compelled to sign the settlement deed arrived at through mediation cannot satisfy the requirements of any provision contained in Chapter II which is also against the presumption of validity of the documents as stated above but considered the date when the claim was asserted in the court of law as the effective date of application

5 *Ibid.*

6 AIR 2022 Ker. 166 .

7 *Id*. at 169.

8 *Id*. at 173.

of amended section 28. This is a major departure from the earlier law on the subject where either date of conclusion of a contract or date of cause of action is being considered for applicability of any amended provision of law.

Government contracts

The Andhra Pradesh High Court in *Rajadhani Rythu Parivakshnana Samihi* v. *State of AP*[9] made a technical difference between the government and statutory contracts.A contract is a statutory contract when the competent authority executes a contract pursuant to any statute and incorporates in it the statutory terms. This contract must be held to be statutory contract though not a Government contract as adumbrated under article 299. Article 298 is applicable only when state is a party/agent to a contract. It is not applicable to corporation constituted or established under any statute where an agreement is between the State authority and private parties based on an Act that agreement is a statutory in nature which is different from a government contract. When such agreement created statutory obligation on a state or its instrumentality to discharge their obligation, they are bound to discharge their obligation.

Restraint of trade and protection of trade secrets

In *Sudipte Banerjee* v. *L.S Davar and company,*[10]the High Court of Calcutta delineated the scope of section 27 of the Indian Contract by holding that the object of this Section is to promote freedom of trade but this Section is not similar to the English rule on the same subject. The court ruled that a comparative assessment of legal position on this subject in these two jurisdictions would reveal that the Indian law is narrow in scope and invalidates many agreements that are valid under English Common Law as it does away with the distinction observed in English cases between partial and total restraint of trade and makes all contracts falling within its terms void unless they fall within certain necessary exceptions. The court made the following pertinent observation: [11]

> Whether the restraint is general or particular, qualified or unqualified, if it is in the nature of restrained of trade, it is void. Any restrictive clause prohibiting the respondents to carry on business of the same or similar in nature would be void and hit by Section 27 as Indian law has not advanced as much as the English Common Law over the years. The time has possibly come to re-look at Section27 since times have changed and there is a necessity to impose some restrictions and recognize negative covenants in service contracts, especially where it involves specialized knowledge as it must live up to present needs.

The court pitched for a balanced approach by holding that in essence freedom of trade and commerce must be upheld but at the same time no one should be

9 AIR 2022 (NOC) 508 (A.P).

10 AIR 2022 Cal. 261; AIR online 2022 Cal 730.

11 *Id*. at 266.

allowed to take advantage of the trade secrets and confidential information developed by an individual and use for their own gain and when confronted take the shelter of this Section. The confidential information and trade secrets are required to be protected by law.[12]

The above observations of the of High Court of Calcutta do not represent wholly the legal position as enunciated by the courts in England and India.

The English courts have done away with the distinction between partial and total restraint during the times of Queen Elizabeth when House of Lords, as early as in 1894, in a celebrated case of *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition co. Ltd.,*[13] declared that the restrictive covenant will be valid if found reasonable. Thus the classification of negative stipulations is not based on partial and total restraint but is based on reasonable or unreasonable terms. As against this, courts in India have declared that an agreement even partially restricting any trade is hit by Section because of the reason that Section 28 of the Indian Contract declares a contract expressly void that "absolutely" restricts a person from enforcing his legal rights. Since the word "absolutely" is missing in section 27 so the courts in India have come up with the opinion that section 27 bars even partial restraint.[14]

It is not correct to contend that only exception to general principle of law enunciated in section 27 is the express exception provided in this section which deals with sale of goodwill. For instance, sections 11, 36 and 54 of the Partnership Act validate restrictions imposed on partners during or after the dissolution of a firm. There are also a number of exceptions to the general rule of section 27 created by the courts from time to time like, Trade combination;[15] or exclusive dealing agreement;[16]restraints upon employees.[17]

The Supreme Court in,*Niranjan Shankar Golikari* v. *Century Spg and Mfg Co. Ltd,*[18] held that a negative stipulation of five year restraintis valid on the ground that it is reasonable and upheld the judgment of High Court of Calcutta in *Gopal Paper Mills Ltd*. v. *Surrendri K Ganeshdas Malhotra*[19] that held a negative covenant of twenty years void for being unreasonable.

On the issue of trade secrets, it is already a settled legal position that the employee will be restrained from carrying on a business using the confidential information which he had acquired during his previous employment for a reasonable

12 *Ibid*.

13 1894 AC 535 HL.

14 *Madhub Chander* v. *Raj Coomar* (1874)14Beng LR 76.

15 *Bhola Nath Shankar Das* v. *Lachmi*, (1931) 29 ALL J 84.;*Carew and Co Ltd*. v. *North Bengal Sugar Mills*, ILR (1951) 2 Cal. 386.

16 *Percepts D Mark (India (P)Ltd* v. *Zaheer Khan* (2004) 2 Bom. CR 47.

17 *Chalesworth* v. *Macdonald* (ILR) (1898) 23 Bom 103; *Sociedade De Fomento Industrial ltd* v. *Ravindranath Subraya Kamal* (2000) I Mah. LJ148; *V. N Deshpande* v. *Arvind Mills Co. ltd*,AIR 1946 Bom. 423.

18 AIR 1967 SC 1098.

19 AIR 1962 Cal. 61.

period but is free to carry on same or similar business without using the said confidential information or trade secrets.[20] The legal position in India with regard to restrictive covenants has evolved over the period of time through judicial interpretations, and to a great extent, it has kept pace with the changing times as has been witnessed in England. However, in order to bring more clarity, section 27 be amended and another exception, along with the exception of goodwill be appended to it.

Applicability of amended section 28

In the *State of Meghalaya* v. *Patel Engineering Private Ltd.,*[21]the bid was submitted by the contractor in the present case on August 6, 1996 and it was accepted on August 20, 1996. The contention of the state is that an amendment was brought in section 28 of the Contract Act, 1872[22] on January 8, 1997 that would not apply to the instant case. The contract was however; executed between the parties on April 22, 1997 more than three month after the relevant amendment was incorporated in section 28 of the Contract Act of 1872. The court did not accept the contention of the government but extended the reach of amended section 28 to the contract that was executed before amendment. The court gave a purposive interpretation to section 28 so as to do justice to the weaker party (private individual) as against the government which invariably executes contracts through standard form contract which contains exemption clauses that can be hardly negotiated or changed by the weaker party.

The court made the following pertinent ruling: [23]

> Section 28 as amended in 1997 makes an agreement by which any party thereto is absolutely restricted from enforcing his rights under or in respect of any contracts by usual legal proceedings or which limits the time for enforcement of rights of any party or discharges any party from any liability under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, void to such extent. That would imply that irrespective of when the contract between the parties is entered into, the relevant date would be when a claim is asserted and the relinquishment clause in the agreement is cited to deny the claim.

20 *Hi Tech Systems and Services Ltd* v. *Suprabbat Ray*, 2015 SCC online Cal. 1192; AIR 2015 Cal. 26)

21 AIR 2022 Meg. 36

22 S. 28 after amendment reads as every agreements;

a. by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

b. which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

23 *Id.* at 41.

The court did not consider the date of execution of contract or date of cause of action to determine the applicability of amended section 28.

Effect of COVID-19 on the performance of the contract

In *Satish Kashyap* v. *Chief Muncipal Council Seoni,*[24] the petitioner succeeding in auction of weekly open market (Saptaahik Baithaki Bazaar, Barghat) for the period from April 1, 2021 to March 31, 2022 for which ten post dated cheques were deposited. The petitioner failed to deposit required money because of which a demand notice for rupees 8,47,800 was issued by the respondent, failing which post dated cheques deposited shall be forfeited.

The high court did not delve on the main issue of whether COVID-19 pandemic be reckoned as a *force majeure* for the purpose of frustration of contract or not. The court simply directed the petitioner to make fresh representation to the respondent by placing on record all the relevant orders of lock down and the respondent was directed to pass on a speaking order within a period of one month. This practice of courts to issue consideration order has not done any good to the justice delivery system. It has invariably delayed justice and made it more expensive for the party in whom the consideration order is issued. It is being observed that the competent authority considers the orders of the court and then rejects the claim so as to justify its earlier stand of denying the claim when it was made in the first instance. The courts should decide the cases, instead of issuing "consideration order". It was highly desirable to decide whether COVID-19 be reckoned as a *force majeure* or not as there a good number of pending cases in which COVID-19 is an issue.

The present case should have been decided as a case of commercial hardship. There are a good number of cases where courts have not considered commercial hardship as a ground for frustration of contract.[25] This is the reason that in another case of *Starshine Logistics, Chennai* v. *Tamil Nadu Civil Supplies Corp, Chennai,*[26]the court did not apply doctrine of frustration of contract because, in the opinion of the court, the fundamental basis of the contract did not alter.[27] The doctrine of frustration cannot apply to the contracts where the fundamental basis remains unaltered. The rate escalation of price in the market cannot be a ground to plead frustration but in the present case even bid amount was not deposited as the contract could not be operated because of the change in circumstances that resulted in the imposition of lockdown by the government due to the onset of COVID-19 pandemic.

24 AIR 2022 MP104.

25 *Sachindra Nath* v. *Gopal Chandra Energy Watch dog* v. *Central Electricity Regualtory Commission* (2017) 14 SCC 80; *Govindbhai Gordhanbhai Patel* v. *Gulam Abbas Mulla Allibhai*, (1977) 3SCC 179 *Parshotam Das* v. *Municipal Committee Batala*, AIR 1949 EP 301.

26 AIR 2022 Mad. 244.

27 *Id.* at 247.

Time as an essence of the contract

The Supreme Court in *Welspun Speciality Solutions Ltd* v. *Oil and Natural Gas Corporation ltd.,*[28] went a step ahead by holding that "it is now a settled postion that whether time is of the essence in a contract has to be culled out from the reading of the entire contract as well as the surrounding circumstances.

The apex court while making above ruling disregarded the effect of an explicit clause in the agreement that makes time as an essence. It was laid down: [29]

> Merely having an explicit clause may not be sufficient to make time as the essence of the contract.As the contract was spread over a long tenure, the intention of the parties to provide for extension surely reinforces the fact that timely performance was necessary

The above ruling is not based on section 55 of the Indian Contract which is applicable to a contract whose time is the essence but is consistent with a long line of apex court judgments.[30]

A diametrically opposite opinion was expressed by another bench of the Supreme Court in *B.B Patel* v. *DLF Universal Ltd.,*[31]wherein the apex court held that time was not made the essence of the contract as a reasonable extension of time for delivery was permissible as per the clauses of the agreement.[32] This interpretation seems quite plausible. When parties agree to provide a provision for extension of time, the natural inference would be that the time is not crucial to the conclusion of performance of the contract because it is foreseeable for the parties that there may be some delay in the performance of the contract and that is why a provision is provided for extension of time. This discussion was carried further by the High Court Calcutta in *Mono Orion Foods India Ltd.* v. *Syndicate Reality infra Private Limited*[33] by holding that where it is no where mentioned in the agreement that failing to stick to agreement would lead to certain consequences or revocation of agreement, the time cannot be considered as an essence of the contract.

The High Court of Allahabad in *Jagdish Mani Tripathi* v. *Braj Bhooshan Tiwari and another*[34] came up with a curious finding by extending the reach of section 55 of the Indian Contract Act to the compromise decree. It was held:

> Where one of the parties involved says that time was never regarded by the parties to be the essence, nevertheless, the principle that the court recording a compromise and passing a decree on its basis

28 AIR 2022 SCC at 10.

29 *Id.* at 11.

30 For instance; *D.S Thimmappa Gomathinayagam Pillai* v. *Palaniswami Nadar*, AIR 1967 SC 868; *Coromandel Indag Products (P) Ltd* v. *Garudan Chit and Trading company (P) Ltd*, (2011)8 SCC 601.

31 AIR 2022 SC 683.

32 *Id.* at 693.

33 AIR 2022 (NOC) 406 Cal.

34 AIR 2022 (NOC) 187 All.

> gets jurisdiction to extend time for the performance of a condition is the only change that comes to a contract on which a compromise decree has followed in the matter of application of the principle about time being of the essence. It is, therefore held that the provisions of Section 55 of the contract about time being essence of the contract, making it voidable upon breach would apply to a decree of court founded on compromise in the same manner as any other contract.

Section 55 applies to a contract executed between the two persons where one of them has promised to do a certain thing at or before specified time but fails to do so at or before the specified time.The contract is voidable at the option of the promisee where intention of the parties is to make time as the essence of the contract. It is true that the compromise decree is also based on the consensus of the two parties which is attested by the court but it can be executed by the court in a time bound manner as it deems it proper without invoking section 55. The relief available to the party avoiding a contract because of breach of stipulation as to time where it is considered the essence of the contract is the compensation for any loss occasioned to him by such failure for which he has to approach the court and establish that the breach as to time was the essence of the contract. As against this, compromise decree has to be implemented by the court itself without resorting to section 55 of the Indian Contract Act.

The Madras high court in *T.P Ponnusamy alas P Jacob* v. *R Devaray*[35] added another dimension to this debate by opining that determination of time as an essence of contract is dependent upon the conduct of parties and totality of circumstances and not by mere presence of forfeiture clause. The court reiterated that the extension of time of performance of the contract indicated that time was not essence of contract. The court echoed the age old principle that time is not an essence of contract of sale where immovable property is the subject matter of the contract. In order to buttress its decision that time is not an essence of the contract in the instant case, the court took the support of the fact that the vendor had not removed encumbrance from the land and time for performance of the contract was extended that means time is not the essence of the contract.

It is submitted that the principle of law propounded by the courts form time to time that time is not the essence of contract in case of sale of immovable property was laid down, initially, at the time when price of the immovable property was not fluctuating within the short time. In *Gomathinayagam Pillai* v. *Palaniswami Nadar*,[36] the Supreme Court said that in a contract for the sale of land or immovable property, it would be normally presumed that time was not of the essence of the contract but now this scenario has changed and fluctuation of price of immovable property also occurs that too at a greater pace and with huge margin so this old principle that time is not the essence of the contract of sale of

35 AIR 2022 Mad. 218.
36 AIR 1967 SC 868.

immovable property no longer holds water. The apex court in *obiter* in *Vatsavayi Venkata Suryanarayanama Raju* v. *Metta Veerabhadra Rao*[37] has taken a note of the changed circumstances and observed that the age-old principle that in a contract relating to immovable property time is not of essence requires to be revisited in view of the changed circumstances created by inflation and steep increase in the price structure of such properties

The Supreme Court in *Katta Sujatha Reddy* v. *Siddamsetty Infra Projects Pvt. Ltd*[38] quoted with approval the findings of another bench of its own court in *Chand Rani (dead) by LRs* v. *Kamal Rani (dead) by LRs*[39] that there is no presumption as to time being the essence of the contract in case of sale of immovable property. Even it is not of the essence of the contract, the court may infer that it is to be performed within the reasonable time if it could be inferred from (i) the express terms of the contract (ii) the nature of the property, and (iii) the surrounding circumstances, for example, the object of making of contract. This makes clear that whether time is an essence of a contract or not, it can be inferred from the language used in the contract itself.

Secondly, where languages of the contract makes it clear that severe consequences of forfeiture would ensue, for instance, if the payment is not made within three months of the date of the agreement, such clauses make the time as an essence of the contract.[40] The court opined that the vendor has failed to remove the encumbrances so time cannot be said to be the essence of the contract. It can be said that the vendor by his conduct did not regard time as an essence of the contract and he has made by his conduct timely action of the contract impossible and he cannot now take the plea that time is the essence of the contact.

Application of *force majeure* clause

In *B.S Enterprises* v. *Indian Oil Corporation,*[41] the basic issue involved was termination of the contract by Indian Oil Corporation because B.S Enterprises had failed to make available trucks within the stipulated time mentioned in the agreement. The plea of the B. S enterprises was that the officials of the respondent Indian Oil company has found some deficiencies in its trucks and those deficiencies could not be removed within the given time because of onset of second wave of COVID-19. These arguments were not accepted by the single bench in the first instance and now by the division bench. The merits of the decision apart, neither the single bench, nor division bench rightly appreciated the application of force majeure clause in the agreement. The court observed as follows:

> Tender was floated much prior to onset of second wave of Covid-19 pandemic. LOA was also issued to tenderer before second wave of COvid-19 Pandemic. Tenderer tried to take shelter on force majeure

37 (1999)ALD 308).

38 AIR 2022 SC 5435.

39 (1993) 1 SCC 519; AIR 1993 SC 1742.

40 *Id*. at 5444.

41 AIR 2022 Cal. 50.

> clause but for invoking said clause, tenderer was required to give notice to other side as per stipulation but nothing to show that any such notice was given. The situation like Covid-19 pandemic is not specifically covered by force majeure clause.

The high court focused on termination of contract and held that it was proper because of the above mentioned reasons. The court did not discuss application of force majeure to the given contract but mentioned that situation like COVID-19 pandemic is not specifically covered by force majeure clause. The high court did not find it necessary to discuss section 56 of the Contract Act which deals with the force majeure effect on a contract. The observations of the high court raises two pertinent questions:

(i) Is section 56 available for facilitating performance of the contract or it only provides relief to a party for his/her non performance?

(ii) Is *force majeure* applicable to a contract under section 56 even where there is no provision of force majeure provided in the contract?

The relevant portion of section 56 reads as under:

> An agreement to do an act impossible in itself is void.
>
> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

The above provision of section 56 makes it amply clear that it will apply only where doing of an act contemplated in the contract becomes impossible. This provision cannot be invoked for doing an act but it absolves a party to contract from doing an act when it becomes impossible. This line of difference based on the language used in Section 56 has to be appreciated.

The question whether force majeure is applicable to a contract even where no provision to that effect is provided in the contract has to be answered in affirmative because of the reason that section 56 lays down substantive law on the subject which is not procedural in nature or content. It is not open to the court to say that there was no provision provided in the contract relating to COVID-19 as a *force majeure* clause. It is pertinent to mention that Section 56 applies to unforeseeable and not to foreseeable situations and Section 56 is not confined to only those situations that have been expressly mentioned which may make performance of the contract impossible but it will apply to all those situations which make performance of the contract impossible whether expressly mentioned in the contract or not.

Unjust enrichment

The High Court of Telangana gave wide interpretation to section 70 of the Contract Act in *ITC Ltd.* v. *State of AP*[42] that catches its spirit. The petitioner had

42 AIR 2022 AP 36.

deposited Rs. 4.5 crores with Andhra Pradesh Industrial Infrastructure Corporation Limited (APIIC) for allotment of land for its expansion project. This expansion move was not approved by the forest department. Meanwhile, the erstwhile state of AP was bifurcated under A.P Reorganization Act, 2014 into the new state of Telangana and the residuary State of AP with the result many complicated issues cropped up. Neither land nor the deposited amount was transferred to the petitioner. Hence this petition. The high court very rightly distilled out spirit from the language of section 70 and observed: [43]

> When the forest advisory committee did not approve the proposal of the petitioner, the proposal did not fructify. The petitioner is entitled to refund of the same with interest. The respondent cannot retain the same because the payment was not intended by petitioner to be gratuitous and there has been total failure of consideration and such retention would be clearly unjust enrichment. Section 70 comes into play and the respondent should return the said amount with interest to the petitioner

Abandonment and breach of contract

The Supreme Court in *Shripati Lakhu Mane* v. *Member Secretary Maharashtra Water Supply and Sewerage Board,*[44] maintained a fine distinction between abandonment and breach of contract in the following words: [45]

> It is fundamental to the law of contract that whenever a material alteration takes place in the terms of the original contract on account of any act of omission or commission on the part of one of the parties to the contract, it is open to the other party not to perform the original contract. This will not amount to abandonment of the contract. Moreover, abandonment is normally understood in the context of the right and not in the context of a liability or obligation. A party to a contract may abandon his rights under the contract leading to a place of waiver of abandoning an obligation. In this case, the appellant refused to perform his obligations under the work order for reasons stated by him. This refusal to perform the obligation can perhaps be termed as a breach of contract and not abandonment
>
> The above observation of the apex court, it is submitted, needs further clarification that an obligation created by unilateral act of omission or commission cannot create an obligation and non performance of such an obligation amounts to its non acceptance which would mean abandonment of the original contract and not a breach of contract.

43 *Id*. at 40.

44 AIR 2022 SC 1574.

45 *Id*. at 1579.

The apex court further held:

> The refusal of a contract to continue to execute the work, unless the reciprocal promises are performed by the other party cannot be termed as an abandonment of contract. A refusal by one party to a contract may entitle the other party either to sue for breach or to rescind the contract and sue on a quantum meruit for the work already done.[46]

The above observations of the apex court are based on a wrong premise that there was a concluded contract between the parties and appellant committed breach of that contract. However, the fact is that a work order was issued to the appellant on July 3, 1986 but then the appellant was informed on 28.07.1986 that the execution of the work was kept in abeyance due to "administrative emergencies." On December 17, 1986 the appellant was informed to commence the work immediately after this notification.The appellant informed the respondent about the non availability C-pipes and cement pipes of the diameter originally agreed. When the respondent wanted to replace the pipes with pipes of different dimension, the appellant demanded that a fresh rate be finalized which was communicated through a letter on Feburary 20, 1987. Before issues raised in this letter could be resolved, the respondents issued another letter on March 2, 1987, directing the appellant to stop the pipe work and start the work at another place. The respondent then sent a telegram on April 2, 1987 informing the appellant to start the work but later on by a letter on March 4, 1987, he was informed that the scheme was going on modifications. The appellant made a representation on November 4, 1987 about the nonpayment of bills and delay in sanction of the revised rates already communicated to respondents on 02.12.1987. On 22.02.1988 the respondents intimated the appellant that a fine of Rs. 10 per day will be imposed on him for not starting the work *w.e.f.,* the date of the said letter and he was again called upon to start the work. A similar letter was issued on March 22, 1988.

On the basis of the above correspondence, the apex court rightly held that the appellant was not guilty of anything including abandonment but expressed surprise as to why the respondent did not rescindthe contract, forfeit the security deposit and entrust the work to another contractor at the risk and cost of the appellant. After this observation, the apex court went to other extreme by holding that the correspondence between the appellant and the respondent makes it clear that the latter cannot even accuse the former of non performance of the contract[47]. The apex court rightly invoked Section 67 by holding that if any promisee neglects or refuses to afford the promisor reasonable facility for the performance, of his promise, the promisor is excused by such neglect or refusal as to the non-performance caused thereby.

This case, it is submitted, is not an abandonment of the contract as held by the high court and overruled by the Supreme Court in the instant appeal nor is it a case of breach of contract as indirectly held by the Supreme Court because changing

46 *Id.* at 1579.

conditions unilaterally without any *consensus ad idem* cannot result into a contractual obligation for non-performance of which results into breach of contract. The original contract was modified unilaterally by the respondent and the conditions imposed on the modified terms by the appellant were not accepted by the respondent. There was no novation of the contract as provided under section 62 so there was no breach of contract on the part of appellant. This is a case of section 67 plain and square which was also accepted by the Supreme Court in arriving the decision of the case.

Rights of pledgor

The High Court of Calcutta in *Manav Investment and trading company Ltd.* v. *DBS Bank India Ltd.,*[48] laid down several principles of law by reading sections 176 and 177 of the Contract Act conjointly and many issues pertaining to the subject have been delineated which are as under:

i. The provisions of section 176 of the Contract Act are to be mandatorily followed as and when the given case falls within its ambit. The applicability and sweep of section 176, unlike several other provisions on the same subject, is not eclipsed by the phrase "in the absence of any contract to the contrary"

ii. The notice given to the pledgor under section 176 has a purpose; it accords special protection to the pledgor. He has to be informed about the proposed sale of the security. This notice cannot be dispensed with and parties cannot agree that in case of any pledge, the pledgee may sell the pledged articles without notice to the pledgor.

iii. The right of redemption under section 177 is available to the pledgor even beyond the prescribed time and right up on the time the actual sale of the goods pledged takes place and expression "the actual sale" referred to in section 177 means the sale that is in line with the provisions of section 176 which gives the pledgee the right to sale; and if the sale is not in conformity with these provisions, then the equality of redemption in the pledgor is not extinguished.

iv. The notice contemplated by section 176 is not an implied notice. It has to be an express notice, free from ambiguities and specific about the intention of the pawnee to dispose of the security.

v. The notice envisaged in section 176 must be reasonable notice clearly showing intention to sell the security within the specified date so as to afford an opportunity to the debtor to pay amount in question within the prescribed time.

vi. There is a difference between "right to sell" and "intention to sell." The pledgee has to intimate his intention to sell the security to the pledgor and

47 *Id*. at 1579.

48 AIR 2022 Cal. 156.

not only that he has a right to sell for which due notice of all details of the time, date and place of sale be given to the pledgor.

vii. The notice mentioning sale "in accordance with Section 176" is not sufficient. The ingredients and requirements of Section have to be mandatorily complied with and a reasonable notice of the sale should be evident from the words used in the notice.

The above principles have afforded second opportunity to the pledgor to fulfill the terms of the agreement, otherwise he is supposed to know the consequences of his default at the time he executed the contract and pledges the security. The above principles not only reflect correct exposition of law as envisaged in Sections 176 and 177 but also attempts to seek ends of justice, not by litigation but by the terms of the contract which is now possible well before the contest in the court of law.

General Lien

In *Sunil Ratncher Gulle* v. *Union of India,*[49] the petitioner got a loan of rupees twenty one lakh from the respondent bank. The petitioner is also a director and personal guarantor in the company, "Sunil Hitech Limited". This company was dissolved and the liquidator was appointed by the National Company Law Tribunal (NCLT). The petitioner had taken home loan from the bank by depositing title deed of the flat which he is now interesting to sell for repaying the home loan. The petitioner requested the bank to allow him to sell his house for repayment of home loan but received no response. The petitioner issued a legal notice to the respondent with a request to issue NOC to sell the flat but instead of issuing NOC, the respondent bank issued a notice under section 13(2) of the Securitization and Reconstitution of Financial Assets and Enforcement of Security Interest Act, 2022 (hereinafter referred to as SARFAESI Act) declaring loan account of the petitioner as NPA and the petitioner was called upon to pay the loan amount. The respondent bank also gave no objection to the petitioner to sell out the flat with an instruction to adjust the sale amount towards home loan and remaining amount to be adjusted towards loan account to the company.

The petitioner sold the flat and liquidated home loan and moved an application for release of property papers to the purchaser of the flat but the respondent bank did not respond.

The petitioner filed the present petition and high court observed as under: [50]

> Admittedly, there was a relationship between the petitioner and the respondent as banker and customer. It is further clear from the pleading that the title deed of the property in question was handed over to the respondent bank as a security. Admittedly, said loan amount is repaid by the petitioner. Though the respondent bank has submitted that there is another loan account against the

49 AIR 2022 Bom.P. 195.

50 *Id*. at 200, para 17.

> petitioner and the bank has already moved an application to the debt recovery tribunal for obtaining necessary records, bank is at liberty to move against the petitioner and other directors to recover the said loan amount. Admittedly, said security was given against the loan amount which was already satisfied by the petitioner. In such a situation, it is not open for the respondent bank to continue to enforce its general lien for the security deposited with it especially when the entire amount was repaid. General lien is not exercised for a general balance of account as was required under Section 171 of the said Act. Moreover, it would not be open for the bank to exercise its right of general lien for the securities on the pretext of the bank and customer relationship. It cannot exercise such lien under Section 171 of the said Act. Thus there is no justification on the part of the respondent bank to retain the said documents by relying upon the provisions of Section 171 of the said Act.

The court further observed that it is open for the respondent bank to take such steps to secure its interest regarding the said loan account, however not by invoking the provision of Section 171 of the said Act. The respondent bank has no right to with hold the title deeds especially when there is no relationship between the petitioner and the respondent as banker and customer.[51]

It is submitted that the above ruling is not only contrary to the interpretation of the expressions "general balance of account" but also against the long line of precedents delineating the purpose and ambit of this expression.

The high court erred in holding that once the petitioner has repaid the loan amount for which he had deposited titled deed of the flat as a security, the bank customer relationship of the petitioner and respondent comes to an end. This may be true for section 170 but not for section 171. Section 171 deals with general lien as against bailee's particular lien provided in section 170. The general lien is a special lien that is specific to bankers, factors, wharfingers, attorneys and police brokers for retaining goods bailed to them for "general balance of account". The expression general balance of account does not mean here whole outstanding amount against one loan account but different loan accounts taken together. Section 171 provides for a special lien to certain categories of entities for their special position. The banker is one of them. This has been already established by a good number of case decided on this point by the supreme court[52] and high courts.[53]There are high courts in India that have even suggested correction of the word ''lien'' in Section 171 and has opined that the proper term is 'set off.'[54]

51 *Id*. para 20.

52 *Syndicate Bank* v. *Vijay Kumar* (1992) 2 SCC 330.

53 *Nakulan* v. *Canara Bank* , AIR 2014 Ker. 64; Pradyumna Kumar Sahoo v. SBIAIR 2018 Ori.P 84

54 *Punjab National Bank Limited* v. *Arure Mal*, AIR 1960 P&H 632; *India Bank* v. *Sri Amnapoorne* Finance, 2002 Mad.180.

Lord Denning in *Halesowen Press work and Assemblies Limited* v. *Westminster Bank limited,*[55] expressed similar opinion that banker's lien is not a true lien. To avoid any confusion, we should discard the use of lien in this context and speak simply of a bankers right to combine accounts or right to "set off" one account against the other.

Lord Denning further explained it by way of an example that suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts? He says that answer to this question is yes and the banker has a right to combine the two accounts whenever he pleases and to set off one against the other, unless there is an agreement, express or implied to keep these two accounts separate.

A divergent opinion with correct exposition of law has expressed by the Madras high court in *Chandra* v. *Branch Manager REPCO Bank, Gandhipuran Branch Coimbatore.*[56] It was held that the law regarding the general lien of banker is well settled to the effect that a bank has a right to with held documents till such time, the entire loan which was either been borrowed or guaranteed is repaid. The mere fact that the petitioner is a borrower in one case and guarantor in another case would not alter the position of general lien.[57]

In *Sahastra Exports Pvt. Ltd* v. *AP Mother Malrsh,*[58] an interesting question of interplay between the general lien and privity of contract was raised. In this case, the plaintiff is a private limited company in India; Defendant no. 1 is a Spanish company and is one of the world's largest container supplying line and vessel operator. Defendant no.2 is a private limited company in India and is a subsidiary of defendant No.1. Defendant no.5 is a company incorporated in China. The plaintiff first engaged defendant no.2 for shipment of Ascorbic Acid to its customer based in Beixut, Lebanon. There was a dispute and the defendant No.2 sold Ascorbic Acid in auction and claimed the balance amount which remained unpaid. Then the plaintiff engaged defendant no.5, a separate company for shipment of the Cargo. When the plaintiff paid the whole amount to the defendant no. 5, the defendant no.2 refused to issue delivery order and deliver the Cargo to the plaintiff on the ground that his account has been suspended due to non payment against earlier transaction. The court on the basis of the facts and the material placed before it concluded that there was no privity of contract between defendant no. 1 and 2 and defendant no. 5 is totally separate and independent entity. The general lien could be exercised if there is a contractual relationship between defendant nos. 1, 2 and 5.

The question arises; can the similar plea be raised by a customer who has taken two loans from two different branches of the same bank at two different dates against the securities deposited and the customer has repaid loan in one

55 (1970) 3 WLR 625.
56 AIR 2022 Mad. 254.
57 *Id*. at 255.
58 AIR 2022 Bom.216.

branch but remains outstanding in another branch? Can doctrine of privity of contract is available in such case? It is submitted that in such cases the different branches of the same bank will be treated as a single entity and principal of privity of contract will not come into play. The different accounts of the same branch or of different branches will not make any difference for the applications of section 171.

Doctrine of ratification

The supreme courtin *Shabbir Mohammad Sayed* v. *Noor JehanMushtaq Sheikh*[59]quoted Pollock and Mulla, authors of the Indian Contract and Specific Relief Acts with approval and laid down that the core principle of ratification is one by which a person approves of the act of another knowing about the act[60]. Ratification is an act of the known person whose act is sought to be ratified. The apex court, however, did not further clarify that the knowledge about the act may be actual or imputed. Even imputed knowledge will suffice for ratification where corroborative evidence strongly points out that the principal was in know of the act. This interpretation is strengthened by the fact that section 197 makes it clear that ratification may be express or implied.

III PARTNERSHIP ACT

Nature of Partnership

The Gujarat high court in Principal Commissioner v. *Cardile Health Care limited*[61] *has* shed light on many principles of law relating to Partnership Act. The court ruled that Section 4 of the Partnership Act does not make a firm a "person" in the sense as understood for a ''company'' incorporated under the Companies Act. A firm is not separate from its partners. The partners and the firm are one and the same. The attention of the court was invited towards section 3(42) of the General Clauses Act that defines a person to include, *inter alia*, a body of individuals, whether incorporated or not but the high court found itself bound by the rulings of the apex court.[62] The high court ruled that it is law alone that can create or recognize a juristic personality district from the constituent individuals as in the case of companies. Therefore, merely because definition of "person" would include more than one person as a body of individuals will not make it an entity which can hold on its own in the eyes of law. There is no automatic birth of a juristic person unless specifically recognized by the law.[63]

Assets of a firm

The court laid down that partners capital to a firm can be in the form of cash/ Asset. It can be in the form of contribution of skill and labour alone without contribution in cash ''sweat equity''. They are certainly assets of that individual and there is no reason why they cannot be construed as a consideration for earning profit in the business of a Partnership firm.[64]

59 AIR 2022 SC 3755 at 3761.

60 *Id*. at 3761.

61 AIR 2022 Guj. 168.

62 *Dulichard Laxminerayan* v. *Commissioner of Income Tax* (1956) 29 ITR 53.

63 *Id*. at 176.

Suit by an unregistered firm

In *Surya Narayan Pradhan* v. *Jumden Lepche,*[65] the Skim high court held that the suit filed by a partner of the unregistered firm would not attract section 69(2) when the partner files a suit in his individual capacity. The high court, however did not make it clear how a partner of an unregistered firm can file a case in his individual capacity for a cause of action that pertains to such firm. The high court ruled that the averments in the plaint make it clear that the plaintiff had sued the defendants in his individual capacity and not on behalf of the partnership firm. The high court did not accept the contents of the affidavit as was done by the District court in which it was stated that the plaintiff is a partner of the firm and he was authorized by the other partners to file the affidavit on behalf of the partnership firm.[66]

The High Court of Telangana in *Somuri Ravali* v. *Somuri Purnachandra Rao and others*[67] attempted to lessen the rigour of section 69 of the Partnership Act by holding that where the original partnership deed is registered but has been subsequently amended, the amended partnership deed need not to be registered provided there is nothing to indicate either expressly or implicitly any novation or substitution of original partnership deed has taken place. The court added that the reallocation of shares of a partnership deed in the amended partnership would not require re-registration of a partnership firm.

The Meghalaya high court further released the rigour of section 69 *in Jayanta Kumar Deb* v. *State of Megalaya*[68] by holding that the invocation of article 226 by the petitioner against the unreasonable and arbitrary action of the respondent cannot be defeated by referring to Section 69 of the Partnership Act. Section 69 of the Partnership Act cannot act as a bar for the relief prayed in the writ petition. Section 69 is applicable only when a partner seeks to enforce or impeach any constitutional obligation arising out of partnership deed of an unregistered firm.[69]

IV SALE OF GOODS

Conditions and Warranties

The supreme court in *Rajratan Babulat Agarwal* v. *Solartex India Pvt. Ltd.*[70] had a thorough discussion on combined reading of sections 13, 41, 42 and 59 of the Sale of Goods Act, besides provision of other enactments. The apex court laid down many principles of law of seminal importance by re-interpreting these provisions. There was a contract of sale of goods by description, namely Indonesian coal and of specified quantity as enumerated in the purchase order. The purpose for which the coal was to be used was also mentioned namely it was

64 *Id*. at 177.
65 AIR 2022 Ski. 20
66 *Id*. at 23.
67 AIR 2022 (NOC)30.
68 AIR 2022 Meg. 92.
69 *Id*. at 96.
70 AIR 2022 SC 5493.

to be used for boiler. The 412 MT coal was supplied as per the purchase order but no part of it had been returned by the corporate debtor to the creditor. The court reached to the conclusion that the goods so delivered may have been used or consumed. It may constitute acceptance of goods within the meaning of section 42 of the Sale of Goods Act.

The precise question for the court to decide was that the characteristics of the coal of given quantity with reference to certain objective criteria were indeed specified. It were understood as conditions to be fulfilled by the seller but those conditions were not fulfilled by the creditor seller. The apex court ruled that an analysis of relevant provisions of the Act would reveal that a stipulation in a contract of sale may be a condition or a warranty. A condition is on higher pedestal than a warranty. The breach of a condition gives right to an aggrieved party to repudiate the contract but breach of warranty gives right to claim for damages only and not a right to repudiate the contract. Whether a stipulation is a warranty or a condition is a matter to be decided on the basis of the facts of each case and buyer is free to treat the breach of condition as a breach of warranty and claim damages (section 13(2)). This is possible only when the contract is not sever-able and the buyer must have accepted all or any part of the goods which is of course, subject to the contrary contract made expressly or implicitly.

The apex court opined that section 13(2) of the Sale of Goods Act was amended in 1963 and the words ''or where the contract is for specific goods the property in which has passed to the buyer'' have been deleted. Going by the objects and reasons of the amending Act, it is found that the said words gave rise to some difficulty. It is, *inter alia*, stated in the objects and reasons that under Section 20 of the Act, property in specific goods in a deliverable state passes to the buyer when the contract is made. When there is a contract for sale of specific goods by sample, section 17(2) of the Act provides for an implied condition that the bulk should correspond to sample in quality. It is further indicated in the abject and reason that when in such a case property is delivered subsequently which does not correspond with the sample, section 13(2) obliged the buyer to treat the implied condition under section 17(2) as a warranty, thus robbing the buyer of the right to rejects the goods and entitling seller to claim damages only. The Law Commission also made a recommendation that in case of sale of specific goods by sample, it should be taken out of section 13(2). Thus the omission in section 13(2) by the Amending Act 33 of 1963 confines the compelled treatment of a breach of a condition as a breach of warranty to only cases where the contract is not sever-able and the buyer has accepted the goods or a part thereof. No doubt, all of this is subject to a contract either expressly or implied otherwise.[71]

The apex court raised pertinent questions for instance; (1) where a seller has delivered the goods and the buyer has even accepted them, can Section 59 be invoked by the buyer? (2) where the property has passed to the buyer interms of the meaning of Section 19 of the Sale of Goods Act which on the one hand entitles

71 *Id*. at 5503.

the seller to sue for the price of the goods, in view of the word ''warranty'' neglects or refuses to pay under Section 55 read with Section 59, can the buyer in a suit for the price filed by the seller 'set up' a breach of warranty within the meaning of section 59 and persuade the court to either decree a reduction in the price or extinguish the liability of the buyer or to even pay any part of the price?

In simple words, if the goods are delivered and accepted by the buyer as contemplated under Section 42 of the Sale of Goods Act, will the right of buyer arising out of breach of warranty under section 59 be extinguished? if the mere acceptance of the goods results in depriving the right of the buyer to invoke section 59 of the Act, then undoubtedly the buyer will be liable to pay the price.[72]

The apex court then raised a hypothetical question in the following words.

> Let as assume that there is delivering and acceptance in a given case. If parties intended that the property in the goods would pass only after delivering is effected and acceptance is made and if the case falls under section 13(2) of the Act and the buyer sets up a compelled breach of warranty though in fact a condition was violated, it may not be legal to deny the benefit of the range of remedies open to a buyer under section 59. Acceptance of goods at any rate within the meaning of section 13(2), if it does not constitute passing of property, would not also deprive the buyer of the right under section 59 of the Act.

The apex court raised yet another pertinent question regarding a situation where buyer has accepted the goods under section 42 or has accepted the goods by communicating so expressly to the seller, a situation occurs that leads creation of circumstances that fall under section 14, what could be then the legal position? for instance buyer finds that seller has no right to sell because goods are stolen. A third party comes forward and contests his case that the goods were never the property of the seller, would it not be condition under Section 14(9) which has been observed in its breach by the seller?

The last but not the least question that was raised by the apex court was assuming that the buyer has not yet paid the price, can he not despite having accepted the goods exercise his right under section 59 and seek extinguishing of the price apart from claiming damages.[73]

All the above issues raised by the apex court are a matter of interpretation. The last question raised has an answer in Section 27 of the Sale of Goods Act and not in section 59. Section 13(2) has to be read with sections 14 and 27. Section 27 incorporates the principle of *nemo dat quod non-habet,* no one can pass on better title than what he has which prevents buyer from becoming the owner of the goods which were not owned by the seller. The question of extinguishing of price as laid down by the apex court would not arise. The seller may be asked to pay

72 *Id*. at 5507.
73 *Ibid.*

damages not only to buyer but also to the true owner. The buyer may not be right in asking for extinguishing of price as contended by the apex court.

V NEGOTIABLE INSTRUMENTS

Meaning of debt

The Supreme Court in *Sunil Todi* v. *State of Gujarat*[74]delineated many facets of liability stipulated in Section 138 of the Negotiable Act, 1881 (NI Act) which includes the meaning of debt.

The apex court opined that an obligation may be present or future and that a sum of money promised to be paid on a future day by reason of present obligation would also include debt. The term debt would include a post dated cheque issued after the debt has been incurred but would not include the sum payable on a contingent event unless that contingency occurs and then it takes the color of debt.

The apex court posed two questions in the instant case for their determination (i) whether Section 138 of the NI Act is applicable only to a situation where there is an outstanding debt already and cheque has been issued to discharge that debt? (ii) whether section 138 of the NI Act is applicable also to a cheque for a debt that is incurred before the cheque is issued.[75]

The apex court while answering to its own questions made the following pertinent observation.

> The object of the NI Act is to enhance the acceptability of cheques and inculcate faith in the efficiency of negotiable instrument for transaction of business. The purpose of the provision would become otiose if the provision is interpreted to exclude cases where debt is incurred after the drawing of cheque but before its encashment. The true purpose of Section 138 would not be fulfilled, if debt or other liability is interpreted to include only a debt that exists on a date of drawing of the cheque. Moreover, Parliament has used the expression "debt or other liability". The expression "or other liability" has a content which is broader than "a debt" and cannot be equated with the latter… The issuance of the cheque in the context of a commercial transaction must be understood in the context of the business dealing. The issuance of the cheque was followed close on its heels bythe supply of power. To hold that the cheque was not issued in the context of liability which was being assumed by the company to pay for the dues towards power supplied would be to produce an outcome at odds with the business dealings.[76]

The apex court rightly interpreted the expression "debt or other liability" to include a cheque issued for a debt that is incurred before the cheque is encashed.

74 AIR 2022 SC 147.

75 *Id.* at 158.

76 *Id*. at 158.

This will enhance the credibility of the cheque and will facilitate the trade which is good for a growing economy like India. Will this interpretation include cheques for advance payment? In a day to day business dealings, the customers issue advance cheques for the goods which they are supposed to get from their suppliers who also do not have these goods but have to order them. The date of encashment of advance cheque is before the supplier of the goods get them for the drawer of the cheque. Will it be presumed that the drawer of the cheque has incurred the debt or supplier of the goods has to invoke doctrine of estopple if the drawer of the cheque denies his liability?

The apex court shed light on this issue in the following words: [77]

> if there is a breach in the condition of advance payment, it would not incur criminal liability under Section 138 of the NI Act since there is no legally enforceable debt or liability at the time when the cheque was drawn. When a contract is entered into, the purchaser has to pay an advance, and if there was a breach of that condition, the purchaser may have to make good the loss to the seller but this would not occasion a criminal liability under Section 138

The above interpretation, it is submitted, will not serve the purpose of section 138. Most of the cheques are issued in advance to discharge the liability to be incurred in future. The proper interpretation would be to see whether liability had incurred at the time when drawee presented the cheque for its encashment. The material date should not be the date when the cheque was issued but when it was presented for encashment, otherwise the purpose of Section 138 will be defeated in cases of advance cheques.

Difference between debt and security

The Supreme Court in *Sunil Todi* v. *State of Gujarat*[78] quite rightly blurred the difference between debt and security. The court ruled:[79]

> Merely labeling the cheque as a security would not obviate its character as an instrument designed to meet a legally enforceable debt or liability. There is no inflexible rule which precludes the drawee of a cheque issued as a security from presenting it for payment in terms of the contract. It all depends on whether a legally enforceable debt or liability exists or not.

While holding above opinion the apex court invoked its decisions in other cases[80] where it was held that whether a set of cheques has been given towards

77 *Id.* at 154.

78 AIR 2023 SC 146.

79 *Id.* at 158.

80 *HMT watches* v. *M A Habida* (2015) 11 SCC 776; *Sampelly Satyanarayane Rao* v. *Indian Renewable Energy Development Agency Limited M/S Womb Laboratories Pvt. Ltd* v. *Vijay Ahuja* AIR Online 2019 SCC 2228.

security or otherwise is a question of fact which has to be determined at the trial on the basis of evidence.[81]

It is submitted that the distinction between "debt and security" is without any difference and if this difference is insisted that is bound to put the drawee at a disadvantageous position. The word security has to be interpreted as a security for payment of debt.Even in common business parlance cheques are given as a security to meet the debt incase debtor fails to discharge the debt. The issuance of cheque as a security gives double assurance to the drawee that incase debtor fails to liquidate his debt by paying cash , the cheque issued can be encashed. There may be sometimes difference in actual date for payment and the date of encashment of cheque issued as a security. In such cases, the decision to maintain difference between the cheque to discharge the debt and the cheque as a security will not serve the purpose of drawee for whose benefit Section138 of the NI Act was enacted.

Legal Validity of inchoat promissory notes

The High Court of Madras was called in *R. Barathbaran* v. *R. Nallathambi*[82] to determine the legal validity of an inchoat promissory note. In this case, the trial court had upon the consideration of oral and documentary evidence and also taking note of the admission as to the execution, invoked Section 118 of the NI Act dealing with the statutory presumption and the authority of the holder in due course to fill up the promisor notes under section 20 of the Act and decreed the suit.[83] This decree was overturned by the first appellate court on the ground that thumb impression of the defendant was not obtained and the signature in each of the promissory notes is different from each other on comparison by a naked eye.[84]

The high court formulated the following substantial questions of law for decision.

i. Whether the first appellate court erred in law in not considering the scope of Section 118 of the NI Act and the legal presumption arsing under it before dismissing the suit by reversing the well considered reasoning of the trial court?

ii. Whether the first appellate court erred in law in rejecting the plaintiff's right to fill up the promissory notes under Section20 of the NI Act whereupon the holder is authorized to fill up the blanks and to negotiate the instrument for a certain amount?

iii. Whether the first appellate court is correct in dismissing the suit on the basis of comparison of signatures by naked eye particularly when the defendant has categorically admitted the execution?

The high court first outlined the importance of mandatory presumption in the following words:

81 *Supra* note 78 at 159.
82 AIR 2022 Mad. 263.
83 *Id*. at 263.
84 *Id*. at 264.

> It is in law that in the case of mandatory presumption, the burden of proof on the defendant in such a case would not be light. As the presumption is raised under Section 114 of the Indian Evidence Act. it cannot be held to be discharged merely on the fact that the explanation offered by the defendant is reasonable. When there is a statutory presumption in favour of the plaintiff, it has to be rebutted by proof and not by a bare explanation. Unless the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted.[85]

The presumption under Section 118 of the Negotiable Instruments Act is one of law.The court below shall presume *inter alia*, that the promissory notes were made for consideration once statutory presumption is raised. Onus of proving absence of consideration is on the executants. The lower appellate court has failed to consider the pleading and evidence in the proper perspective and has wrongly thrown the burden of proof on the plaintiff with gross ignorance of legal presumption.

The court further ruled that there is no mandatory provision under the NI Act that both the signature and thumb impression have to be obtained for pro-note and the lower appellate judge has totally misguided or misused the provision of proof and not even followed basic rudimentary of Section 20 of the NI Act.

The observations of the high court are in line with the provisions dealing with the promissory note and is bound to enhance the reliability of the negotiable instrument. Section 20 has a wide scope to fill up the gap of the negotiable instrument executed by the *bona-fide* parties in good faith. This interpretation will help both the parties to the negotiable instrument. The party seeking loan in terms of cash or kind can be facilitated by exchanging negotiable instrument and the party extending the loan will have a security in the form of a negotiable instrument without any fear of it being challenged on the flimsy grounds later on.

Liability of a director and application of vicarious liability principle

The Supreme Court in *Sunita Palita* v. *Panchami Stone Quarry*[86] explained the ambit and scope of Section 141 of the NI Act which creates vicarious liability. The apex court concurred with the appellate court below that when a complaint was filed against the Director of a Company, a specific averment that such person was in charge of and responsible for the conduct of business of the company was an essential requirement of Section 141 of the NI Act.[87] Merely being a director of the company is not sufficient to make the person liable under Section 141 of the NI Act. The requirement of Section 141 of the NI Act was that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company and they get covered under Section 141 of the NI Act. A signatory of a cheque is clearly liable under section 138/141 of the NI Act.

85 *Id.* at 265.
86 AIR 2022 SC 3548.
87 *Id.* at 3556.

A director of a company who was not in-charge or responsible for the conduct of the business of the company at the relevant time will not be liable under these provisions.

However, the moot point is how to determine whether a director was in charge or responsible for the conduct of the business of the company at the relevant time? Are the provisions of law governing appointment and functions of the director have to be taken into account or the actual role and functions of director or other concerned person that has to be kept into consideration at the time of determination of the liability.

The director of a company may be holding higher position than the managing director, independent director or non executive director or the signer of the cheque in conducting business of the company yet he may not be held liable because of the statutory position by virtue of which he has been appointed. As again this, a signer of the cheque may not have any role in the conduct of the business and he may be the last man in the chain of hierarchy who is authorized to sign the cheque for a payment that has been authorized by the competent authority.

The Supreme Court in *S.P Mani and Mohan Dairy* v. *Snehalatha Elangovan*[88] made a thorough discussion on the ambit and scope of Sections 138 and 141 of the NI Act and their interoperability. The apex court opined that the gist of Section 138 is that the drawer of the cheque shall be deemed to have committed an offence when the cheque drawn by him is returned unpaid . The condition precedent and condition subsequent to constitute the offence are drawing of cheque on the account maintained by the drawer with a bank, presentation of the cheque within the prescribed period, making of a demand by the payee by giving a notice in writing within the prescribed period and failure of the drawer to pay within the prescribed period once these conditions of dishonor of cheque are complete. If the drawer is a company, the offence is primarily committed by the company. Then Section 141 has to be invoked for determining liability of a company. Since no corporeal punishment can be imposed on the company, the moot question is; who is liable?

Section 141 provides an answer. Every person who at the time of the commission of offence was committed was in charge of and responsible for the conduct of its business; irrespective of whether such person is a director, manager, secretary or other officer of the company. It would be for such responsible person to prove that the offence was committed without his knowledge or despite his due negligence.[89]

The apex court made a very pertinent observation which marks a shift from the earlier rulings that tried to fix the responsibility on the basis of the position a person was holding in a company and not on the basis of power which he was wielding. The apex court has now very rightly made the person liable for dishonoring

88 AIR 2022 SC 4883.
89 *Id*. at 4892.

of cheque under section 141 read with 138 for the power he was exercising, irrespective of the position which he was holding.

The apex court also added "time" when the offence was said to have been committed by the company to determine the liability under section 138. It is a common place that an offence means an aggregate of facts or omissions which are punishable by law and therefore can consist of several parts, each part being committed at a different time and place involving different persons. The court rightly put it that provisions of section 138 would require a series of acts of commission and omission to happen before offence of, what may be loosely called as "dishonor of cheque," can be constituted for the purpose of prosecution and punishment.[90]

The court extended the reach of section 141 to all those persons who were in charge of the company at the critical time when each of the series of acts of commission and omission essential to complete the commission of offence by the company were being committed. The court explained this legal position by way of an example. "A" might be in charge of the company at the time of drawing the cheque. "B" might be in charge of the company at the time of dishonor of cheque and "C" might be in charge of the company at the time of failure to pay within 15 days of the receipt of the demand notice. In such a case, the permissibility of prosecution of "A" "B" and "C" respectively or any one of them would advance the purpose of the provision and if none can be prosecuted or punished, it would frustrate the purpose of the provision of Section 138 as well as Section 141. The apex court found source of this interpretation in the expression, "every person shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly" as it finds place in sub-Section (I) of Section 141 and the use of phrase "provided that nothing contained in this sub-Section shall render any person liable to punishment if he proves" that which occurs in the first provision. The apex court then made a path breaking pronouncement in the following words: [91]

> Every person who was in charge of and was responsible to the company for the conduct of its business at the time of any of the components necessary for the commission of the business occurred may be proceeded against but may not be "punished" if he succeeds in proving that the offence was committed without his knowledge and despite his due diligence; the burden of proving that remains on him. Therefore, it also has to be held that the time of commission of the offence of dishonor of cheque cannot be on the stroke of a clock or during 15 days after the demand notice has to be constituted as the time when each of the commission or omission was committed. The word "every" points to the possibility of a series of persons

90 *Id.* at 4894.

91 *Ibid*.

being in charge when the sequence of events culminating into the commission of offence by the company were taking place.

The following principles of law have been propounded by the apex court.

i. It shall be the primary responsibilities of the complainant to make specific averments in the complaint about the persons of the company responsible for the conduct of the business so as to fasten vicarious liability on them.

ii. The complainant is not legally required to show that the accused partner of a firm was in know of each and every decision of the firm so as to make him criminally liable.

iii. To prosecute an accused partner is different from his punishment. Section 141 of the NI Act makes it abundantly clear that where an accused to the satisfaction of the court proves that he does not have the knowledge of the commission of offence or he had exercised due diligence to prevent the commission of such offence, he will not be revisited by punishment.

iv. The complainant need not to be unnecessarily be burden with the knowledge which he is not supposed to have it. He is supposed to know the person in charge of the affairs of the firm or company but he is not supposed to know the administrative matters. In such case, he has to allege that the person named in the complaint is in charge of the affairs of the company or firm and then it is only for the alleged accused who has the special knowledge about the role he has played in the company or firm to show to the court that at the relevant point of time he was not in charge of the affairs of the company or firm.

v. The plain reading of Sections 141 and 138 amply show that once the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers in charge of the affairs of the company or firm to show that they were not liable to be convicted.

vi. The existence of some special circumstances may absolve any alleged accused from liability. This special circumstance will be in the knowledge of the alleged accused. It is for him to establish at the trial stage that their existed special circumstances sufficient to show that he was not in charge of the affairs of the company or firm.

vii. The criminal liability is fastened only on those who were in charge of and responsible for the conduct of the business of the firm at the time of commission of an offence. But vicarious criminal liability can be inferred against the partners of a firm when it is specially averred in the complaint about the status of the partner "qua" the firm. This would make them liable to face the prosecution but it would not lead to automatic conviction. They will not be adversely prejudiced if they are eventually found to be not guilty as a necessary consequence thereof would be acquittal.

viii. If any Director wants any process issued against him to be quashed by filing a petition under Section 482 of the code on the ground that only a

bald averment is made in the complaint and that he/she is really not concerned with the issuance of the cheque, he/she must furnish some sterling incontrovertible material or acceptable circumstances to substantiate his/her contention. He/she must make a case that making him/her stand the trial would be an abuse of process of court.

The court has laid down that an accused has to prove with the help of "sterling incontrovertible material or acceptable circumstances his non involvement in the commission of the crime. He has not to prove his innocence beyond the shadow of doubt.

The following principles of law were also enunciated by the apex court.

(i) Vicarious liability can be fastened on those who are incharge of and responsible to the company or a firm for the conduct of its business. The firm means a company for the purposes of Section 141.

(ii) The complainant is not required to reproduce language of Section 141 verbatim in the complaint as the complaint is required to be read as a whole.

(iii) The complaint has to proceed in terms of law once it is proved that the substance of the allegations made in the complaint fulfills the requirements of Section 141.

(iv) The courts should avoid adopting of hyper technical approach in construing the complaint so as to quash it.

(v) The courts should keep in mind the laudable object of preventing bouncing of a cheque and sustaining the credibility of commercial transactions resulting in the enactment of sections 138 and 141, respectively.

(vi) It is to be kept in mind that these provisions create a statutory presumption of dishonesty exposing a person to criminal liability if payment is not made within the statutory period even after the issuance of the cheque.

(vii) The power of quashing a complaint should be exercised infrequently and where reading the complaint as a whole the factual foundation of the complaint has been laid, then the complaint should not be quashed.

(viii) Where the ingredients of the offence are altogether lacking , the court concerned owes a duty to the accused to discharge him and this holds true even where it appears that the everything stated in the complaint is correct and even when construing the allegations made therein liberally in favour of the complaint, it is still bereft of the essentials of the offence charged.

VI CONCLUSION

During survey year, it has been found that courts have sometimes stretched too much provisions of law and sometimes constricted there in its endeavor to do justice. The court in *N Vaidyanathan* did not grant relief to the appellant who was pleading use of coercion by the opposite party for executing the document. The court, even after admitting that the appellant might have been put to inconvenient

or compelling circumstances for executing the document in question, did not invoke Section 15 of the Contract Act which covers not only committing but even threatening to commit any act forbidden by the IPC. The appellant was kidnapped in connivance with the police persons against which his mother of the appellant filed a complaint through e-mail to the police commissioner and to the grievance cell of the Chief Minister but it was not found sufficient to get favourable decision.

The Supreme Court in *Arce Polymers* allowed waiver of a statutory right but has very rightly added a caveat that waiver of the statutory right cannot be always inferred from conduct. The Kerala high court did not find it prudent to apply free consent principle to mediation agreement on the basis of presumption of its validity when it is duly executed.

The High Court of Calcutta in *Sudipte Banerjee* found section 27 of the Contract Act not adequate enough to extend protection to trade secrets. The court found English law on the same subject more forward looking and abreast of the modern day requirements. The court suggested amendment to section 27 so as to accord protection to the trade secrets. It is submitted that there is no harm in making express provision for the protection of trade secrets, especially when every effort is being made to attract more and more investment. However, the high court did not make proper research to find out that the English law on this subject is not ahead to India Law and the courts in India have given, in appropriate cases, protection to the trade secrets also.

Patel Engineering Private Ltd represents an innovative interpretation for application of amended provision of section 28. The amendments have prospective effect is a rule of interpretation unless otherwise expressly provided in the amended rule. The court did not change this rule of interpretation but changed its application to the given facts by holding that irrespective of when the contract between the parties is entered into, the relevant date would be when a claim is asserted. The date of conclusion of contract or the date of cause of action was not given any weight by the court but the date of assertion of the claim was considered critical for determining application of the amended provision.

In *Satish Kashyap,* the court made a contentious observation by holding that the agreement did not provide a provision for frustration of contract by the exigency like COVID-19 and issued a consideration order without pronouncing on the application of force majeure like COVID-19. Section 56, which deals with the frustration of contract, is a substantive provision that would include all those circumstances within its fold that make performance of the contract either unlawful or illegal whether it has been provided in the contract expressly or not.

> Divergent opinions have been expressed by the different benches of the apex court on the question of time as an essence of the contract. One bench observed that extension in time for performance of the contract means that parties treat time as an essence of the contract but other bench made a quite opposite observation. A clause in the contract allowing extension of time would mean that the parties

have in the beginning of the contract contemplated some delay in its execution that is why a clause to this effect has been provided.

The High Court of Bombay constricted the scope of Section 171 providing for banker's general lien which is bound to defeat the purpose for which this protection was accorded to many entities including banker . The court laid down once the loan has been liquidated, the banker has no right to retain the security received against this loan for the repayment of another payment. This has been held inspite of the contrary ruling on the same subject both in India as well as England.

Surya Narayan Pradhan is yet another purpose oriented opinion attempting to mitigate the rigour of Section 69 of the Partnership Act which indirectly makes registration of a firm mandatory by making claims of unregistered firm unenforceable. It has been held that this rule does not apply to amended deed of a firm which is unregistered but is a modified version of an earlier registered firm.

The courts have maintained a distinction between "debt and security" and the drawer of the cheque as a debt is held liable for dishonour of the cheque but not for the dishonour of the cheque issued as a security. If this difference is insisted that is bound to put the drawee at a disadvantageous position. The word security has to be interpreted as a security for payment of debt.Even in common business parlance cheques are given as a security to meet the debt incase debtor fails to discharge the debt. The issuance of cheque as a security gives double assurance to the drawee that incase debtor fails to liquidate his debt by paying cash , the cheque issued can be encashed.

The vicarious liability of the director or any other functionary has been settled on the basis of their functions and not on the basis of the position. However the Supreme Court has added one more dimension to the vicarious liability principle by holding that those who are in charge of or responsible for conduct of business have to be prosecuted and then they have to show that the cheque was issued without their knowledge or in spite of their due diligence.