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MERCANTILE LAW

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I INTRODUCTION

THE COURTS have decided a lesser number of cases during the surveyed year than the usual on the subjects of Indian Contract Act, 1872 Partnership Act, 1932 Sale of Goods Act, 1930 and Negotiable Instruments Act, 1881. Most of these cases have reiterated legal positions that are more or less settled. These cases have not been included in this survey but only those cases that have either deviated from the established legal position or have given new interpretation to the legal provisions have been appraised, and critically examined in this survey with the help of more tenable alternative viewpoints.

II LAW OF CONTRACT

Termination of contract

In *MS Z Plus Surakhya Seva Bhubaniswar* v. *State of Odisha,*[1] the court upheld the doctrine of "*Pacta Sunt Servanda"* and opined that the contract cannot be terminated by mere mentioning that the services rendered by the opposite party are unsatisfactory. In the instant case, the authority had reserved the right to terminate the contract at any point of time after giving 30 days' notice to the service provider. The court observed that the termination order did not assign any reason for termination of the service contract. The grounds for termination of the service contract mentioned in the counter affidavit filed on behalf of the authority cannot validate the order.Thus, a stipulation in the service contract that the authority can terminate the contract at any time by giving an advance notice as agreed in the service contract shall have no effect, unless the reasons are mentioned. This now holds true, on the basis of this decision, that even where the parties have initially agreed that the contract can be terminated after giving advance notice, without assigning any reason.

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1 AIR 2023 Ori.82.

Doctrine of mistake

In *Ravindra Kumar Das* v. *State of Odisha,*[2] the scope of doctrine of mistake, as envisaged under sections 21 and 22, was discussed but the discussion went beyond the scope of these sections. The court observed as following: [3]

> The word "mistake" is generally used in the law of contracts to refer to an erroneous belief, a belief that is not in accord with the facts. To avoid confusion, it should not be used as it sometimes is in common speech, to refer to an improvident act, such as the making of a contract that results from such an erroneous belief. Nor should it be used as it sometimes is, by courts and writers, to refer to what is more properly called a misunderstanding, a situation in which two parties attach different meanings to their language. An unconscious ignorance or forgetfulness of a fact, past or present, material to the contract or a belief in the present existence of a thing material to the contract, which does not exist, some intentional act, omission or error arising from ignorance, surprise, imposition or misplaced confidence in a legal sense, the doing of an act under an erroneous conviction, which act but for such conviction, would not have been done.

The above observations lead nowhere. A plain reading of sections 20, 21 and 22 makes it clear that the doctrine of mistake as understood from the integrative reading of these sections applies where both the parties to a contract are under a mistake as to matter of fact essential to the agreement. This legal position is further clarified in section 21 by maintaining the distinction between mistake of law in force and mistake of law not in enforce. This section clearly mentions that a mistake as to law in force is not to be considered as a mistake as envisaged under section 20 but it is a mistake as to law that is not in force that will qualify as a mistake as understood under section 20. Section 22 further clarifies section 20 by laying down that if one party in a contract makes a mistake about a fact that contract is not voidable.

The above statutory position makes it clear that sections 20, 21 and 22 are the complete code on the doctrine of mistake which should be about a material fact to an agreement. Both the parties should be under a mistake. The mistake as to law not in force is equal to mistake of a fact.

It is submitted that the explanation accorded to the sections by the court do not reflect true ambit and scope of these sections and is not consistent with the established law on this subject and this exposition is also not free from ambiguity. The court has used unconnected and unrelated expressions as is quite evident from the above cited passage from the judgment.

The court has also laid down a debatable principle that a party can rectify mistake of the fact that may have crept unconsciously, ignorantly and under a

2 AIR 2023 (NOC) 572 (Ori).

3 *Id*., para 17.

state of forgetfulness. This observation has no grounding in law and cannot be even impliedly read from the provisions of section 20, 21 and 22. The court has, however, very rightly ruled that a right to make a contract includes right not to make a contract. Quite naturally, no person can be compelled to make a contract. A person possesses both positive as well as negative right. The positive right here means right to make a contract and negative right means right not to make a contract. This discussion on positive as well as negative rights is beyond the ambit of sections 20, 21 and 22 as they fall in the domain of jurisprudence and cannot help in any way in the interpretation sections 20, 21 and 22

Time as an essence of the contract

Section 55 of the Indian Contract Act, 1872 (ICA) deals with the effect of failure to perform a contract within the stipulated time in a contract where time is an essence of the contract and declares a contract voidable at the option of the promisee where a promiser fails to do a thing or things at or before the specified time as agreed upon. Section 55 does not provide any guidance for determining intention of the parties in such cases. The courts have laid down different principles of law for determining intention of the parties, in a given case, to ascertain as to whether time is the essence of the contract. Generally, time is considered as an essence of the contract in the following three cases (i) where it is expressly mentioned in the contract (ii) where delay will result in loss to the opposite party (iii) where language used in the agreement or nature and necessity of the contract permits such interpretation.

The Supreme Court in *Meharbir Prasad Rungta* v. *Durgadatta,*[4] held that ordinarily time is an essence of the contract in commercial contracts. It is also to be kept in mind that section 94 of the Bhartiya Sakshi Adhiniyam, 2023 excludes oral evidence as against available documentary evidence.

Against the above backdrop, the High Court of Calcutta in *Shyamal Kumar Roy v. Suhail Kumar Agarwal*[5] laid down as follows:

> Mere fixation of time for performance in the contract will not lead the court to hold that time was the essence of contract. An answer to the query as to whether time was the essence of contract shall be gathered from the conduct of the parties and in the case in hand, from such conduct of the parties to contract.It seems that although in the contract it was agreed that within 12 months from the date of delivery of sanction plan and possession of site, the construction was to be completed but the parties did not treat that time would be the essence of the contract.

It is submitted that this decision is not in harmony with the above stated legal position culled from different decisions, including the judgement of the apex court. When the time for performance of the contract is fixed; when contract

4 AIR 1961 SC 990.

5 AIR 2023 Cal. 206.

involves immovable property; when the extension in time for performance of the contract is sought, courts have in all such cases held that time is the essence of contract. Furthermore, the moot question is; when the language used in the contract about time for performance of the contract is plain and unambiguous, is it still open for the courts to gather intention of the parties form their conduct?

Unjust enrichment

In *Anjana Bai bagde* v. *Shyam Ratan Sahu,*[6] the court attempted to elaborate the well-known doctoring of unjust enrichment but the discussion made by the hon'ble court on this subject did not bring the desired clarity. The court rightly put it, in the beginning, that money was with the appellant and respondent has a right of restitution as he cannot be deprived of this money. So far so good, the court then made the application of the doctrine of unjust enrichment unnecessarily complicated by holding that the apex court has stated that the restitution and the unjust enrichment have to be viewed in two stages i.e pre suit and posts suit. In the words of the court: [7]

> Since the money is in the hold of the appellant, we are of the opinion that the respondent has a right of restitution and he cannot be deprived of the said amount. The Supreme Court has observed that the restitution and unjust enrichment have to be viewed in two stages i.e. Pre-suit and post-suit. In the pre-suit position the amount is not returned and also in the post-suit the amount is still with the appellant. If we look into other angel that the appellant has borrowed the money from the nationalized bank, what the bank would demand. Therefore, by applying the principles of justice and equity and not to make it as an incentive for the appellant, it is directed that the respondent shall be entitled to receive the amount of 4 Lakhs from the appellant.

The court took the discussion to another direction without taking it to any logical conclusion. It is submitted that the doctrine of unjust enrichment that is enrichment of one at the cost of another founded by Lord Mansfield in *Moses* v. *Macfertan*[8] is a simple application of principle of equity without any qualification of pre and post suit position as endorsed by the High Court on the basis of the observation made by the apex court.

Furthermore, doctrine of unjust enrichment has only interpretational value in India because the law on quasi contracts as referred to in English Contract Law is codified in India under the title 'certain relations resembling those created by contract, covered under sections 68 to 72. There is no room for above stated distinctions between pre and post suit positions in these sections.

6 AIR 2023 Chh.11.

7 *Id*. at 14.

8 (1558-1774)ALL ER Rep.58.

Mis-application of doctrine of frustration

In *AUI India International LLP* v. *Chandigarh Supplies Corporation Limited.,*[9] an appeal was filed against the order of judge, Commercial Court, District level where in the order passed by the Managing Director of the Chhattisgarh supplies Corporation Limited was challenged on the ground that the order of managing director is not in the capacity of an arbitrator. Hence this appeal.

The appellant AVI India International LLP, a partnership firm was constituted with two partners. Pursuant to an e-auction to purchase the rice available with the corporation, an agreement was executed between the parties. The agreement was entered for sale of 10000 MT of rice which was to be lifted within 45 days and an amount of Rs 1 crore and 10 lakh was deposited as an earnest money. It is stated that after the execution of the agreement one partner of the firm died due to COVID-19 on 8-4-2021. It was stated that due to the second wave of COVID a lockdown was imposed in the State of Chhattisgarh from April 9, 2021 to May 3, 2021, thereby entire commercial transport came to a standstill. The appellant contended that the place wherethe rice was to be lifted was kept out of bounds due to lockdown, including the place where the firm was operating. Subsequently, the firm paid an amount of rupees 2,2120000 to the Corporation and afterwards delivery order was issued. The Corporation invoked the *force majeure* clause. The corporation extended the time on May 27, 2021 which continued from June 1, 2021 and a limited lock down was imposed in the State of Chhattisgarh. Subsequently, 5,53,00000 was paid to the corporation for the purchase of 2500 MT of rice for which the delivery order was issued. There by 3500MT of rice was lifted as against for rupees 7,74,20,000/-

On July 28, 2021, the Corporation issued a show cause notice to the appellant as to why security amount should not be confiscated. The appellant in this reply pleaded frustration of contract due to the death of the partner and lockdown due to COVID-19. The court upheld it by holding that undisputed facts about the imposition of lockdown, immediately after the agreement was executed would show that the period of execution of contract, *i.e.,* 45 days expired during the period of lockdown and nothing could have been transpired.[10] The court further held that the undisputed facts suggest that after the execution of agreement, *i.e.,* April 1, 2021 one of the partners died due to COVID infection. The state was under lockdown that continued up till May 31, 2021. In the meanwhile, the period of 45 days, which was initially fixed for purchase of rice, expired on May 15, 2021. It is further undisputed that the lockdown was further imposed from 1-6-2001in the state with the limited restrictions. These facts have not been disputed subsequently after the expiry of period on the occasions *i.e,* on May 3, 2021 and June 25, 2021. An amount of rupees 7,74,20,000 was paid by the appellant for which the appellant lifted 3500 MT of rice. The said lifting was in lieu of the payment already made. Though the original contract of April 1, 2021 was to be executed within a period of

9 AIR 2023 Chh. 167.

10 *Id*. at 172.

45 days, the same suffered because of *force majeure* event of lockdown due to pandemic.

The high court invoked Sections 32 and 56 of the ICA Act and some of the leading judgments of the apex court[11]and of the English courts.[12] The court also discussed the theory of unjust enrichment to reach to the conclusion that the state cannot retain earnest money as that would amount to its unjust enrichment.

It is submitted that the above ruling of the high court suffers from self-contradiction and is not supported by the relevant provisions of law.

The doctrine of frustration of contract will not come into play because of the death of the partner of a firm that is liable to third party for the reason that liability of partners in a firm is joint and several as envisaged under section 7 of the Partnership Act, 1932.

The impending lockdown that was considered as a ground for frustration of the contract in question by the court cannot be so in the instant case. The contract was to be executed within 45 days but could not be because of the lockdown. Interestingly, the appellant lifted 3500MT of rice after the corporation invoked *force majeure* clause and extended the time for execution of the contract. Neither the doctrine of frustration nor the principle of unjust enrichment was applicable to these facts that were even admitted by the court. It was at the most a case of commercial hardship but that is not equivalent to the grounds of frustration of contract. There are a good number of cases decided by the Indian courts wherein commercial hardship was not considered equivalent to frustration of contract. The bargain may be expensive or may not yield desired profit or may entail loss but that are not the grounds of frustration of the contract. Even the delayed performance of the contract has not been considered a ground for frustration of the contract by the Indian courts. The appellant made payment subsequent to the death of the partner and limited lockdown but did not lift the whole rice, *i.e.,* 10 thousand MT as stipulated in the contract which was a plain breach of contract and the court should have decided the case, otherwise.

Agency

In *P Venkata Ravi Kishor* v. *JMR Developers Private Limited Hyderabad.,*[13] the High Court of Telangana got an opportunity to delineate different facets of agency. The court expanded the scope of section 182 which defines "agent" and "principal". The court opined that these definitions are flexible enough to include a person to act as "agent" to more than one principal. However, the language of section 182 is simple and is not even subject to any contract to the contrary. It is

11 *Energy Watchdog* v. *Central Electricity Regulatory Commission* (2017) 14 SCC 30: *State of Bihar* v. *Industrial Corporations (P) Ltd* (2003) 11 SCC 465 : *DP Agrawal* v. *B.D Agarwal*, AIR 2003 SC 2686; *Satyabrrate Ghose* v. *Mugneeram Bengur and Co*, AIR 1954 SC 44

12 *Tylor* v. *Caldwell* (1861-73) All ER Rep 24; *Sea Angel Case* 2013 (1) Lloyds Law Report 569.

13 AIR 2023 (NOC) 309 (TEL.).

not correct to interpret that language of section 182 is flexible to include "one agent and more than one principal" scenario but it can be said that there is no legal bar for an agent to serve more than one principal at a time. The court, while outlining the scope of section 202 of the Indian Contract Act, laid down that this section in general terms regulates relationship of principal and agent and rightly held that this section does not impinge upon parties to enter into a written agreements and to register those agreements. The court then made an unwarranted observation that section 202 pre-supposes existence of written agreement. Section 202 deals with the termination of agency where the agent has an interest in subject matter. Nowhere, it is mentioned in this section that the agreement should be in writing. The plain meaning of section 202 is that an agency cannot be unilaterally terminated where the agent has himself an interest in the property which forms the subject matter of the agency, except where there is an express contract contrary to this legal position. Section 202 has to be read as an exception to section 201 which lays down general rules for termination of agency which can be done by the principal or agent under the circumstances laid down in that section. An exception is created to this general principle that is incorporated in section 202, immaterial of whether the contract is in writing or not. The unilateral termination of agency, whose agent has interest in the property of that subject matter, is possible only when there is an express contract to that effect, but not otherwise.

III PARTNERSHIP

In *Mohammed Mira Ismail* v. *Delhi Mall,*[14] the court invoked "necessary party" doctrine in order to decide suit for rendition of accounts in light of section 39 of the Partnership Act read with Order l Rule 10(2) of the Civil Procedure Code. In the instant case, the trial court had returned plaint for deletion of some of the defendants on the ground that they were third parties to the suit. The high court upheld the findings of the trial court by invoking judgment of the Supreme Court in *Mumbai International Airport Private Limited* v. *Regency Convention Centre and Hotels Private Limited.*[15] The apex court expounded the scope of order l Rule 10(2) in the following words:

> Let us consider the scope and ambit of Order l Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party but about the judicial discretion of the court to strike out or add parties at any stage of their proceedings. The discretion under the sub-rule can be exercised either *suo moto* or on the application by the plaintiff or the defendant or an application by a person who is not a party to the suit.

The high court on the basis of the above ratio of the decision of the apex court held that it is clear that the court has got judicial discretion to strike out or add parties at any stage of proceeding either by exercising *suo moto* power or on

14 AIR 2023 Mad. 136.
15 (2010) 7 SCC 417).

the application by the parties to the proceedings. Therefore, the contention of the petitioner that he being *dominuslitis,* has a right to add any number of defendants to suit, even though they are not necessary parties, is not legally sustainable.[16] The high court gave much emphasis on judicial discretion to judges to add or delete any party joined in the suit without making mention that discretion can be exercised by the court only on the such terms as may appear to the court *to be just* as expressly mentioned in Order l Rule 10(2). It can be safely contended that the hon'ble high court has not laid down any general rule that creditors and debtors cannot be impleaded in a suit for rendering accounts on the dissolution of the firm by invoking "necessary party" doctrine. It may vary from case to case and sometimes absence of arraignment of creditors and debtors may not lead to proper rendition of accounts of firm on its dissolution.

Effects of non-registration of firm

In *B. Ramalinga Raju* v. *Price Water House, Hyderabad*.,[17] the High Court of Telangana gave a narrow interpretation to section 69(2) in order to save the plaintiff from its rigour. The court held that to attract section 69(2) of the Partnership Act 1932, there must be a contract entered by firm with the third party during the course of business dealings and it must be entered with the intention to enforce a statutory right or a common law right.

It is submitted that section 69(2) is plain and free from ambiguities. It does not impose these conditions even impliedly. One is at loss to understand how section 69(2)[18]of the Partnership Act that deals with the legal relationship between the partners in the firm and the third party will be made applicable to a situation where statutory auditor has been appointed in a company who is not even accountable to the board of directors of company.

The court made section 69(2) in-applicable to the case in hand by reasoning that the relationship of Auditor with the company is professional and not contractual. Section 69 (2) of the Partnership Act is not attracted.

The court, it is submitted, has erroneously invoked section 69(2) which applies only to registered firms and not to the companies. The court also mistakenly tried to maintain the difference between the professional and contractual services and also misread section 69(2) by holding that its application requires that a contract must be entered by firm with a third party with an intention to enforce a statutory right or a common law right.

IV SALE OF GOODS

Mis - application of doctrine of "transfer of risk"

In *Bina Khanna* v. *State of Bihar.,*[19] the appellant was successful bidder in a number of auctions of timber at different times. The first auction of lot L-24 and L-

16 *Id*. at 137.

17 (AIR 2023 (NOC) 385 (Tel.).

18 S.69(2) provides that no suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of firms.

19 AIR 2023 THA 37.

33 was held on January 23, 1997 for a sum of rupees 79,490. The appellant was required to deposit 15% of the said price as a security deposit which he did on the same day. The balance amount was also deposited for lifting the timber for which trucks were sent but timber was not released because of the seizure of that depot by the competent authority which remained closed for six months. The appellant participated in other auctions also that included L-19L-23 B-59 B-62 and B 72 and emerged successful bidder in some of them. The appellant lifted L-19 and L-23 but he refused to lift L-24 and L-33. He contended that the quality of the timber of L-24 and L-33 has deteriorated and applied for the refund of the deposited amount which he had deposited as a security money for other auctions where he emerged as a successful bidder but could not conclude them because of the dispute before the hon'ble high court.

The high court had to decide whether appellant is entitled to refund of the whole money deposited for L-24 and L-33 where he could not lift the timber, in the first instance, because of the seizure of the depot and, in the later instance, because of the deteriorated quality of timber on account of delay due to seizure of the depot.

The refund of the caution money in other auctions was also subject matter of contention. The high court did not dig deep into the subject matter but invoked sections 20 and 26 of the Sale of Goods Act for reaching to the conclusion that forfeiture of money deposited in L-24 and L-33 by the respondent is justified. In the words of the court: [20]

> The court has gone through the judgments of the trial court as well as appellant court and finds that the learned appellate court has dealt with section 20 of the Sale of Goods Act and came to the conclusion that where there is unconditional contract of specific goods in deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods, are both is postponed. Section 26 of the Sale of Goods Act states that the principle of risk follows with the property. Once the property in the goods has passed, the risk or any deterioration of it shall be on the purchaser.

Furthermore, the court ruled out application of section 53 of the Indian Contract Act to the instant case. It was observed:[21]

> Admittedly, the appellant has not claimed for compensation and pleading to this effect is not there. In that view of the matter, section 53 of the Indian Contract is not attracted.

It is submitted that the above sections of the Sale of Goods Act invoked by the hon'ble court are not applicable to the case in hand. The issue was not whether

20 *Id*. at 40.
21 *Ibid.*

property in timber earmarked as L-24 and L-33 has passed from respondent to appellant or not. The issue was who has to bear the risk in the sense as understood in section 26 of the Sale of Goods Act. Hon'ble high court half-heartedly cited section 26 without appraising this section properly so as to fully grasp its ambit and scope and its application to the given case. The court cited only the first of part of section 26 of the Sale of Goods Act and then reached an erroneous conclusion. This necessitates verbatim reproduction of section 26 which is as follows:

> Section 26: Unless otherwise agreed, the goods remain at the seller's risk until the property is transferred to the buyer but when the property there in is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.
>
> Provided that were delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for the such fault.
>
> Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

The principle of law citied by the high court that risk and property go hand in hand has been filtered from the first part of the above section but has ignored the equally strong exceptions. One, the risk has to be borne by the party responsible for delay in delivering of goods that has resulted in loss that might not have occasioned otherwise. Two, whatever is the position, the seller in such case is clothed with the duties of a bailee which, to begin with, calls for a duty of reasonable care.

The facts of the case in hand sufficiently revealed that the petitioner was ready to take the delivery of the timber figuring in L-24 and L-33 but could not do so because of the seizure of the depot by the competent authority over which he had no control. The respondent was under a duty to take reasonable care of the logs of timber by virtue of second provision of section 20 because goods were still in his possession. This legal position was overlooked by the hon'ble high court which upheld the forfeiture of money deposited by the appellant.

The above ruling of the high court is also in conflict with the established position of law enunciated by the apex court in several cases. The Supreme Court in *Har Prasad Chaudhari* v. *Union of India*[22] had almost similar facts in hand. The court allowed refund of the deposit of a bidder to whom coal mine was allotted but coal commissioner refused to permit limes to take the coal to U.P. Similarly, in *Uberoi Mohindra Singh* v. *State of Haryana,*[23] the Supreme Court allowed refund of deposited money in a contract of *Yamuna of quarrying* where the contractor

22 (1973) 2 SCC 746.
23 (1991) 2 SCC 362.

was prevented from performing his part because of the failure of the flood control department to give no objection.

On the ratio of the above judgments of the hon'ble supreme court, it is submitted that the about decision does not fall in section 20 of the Sale of Goods Act nor is it in line with the law laid down in section 26 of the Sale of Goods Act nor is it in *sync* with the opinions of the apex court expressed on the similar subject from time to time.

V NEGOTIABLE INSTRUMENTS ACT, 1888

Liability of the drawee

The High Court of Madras in *G Deepa* v. *The General Manager ICI Bank Limited, Chennai*[24] got an opportunity to interpret section 31 of the Negotiable Instruments Act (herein after NI Act) beyond its scope by invoking general powers of the RBI as envisaged in sections 45 to 53 of the Reserve Bank of India Act, 1934.

Briefly, the 2nd petitioner had issued a cheque for an amount of rupees 48000/- in favour of the 1st petitioner for depositing admission fee of the son of the 2nd petitioner. When the 1st petitioner presented the cheque to the 1st respondent for withdrawing money, he was informed that an amount of rupees 15000/- only will be honoured because of the limit prescribed by the RBI. Therefore, the cheque was not honoured not because of the insufficiency of the fund in the account as is a usual practice in such cases but because of RBI guidelines. The cheque was returned for the reason that the third- party withdrawal limit at non base branch exceeded rupees 15000/-.

The petitioner's counsel raised many pertinent issues. (i) The RBI guidelines deny the basic right of the owner of the money *i.e.,* to use it as per his convenience. The guidelines deny even to the account holder to withdraw his own money for emergency purpose. (ii) The money essentially belongs to the customer and not to the bank. The bank is bound to return the sum to the account holder as and when demanded, if available in the account. (iii) There is no rule for depositing the maximum amount, there can also be no rule for withdrawing minimum amount. Not honouring the cheque by the bank in spite of the sufficient funds available is against the very spirit of the NI Act and banking regulations. (iv) The RBI cannot frame rules arbitrarily to deny withdrawals by fixing a ceiling amount. (v) The banks are free to satisfy themselves about the credentials of the person withdrawing the amount and nothing more. (vi) The petitioner even challenged ceiling of cash withdrawal by the account holder as it is not permissible under banking regulations, NI Act and RBI guidelines. The limit fixed for cash withdrawal is against the NI Act and banking regulations.

While responding to these potent contentions, the hon'ble high court first took the help of section 5 (C) (a) of the Banking Regulations Act which defines banking policy. In the words of the court, it means any policy which is framed by the RBI from time to time in the interest of the banking system or in the interest of

24 AIR 2023 Mad. I.

the depositors, the volume of the deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources. The guidelines of the RBI are in the interest of Banking Regulations and the account holders. They need to be followed and cannot be violative of the Banking Regulations Act. The court further ruled that merely because the circular issued is recommendatoryin nature, suggesting such ways and means to fix the ceiling limit, in order to prevent the frauds by third parties in non-base branches, cannot be violative of the Banking Regulations Act. The court finally recorded its findings in the following words:

> This court is of the view that when the account holder opens an account, he is aware of the restrictions for withdrawal in non-base bank. He cannot complain about such restrictions. The restrictions have been made as per the policy of the bank to prevent the frauds. Therefore, it cannot be construed that it violates the Banking Regulation Act. If the cheque was presented in the base branch where account was maintained and it is dishonoured despite there is sufficient fund in the account, then it can be said that the drawee must compensate the drawer for any loss or damage caused by such default as per section 31 of the NI Act.

Admittedly, the account is maintained in the base branch of the 1st respondent where as a cheque was presented in the non-base branch where the account is not maintained. In such a view of the matter the petitioner now cannot take aid of section 31 of the NI Act.[25]

The following observations were also made by the high court:

(i) 1st respondent is only a bearer of the cheque and the second petitioner is a drawer. The second petitioner has not filed the write petition for any such relief. He has been impleaded only during the hearing of the case on 30.09.2022 after 14 years of the writ petition. That itself indicated that he has been impleaded only to support the case of the 1st petitioner.

(ii) Be that as it may, when the bank made their own policy only for the purpose of putting up restrictions in the non-base bank, the account holder consciously opened the account with all the restrictions in honouring the cheques in non-base branch after wards, he cannot complain that the same is violative of the property right.

The high court did not delve deep into section 31 of the NI Act nor delineated its harmony with the guidelines of the RBI.

Section 31 of the NI Act is a substantive provision, which neither admits any exception, nor saves any contrary law, nor is subordinate to any contract between the parties. This section reads as under:

25 *Id*. at 7.

> The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do and in default of such payment, must compensate the drawer for any loss or damage caused by such default.

While dissecting the above provision, it becomes quite clear that the reasoning given by the hon'ble high court is not germane to section 31. The court has also not discussed in light of section 31 the legal validity of the circular issued by the RBI, which is recommendatory in nature. The court has attempted to make section 31 subordinate to the contract executed by the account holder with the bank which contains general clause for all account holders that they will be bound by the rules and regulations of the bank. But the language of section 31 is plain and simple. It is not subject to any contract between the parties as is the usual practice in such cases.

The court has also attempted to differentiated between the drawer of the cheque (in the first instance) and the person in whose favour cheque is issued *viz –a- viz* liability of the bank for dishonouring the cheque, in-spite of the sufficient funds of the drawer in the bank. It is submitted that there is no difference in the liability of the bank which is immaterial of the factwhether the drawer (account holder) has presented the cheque to the bank or any payee has presented the cheque that has been dishonoured by the bank, in-spite of the availability of funds.

The high court should have invoked expression *"properly applicable to the payment of such cheque"* used in section 31 of the NI Act to ward off the contentions of the petitioner. It could be said that the sufficiency of amount in the bank would not make the bank liable under section 31 for dishonour of the cheque where that amount cannot be properly made applicable to the payment of the cheque in view of the RBI regulations.

In *B. V Sehailah* v. *State of Telangana,*[26] the Supreme Court made some pertinent observations. The instant case was initially filed for dishonour of the cheque under section 138 of the NI Act before the trial court that had convicted the accused. The case was then heard by the high court in a revision which confirmed the conviction, but during pendency of revision, the parties had entered into a memorandum of understanding to settle the dispute amicably by the sole arbitrator. The high court was not informed about this compromise which led confirmation of conviction. Thus, an appeal was filed before the apex court against the conviction confirmed by the high court. The apex court laid down that the compromise either amicably or through arbitrator tantamountto compounding of offence as is permissible under the NI Act.

The apex court followed it's earlier ruling in *Meters and Instruments Private Limited* v. *Kanchan Megha*[27] in which primarily it was laid down that the object of

26 AIR 2023 SC 717.
27 (2018) SCC 566.

the statute is to facilitate smooth functioning of business transactions. This provision is necessary as in many transactions' cheques were issued merely as a device to defraud the creditors. Dishonour of a cheque causes incalculable loss, injury and inconvenience to the payee and credibility of the business transactions suffers a setback. At the same time, it was also noted that the nature of offence under section 138 primarily relates to civil wrong and 2002 amendment specifically made it compoundable.

Invoking the above observations, the apex court ruled: [28]

> This is a very clear case of the parties entering into an agreement and compounding offence to save themselves from the process of litigation. When such a step has been taken by the parties and the law very clearly allows them to do the same, the high court then cannot override such compounding and impose it's will.

The above observation of the apex court is in line with its earlier rulings. The judgement, though silent, could be read as laying down the principle that the offence under section 138 is a result of failure to perform a civil action. It is not an independent offence. Even where this offence is committed, its conviction cannot be executed where parties have entered into a compromise either on their own or through the intervention of the third party. Once the compromise is affected, even after conviction at the trial stage, the conviction can be stalled. Thus, the offence under section 138 is not independent of the performance of civil actions agreed by the parties based on their initial promise. The party may choose to fulfil its promise by honouring its own negotiable instrument even after conviction. It would still amount to compounding of offence. The observation of the apex court could also be read as laying down the principle of law that compromise between the parties after the dishonour of cheque and even after conviction would tantamount to compounding of offence under section 147 of the NI Act.

However, the apex court did not shed light on a situation where the cheque issued was dishonoured by the bank on its presentation due to deficiency of funds. Then a complaint was filed and the accused was convicted. Post conviction,the complainant and accused made a compromise under section 147 of the NI Act and the accused made a promise to pay but did not pay. Will the offence under section 138 revive or will it be treated as a simple breach of contract (compromise here) for which only civil action will lie without any penal consequences as envisaged under Section 138 of the NI Act. This interpretation would provide a gate of escape for the drawer whose cheque has been dishonoured. However, courts are yet to clear mist of confusion in such cases

Presumption of debt or liability

The High Court of Andhra Pradesh in *Vuggivalas Udaya Chandra Rao* v. *Sunkare Venkates Warlie*[29] was called to delineate the scope of presumption under various provisions of the NI Act.

28 *Id.* at 719.

29 AIR 2023 AP130.

The plaintiff was working as a manager in Sai Renuka Lodge owned by two sisters, one of them was married to Venkates Warlie who was doing real estate business in partnership with the defendant of the present suit. The defendant used to visit Sai Renuka Lodge and had developed acquaintance with the Manager (the plaintiff).

The plaintiff purchased five plots of land from the defendant and paid him rupees 4 lakh. But due to the differences that arose later between the partners the plots could not be conveyed to the plaintiff. The plaintiff demanded money back from the defendant but he had no money so he executed promissory note of rupees 2 lakh each, agreeing to repay money with an interest at the rate 24% per payment. The defendant did not pay the amount as promised but kept postponing the payment citing ongoing disputes between the business partners. Plaintiff waited for the payment for three long years but could not get the money and he finally filed the suit that was decreed in his favour with costs for rupees 6,86,666/- with an interest of 6% per annum on rupees 4 lakhs from the date of suit till payment. This decision was challenged in the instant case. The court overturned this decision by making the following observations.

((i) This court views that the plaintiff is supposed to let in evidence to prove that he paid rupees 4 lakhs at the time of purchase of 5 plots. As such, at least, the plaintiff must establish on which date he paid the amount and the location of the plots which he intended to purchase.[30]

(ii) Based on the evidence presented by both parties, several inconsistencies and contradictions are apparent. The plaintiff's claim that he paid the consideration amount of rupees 4 lakhs to the defendant is not supported by any concrete evidence. The plaintiff did not make any enquiries about the plots he intended to purchase from the defendant and did not enter into the sale agreement to obtain any documents relating to the property, which raises doubts about the genuineness of the transactions. The defendant was successful in showing the improbability of consideration and rebutted the presumption of consideration, then the evidential burden goes back to the plaintiff.

(iii) The defendant has successfully discharged the initial evidential burden by providing plausible evidence that raises the doubt about the genuineness of the promissory notes and passing of consideration. As a result, the presumption under section 118 of the NI Act disappears and becomes *functus officio* and the evidential burden shifts to the plaintiff who has also legal burden arising out of the pleading to prove the consideration.

(iv) After a careful consideration of the entire evidence, the court is of the opinion that the plaintiff has not discharged the legal burden as

30 *Id*. at 133.

such he cannot once again rely on the presumption of section 118 of the NI Act.

(v) The plaintiff has not been able to establish that he paid advance amount of rupees 4 lakhs to purchase the plots from the defendant and as a result the plaintiff has failed to discharge the legal burden of proving the consideration.[31]

It is submitted that the hon'ble court has not appreciated the import of section 118 and has not considered section 139 of the NI Act either. The whole scheme of the NI Act is to facilitate trade and commerce and treat negotiable Instruments at par with the current legal tender so that the non-availability of hard cash at a given time is not an impediment for executing commercial transactions. The business must go on, notwithstanding that the cash currency is not being exchanged but may be substituted by negotiable instruments. The NI Act not only recognises negotiable instruments as a good current legal tender but also leans in favour of the person holding it in due course. Section 118[32] of the NI Act creates a rebuttable presumption in favour of the holder in due course as to consideration, date, time of acceptance and transfer, endorsement, stamps and holder of the Negotiable Instruments.

It appears that the court reversed this statutory scheme in favour of signer of the promissory note by holding that the plaintiff (holder of the instrument) has to produce evidence to show that he made a payment for the purchase of plots of land and establish the time for payment of the money for purchase of plots of land. The court did not pay attention to the fact that both these requirements are presumed to be present by virtue of section 118. The hon'ble court also insisted that the respondent/plaintiff must that show the promissory note is a consideration for rupees 4 lakhs which in other words means that there must be a *quid pro quo* relationship between the payment of money and the promissory note. This observation is antithetical to the very purpose of according presumption of existence of consideration where negotiable instruments is issued. The question addressed to respondent/plaintiff should have been put to appellant. It is appellant who is supposed to rebut the presumption that he had issued the promissory note

31 *Id.* at 135.

32 118. Presumptions as to negotiable instruments.

Until the contrary is proved, the following presumptions shall be made:—(a)of consideration —that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration; (b)as to date —that every negotiable instrument bearing a date was made or drawn on such date; (c) as to time of acceptance —that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity; (d) as to time of transfer —that every transfer of a negotiable instrument was made before its maturity; (e) as to order of indorsements —that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon; (f) as to stamps —that a lost promissory note, bill of exchange or cheque was duly stamped; (g) that holder is a holder in due course —that the holder of a negotiable instrument is a holder in due course:

for consideration. The appellant did not contest the signature on the promissory note but alleged that he signed blank papers at the instruction of the partner and is not well qualified to understand the legal consequences of his signature on the blank paper. He did not contend that he was not involved in real estate business. If these facts are considered sufficient to rebut initial presumptions under section 118, then the purpose of section 118 will be easily frustrated. Can court, under the present circumstances, accept the plea of the appellant that he lacked worldly knowledge, having only completed education upto SCC. The appellant was doing real estate business in the name of the Renuka Real Estate along with other partners yet contends that he does not have sufficient business knowledge and is also not well qualified. It seems that the court was influenced by the fact that the promisory note was not issued at the time of the payment of rupees 4 lakhs but was issued at a later date. The court did not consider that in such cases it is not uncommon to get promissory note at a later stage when the promisee gets suspicious of the malafide motives of the promisor that he demands, as a matter of abundant caution, additional security in the form of a cheque, promissory note, etc. The legal position is also in favour of the respondent plaintiff in this sense that it is a well-established legal position envisaged under section 2(d) of the Indian Contract Act that the consideration need not to be contemporary to the document itself. It may be executed, executory or past consideration. It is valid unless it is expressly prohibited in the eyes of law.

As against the above legal positions, the high court held that it is clarified that the consideration for the purchase of 5 plots was paid much before the execution of the promissory note. This indicates that the payment for the plots was made separately from the promissory notes. However, the court did not spell out any infirmity involved in this kind of arrangement and ignored this usual practice, when the refund of borrowed money fails for one reason or the other, the promisor subsequently issues a cheque or promissory note in lieu of the hard cash or at times, to buy more time for intended payment.

Limitation period

Interesting facts were before the Supreme Court in *K. Hymavatva* v. *State of AP*[33] for judicial determination. The appellant and the respondent were known to each other. The respondent requested the appellant to lend him rupees 20 lakhs which he required for medical education of his son and domestic expenses. The respondent executed a promissory note on July 25, 2012 in order to assure repayment of the money borrowed from the appellant. The respondent promised in the note that full and final payment will be made by December, 2016 together with 2% interest on the principal amount. The respondent could not comply with the terms in the promissory note but on April 28, 2017 issued a cheque for a sum of rupees 10,00000/- for partial discharge of the debt. The cheque was presented for collection but it was returned by the bank on May 15, 2017 for want of sufficient funds. The appellant got a legal notice issued on May 24, 2017 which was replied on June 1,

33 AIR 2023 SC 4369.

2017. The appellant sent a rejoinder to the said reply on June 03, 2017 to which the respondent sent a reply to the said rejoinder on June 7, 2017. The appellant filed a complaint then in July 11, 2017 before the special magistrate Vishakhapatnam and analogous complaints. The magistrate took the cognizance of the complaint under section 138 of the NI Act and ordered issue of summons. This was challenged before the high court with a prayer to quash proceedings under CC No. 681 of 2017. The high court allowed petition filed under section 482 of Cr.P.C by observing that the time for enforcing the promissory notes had expired because of the law of limitation much prior to the issuance of the cheque in question. As such, it was held that it is a fit case for quashing of complaint seeking prosecution as it was not in respect of a legally enforceable debt.

The apex court ruled that the promise was to repay the principal amount together with the interest within December, 2016 which means that the cause of the action would accrue only in December, 2016, if the respondent failed to honour his own promise. This cause of action will last for 3 years as stipulated under Article 34 to the schedule in the Limitation Act, 1963. This holds true for promissory notes also. Therefore, in the instant case, the time would begin to run from the month of December, 2016.[34] The apex court ruled:[35]

> The cheque issued for rupees 20 lakhs, which is the subject matter herein, is dated 28-04-2017 which is well within the period of limitations. The complaint in CC No. 681 of 2017 was filed in the court of Chief Metropolitan Magistrate on 11-07-2017 so is the case in the analogous complaints. Therefore, in the instant case, not only the amount was legally recoverable debt which is evident on the face of it, the complaint was also filed within time. Hence, there was no occasion whatsoever in the instant case to exercise the power under section 482 to quash the complaint.

The above ruling of the apex court is in line with the provisions of the Limitation Act, 1963 but it did not decide decisively whether the cheque or promissory note issued to honour the time barred debt can invite penal action under section 138 of the NI Act due to its dishonour— an issue that was hotly debated before the various benches of the supreme court and over which conflicting opinions have been expressed that were acknowledged by the apex court in the instant case.

The issue that was contended on both sides with different reasoning and consequences was that a debt barred by time is legally enforceable under section 25(3) of the Indian Contract Act and the cheque issued for payment of time barred debt is a promise governed by this section. Such a promise, is an agreement, as it constitutes an exception to the general rule that an agreement without consideration is void. Though on the date of making such promise by issuing a cheque,the debt which is promised to be paid , even if time barred, is legally recoverable by virtue

34 *Id.* at 4374.

35 *Id*. at 4375.

of section 25(3) of the Indian contract Act. The Limitation Act only bars the remedy and not the right of the party.This argument has genesis in *S. Natarajan* v. *Same Dharman*[36] *and A. V. Murty* v. *S. Nagabasavanna.*[37]

As against the above contention, it was vehemently argued, based on the ratio of *Expeditious Trail of* cases[38]where the debt is time barred, itis not a legally enforceable debt and where a debt is barred by law any subsequent promise to discharge this time barred debt or liability is based on a void contract which is against public policy and NI Act cannot apply in such cases. In order to attract section 25(3) of the Indian Contract Act, there must be an express promise, made in writing and signed by the parties.[39]

The apex court did not find it of any consequence to deliberate on the above rival contentions as the court called it a mere academic exercise. In the words of the apex court: [40]

> Whether the debt in question is a legally enforceable debt or other liability would arise on the facts and circumstances of each case and in that light the question as to whether the power under section 482 Cr.P.C is to be exercised or not will also arise in the facts of such case. Even otherwise, we don't see the need to tread that path to undertake an academic exercise on that aspect of the matter. Since from the very facts involved, the case on hand *ex facie* indicates that the claim, which was made in the complaint before the trail court, based on the cheque which was dishonoured cannot be construed as time barred and as such it cannot be classified as a debt which was not legally recoverable.

What constitutes notice of dishonour of the Negotiable Instruments?

In *South Eastern Coalfields Ltd.* v. *M. R. Beltings,*[41] the High Court of Chhattisgarh did not dig deep to find the answer to the question that what constitutes notice under section 30 of the NI Act?

In the instant case, the plaintiff and defendant were two business partners and friends too. The defendant requested the plaintiff to lend him rupees 13 lakhs which he did and in return received cheques of varying amounts and dates. The amount was not returned to the plaintiff for a considerable time and he then enquired from the concerned bank about the status of amount in the account of the defendant. He was told that the defendant did not have sufficient funds in his account. The plaintiff did not receive the amount so he filed a civil suit for the recovery of the principal amount together with the interest. The defendant denied to have taken any loan from the plaintiff. He contended that there was no negotiation

36 (2021) 6SCC 413.
37 (2002)2SCC 642.
38 AIR 2021 SC 1957.
39 *Supra* note 36 at 4371.
40 *Id*. at 4374.
41 AIR 2023 Chh. 182.

or loan transactions between them. No date of loan was mentioned and frivolous complaints have been filed against him.

The trail court framed the precise issues with respect to the fact whether the loan was extended to the defendant or not and whether the loan of rupees 13 lakhs was paid in lieu of the cheques received by the plaintiff. The trail court held it in affirmative and decreed that the plaintiff was entitled to rupees 13 lakhs, hence this appeal.

The high court took a diametrically opposite stand and put questions to the respondent which should have been legally put to the appellant. The court ruled:

(i) The facts would reveal that there is no document on record to substantiate as to on which date the loan of rupees 13 lakhs was given by the plaintiff to the defendant.

It is submitted that this observation of the high court is misdirected. Section 118 lays down a rebuttable presumption of consideration, date of execution, time of acceptance, time of transfer, order of endorsement, stamp and holder in due course. No where the appellant/defendant has contested that his signatures on cheques were forged nor he disowned these cheques. Once it is shown to the satisfaction of the court that the respondent is in receipt of cheques which are not forged and have been issued by the bank against the name of the drawer, the presumption under section 118 will follow.

(ii) The court ruled that the case in hand proceeded in trial completely on the presumptions that the loan of rupees 13 lakhs was advanced without any proof thereof. The only reason that the plaintiff was holder in due course of cheques cannot lead to construe a liability of reverse operation of the facts. The court further stated that a thoughtful consideration would have been given had there been any iota of evidence of advancement of loan of rupees 13 lakhs to the defendant. On the basis of cheque, which were in hold of plaintiff, liability cannot be fastened on defendant specially when the parties to suit were engaged in businesses activity.[42]

It is submitted that the above observations should have led to opposite conclusions had the hon'ble high court taken cognizance of legal presumption incorporated in sections 118 and 139 of the NI Act. Surprisingly, both these sections have not been given due consideration in the judgment. Section 118 deals with presumption as consideration etc. and section 139 carves out presumption in favour of holder. This section reads as under.

> It shall be presumed, unless the contrary is proved that the holder of the cheque received the cheque of the nature referred to in section 138 for the discharge, in whole or in part, of any debt or other liability.

It is submitted that the court was not required to search for additional proof for signing the cheque. It was appellant/defendant who had to show the court to

42 *Id.* at 1.

its satisfaction that the cheque is not genuine or signature is forged. The court itself admitted that the parties were carrying on their business and generally in such cases additional documentary proof should not have been demanded. This is evinced by the language of section 139 itself which is titled as "holder in due course".

(iii)The court invoked sections 30 and 31 of the NI Act but did not discuss logical contours of these provisions. Section 30 imposes liability on the drawer of the cheque in case it is dishonoured provided due notice of the dishonour has been given to the receiver by the drawer. Section 31 makes drawee liable where he holds sufficient funds of the drawer in his hands properly applicable to the payment of such cheque but refuses to make payment against the cheque.

It is clear that section 31 is not in any way applicable to the given case. Nowhere, it has been contested by either of the party that the bank refused to make payment against the cheques in spite of holding sufficient funds of the drawer. Section 30 has not been discussed thoroughly by the hon'ble court. This section rests on two principles of law relevant here.

(i) The drawer of a cheque is bound to compensate the holder in case of its dishonour by drawee or acceptor.

(ii) This liability arises only when "due" notice of its dishonour has been given to or received by drawer.

The court rightly said:

> Reading the aforesaid section, therefore, would show that notice of dishonour to the drawer is absolutely necessary and unless and until it is given, the holder has no cause of action against him.[43]

The court invoked *Union Bank of India* v. *Swastika Motors*[44] to reach the above conclusion in which it was held that the holder has no reason upon the drawer until the cheque has been presented and payment refused. The court did not discuss ambit of the word "due notice" under section 30 but the impression is being created that the cheque must be physically produced to the bank and bank must issue a letter regarding presentation of cheque and insufficiency of funds thereof.

Section 75 of the NI Act provides for presentation of cheque for acceptance or payment which shall be made to the duly authorised agent of the drawee, maker or acceptor, as the case may be, or where the drawee, maker or acceptor has died to his legal representative. This provision does not prescribe any particular mode of presentation of cheque. Would the contention of the respondent/plaintiff that he has requested the defendant to make payment but it was not made and having enquired from the bank, it was revealed that the defendant did not have sufficient funds in his account, amount to presentment as envisaged under section 75 of the NI Act?

43 *Ibid.*

If the court insists on the formal procedure to be followed in the cheque dishonour cases, then the presumption leaning in favour of the holder and other safeguards will be defeated. The courts have to take cognizance of the fact that the business partners during their good relations seldom ask for additional securities as and when they issue cheques. They also will not go directly to the court for recovery of money lent *in lieu* of cheques. They will surely try to exhaust other inexpensive alternatives. To insist on strict adherence to the formal procedure not required by relevant provision of the NI Act will do harm to the interest of holder and will defeat the very purpose for which these provisions were carved out in the NI Act.

The legal position on this point has been lucidly outlined by the apex court in *Rakesh Jain v. Ajay Singh.*[45] It was ruled: [46]

> As soon as the complaint discharges the burden to prove that the instrument, say a cheque, was issued by the accused for discharge of debt, the presumptive device under section 139 of the Act helps shifting the burden on the accused. The effect of the presumption, in that sense, is to transfer the eventual burden on the accused of proving that the cheque was not received by the bank towards the discharge of any liability. Until this evidential burden is discharged by the accused, the presumed fact will have to be taken to be true, without expecting the complainant to do anything further.

In the same vein, the apex court at another place in the same case cleared the mist of confusion further by stating: [47]

> Once the presumption under section 139 was given effect to, the courts ought to have proceeded on the premise that the cheque was indeed issued in discharge of debt/liability. The entire focus would be then necessarilyto shift on the case set up by the accused since the activation of the presumption has the effect of shifting the evidential burden on the accused. The nature of inquiry would then be to see whether the accused has discharged his onus of rebutting the presumption. If he fails to do so, the court can straight way proceed to convict him, subject to the satisfaction of the other ingredients of section 138. If the court finds that the accused has been discharged, the complainant would be expected to prove that said fact independently without taking aid of the presumption. The court would then take overall view based on the evidence on record and decide accordingly.

44 AIR 1983 Delhi, 240.
45 AIR 2023 SC 5018.
46 *Id*. at 5028.
47 *Id*. at 5031.

On the close security of the above stated opinions of the apex court and reasoning adduced above by the present author to the opinion expressed by the High Court Chattisgarh above, it can be respectful submitted that the case has been erroneously decided.

Vicarious liability

The Supreme Court in *Siloy Thomas* v. *Somany Ceramic Ltd.*[48]was seen laying down technical justice as against real justice. In this case, the complaint was filed against appellant on the ground that the cheque issued by his firm was dishonoured. He contested that the cheque was issued on August 21, 2015 but he had resigned from the firm on May 28, 2013. He took this plea earlier before the high court but this plea was not considered because the high court ruled that this is an issue of fact that will be determined at the trail stage. The supreme court, however, decided this case in favour of the appellant on technical issues invoking section 141 of the NI Act that deals with the vicarious liability of the partners in case of dishonour of a cheque. The apex court opined: [49]

> The averments in the complaint filed by the respondent are not sufficient to satisfy the mandatory requirements under section 141 (I) of the NI Act. Since the averments in the complaint are insufficient to attract the provisions under section 141 of the NI Act to create vicarious liability upon the appellant, he is entitled to succeed in this appeal.

The court reached to the above conclusion by invoking its own earlier ruling in *Ashok Shewakramaniors* v. *State of AP,*[50] and laid down:

> In light of the dictum laid down in *Ashok Shewakramani* case (supra), it is evident that a vicarious liability would be attracted only when the ingredients of section 141 of the NI Act are satisfied. It would also reveal that merely because somebody is managing the affairs of the company, per se, he would not become in charge of the conduct of the business of the company or the person responsible to the company for the conduct of the business of the company.

A bare perusal of section 141 of the NI Act would reveal that only that person, who at the time of offence was committed, was incharge of and responsible to the company for the conduct of the business of the company as well as the company alone shall be deemed to be guilty of the offense and shall be liable to be proceeded against and punished.

It is submitted that the above observations of the apex court are based on its earlier ruling in *Ashok Shewakramani's*, case (supra) wherein the court had held that mere management or involvement inday to day affairs don't automatically trigger liability under section 141. The court had held that the accused must have

48 AIR 2023 SC 4929.

49 *Id*. at 4934.

50 AIR OnLine 2023SC 669.

held higher responsibility within the company. It emphasised that there must be a conjunctive reading of the expression "was in-charge of and was responsible" to the company for the conduct of its business mentioned in section 141 of the NI Act.

The *Ashok Shewakramani's* case was based on the accusation of the director for issuing a cheque that was dishonoured. The complainant contended that the accused were liable because they were aware of the transactions and dishonour of cheques. It is in this context that the apex court laid down that "being in-charge of the company" is insufficient, being responsible for the conduct of the business is the crucial criterion.

It is submitted that the apex court in the above two rulings applied requirements of section 141 to the pleadings instead of actual factual positions. To ask that averments in the pleadings should follow actual wording used in section 141 and more particularly the expression that the accused was "in charge of and was responsible to the company for the conduct of the business of the company" is too much to ask for. This could be the requirement of the proof that would be led by the evidence in hand. It is submitted that section 141 lays down the rules of proof and not that of the pleadings. If it is held otherwise (as laid down in the above two cases) it will do injustice to the holder as it would cost him the amount mentioned in the dishonoured cheque not for his fault or lack of entitlement but because of the casual drafting of the pleadings by the ignorant lawyer.

In *Sify Thomas* (supra) the averments were as follows.

> That the accused No. 1 is a partnership firm with the name and style of M/s Tile Store, having its office at 5-654/B, Jyothis Complex, Bypass Road, Eranliupalam, Calicut – 673006 (Kerala) while accused No. 2 to 6 are the partners of the accused No. 1. The accused No. 2 to 6 being partners are responsible for the day-to-day conduct and business of the accused No. 1.

Similarity in *Ashok Shewakramani* case (supra), the averments of different complaints clubbed together were as follows.

1. All the directors were liable for the transactions of the company.
2. The appellants were fully aware of the issuance of the cheques without sufficient balance.
3. The appellants are dealing with the day-to-day affairs of the company.
4. The appellants were fully aware of the business transactions.
5. The appellants are managing the company and are also in charge of the company.
6. The appellants were jointly and severally liable for the acts of the company.

The above averments in both the cases point towards the fact that the partner/director was at the helm of affairs and dishonoured cheques were issued

with his knowledge, whether actual or imputed. These averments should have been sufficient to bring these cases within the ambit of section 141 and through the evidence, it would have been decided whether the requirements of section 141 are satisfied or not. This is a logical interpretation of section 141 because mere averments would not make partner/director liable unless it is proved with the help of evidence that the partner/director was in-charge of and responsible for the conduct of business of the company. Holding otherwise, will provide an escape route to the persons responsible for issuing a cheque that has been dishonoured that too on technical grounds of not following verbatim the languages used in section 141 of the NI Act in the pleadings.

VI CONCLUSION

The above discussion on different facets of law governing contractual relations, partnerships, sale of goods and negotiable instruments reveals that a number of principles of law have been enunciated by second appeal courts and even by the supreme court on these subjects. New requirements of law have been crafted by ignoring the earlier ones and doubtful exposition of law beyond the ambit and scope of the relevantprovisions of law have been also identified and examined critically.

The court in *MS Z Plus Surakhya Seva Bhubaniswar (supra)* was seen leaning in favour of service providers by making it clear that mere mention in the agreement that services will be terminated without assigning reason will not suffice. The employer has to give reasons for termination of the service contract. It is a common practice that the employers reserve their right to terminate the contract at any point of time after giving 30 days' notice to the service provider without giving any reason. The court has not only denounced this practice but has made it clear that the subsequent reasons provided on the affidavit submitted to the court will not cure the original deficiency. The order of termination of service contract must be annexed with the reasons of termination and this holds true even where the service contract makes mention expressly that it will be terminated at any time without assigning any reason.

In *Ravindra Kumar Das (supra),* it has been observed that the court has unnecessarily made the doctrine of mistake as envisaged under sections 20,21, 22 very complicated. The court also read many expressions in these sections which cannot be even impliedly read in them. The explanations given by the court to these sections donot represent their true ambit and scope. What is more startling is that the court has went on saying that a party can rectify mistake of the fact that may have crept unconsciously, ignorantly and under a state of forgetfulness. A plain reading of the provisions of sections 20, 21,and 22 do not even remotely justify this interpretation once a contract is executed but it appears that the court justified this view point by wrongly invoking jurisprudential facets of a "right" by observing that the "right" to make a contract includes "right" not to make a contract. Once a contract is made, it cannot be changed under the garb of rectifying a mistake. It takes at least two to make a contract and it also takes two to rectify the

mistake that might have crept in the contract. No mistake can be unilaterally rectified and even if both the parties agree to rectify a mistake in the contract that may fall under section 55 as a case of 'novation', if that rectification materially alters the scope of the contract. The courts can rectify a mistake in the contract where it patently appears as a mistake in order to do complete justice with the parties but it cannot be in the way as propounded by the court.

Section 55 of the Indian Contract Act declares that where time is the essence of the contract, breach of it would make the contract voidable at the option of the promise.However, there is no sufficient guidance in this section to determine whether time is of essence or not in a contract in question. Generally, courts have opined that where no time is fixed for the performance of the contract, then it can be gathered from the language used in the contract, intention of the parties and other surrounding circumstances. The courts have carved out certain exceptional situation where it shall be presumed that the time is an essence of the contract. However, in *Shyamal Kumar Roy,* the High Court of Calcutta has taken a different line of reasoning which is not in accord with the established position of law and express provisions of the contract in question.The observation of the court has raised a moot point; is it still open for the courts to gather intention of the parties form their conduct where the language used in the contract indicating time as the essence of the contract is plain and unambiguous?

In *Anjana Bai bagde*,(*supra*) the court has unnecessarily maintained a distinction between pre and post suit position for the application of doctrine of unjust enrichment without bringing out the desired clarity.In *AUI India International LLP,* (*supra*),the court did not appreciate a well-maintained difference between the frustration of the contract and commercial hardship. There is a long line of cases decided by various high courts and supreme court whereby it is now well settled that there may be some delay in the performance of the contract or there may not be profit in executing the contract that theparties might have contemplated in the beginning but that would not justify invoking of doctrine of frustration of the contract but may fall in the category of commercial hardship. The case in hand was a case of commercial hardship but the court did not apply this principle in this case and held it as a case of frustration of the contract in dispute for wrong reasons.

In *P Venkata Ravi Kishor,* (*supra*), the court read many hypothetical situations in sections 182, 201 and 202 of the Indian Contract Act which are not in the letters of these sections.Section 182 defines "agent" and "principal". The court opined that these definitions are flexible enough to include a person to act as "agent" to more than one principal. However, the language of section 182 is simple and is not even subject to any contract to the contrary. It is not correct to interpret that language of section 182 is flexible to include "one agent and more than one principal" scenario but it can be said that there is no legal bar for an agent to serve more than one principal at a time. The scope of section 202 of the Indian Contract Act was explained by the court and it was held that section 202 pre-

supposes existence of written agreement but this reading of section 202 is beyond the scope of its letters.

In *Bina Khanna,*(*supra*) the court did not apply section 26 properly to the case in hand. The court only applied first part of this section and ignored its later part. The court rightly said that the risk and property on goods go hand in hand. Where property has passed from the seller to the buyer the risk will be borne by the buyer, no matter the goods are still in the possession of the seller. However, the court failed to take notice of equally important exception to this principle of law incorporated in the same provision that where transfer of goods has been delayed by the seller or bythe byer, then the goods are at the risk of the party who is responsible for this delay in the delivery of the goods that caused their damage. The person holding possession of the goods is clothed with the responsibility of a bailee.This principle of law has been overlooked. Had this legal position been considered by the court, the decision would have been quite opposite.

In *G Deepa,* (*supra*), the decision of the court was right but the reasoning given was not apt to the language of the relevant provision. The court upheld the limit to therestrictions imposed by the RBI on cash withdrawal on non-base branch of the bank where customer does not have his account but has in a different branch of the same bank. The court did not put proper gloss to the language of section 31 of the NI Act that would have set a clear precedent to such challenges in future.

In *Vuggivalas Udaya Chandra Rao*(*supra*),the court was seen diluting the rebuttable presumption carved in section 118 in favour of the 'holder in due course' and askedfor the corroborative evidence from the holder on the proof of instrument, date of instrument, time of instrument and consideration for instrument, ignoring the presumption of 139 of the NIA Act in their favour.

In *South Eastern Coalfields Ltd.* (*supra*), the court insisted that cheque must be presented before the bank and the bank must have refused to honour the cheque for want of sufficient funds, only then action would lie under section 138 of the NI Act. The court also insisted on formal notice to the accused about the dishonour of the cheque for want of sufficient funds. The enquiry made by the complainant about the status of funds in the bank account of the drawer was not considered equivalent to the presentation and verbal information to the accused about insufficiency of the funds in his bank account was not considered sufficient notice to the accused as contemplated in section 30 of the NI Act.The court ignored the purpose of the NI Act and insisted on the formal procedure as prescribed. In *Siloy Thomas,* (*supra*), the court went further by insisting on the use of actual language in the pleadings. Loose language or indirect language from which spirt equivalent to the one that could be distilled from section 141 of the NI Act dealing with the vicarious liability was not approved by the hon'ble court and thus leaving the complainant at the mercy of poorly drafted pleading by an ignorant counsel.