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# MERCANTILE LAW

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### I INTRODUCTION

THIS SURVEY covers the cases decided by the constitutional courts on the subjects of the Law of Contract, Sale of Goods, Partnership and Negotiable Instruments. There has been no path breaking judgment during the surveyed year on these topics. Nevertheless, some decisions have either clarified existing doubtful legal positions or have spawned new nebulous issues that require further elaboration. These judgments have been discussed thoroughly so as to make the readers fully conversant with the legal principles enunciated and the rationale of the counter viewpoint. In addition to these judgments, a good number of judicial pronouncements made during the year under reference have reiterated the established legal principles. These judgments have not been considered in this part of the survey, as it will not serve any worthwhile purpose to include these judgments as a restatement of the current legal position.

### II LAW OF CONTRACT

#### **Competence of the parties**

In *Kunhalima v. Mohammad*,<sup>1</sup> the High Court of Kerala laid down that the parties must be competent to contract, and one of the conditions of the competence of the parties is that neither of them should be insane. It is prudent to state that the insanity of the party to a contract must exist at the time of the execution of the contract. The plea of insanity before or after the execution of the contract will not help the cause of the party seeking annulment of the contract on the plea of insanity. The moot point is how to determine insanity? In the instant case, the court did not accept a medical certificate issued by a doctor only because the doctor was not examined. What would have been the opinion of the court if the doctor had died after issuing the certificate? In the opinion of the court: <sup>2</sup>

Plea that the executant was not competent to contract for want of a sound disposing state of mind, at the time of execution of the sale deed. A medical certificate was produced to prove the mental state of the executants, but its author was not examined. Relevance lies

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1 AIR 2024 (NOC) 551 (Ker.)

2 *Ibid.*

not in the medical certificate itself but in the opinion expressed by the author/doctor.

The High Court of Kerala gave more importance to the physical disposition of the doctor than his opinion expressed in the certificate. This condition may prove, at times, too heavy to manage when the doctor is not available or has left the station or has died after issuing the certificate.

#### **COVID-19 and the contractual obligations**

The Covid-19 came up with the untold miseries. It had challenged the might of the state and its physical infrastructure, human resources and institutions of governance. No one could predict the devastating effects of this unknown virus, nor could the loss caused by it be estimated. It had challenged legal jurisprudence also in more ways than one. One such challenge came to be seen with regard to contractual obligations. The courts were called to appraise the impact of the COVID-19 on the different facets of contractual obligations, either before or after the execution of a contractual relationship. *Manoj Paliwal v. State of Rajasthan*,<sup>3</sup> represents the same species of contracts in which the effect of the COVID-19 on contractual obligation was debated. The court was empathetic in declaring the COVID-19 as a good ground of frustration of the contract under section 56. The court ruled:<sup>4</sup>

It is noted that the contractual obligations which the petitioners could not perform for the period from March 2020 to June 2021 were on account of the lockdown due to the outbreak of Covid-19 in the country. Since there was no industrial activity in the state of Rajasthan, the petitioners were unable to perform their part as per the agreement dated 30.01.2019. The outbreak of the pandemic of Covid-19 was an act of God beyond the control of petitioners and therefore on account of the same, if the petitioners could not fulfil their contractual obligation, they cannot be burdened with the liability of paying the amount due to the gram panchayat, Pasund.

The court did not buy the argument that there was no such stipulation in the contract that would warrant the invocation of the COVID-19 scenario as a ground for the frustration of the contract. The court, though not expressly, applied the “implied theory” doctrine for the declaration of frustration of the contract by stating:<sup>5</sup>

This court is of the view that if the situations beyond human control happen during the currency of a contract and the same have not been taken note of or written in the contract/agreement, they are required to be considered while setting the dispute between the parties for balancing the equity and arriving at a just and proper decision.

3 AIR 2024 Raj. 103.

4 *Id.*, at 105.

5 *Ibid.*

The above stand taken by the court is in line with the long line of judicial decisions handed down by the courts from time to time, but its application to the instant case is not free from doubt. A close screening of the facts of the case reveals that the petitioners did not perform their contractual obligations a number of times during the currency of the agreement for different reasons, and the reasons for not performing the contract between March 2020 and June 2021 were due to the COVID-19. Could the benefit of the impact of COVID-19 be extended to contractual obligations before COVID-19? The court took the cognizance of the fact that since industrial activity was affected by the COVID-19, so could be the performance of the contractual obligation. However, the auction was for lifting the marble slurry and for dumping the same at the dump yard. The agreement cannot be in any way linked with the industrial activity, though that might have been the object of the petitioner, but that was not a part of the main agreement. The court pronounced the judgment by applying the COVID-19 as a *force majeure* to those contractual obligations that also arose before the advent of this virus, and also to the assumed industrial activities that were not a part of the main contract.

#### **Interplay of the law of contract and the Arbitration Act.**

The Supreme Court in *Re: Interplay Between Arbitration Agreements under A and C Act and Stamp Act*<sup>6</sup> made a rich discussion on the diverse aspects of the Arbitration and Conciliation Act, 1996, (A and C) Stamps Act, 1899 and Contract Act, 1872. The precise issues raised and relevant for this part of the survey are: (i) Is the defect of inadequate stamps or no stamps curable? (ii) If not curable, will such an agreement be unenforceable under the Indian Contract Act? (iii) Is an unenforceable contract admissible in the court of law? Can these issues be addressed by resorting to the doctrine of harmonious construction? Taking the last issue first for discussion, the apex court urged the application of the doctrine of harmonious construction in no uncertain terms by applying the doctrine of *generalia specialibus non derogant*.<sup>7</sup>

The apex court referred to the subject matter of these two legislations and opined that the Contract Act, as the name suggests, sets out the rules in relation to contracts in general.<sup>8</sup> This Act defines the agreement and contract.<sup>9</sup>

On the other hand, an Arbitration agreement is one of the many different types of contracts to which it is applicable. It was further held that the Arbitration agreement is a special law to be dealt under the A and C Act because it governs the law on arbitration, including arbitration agreements.<sup>10</sup>

It is submitted that the A and C Act is a special legislation for all arbitration agreements and such agreements have to be dealt under A and C Act alone.

6 AIR SC 2024 P1.

7 The discussion is confined to the assumed overlap between the Contract Act and Arbitration and Conciliation Act. Though the apex court was called, in the instant case, to resolve intersection of the Contract Act, Arbitration and Conciliation Act and Stamps Act.

8 *Supra* note 6 at 64.

9 *Id.* at 65.

10 *Ibid.*

However, endorsement of the earlier opinion expressed in *Bhaven Construction v. Exe Engineer Sardar Sarovar Narmada*<sup>11</sup> by the apex court in the instant case needs further elaboration. The *Bhaven Court* had held that the A and C Act is a code in itself. The present court elaborated it further in the following words:

It provides for a detailed mechanism by which arbitration may be conducted, with a view to ensuring it is successful as a speedy and efficacious alternative to the courts. The statement of objects and reasons of the Arbitration Act records that the main object of this law was to comprehensively cover international and commercial arbitration and conciliation, as also domestic arbitration and conciliation.<sup>12</sup>

The apex court is right in holding that the A and C Act is a special legislation with respect to the arbitration agreement, but is not right in opining that this enactment is a complete code in itself. The Contract Act is then other legislation for all agreements, unless expressly excluded. This Act provides substantive provisions for an agreement to be valid and enforceable. Section 10 of the Contract Act runs through all agreements to be valid and enforceable. An Arbitration agreement is basically an agreement with an in-built mechanism to resolve disputes, if any, which may crop up between the parties in future.

This arbitration agreement, like any other agreement, must satisfy the requirements of section 10 of the Indian Contract Act. Those requirements have not been dispensed with by the A and C Act. Any dispute relating to the competence of the parties or lack of consideration or illegality of the object of an Arbitration Agreement has to be decided with reference to sections 10, 11 and 23 of the Indian Contract Act. The courts have to fall back on these provisions of the Contract Act because they continue to govern all agreements, including arbitration agreements. It is true that the constitutional courts have invoked the “doctrine of severability” in cases where an arbitration agreement can be separated from the main contract in order to facilitate expeditious and amicable resolution of disputes, but where severability is not possible, the substantive provisions of the Contract Act have to be followed. So, it is correct to say that the A and C Act is a complete code on the arbitration agreements only after fulfilling the basic conditions stipulated under the relevant sections of the Indian Contract Act.

The enunciation of the “complete code” principle for the A and C Act by the present court has been contradicted at another place in the same judgment in the following words:<sup>13</sup>

In terms of section 10 of the Indian Contract Act, agreements are contracts if they are:

- a. made by the free consent of the parties competent to contract;
- b. with a lawful consideration

11 AIR OnLine 2021 SC 6.

12 *Supra* note 10.

13*Id.*, para 180.

- c. with a lawful object; and
- d. not expressly declared to be void under its provisions.

These requirements do not affect any law in force and not expressly repealed, which:

- a. requires the contract to be made in writing;
- b. requires a contract to be made in the presence of a witness; or
- c. laws relating to the registration of documents.

In addition, section 7 of the A and C Act specifies the requirement for the existence of an arbitration agreement. It is the arbitral tribunal and not the court which may test whether the requirements of a valid arbitration agreement are met. If the tribunal finds that these conditions are not met, it will decline to hear the dispute any further. If it finds that a valid arbitration agreement exists, it may assess whether the underlying agreement is a valid contract.<sup>14</sup>

The above observations of the apex court are the correct exposition of the law on the subject, but it, at the same time, runs contrary to the observation of other brother judges of this court that the A and C Act is a complete code on the arbitration agreements. The above observations, underlined by the apex court, will find an answer in the provisions of the Contract Act and not in the A and C Act. Thus, negating the reference of the apex court on the A and C Act as a complete code on the subject.

This is the reason that *Justice Khanna*, in his concurring but separate judgment, delved deep into the different provisions of the Contract Act to conclude that these provisions are applicable even in the case of an arbitration agreement to decide whether that agreement is valid or not, based on the different provisions of the Contract Act. In the words of *Sanjiv Khanna J.*:

As per the Indian Contract Act 1872, an agreement not enforceable by law is said to be void, and an agreement enforceable by law is a contract (section 2 h). A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable (section 2 j).

The requirements of Section 10 of the Contract Act are that the contract should be made by the parties competent to contract, for lawful consideration and with lawful object. Consent of the parties should be free. The contract should not be expressly declared to be void. Section 2 has to be read with Section 10 and not in isolation, to avoid contradiction and to harmoniously apply the two sections.<sup>15</sup>

The court further opined that sections 11 and 12 of the Contract Act deal with the persons entitled to contract. Where a person is explicitly declared as incompetent or does not fall within the definition of a competent person under the aforesaid provisions, like a minor or a person of unsound mind, a contract entered into by such a person would be void. An agreement is also rendered void when

<sup>14</sup> *Id.* at 67, para 183.

<sup>15</sup> *Ibid.*

both parties are under a mistake of fact. As per section 23, agreements are void if the consideration and objects are unlawful. This section does not have any application to the present issue, nor has section 25, which relates to agreements without consideration and in which situation they have to be treated as void. Agreements which are in restraint of marriage or in restraint of trade are void. Agreements by way of wager are also void. The agreements, the meanings of which are not certain or incapable of being made certain, are void. Section 28 states that the agreements in restraint of legal proceedings are void, but exception I states that a contract by which parties agree for disputes arising between them to be referred to arbitration shall not render the contract illegal.

Sections 13 to 19A relate to consent (Section 13), free consent (Section 14), coercion (Section 15), undue influence (Section 16), fraud (Section 17), Misrepresentation (Section 18), voidability of agreements (Section 19), without free consent and power to set aside a contract induced by undue influence (Section 19A). The Contract Act declares contracts affected by the preceding provisions to be voidable at the option of the aggrieved party.

Under Section 21, a contract is not voidable because it is caused by mistake as to the law in force in India and a contract where a mistake of fact is made by one party is also not voidable as per Section 22. Accordingly, under Section 23 of the Contract Act, the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature as to defeat the provisions of law, or is fraudulent. After making a threadbare discussion on the different provisions of the Contract Act, *Sanjiv Khanna J.*, concludes;

Neither are these provisions applicable in case of unstamped or insufficiently stamped instruments, nor is the consideration or object unlawful, as it involves or implies injury to a person or property of another. The last clause of Section 23 applies when the consideration or object of an agreement is regarded as immoral and or opposed to public policy. An instrument, whether unstamped or insufficiently stamped, will not fall foul on the ground of consideration or object of the agreement being immoral, nor will it fall foul as opposed to public policy.<sup>16</sup>

The exposition of the relevant provisions of the Indian Contract Act made by *Justice Sanjiv Khanna J.*, is absolutely on the spot, but is not in resonance with the observations of his brother Judges that the A and C Act is a complete code on the subject. It has been rightly opined by *Mr. Justice Khanna* that the above-discussed provisions of the Indian Contract Act do not apply to the given case but may apply to other cases involving issues that may fall foul of these provisions, even though the case also attracts relevant provisions of the A and C Act. There is no overlap between the Indian Contract and the A and C Act. A contract must first be valid and legal under the Indian Contract Act; only then may attract the A and C Act. However, a fine distinction has to be understood here. A

<sup>16</sup> *Id.* at 88.

void contract under the Indian Contract cannot be enforced through arbitration, but an exception has been carved out by the court, by invoking the doctrine of severability. This doctrine allows the courts to facilitate resolution through the provisions of the A and C Act, where the Arbitration Agreement will survive independent of the terms and conditions of the main agreement.

#### **Breach of contract**

The Supreme Court in *Authorized Officer Central Bank of India v. Shanmugavelu*,<sup>17</sup> discussed the different facets of Sections 73 and 74 of the Indian Contract Act and their applicability to the forfeiture of the earnest money deposited under Rule 9(5) of the SARFAESI Rules. This case was earlier decided by the High Court of Madras<sup>18</sup> that had taken the view that Rule 9 (5) must be “read down” to yield the underlying principle recognized in Sections 73 and 74 of the Contract Act. The purpose behind this “reading down” approach of the high court of Rule 9(5) was not to make the provision valid or workable in terms of its plain meaning but to prevent the harsh consequence of forfeiture of the entire earnest money deposited, irrespective of the extent of default in the payment of the balance amount.

The apex court explained the ambit and scope of the doctrine of reading down in the following words:

The principle of ‘reading down’ a provision emanates from a very well settled canon of law, that is, the courts, while examining the validity of a particular statute, should always endeavour towards upholding its validity, and striking down legislation should be a last resort. “Reading down” a provision is one of the many methods the court may invoke when it finds that a particular provision, if for its plain meaning, cannot be saved from invalidation, and so by restricting or reading it down, the court makes it workable to salvage and save the provision from invalidation. Rule of reading down is only for a limited purpose of making a provision workable and its objective workable.<sup>19</sup>

The apex court first elaborated the distinction between the consequences of breach of contract and forfeiture in the following words:

If the consequences of forfeiture were purely a matter of breach of contract, then there would have been no occasion for the legislature to specifically provide forfeiture through the statutory provisions, and it would have simpliciter relegated the consequences of such breach to already existing general law under sections (s) 73 and 74 of the Indian Contract Act.<sup>20</sup>

17 AIR SC (2024) 962.

18 AIR 2022 Mad. 35.

19 *Supra* note 17 at 1004.

20 *Id.* at 962.

The Supreme Court, while overruling the above “reading down” approach of the High Court of Madras, clarified the legal position in the following words:

The high court had committed an egregious error by proceeding to “read down” Rule 9 (5) in the absence of said provision being otherwise invalid or unworkable in terms of its plain and ordinary meaning, without appreciating the purpose and object of the said provision. The rule of “Reading Down” is only for the limited purpose of making a provision workable and its objective achievable. Harshness of a provision is no reason to “read down” the same, if its plain meaning is unambiguous and perfectly valid. A law/rule should be beneficial in the sense that it should suppress the mischief and advance the remedy. The harsh consequence of forfeiture of the entire earnest money deposited has been consciously incorporated by the legislature in Rule 9 (5) to sub serve the larger object of the SARFAESI Act of timely resolving the bad debts of the country. The idea behind prescribing such a harsh consequence is not illusory; it is to attach a legal sanctity to an auction process once conducted under the SARFAESI Act, which ultimately concludes. Any dilution of the forfeiture provided under Rule 9(5) would result in the entire process being set at nought by a mischievous auction purchaser through sham bids, thereby undermining the overall object of the SARFAESI Act of promoting financial stability, and fostering a more efficient and streamlined mechanism for recovery of bad debt.<sup>21</sup>

The apex court limited the scope of the doctrine of “reading down” of a statute to only three cases.

- (i) Where a statute will be otherwise rendered invalid.
- (ii) Where a statute will be rendered otherwise unworkable.
- (iii) Where the object of a statute will be defeated.

The court did not approve the application of this doctrine of reading down to prevent unjust enrichment. The doctrine of “reading down” is an external aid to the construction of statutes. Its application is not based on any provision of the Act or rule but is based on judicial discretion. The apex court, it is submitted, should have held that the doctrine of “reading down” does not apply to the present case without circumscribing the limits of the doctrine. The application of the “reading down” doctrine may sometimes be demanded by a situation where unjust enrichment is apparent on the face of the records. This has been indirectly affirmed by the apex court in the same judgment in the following words:

Thus, this court held that where extraneous conditions exist that might have led to the inability of the successful action purchaser despite best efforts from depositing the balance amount to no fault

<sup>21</sup> *Id.* at 1005.

of its own, in such cases the earnest money deposited by such innocent successful auction purchaser could certainly be asked to be refunded.<sup>22</sup>

This legal position has been more elaborately explained in *Alisha Khan v. Indian Bank (Allahabad Bank)*,<sup>23</sup> which the present court quoted with approval. It was laid down:

Whenever a challenge is laid down to an order of forfeiture made by an authorized officer under sub-rule (5) of rule 9 of the Rules by a bidder who has failed to deposit the entire sale price within ninety days, the tribunal/courts ought to be extremely reluctant to interfere, unless of course, a very exceptional case for interference is set up. What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the face of each case and by recording cogent reasons for the conclusion reached.<sup>24</sup>

#### **Unjust enrichment**

In *Authorized Officer, Central Bank of India v. Shanmugavelu*,<sup>25</sup> the apex court got an opportunity to shed light on the ambit and scope of the doctrine of unjust enrichment which has roots in the celebrated ruling of Lord Mansfield in *Moses v. Macferlan*,<sup>26</sup> In his words; “law as well as justice should try to prevent “unjust enrichment” that is, enrichment of one at the cost of another”.

The apex court confined this doctrine of unjust enrichment to cases where either there is no law or the law is silent on the refund of money. The apex court, in the instant case, followed a long line of its earlier rulings that have laid down that the equitable considerations have no place where the statute contains express provisions.<sup>27</sup> Consideration of equity cannot prevail and does not permit a high court to pass an order contrary to the law.<sup>28</sup> Equity and law are twin brothers, and law should be applied and interpreted equitably, but equity cannot override a written or settled law.<sup>29</sup> It was finally ruled as follows:

The high court erred in law by holding that forfeiture of the entire deposit under Rule 9 Sub-rule of the SARFAESI Rules by the appellant bank after having already recovered its dues from the subsequent sale amounts to unjust enrichment.<sup>30</sup>

Thus, it appears that the courts in India are not following the ruling of Lord Mansfield in letter and spirit who had made doctrine of unjust enrichment applicable

22 *Id.* at 1009.

23 AIR OnLine 2021 SC 607.

24 *Id.* at 1008, *supra* note 22.

25 *Ibid.*

26 (1558-1774) All. E R Rep.581.

27 *E. Palanisamy v. Palanisamy*, (2003) 1 SCC P 123 at 127.

28 *Council for Indian School Certificate Examination v. Isha Mittal*, (2000) 7 SCC 521.

29 *PM Letha v. State of Kerala* (2003) 3SCC 54.

30 *Supra* note 22 at 1007.

to law as well as to justice as the courts have consistently held that where the language of the provisions of a statute is plain and free from any ambiguity, then the doctrine of unjust enrichment will not be made applicable. Looking from this perspective, the language of Section 9 (5) of the SARFAESI Security Interest (Enforcement) Rules, 2002 is plain and simple, which reads as under:

In default of the Payment within the period mentioned in sub-rule 4, the deposit shall be forfeited to the security creditor, and the property shall be resold, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

The above provision is absolute and does not, as such, admit any exception that would give any scope for applying the unjust enrichment doctrine. Despite this statutory position, there are earlier rulings<sup>31</sup> from the apex court where exceptional situations have been carved out from the above Rule 9 (5) to give relief to the party on the pretext of preventing unjust enrichment, which may otherwise result in it.

The present court also toed a similar line, which is reproduced here at the cost of repetition:<sup>32</sup>

Thus, this court held that where extraneous conditions exist that might have led to the inability of the successful auction purchaser despite best efforts from depositing the balance amount to no fault of its own, in such cases, the earnest money deposited by such innocent successful auction purchaser could certainly be asked to be refunded.

However, the court did not extend its above observation to the facts of the case in hand, where the respondent had contended that he was unable to make the balance payment owing to the advent of demonetization. The same led to a delay in raising the necessary finance. The respondent had also pleaded that the appellant bank failed to provide certain documents to him in time, as a result of which he was not able to secure a term loan.<sup>33</sup> These contentions were not accepted by the court for the reasons stated below:

The aforesaid by no stretch can be said to be an exceptional circumstance warranting judicial interference. We say so because

31 See *Authorized Officer State Bank of India v. C. Natarajan* (2023) SSCR 1067. The court had held that if circumstances are shown to exist where a bidder is faced with such a grave disability that he has no other option but to seek extension of time on genuine grounds so as not to exceed the stipulated period of ninety days and the prayer is reflected without the consideration of all facts and circumstances, refusal of the prayer for extension could afford a ground for a judicial review of the decision making process on valid grounds. One such exceptional circumstance led to the decision in *Alisha Khan v. Indian Bank* (2021) SCC OnLine SC 3340 where this court intervened and granted relief because due to COVID complications, the appellant had failed to pay the balance amount.

32 *Supra* note 25 at 1009.

33 *Ibid.*

demonetization had occurred much before the e-auction was conducted by the appellant bank. As regards the requisition of documents, the sale was confirmed on 07.12.2016, and the respondent first requested the documents only on 20.12.2016, and the said documents were provided to him by the appellant within a month, i.e., on 21.01.2017. It may also not be out of place to mention that the respondent was granted an extension of 90 days' time period to make the balance payment and was specifically reminded that no further extension would be granted; despite this, the respondent failed to make the balance payment.<sup>34</sup>

The observation of the apex court suffers from an apparent contradiction. The court started with the premise that equity cannot supersede the law, and the doctrine of "reading down" cannot be invoked to blunt the positive law. The court identified three situations where the doctrine of "reading down" could be applied and not beyond. This would mean that the doctrine of unjust enrichment, which has roots in equity, cannot be applied to negate a claim based on the law. However, towards the end of the judgment, it appears that the apex court is more than willing to invoke the doctrine of unjust enrichment in exceptional cases. This is the reason that the apex court did not overrule *Alisha Khan's* case (supra), where the doctrine of unjust enrichment was applied, but came in agreement with *K. Natarajan J.*, who accepted the application of the principle of unjust enrichment to the circumstances that are exceptional and very rare. Even this observation may narrow down the application of the principle of unjust enrichment, but may not altogether eliminate its relevance in the sense as propounded by Lord Mansfield, by holding that law as well as equity must prevent unjust enrichment, i.e., enrichment of one at the cost of another, which puts law and equity on the same footing.

#### **Undue influence**

In *Kerala Water Authority, Thiruvananthapuram v. Jay K Mathew*,<sup>35</sup> the high court in a brief judgment elucidated the scope of undue influence as defined in Section 16 in the following words:

Law is well settled that more influence is not undue influence under Section 16 of the Indian Contract Act.<sup>36</sup>

The above observation of the high court is spot on and reflects the exposition of Section 16, but the remaining part of this observation, quoted below, raises doubt about its correctness.

The first plaintiff's mother had been admittedly residing with the first defendant and his family. The third defendant had come of marriageable age. These aspects would necessarily have made the mother give some property to her granddaughter. Such influence could not, in the circumstances, be held to be

<sup>34</sup> *Ibid.*

<sup>35</sup> AIR 2024 Ker. 58.

<sup>36</sup> *Id.* at 63.

“undue influence” The mere fact that the first defendant had met the expenses for the gift by itself is not sufficient to find that the documents are vitiated.”<sup>37</sup>

The court also relied on the fact-finding made by the court below under Order XXXII Rule 15, which had observed that the mother who had gifted some portion of her property to the grandchild as against one of her sons was in a sound mental state at the age of 94 and was able to recollect details regarding her education, marriage and family with precision. There was no evidence to find that her mental capacity was affected by reason of her age.

The court did not analyze whole of section 16 with reference to the facts of this case. Section 16 has three parts. Part I is of a general nature; it applies where a subsisting relationship between the parties is such that one is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The application of this clause to the instant case was not at all discussed by the court. The court took recourse of second clause of the second part of section 16, which conjunctively states *inter alia*, that a person is deemed to be in a position to dominate the will of another where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of his age, illness or mental or bodily distress.

The court rested its opinion on the above clause only, but gave no thought to the first part of Section 16, which is more broadly worded. The above-cited findings of the court that “these aspects would necessarily have made the mother give some property to her granddaughter” make it a good case for Part I of Section 16, in addition to Part II. The court did not discuss part I of the section, let alone its application to the present case.

### **Contractual obligation**

The Supreme Court was called to delineate the ambit and scope of sections 37 and 40 of the Indian Contract Act in *Vinayak Purshotam Dube v. Jayashree Padamkar Bhat*.<sup>38</sup> The apex court clarified many legal issues associated with these two sections, which are not explicit in the actual language of these sections, including the explanations appended to them. These two sections are reproduced here to serve as a ready reference.

Section 37 reads as follows:

Obligation of Parties to a Contract: The parties to a contract must either perform, or offer to perform, their respective promises unless such performance is dispensed with or excused under the provisions of this Act, or any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

<sup>37</sup> *Ibid.*

<sup>38</sup> AIR SC 2024 at 1386.

## Section 40 Provides

Person by Whom Promise is to be Performed: If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promiser himself, such promise must be performed by the promiser. In other cases, the promisor or his representatives may employ a competent person to perform it.

The brief facts of this case are that the complainant had given his land for the development of a housing colony to the opposite party, who promised to give eight residential flats of specified dimensions and 6.5 lakhs rupees in cash as consideration. It was alleged that the opposite party had failed to make payment and committed deviations from the sanctioned plan, non-construction of a compound wall, impacting parking and issues regarding access and unauthorized constructions beyond the sanctioned plan that were sold to third parties. The use of substandard material in the buildings that resulted in cracks and other related issues was raised. The complaint was filed before the District Forum of Kolhapur under the Consumer Protection Act with a long list of prayers. The district forum was required to resolve Jurisdictional issues in the first instance, as raised by the defendants who sought dismissal of the complaint as being a purely civil matter involving an immovable property for which the proper forum is the civil court. The district forum, after the perusal of the developmental agreement, reached the conclusion that the contract is not related to the sale and purchase of property but is a service agreement involving an immovable property that squarely falls under the Consumer Protection Act.

The district forum decided the case in favour of the complainant and awarded the compensation of different sums on the different heads, but that was not to the satisfaction of the complainant. Thus, both parties went on appeal before the State Commission against this decision, but on different grounds. The State Commission partly upheld the order of the district forum and partly modified it based on the different clauses of the developmental agreement.

The decision of the State Commission did not satisfy either of the parties. Both of them went in an appeal before the National Consumer Dispute Redressal Commission (NCDRC) by filing a revision petition. During the pendency of the petition before the NCDRC, the original opposite party died, and his legal representatives, *i.e.*, his wife and two sons, were brought on record.

The NCDRC again partly modified the order of the State Commission and came to an agreement with the findings of the district forum. Against this decision of the NCDRC, the appellant opposite party thereafter approached the Supreme Court by preferring a special leave petition. The Supreme Court refused to interfere with the findings of the NCDRC and disposed of the SLP with liberty to appellant opposite party to resort to the remedy of review before the NCDRC. Both parties filed a review petition before the NCDRC, and it is this order of the review petition of the NCDRC that was challenged in the present case before the Supreme Court.

The pertinent observation of the National Commission in the review petition that was hotly debated before the Supreme Court in the present case is reproduced as under:

Further, we have no reason to agree with the contention raised by the review applicant that after the death of the original owner, the legal representatives are not accountable for the liabilities under the agreement. In the eventuality of the death of the developer, it cannot be stated that various clauses of the development agreement between the parties become redundant or that the complainant is not entitled to seek execution of the provision of the development agreement. Such execution has to be made by the legal heirs of the developer only.

Precisely, it is the above finding of the NCDRC that was put to challenge in the present petition. It was submitted that the appellants, being legal representatives of the original opposite party, are willing to make the payment as directed. But they had reservations about the other directions issued against them. They contended that it is not permissible for them to comply with these directions inasmuch as the said directions were issued by the district forum as well as by the State Commission personally against the opposite party, who is since deceased. It was contended that the original opposite party was having the proprietorship concern, which could be made liable for the satisfaction of the compensatory payments only, but not for complying with the other directions issued, which cannot now fall on his legal representatives to comply. It was argued that the original opposite party had skill and expertise to comply with the said directions as a developer but on his demise, his legal representatives, namely his widow and two sons cannot be compelled to carry out these directions as they neither possess the necessary skills nor expertise, and further they are not continuing the proprietorship concern of the original opposite party which has been now wound up on the demise of the proprietor.<sup>39</sup>

The court dissected sections 37 and 41 of the Contract Act and laid down, (i) section 37 states that a promise made by a promisor is binding on his representative in case of his/her death, unless a contrary intention appears from the contract. This legal position has been rightly elicited by the apex court from the language used in section 37. (ii) Legal representatives are liable for the debts of their predecessors, but their liability is limited to the extent of the estate of the deceased inherited by them. This legal position taken by the apex court is not based on section 37, which in clear terms provides that the promises bind the representatives of the promisors in case of the death of such promisor before the performance, unless a contrary intention appears from the contract. This contrary intention was not visible in the Development Agreement as interpreted by the NCDRC.

(iii) The representatives of the promisor are not personally bound by the promise made by the promisor now represented by them. Their liability is limited to

<sup>39</sup> *Id.* at 1391.

the extent of the estate of the deceased falling in the hands of these representatives. Their liability is not personal but is fastened with the estate which they have inherited. Therefore, when personal considerations are the basis of a contract, they come to an end on the death of either party, unless there is a stipulation express or implied to the contrary. This is especially so when the contract involves the exercise of special skill.<sup>40</sup> (iv) A contract can be performed vicariously by the legal representatives of the promisor, depending upon the subject matter of the contract and the nature of the performance that was stipulated in the contract. But if a contract involving the exercise of an individual's skill or expertise of the promisor or which depends upon his/her personal qualification or competence, the promisor has to perform the contract by himself/ herself and not by his/her representatives. (v). A contract of service is also personal to the promisor. This is because when a person contracts with another to work or to perform service, it is on the basis of the individual's skills, competence or other qualifications of the promisor and in circumstances such as the death of the promisor, he is discharged from the contract. (vi) Correspondingly, duties or obligations which are personal in nature cannot be transferred from a person who had to personally discharge those duties to his legal representatives, on the demise of the later, just as a right is uninheritable and the right personal to him dies with the death of the owner of the right; similarly, a duty cannot be transferred to the legal representatives of the deceased if the same is personal in nature.<sup>41</sup>

The apex court emphatically laid down that the personal consideration and exercise of special skill by the promisor will not make his legal representative liable for his contractual obligation for which section 41 has been invoked which provides that where intention of the parties to a contract indicates that the promise should be performed by the promisor himself, then in such cases promise should be performed by him alone but in all other cases the promisor or his representative may employ a competent person to perform it.

The Supreme Court has cast net on wide waters by implying personal skill and expertise in section 41, which does not expressly provide so. Neither section 37 nor section 41 expressly mentions the conditions that have been filtered out by the apex court from these sections. However, two illustrations that have not been cited by the apex court do make the application of these two sections abundantly clear.

Illustration (1) A Promises to deliver goods to B on a certain day on payment of Rs. 1000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1000 to A's representatives.

Illustration (b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

40 *Id.* at 1392.

41 *Ibid.*

The above illustrations amply outline the scope of section 37. The representatives of the deceased will be absolved from the responsibility, and there will be no vicarious liability for them when the performance of the contract is based on the continued existence of the promisor, which, in other words, will be a personal performance. For instance, a contract for painting a picture, writing a book, singing a song, acting in a film or serial or rendering professional service like a doctor, lawyer, engineer, architect, etc. The continued existence of the subject matter and death or incapacity of the party required to make personal performance under a contract are judicially recognized grounds of frustration of the contract under section 56. Whether the services of the contractor qualify for the above-mentioned personal service is a moot point. To bring the services of the contractor within the purview of illustration (b) will have far-reaching consequences.

#### **Banker's general lien**

In *Balaram Chowdhury v. Indian Bank, Bhubaneshwar*,<sup>42</sup> the High Court of Orissa was called to determine the ambit and scope of the banker's general lien as envisaged in Section 171 of the Indian Contract Act.

The petitioner had acquired a home loan of Rs. 6,71,000 *vide* A/C no: 6572029945 from the Indian Bank for which the petitioner and his wife, Sagurti Chaudhury, were shown as joint borrowers. The petitioner had deposited the original title deed of his self-acquired property.

The petitioner's wife was running her own business in partnership with one Dutta under the banner of Koshish. These two partners availed a loan of Rs. 20 lakhs from the same bank (Indian Bank) on behalf of their firm and also availed a term loan of Rs. 30 lakhs. However, due to non-operation of the open cash credit account and non-payment of installment, both these accounts in the name of the petitioner's wife were declared as NPA. The petitioner received a notice from the bank stating that the CIA (Certified Internal Auditor) number of his wife would be linked to the debt account of Koshish, indicating the outstanding amount of Rs. 21,63,291 Lakhs in respect of open cash Account no: 6609955017 and Rs. 24,66,361 lakhs in respect of term loan account 6605504055. It was further mentioned in the notice that if the dues are not cleared, then the personal CIF of the wife of the petitioner would get linked to the loan dues of the firm. The petitioner was also informed that his loan account will also be declared NPA only because the loan amount of the firm Koshish has been declared, even when the petitioner has not committed any default in repayment of the home loan taken by him.

The petitioner, immediately after receiving the above stated notices, paid the outstanding amount of Rs. 3,30,000 lakhs of the home loan account and closed it then and there. In spite of the closing of this home loan account, the bank did not release the title deeds deposited by him with the bank as security for repayment of the home loan. The bank contended that it is within its right to exercise a general lien and deny the release of the documents because the loan account of his wife has been declared as NPA, and she was the borrower of the home loan together

42 AIR 2024 Ori. 107.

with her husband, against which title deeds were deposited as security. Though this home loan has been repaid, her separate account has been declared as NPA. The bank has exercised its general lien and is not bound by law to release these title deeds till the loan is repaid.

This action of the bank was challenged in the present petition, in which the ambit and scope of Section 171<sup>43</sup> of the Indian Contract Act became the focal point. The court recorded its observation in the following words:

On a careful perusal of Section 171 of the Indian Contract Act, it comes to notice that to exercise a general lien to retain the document as a security for a general balance of account, one of the ingredients is that the property must be bailed in favour of the bank.

No law for the time being in force permits the bank to retain the title deeds alleging dues in respect of any other transaction under section 171 of the Indian Contract Act. The bank is bound to receive the balance and issue a no due certificate in respect of the loan and return all the documents deposited by the petitioner.

The mortgage was created for a specific loan transaction. Upon repayment of said loan, under no stretch of imagination, the bank would claim a general lien and retain the documents. Title deed deposited as a security is not a form of security in respect of which section 171 of the Contract Act can be applied.<sup>44</sup>

The above decision of the Orissa high court is influenced by the ruling of the High Court of Madras in *Ginning Industries Private Ltd v. TN Mercantile Bank* which lays down as under;

Section 171 of the Contract Act confers the statutory right on a banker to retain as security for a general balance of accounts any goods bailed to them. The said statutory right is only for the recovery of their legislative dues. When section 171 of the Contract Act contemplates only retention of goods, it has to be seen whether the title deeds of the plaintiffs can be deemed as “goods” as defined under the Sale of Goods Act. The term “goods” contemplated in Section 171 of the Contract Act is to be understood in the sense that it should be converted into money, or in other words, the goods should have marketability. In the instant case, the “goods” mean only the title deeds which belong to the customer, viz., the plaintiff, and were deposited with the defendant bank as security. Therefore, there will be no bailment in case of title deeds.

The above concurrent findings of the two high courts need consideration on the following lines.

Section 171 of the Contract Act provides a provision for a general lien to bankers in addition to other entities as a special case.

43 S. 171. General lien of Bankers, factors, wharfingers, attorneys of a high court and Policy-brokers may in absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them but no other person have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

44 *Supra* note 42 at 110.

- i. The Supreme Court in *Syndicate Bank v. Vijay Kumar*<sup>45</sup> has held that the lien in its primary sense is a right to retain that which is in its possession, belonging to another, until certain demands of the person (bank) are satisfied. The bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking, and the general lien is a valuable right of the banker judicially recognized. Similarly, in *Brahmayya and Co. v. K.P. Thangave Nadar*,<sup>46</sup> the court ruled that when goods are deposited with, or securities are placed in the custody of a bank, it would be correct to speak of the rights of the bank over the security or the goods as a lien because the ownership of the goods or securities would continue to remain with the customer. In *City Union Bank Ltd v. Thangarajan*,<sup>47</sup> it was laid down that the bank gets a general lien in respect of all the securities of the customer, including negotiable instruments and FDRs, but only to the extent of which the customer is liable. In *Chettina Mercantile Bank Ltd. v. PL. A Pichammai Achi*,<sup>48</sup> AIR 1945 Mad.447; (1945)2MLJ100 it was laid down that the banker's lien can properly be said to arise only in respect of any of the securities held by the bank, and the bank has a lien over these securities.
- ii. The court construed the expression "goods bailed" under Section 171 narrowly, which excluded the exercise of lien in the title deeds deposited with the bank as security of loan. The court held that the title deeds deposited with the bank are not the goods bailed as understood under section 171. It is submitted that the definition of the goods has to be understood in the sense as mentioned under section 2 (7) of the Sale of Goods Act, which defines goods as movable property except actionable claims and money, and includes stocks and shares. Section 2 (11) defines "property" as the general property in goods and not merely a special property.
- iii. The title deeds have been deposited as security, which is equivalent to the goods bailed as understood under section 148 of the Indian Contract Act that defines the bailment. The bailment is a delivery of goods for some purpose, and once the purpose is accomplished, the bailed goods have to be returned. The same holds for the title deeds, which have been deposited as security to secure the loan. Once the loan is repaid, the security (title deeds) has to be returned. The only difference is that a bailee has a right of lien on the goods over which he has expended his skill and labour, which is called a particular lien (Section 70), but as against this particular lien, the bankers can also exercise a general lien over

45 AIR 1992 SC 1066.

46 AIR 1956 Mad- 570.

47 (2003) 46 SCL 237 (Mad.).

48 AIR 1945 Mad.447; (1945)2MLJ100.

securities deposited by the borrower for whatever is outstanding against such borrower.

- iv. The court in the instant case erroneously held that no document had been placed before this court to show that the borrower had given any authorisation to the bank to hold the documents of the already mortgaged property given as security to obtain the loan for the purpose of securing any other loan. In-fact, this contrary contract is not required to be shown for exercising the general lien, but it is the other way round. This legal position has been accepted by the court at another place in the same judgment by holding:

Therefore, what is required to be seen in the instant case is whether there is any contract to the contrary, which prevents the bank from exercising its general lien and as to whether any goods have been bailed to them.<sup>49</sup>

The above observations of the present author should not be stretched to conclude that the final judgment in the instant case has been put in question. The observation of the court that the bank in the instant case is not within its right to exercise a general lien aligns with the relevant provisions of law, including the opinions expressed by the courts in the earlier judgments. The bank's general lien can be exercised only when the demand is mutual and between the same parties,<sup>50</sup> and must belong to the borrower in the same capacity.<sup>51</sup> However, it is to be noted that the banker can exercise the right of general lien, that is, the "general" as against the "particular" lien of the banker. This general lien permits the bank to combine the securities of one or more accounts of the same customer. It also permits the bank to stop the release of securities received against a loan already repaid when another loan of the same customer is not yet paid. However, the bank is not within its rights to combine securities received against the loan sanctioned to two different persons or to the same person but holding accounts in different capacities. For instance, a borrower and a director of a company or an individual and a partner of the firm or a partner of two different firms.<sup>52</sup>

On the analogy of the above case law, the judgment handed down in the instant case correctly lays down that the bank cannot withhold securities deposited against the loan advanced in the account of the husband that has been liquidated against the separate loan account of the wife that has been declared as NPA. The couple has maintained two separate loan accounts, and the wife's loan account of the wife has another partner also. Thus, there is no mutuality, and the loan account of the husband has no contractual relationship with the loan account of his wife. The court has, therefore, rightly held that the bank cannot exercise a general lien in

49 *Supra* note 44 at 110.

50 See also *Punjab National Bank Ltd v. Aruna Mal Durga Das* AIR 1960 Punj 632.

51 AIR 1934 Rang. 66

52 See *Raman v. Chota Nagpur Banking Association Ltd* 1944 Pat 368 and *Punjab National Bank Ltd v. Satyapal Viramani* AIR 1956 Punj. 118.

the instant case and withhold the securities of the husband against the NPA account of his wife.

However, the opinion of the court that the “goods bailed” under section 171 required for the exercise of general lien do not cover “title deeds” needs reconsideration because customers need a loan facility which has become life line of the country’s economic growth, and this loan is facilitated by depositing the title deeds in the bank. This makes the whole process customer-friendly as well as bank-friendly. It becomes easy for the customer to deposit the title deeds of his property with the bank, which is readily available without any further formality, and the bank is also convinced that the property cannot be disposed of, as it holds the document of title. This is a win-win situation for both parties. Holding otherwise will do no good to the customer nor to the bank. The bank will ask for alternative security in place of documents of title to secure its loan, and the customer has to either arrange it or drop the idea of obtaining the loan, which may, in turn, have far-reaching implications on the country’s economy. The Supreme Court has to step in to clear the mist of confusion, or the parliament has to append an explanation to section 171, which may be on the following line.

#### **Proposed explanations to be appended to section 171**

Explanation -I, for the removal of any doubt, the expression “goods bailed” used in Section 171 would include a document of title to the goods or any other security provided to the bank instead of the loan advanced to the customer.

Explanation –II The general lien can be exercised by the bank in respect of the goods bailed by the customers against any loan advanced to them, but would not include the goods bailed as security in respect of any other account jointly held by the customer with others.

### III PARTNERSHIP

In *S. Shivray Reddy v. S. Raghuray Reddy*,<sup>53</sup> multiple issues were raised, including the effect of the death of a partner on the status of the partnership firm and the application of limitation in the absence of averments to this effect. In this case, a firm was constituted in which M Balary Reddy was one of the partners. The primary business of the firm was the construction of buildings on a contract basis with respect to the works of the government and municipalities. Reddy died in 1984, but the firm continued its business.

The respondent/plaintiff no.1 instituted a suit bearing no. O.S No: 67 of 1997, thirteen years after the death of the partner, seeking relief of the dissolution of the firm and rendition of accounts. The II Additional Chief Judge, City Civil Court, Hyderabad allowed the original suit and passed a decree with a liberty to file a separate application seeking appointment of an advocate commissioner for rendering accounts of the firm and for other appropriate reliefs.

The defendant firm filed a C.C.C Appeal No. 35 of 1999 before the High Court of Andhra Pradesh. The appeal was allowed on the ground that O.S No. 67 of 1997

53 AIR 2024 SC 2897.

was barred by the limitation, as one of the partners in a subsisting partnership firm died in 1984. Therefore, the firm stood dissolved immediately on the death of the partner. Since the original suit was filed in 1997, it was barred by limitation.

Aggrieved by this decision, an LPA was filed before the division bench that had allowed the appeal and set aside the judgment on the ground that the plea of limitation was never raised during the pleadings in the trial court and the learned single judge ought not to have dealt with that issue at all. The appellants, being aggrieved by this decision, have preferred the present appeal by a special leave.<sup>54</sup>

The precise questions before the apex court were (i) whether the firm stands dissolved immediately after the death of the partner?

- (ii) When the limitation period will be computed in such cases, from the date of expiry of the partner or from the date of the cause of action?

The apex court invoked Section 42 of the Partnership Act, which deals with the dissolution on the happening of certain contingencies.<sup>55</sup> It was ruled:

A fervent plea was raised by learned counsel for the respondents that the firm continued to exist even after the death of Shri M Balary Reddy, and the business activities were continued by the firm. Even it is assumed for the sake of argument that the partners were carrying on the business activities after the death of Shri M Balary Reddy, there cannot be any doubt that the firm stood dissolved automatically in the year 1984 as mandated under section 42(c) of the Act unless and until there was a contract between the remaining partners of the firm to the contrary. There is, of course, no such averment by the respondents. The business activities, even if carried on by the remaining partners of the firm after the death of Shri M Balary Reddy, would be deemed to be carried on by them in their individual capacity in the circumstances noted above.<sup>56</sup>

The apex court invoked Section 42 of the Partnership Act, but without appraising the language of this section. Section 42 provides that in the absence of any contract, a partnership firm stands dissolved, *inter alia*, by the death of a partner. This section does not expressly provide that this agreement should be in writing or registered, like other sections in the Indian Contract Act.<sup>57</sup> It is an established principle of contract jurisprudence that a contract may be either express (oral or written) or implied, *i.e.*, by the conduct. This means that an implied contract

<sup>54</sup> *Id.* at 2898.

<sup>55</sup> Subject to contract between the partners a firm is dissolved;

- a) if constituted for a fixed term, by the expiry of the term;
- b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;
- c) by the death of a partner; and
- d) by the adjudication of a partner as an insolvent.

<sup>56</sup> *Supra* note at 2901.

<sup>57</sup> For instance: S. 25 of the Indian Contract Act.

would also satisfy the requirement of a contract as envisaged in section 42. This implied contract is very much evident from the conduct of the partners of the firm in the instant case. The firm continued its business from 1984 onwards when Reddy, one of the partners of the firm, died, and a suit for dissolution of the firm and rendition of accounts was instituted in 1997. Thus, continuance of business could be attributed to an implied contract in the instant case.

The observation of the apex court that the business activities, even if carried on by the remaining partners of the firm after the death of Reddy, would be deemed to be carried on by the remaining partners in their individual capacity is to deny the obvious. How could they carry on the joint business of the firm and share the profit of the business of the firm, yet they will be deemed to have carried on their business in their individual capacities? How could the joint business of a firm carried on by the partners of the firm for thirteen long years, after the death of a partner, be deemed to have been carried on by the partners in their individual capacity? This argument of the apex court does not find favour with section 4 of the Partnership Act, either. This section defines the partnership as a relationship between the persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. This provision does not make an express contract a *since quo non* for constituting or reconstituting a firm. The firm carrying on a business for 13 long years, as in the present case, should have been considered as a firm carrying on a business despite the death of the partner, and it should have been deemed that there was an implied contrary contract to carry on business as a firm even after the death of the partner. The death of the partner of a firm will result in the dissolution of the firm, unless there is a contract to the contrary, which may be express or implied by the subsequent conduct of the parties. The continuation of the business of the firm after the death of a partner should be construed as a contract contrary to the dissolution of the firm.

#### IV NEGOTIABLE INSTRUMENTS

##### **Presumption of debt**

The apex court had to deal with the challenge of concurrent findings of the acquittal of the accused by the courts below in *Dattatraya v. Sharanappa*.<sup>58</sup> The appellant is an original complainant who claims to have known the sole respondent for the last six years. The respondent had borrowed rupees 2 lakhs from the appellant to meet the family's necessities. The respondent had issued a cheque against this loan amount, which was drawn on the Bank of India as a guarantee against repayment. The respondent was to repay the amount within a period of six months, for which a written agreement was also executed. The respondent failed to repay the amount in spite of the repeated reminders. The appellant had no choice but to present the cheque for encashment on October 22, 23. The cheque was dishonored on account of insufficient funds, for which a bank memo was issued on October 24, 2023. Being aggrieved by the dishonor of the cheque, a demand notice was sent by the appellant on October 31, 2023 to the respondent,

58 AIR 2024 SC 4103.

wherein it was stated that the respondent had intentionally cheated him and had not made any effort to discharge his liability. It was stated in the demand notice that the respondent had committed an offence under Section 138 of the NI Act and Section 420 of the Indian Penal Code, 1860.

The respondent in his reply notice contended that the accusations made by the appellant are false and devoid of any pertinent details of loan transactions, like date and time of advancement of the said debt, which in fact was never advanced. The appellant was not satisfied with the reply of the respondent, so he filed a criminal complaint against him under Section 200 of the Cr PC (Now replaced by the *Bhartiya Nagrik Suraksha Sanhita (BNSS)*, 2023). The trial court found that the cheque was not originally given to the appellant as a security cheque. Instead, the same was given to the appellant six months later when the respondent had failed to repay the loan amount. The trial court observed that the agreement marked by the appellant in support of his case was without the signature of the respondent, contrary to the terms of the agreement, but a signature was affixed by the respondent on the stamp paper itself, which, in the opinion of the court, is not sustainable in the eyes of the law. The court also examined the ITR of the appellant and found that he had failed to declare the alleged loan transaction as a part of his returns to the IT Department. The trial court dismissed the complaint filed by the appellant and acquitted the respondent.

The appellant moved to the High Court of Karnataka against the decision of the trial court. The high court found a contradiction in the statement of the appellant as to the time and date of the issuance of the cheque. The high court took the help of the ratio of *Rangappa v. Sri Mohan*<sup>59</sup> in deriving the conclusion that the presumption under section 139 about the validity of the negotiable instrument is a rebuttable one. The contention of the respondent that the financial capacity of the appellant was not sound, so he was not in a position to lend the money in dispute to the respondent, was accepted by the high court and presumed that the loan transaction had not taken place.

The appellant got two concurrent findings against him that did not deter him from moving to the apex court. The appellant contended before the apex court that the signature on the cheque was admitted by the respondent, which is sufficient to raise a presumption under section 139 of the NI Act, and the respondent had failed to rebut the said presumption. The appellant also challenged the application of the ratio of the *Rangappa* case by the high court as it was misplaced, and the respondent had failed to discharge his onus even by applying the standard of preponderance of probabilities.

The apex court, after hearing both parties, made some pertinent observations. The court, while tracing the history of liability under section 138, observed that the earlier cheque dishonor cases were dealt under section 420 read with section 415 of the IPC. To enhance the acceptability and credibility of the negotiable instruments, amendments were made in the NI Act by introducing Chapter VIII for

59 AIR 2010 SC 1898.

providing adequate safeguards to honest businesses that accept negotiable instruments in the faith that it will be honored in due discharge of the liability of the drawer.

The apex court dissected Section 138 of the NI Act and observed that this section can be successfully invoked only when three conditions are fulfilled by the appellant. Firstly, the cheque must be present for encashment within its validity period. Secondly, the holder of the instrument must have made a demand for payment to the issuer, and lastly, the drawer ought to have failed to make the payment within a period of 15 days of the receipt of the demand. The court further held that section 142 (b) explicitly provides a limitation period of 30 days from the date when the cause of action has arisen for initiating proceedings under Section 138 of the NI Act.

The apex court endorsed its earlier opinion expressed in *K. Bhaskaran v. Sankaran Vaidhyan Balan*<sup>60</sup> and held that the issuance of cheque towards a liability, the presentation of the cheque within the prescribed period, its return on account of dishonor, notice to the accused and failure to pay within 15 days thereof, stand as *sine qua non* for an offence under Section 138 of the NI Act. The court further added that the period of one month of filing a complaint for Section 138 of the NI Act 1881 has to be reckoned from the date the drawer of the cheque has failed to discharge his liability to the presenter within the prescribed period of 15 days as per the proviso (c) to section 138 of the NI Act, 19881. It was emphasized that a conjoint reading of sections 138 and 142 of the NI Act, 1881, makes it clear that the cause of action arises only after the failure of the drawer to pay, after the receipt of the demand notice.<sup>61</sup>

The apex court deliberated on the objects of the NI Act that led to the amendments to Chapter VIII, which has prescribed a procedure for summary trials as envisaged in Sections 260 to 265 of the Cr PC 1973 (Now the Bharatiya Nagarik Suraksha Sanhita, 2023) that has to be applied for the trials under Section 138 of the NI Act. The court opined that a liberal approach has to be adopted in the attendance of the accused. His attendance is sought only when his presence is indispensable; the court must grant an exemption where some exceptional circumstances so warrant. The issuance of a non-bailable warrant in case of absence of an accused, due to any circumstances, at the first instance, shall be avoided.

The apex court churned out the gist of Section 118 of the NI Act by stating that this section of the NI Act lays down special rules of evidence appended to the scheme of the Act. It raises a rebuttable presumption against the drawer that the negotiable instrument was drawn and subsequently accepted, indorsed, negotiated, or transferred for existing consideration, and the date so designated on such an instrument is the date when the concerned negotiable instrument was drawn.

60 AIR (1999) 7 SCC510.

61 *Supra* note 59 at 4107.

There is also a presumption as to the fact that the same was transferred before its maturity and that the order in which multiple indorsements appear on such an instrument, that is the deemed order thereon. The holder of a negotiable instrument is presumed to be its holder in due course, except where the negotiable instrument is obtained from a lawful owner and from his/ her lawful custody thereof with the help of an offence as contemplated under any law or through the means of fraud. In all such cases, the burden of proof lies upon the holder of a negotiable instrument to prove that he is the holder in due course.<sup>62</sup>

The apex court then threw light on the import of Section 139<sup>63</sup> of the NI Act by holding that the presumption envisaged under Section 139 of the NI Act imposes an obligation on the trial court to presume that the cheque in dispute was issued by the drawer or accused for the discharge of a particular liability. The use of the expression “shall presume” ameliorates the conundrum about the right of the accused to present evidence for rebutting the said presumption. The effect of such presumption is that upon filing of the complaint along with the relevant documents, thereby prima facie establishing the case against the drawer, the onus of proof shifts on the drawer or accused to adduce cogent material and evidence for rebutting the said presumption.

The apex court endorsed the viewpoint that section 139 incorporates what is commonly called the reverse onus, which has been incorporated with an object to inject and enhance credibility of the negotiable instruments and serves as an indispensable device to prevent undue delay in the decision-making process. The test of proportionality has been approved, but the accused is not required to rebut the presumption through an unduly high standard. Therefore, the liability of the defence in cases under section 138 of the NI Act is not that of proving its case beyond a reasonable doubt.

The apex court took the help of its recent ruling in *Rajesh Jain v. Ajay Singh*<sup>64</sup> and opined that the accused may establish non-existence of a debt or liability either through conclusive evidence that the concerned cheque was not issued towards the presumed debtor liability, or through adduction of circumstantial evidence vide standard of preponderance of probabilities. The presumption only enables the holder to show a prima facie case; it can survive before a court of law only when the contrary has not been proved to the effect that a cheque or negotiable instrument was not issued for a consideration or for discharge of any existing or future debt or liability.<sup>65</sup>

62 *Id.* at 4108.

63 S.139 reads as follows: Presumption in favour of holder: It shall be presumed, unless the contrary is proved that the holder of a 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.

64 (2023)10 SCC 148.

65 *Supra* note 59 at 4109.

The support of section 140<sup>66</sup> of the NI Act was taken by the apex court in the following words:

Through this legal fiction adopted by the legislature vide Amendment Act of 1988 to the NI Act of 1881, it has barred the drawer of a cheque, which was dishonored, to take a defense that at the time of issuance of the cheque in question he or she had no reason to believe that the same will be dishonored upon being presented by the holder of such a cheque, especially and specifically for the reasons underlined in section 138 of the NI Act, 1881.

The apex court advised for conjoint reading of sections 118, 139, and 140 of the NI Act, which gives birth to a deemed fiction and acknowledged that a similar viewpoint has been expressed by this court in *K.N Been v. Mauniyappan*.<sup>67</sup> Section 118 provides for a presumption that a negotiable instrument (including a cheque) has been drawn for consideration unless the contrary is proved. Under section 139, it shall be presumed that the holder of the instrument received it in due discharge of the whole or part of the debt or liability unless the contrary is proved. Section 140 further strengthens the case of the complainant by taking the defence of lack of *mens rea* from the accused by stating that it shall not be the defence of the accused that he had no reason to believe at the time of the issuance of the cheque that it may be dishonoured on the presentment.

The apex court in the instant case went beyond *K N Been (supra)* and followed *Rangappa*<sup>68</sup> and *Rajesh Jain*<sup>69</sup> to clarify the position that the accused would undoubtedly place reliance on the materials adduced by the complainant, which would include not only the complainant's version in the original complaint but also the case in the legal or demand notice., complainants case at the trial, plea of the accused in the reply notice, his section 313 Cr PC 1973 statement or at the trial as to the circumstances under which the promissory note or cheque was executed. The accused ought not to adduce any further or new evidence from his end in the said circumstances to rebut the concerned statutory presumption.<sup>70</sup>

The apex court recorded its conclusion in the following words.

It is apparent that there existed a contradiction in the complaint moved by the appellant at his cross examination relating to the time of presentation of the cheque by the respondent, as per the statement of the appellant. This is to the effect that while the appellant claimed the cheque to have been issued at the time of

66 Defence which may not be allowed in any prosecution under section 138: It shall not be a defence in a prosecution for an offence under section 138 that the drawer had no reason to believe when he issued the cheque that the cheque may be dishonoured on presentment for the reason stated in that section.

67 AIR (2001) 8 SCC 458.

68 *Rangappa v. Sri Mohan* (2010) 1SCC 441.

69 *Rajesh Jain v. Ajay Singh*, AIR 2023 SC 5018.

70 *Supra* note 59 at 4110.

advancing the loan as security, during the cross-examination, it was revealed that the same was presented when an alleged demand for repayment of the alleged loan amount was raised before the respondent, after a period of six months of advancement. Furthermore, there was no financial capacity or acknowledgement in his income tax returns by the appellant to the effect of having advanced a loan to the respondent. Even further, the appellant has not been able to show case as to when the said loan was advanced in favour of the respondent, nor has he been able to explain as to how a cheque issued by the respondent allegedly in favour of Mr. Mallikarjun landed in the hands of the instant holder, that is, the appellant.<sup>71</sup>

The apex court admitted that the appellant was able to establish that the signature on the cheque in question was that of the respondent and cited *Bir Singh*<sup>72</sup> case to drive a point home that a presumption is to ideally arise but did not carry it forward because the appellant had not, in the opinion of the apex court, been able to put forth details of the loan advanced and there was contradiction in his statements. It is because of these two reasons that the apex court concluded that the ratio of *Bir Singh's* case would not have any impact on the present case to the effect of giving rise to the statutory presumption under section 139 of the NI Act, 1881. As against this, the respondent has been able to shift the weight of the scales of justice in his favour through the preponderance of probabilities.<sup>73</sup>

It is submitted that the apex court analyzed all the relevant provisions of the NI Act revolving around the issue in hand, but did not properly appraise the ambit and scope of section 138 read with sections 139 and 140 of the NI Act. The apex court rightly laid down that the object of the amendment to Chapter VIII was primarily to enhance the acceptability of the negotiable instruments and public trust in them. This is the reason that section 138 is supplemented by two more sections, namely sections 139 and 140. The overall scheme of this chapter is to ease the suffering of the person who has parted with his hard-earned money instead of any negotiable instrument. The findings of the trial court that it is not quite clear whether the cheque that was in dispute was given at the time when the loan was provided, or it was given at some later date when the holder of the cheque had demanded repayment of the loan, are irrelevant for section 138. This was repeated by the high court as well as by the Supreme Court, but the fact of the matter is that this contradiction should have no bearing on the decision of the case. Section 138 of the NI Act that fastens the liability on the drawer for issuing a cheque that is dishonored no-where mentions that the cheque should be issued

71 *Id.* at 4111.

72 *Bir Singh v. Mukesh Kumar*, AIR 2019SC 2446.

73 *Supra* note 59 at 4111.

at the time when the loan is granted. The cheque may be given immediately or afterwards. Section 138<sup>74</sup> is silent about the timing of the issuance of the cheque.

The apex court admitted that the trial court as well as the high court had found that the signatures on the cheque as well as on the agreement between the parties herein stand admitted,<sup>75</sup> but the financial capacity of the creditor (appellant), as pointed out by the accused, is not sound enough to permit him (appellant) to lend money to the accused. This finding of the apex court is not in line with the requirements of the relevant provisions on the subject because once the negotiable instrument and the agreement are accepted by the parties along with their signatures, the statutory presumption in sections 138 and 139 will follow. The complainant need not prove his financial viability to lend the money at this stage. To rebut the presumption of validity of the negotiable instrument, the drawer is free to raise financial incapacity of the lender in his defense, but it cannot be used as an initial burden on the holder to show that he had a financial capacity to lend the money. This burden is on the drawer and not on the drawee. This burden cannot be discharged by the accused by merely contending that the complainant had no financial capacity to lend the money. He has to prove it with tangible evidence, and only then will the court take into account the preponderance of probabilities to decide whether the accused deserves acquittal or conviction. There is a sharp dividing line between the two approaches that has not been appraised by the apex court.

This decision has far-reaching implications on the sanctity, acceptability and credibility of the negotiable instruments, more particularly, their statutory presumption will be diluted by the decision of this case because the validity of the instrument has been determined on conditions other than those mentioned in the provisions of the NI Act.

74 S. 138. Dishonour of cheque for insufficiency, etc., of funds in the account- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for [a term which may be extended to two years'], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier; (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice; in writing, to the drawer of the cheque, 5 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice. Explanation. For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

75 *Supra* note 59 at 4111 para 30.

The above opinion of the apex court handed down by the single bench has been now overruled by the division bench of the Justices Sudhanshu Dhulia and Ahsanuddin Amanatullah in a relatively later judgment on April 2, 2025 in *Ashok Singh v. State of Uttar Pradesh*,<sup>76</sup> This decision does not fall in the surveyed year (2024) but for the sake of clarity on the subject and to have latest information to the readers on the issue in hand that this judgment is discussed here.

The issue came up before the Supreme Court in an appeal against the decision of the High Court of Allahabad. The appellant, namely Ashok Singh, contended to have lent a sum of 22 lakhs to the respondent as a loan against a cheque. The appellant presented the cheque to the bank, but it was returned unpaid with the notation, “payment stopped by drawer.”

The appellant (complainant) served a demand notice within the 30-day window allowed by the NI Act after this dishonour of the cheque by the respondent, but he did not respond to this notice. Thereafter, a criminal complaint was filed under Section 138 of the NI Act within the prescribed 15 days. The trial court convicted the accused, and this conviction was upheld by the first appellate court. The accused went on appeal before the High Court of Allahabad. The appeal was upheld on the ground that the financial capacity of the complainant would not have permitted him to lend such a huge amount as a loan to the respondent. The appellant contested this reversal before the Supreme Court.

The Supreme Court of India overruled the decision of the High Court of Allahabad and reaffirmed that the statutory presumption in favour of the complainant exempts him from demonstrating his financial capacity to lend this money.

The apex court opined that the burden of rebuttal rests on the accused because the statutory presumption under Section 139 of the NI Act is a strong one. It was rightly clarified that at the threshold, it is not the complainant’s responsibility to demonstrate his ability or financial resources to make the payment for which the cheque is purportedly issued in his favour. *Holding otherwise will defeat the whole statutory scheme that was quite obviously enacted to protect the interest of the lender of money instead of a negotiable instrument.*<sup>77</sup> The court ruled that the appellant (complainant) cannot be expected to proactively lead evidence to show his financial capability from the beginning unless the accused expressly raises a defence at least in response to the statutory demand notice that the complainant lacked the financial capacity to lend money.

The court observed that the respondent did not react to the statutory notice that was served to him as per the provisions of Section 138, and the late-filed defence that the complainant lacks funds is inadmissible as it would tantamount to placing the initial burden on the complainant. And supported the appellant’s position that he could not be initially burdened with demonstrating his ability to

76 [Criminal Appeal No. 4171 of 2024] decided on Apr 2, 2025: 2025 Latest Case law 323 SC.

77 Added by the present author.

pay his debts. The apex court emphasised that the accused still bears this responsibility because he did not reply to the demand notice to provide proof that the complainant lacked the funds to make the loan, and they did not refute the presumption of a legally enforceable debt.

This division bench ruling is in tune with the legislative scheme envisaged in sections 138, 139 and 140. The burden to prove that the complainant lacked financial capacity is on the accused, which could be considered as a rebuttal of the presumption by applying the “rule of reason” and not the “per se approach.” This rule requires that the court be satisfied that there is every reason to believe that the complainant is neither financially sound nor has other resources to raise this money, which he had lent to the accused. It is a common experience of the good olden days that the partners/ friends would arrange money for each other in times of need, in spite of personal incapacity to finance. All these factors have to be taken into account before deciding the financial capacity of the complainant, for which the defendant has the initial burden to rebut the statutory presumption that is loaded in favour of the complainant.

#### **Liability for the dishonour of a cheque**

In *Rajco Steel Enterprises v. Kavita Saraff*,<sup>78</sup> the Supreme Court was called to decide issues surrounding the dishonour of a cheque in the backdrop of concurrent findings of the two appellate courts against which the present SLP was filed. The petitioner had challenged a common judgment of the High Court of Calcutta by which the petitioner’s appeal against the acquittal of the first respondent in respect of offences under Section 138 of the NI Act was dismissed.

The petitioner, namely Ramish Gupta, had lodged four complaints under Section 138 of the NI Act against the accused/respondent-I, after these cheques were dishonored for want of sufficient funds. These cheques were drawn on November 7, 2008 on the Axis Bank Limited, Burra Bazar in Kolkata. The trial court found that the accused had issued cheques in discharge of a legally enforceable debt and she had failed to rebut the presumption contained in Section 118 read with Section 139 of the 1881 Act. This decision of the trial court was set aside by the appellate court on the ground that the complainant/petitioner has failed to produce any document showing any loan transaction and has also failed to prove handing over of the cheques to him by the accused/respondent No. 1. The first appellate court also took the note of the fact that the signature of the accused and the figures showing the amount in the respective cheques were in different inks and held that the accused respondent had successfully discharged the presumption of guilt contained in the relevant sections of NI Act.

The second appellate court did not interfere with this judgment. It has found that the complainant could not produce any substantiating, valid documentary evidence to establish the existence of a legally enforceable debt or liability. The high court further ruled that by applying the principle of balance of probabilities, a plausible case has been made out by the defense as regards the non-existence of

78 AIR 2024 SC at 2106.

any legally enforceable debt or liability. The balance sheet and the accounts statement of the accused reflect a sorry state of affairs for the finances, and thus, it was concluded that the accused, within the prudence of a normal person, could not have undertaken such transactions for the petitioner/complainant without any consideration whatsoever.

In the present appeal before the apex court, initially, reluctance was shown on the part of the court to interfere with the concurrent findings of the appeal courts below. The court invoked its earlier ruling<sup>79</sup> on this issue and held that this court will interfere with the concurrent findings only when the judgment is not based on evidence or is perverse. Thus, the apex court confined its findings to these two issues only. The apex court stated as follows.

The whole question involved in this proceeding is as to whether the cheques were issued in discharge of a debt, and if they were so, then whether the accused/respondent No.1 was able to rebut the presumption in terms of Section 118 read with Section 139 of the NI Act.<sup>80</sup>

It is submitted that the above two issues framed by the apex court to decide the appeal in hand are not strictly in resonance with the applicable provisions of law. The first question framed above, i.e., “whether the cheques were issued in discharge of a debt,” is to be presumed in light of Sections 118 and 139 of the NI Act. However, this presumption is rebuttable, that would mean that the accused has to rebut it and not the complainant. The findings of the two appellate courts that were upheld by the apex court in the present case would show that the burden was put on the complainant to ward off the allegations levelled against him on the basis of the additional evidence. When that additional evidence was not produced to the satisfaction of the court, the accused was acquitted of any liability under section 138. It is in place to mention that the whole statutory scheme under the NI Act is leaning in favour of the “holder in due course” and a statutory presumption has been carved out to protect his interest because he has parted with his hard-earned money or bartered away his legitimate claim instead of a cheque or any other negotiable instrument. Thus, to begin with, the complainant has to prove that he is a “holder in due course”; then the onus is on the accused to rebut the presumption that favour the holder in due course.”

#### V CONCLUSION

The above discussion has been confined to only those decisions of the high courts and the supreme court that have expounded the law that need, in the opinion of the present author, reconsideration in light of the arguments put forward. The apex court was called to determine the effect of COVID-19 on contractual obligations of the parties. The court could not find any such clause in the contract that would permit its application; nevertheless, it declared it as an *act of God* or *force majeure*, which the parties could not foresee. The court declared that the

79 *Narendra Pratap Narain Singh v. State of UP* (1991) 2 SCC 623.

80 *Supra* note 79.

contractual obligations were dissolved because of the non-performance of the contract due to the Covid-19. The court applied a theory popularly called an “implied-in-fact Contract” theory, which stipulates that with every express contract runs parallel some implied terms in the contract that make performance of the contract contingent upon them, like non-happening of the act of God, continued existence of the subject matter, *etc.* This theory deals with the frustration of the contract. However, the court did not discuss the case with reference to the frustration of the contract but invoked an act of God doctrine, which constitutes one of the grounds of the frustration of the contract.

A scrutiny of the facts of the case discloses that the defendant had failed to perform the agreement before the advent of COVID-19, and the nature of the contract reveals that COVID-19 had affected the industrial activity, but that was not a part of the contract. The circumstances surrounding the case further reveal that it could have been, at best, the case of commercial hardship, but the courts have consistently held that commercial hardship is not a ground for the frustration of the contract.

In *Re: Interplay Between Arbitration Agreements under A and C Act and Stamp Act*, the apex court rightly ruled that the A and C Act is a special legislation when compared with the Contract Act, but the endorsement of its earlier ruling in the *Bhaven Construction* case by the apex court in the instant case creates a doubt. The ruling in this case was that the A and C Act is a complete code in itself. This ruling does not align with the existing legislative framework in place. The Indian Contract Act is the mother legislation, and its sections apply to all valid contracts. A contract is not valid unless it is enforceable by law as provided in section 10 of the Indian Contract Act, and to hold that the A and C Act is a complete code in itself is not correct. Similarly, sections 14 to 22 of the Indian Contract Act deal with the free consent of the parties. The presence of misrepresentation, fraud, coercion, and undue influence makes a contract voidable, and a mistake renders a contract void. All these provisions apply to the A & C Act under the arbitration agreement.

It is submitted that the opinion of the Supreme Court in *Authorised Officer Central Bank of India*, which has overruled the application of the doctrine of “reading down” by the below appellate court (High Court of Madras to prevent unjust enrichment, has itself come up with contradictory findings. The apex court has rightly overruled the opinion of the Madras high court that had applied the doctrine of “reading down” to prevent unjust enrichment to the facts of the case in hand, but while doing so, the court restricted the scope of the doctrine of “reading down” to only enlisted circumstances, which may not always be correct. For instance, the doctrine of “reading down” will also apply to a situation where an error is apparent on the face of the records.

The High Court of Kerala has half-heartedly applied Section 16 of the Indian Contract Act in the *Kerala Water Authority, Thiruvananthapuram*. The court invoked the second clause of the second part of Section 16, which provides that a

person is deemed to be in a position to dominate the will of another where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of his age, illness or mental or bodily distress. The court did not appraise section 16 fully with reference to the facts of the given case. Section 16 has three parts. Part I is of a general nature; it applies where a subsisting relationship between the parties is such that one of them is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The application of this clause to the instant case, which is more broadly worded, was not at all discussed by the court. The findings of the court in this case that “these aspects would necessarily have made the mother give some property to her granddaughter” make it a good case for Part I of Section 16, in addition to its part II. The court did not discuss part I of section 16, let alone its application to the present case.

In *Vinayak Purshotiam Dube*, the Supreme Court expounded the scope of Sections 37 and 40 of the Indian Contract Act and, in that process, attempted to filter out an expression of ‘personal skill and expertise’ in section 41, which does not expressly provide so. Neither section 37 nor section 41 expressly mentions the conditions that have been distilled out by the apex court from these sections. The court should have taken the help of the two illustrations appended to these sections to arrive at the conclusion that was arrived at without invoking them.

The concurrent findings of the two high courts, namely in *Balaram Chowdhury (Orissa HC)* and *Sri Ginning Industries Private Ltd* (High Court of Madras, an earlier ruling) holding that the “documents of title to the goods” do not constitute goods bailed as a security for the loan taken from the bank needs reconsideration as this ruling will neither help to the borrower nor to the bank. The borrower, who needs a loan, would always like to get it without much hassle. Providing a document of title to the goods as security for a loan is always a preferred option for the borrower because it is easy to deposit the document of title to the goods in the bank. The bank is always willing to extend a loan facility against valid security. There is a need to revisit these rulings by the apex court, or else explanations as mentioned below be appended with section 171 of the Indian Contract Act.

Explanation I: For the removal of any doubt, the expression “goods bailed” used in section 171 would include a document of title to the goods or any other security provided to the bank instead of the loan advanced to the customer.

Explanation-II: The general lien can be exercised by the bank in respect of the goods bailed or document of title to the goods received by the bank as a security from the customer against any loan advanced to him but would not include the goods bailed or document of title to the goods received by the bank as a security in respect of any other account jointly held by the customer with others.

The apex court in *S. Shivray Reddy* rightly held that the death of a partner means the death of the firm unless there is a contract to the contrary, but from the decision, it appears that the court is not willing to read a contrary contract in the conduct of the partners demonstrated by them after the death of the partner. The contrary contract under section 42 should include express as well as an implied contract inferred from the subsequent conduct of the parties. Where a firm has more than two partners who continue its business even after the death of one partner, such a firm should not be deemed to have been dissolved under section 42 of the Partnership Act, but the continuation of the business should be construed as an implied contract contrary to the dissolution of the firm. However, this interpretation would not include a scenario where only one partner is left out to run the affairs of the firm due to the death of another partner. There must be at least two partners in a firm at a given point in time.

The apex court in *Sri Dattatraya* had to face a formidable challenge of acquittal of the accused by the two appellate courts below in the case of dishonor of the cheque. The apex court showed reluctance in overturning the acquittal of the accused that was upheld by the courts below, and tried to justify its stand on the ground that judicial propriety demands that the concurrent finding should not be overruled. It appears that the reluctance of the apex court was also influenced by the acquittal of the accused by the courts below, but by doing so, the court's ruling imposed an unnecessary burden of rebuttal on the drawee of the cheque, instead of the drawer of the cheque as contemplated in sections 118, 138, 139 and 142 of the NI Act. This decision of the apex court needs a review.

*Rajco Steel Enterprises* made the position of the drawee precarious by putting onus on the complainant as against the defendant, and rebuttal of the presumption has been made easy by a simple contention of the defendant that the loan was not taken from the complainant or the complainant has no financial capacity to provide the loan. This ruling of the single bench of the apex court has now overturned in another case by the Division Bench in the current year (2025), which has also discussed for the benefit of the readers so that they have the latest information on this issue, because the law is the last interpretation given by the Supreme Court on any issue. (Inference from Article 141 of the Constitution).