27

MERCANTILE LAW

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I INTRODUCTION

A GOOD number of cases have been decided by the Supreme Court and high courts on the subjects of law of contract, Indian Partnership Act, 1932 (IP, Act), (Negotiable Instruments Act, 1881 (NI, Act) and banking laws in 2014. In most of the judgments, established principles of law have been invoked but in others that stream of continuity has not been maintained. Even the settled principles of law have been unsettled in some of the cases which have far reaching implications. New dimensions have been also added to the existing corpus of law. Only those decisions, which have either added new principles of law or admit scope for contrary opinion, have been discussed in this part of the survey.

II LAW OF CONTRACT

Standard form contract

Emergence of 'standard form contracts' in 19th century diluted strict adherence to the then shibboleth of 'sanctity of contract', evolved during the heydays of natural law jurisprudence in eighteenth century. The standard form contracts are business necessity. The big business empires cannot afford to negotiate terms and conditions separately for each contracting party. Even small businesses have found it convenient to structure standard terms and conditions, uniform to all contracting parties. The government as a business partner has also made use of these pre-structured contracts. It has been, however, observed that these contracts have caused hardships to the consumers with unequal bargaining power as these contracts put them 'to take it or leave it situation'.[1] The courts in England have come up with a good number of principles to mitigate rigour of these standard contracts where they have been found lopsided

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1 See observations of Lord Denning MR in *Thornnton* v. *Shoe Lane Parking Ltd.*, (1971) 1 All ER 686 CA.

and giving undue advantage to a stronger party.[2] The legislative measures have also been taken in England[3] as well as in America[4] to address the issues raised by the standard form contracts.

Though in India, no legislation expressly provides that the terms in the contract must be reasonable,[5] nevertheless, courts have followed the principles evolved by the English courts to neutralize the harsh effect of the exemption clause. One of such principles is that the terms in the contract should not be unreasonable. The courts in India have in a good number of cases declared a term in the contract devoid of force where it was found unreasonable.[6]

The Supreme Court has come up with an altogether opposite observation in *Mary* v. *State of Kerala.*[7] The court refused to accept the argument that terms in the contract must be reasonable and unreasonable term in the contract is devoid of any force. It was held that this argument fits in administrative law to ensure rule of law and to see justice prevails, where an action is administrative in nature. It applies only in quasi judicial functions. It certainly cannot be put in service to modify, amend, alter or vary terms of the contract between the parties. The court ruled that to say statutory contract or for that matter every contract must be construed reasonably is one thing but to declare a term in the contract devoid of force because of being unreasonable is altogether a different proposition.

It is submitted that it has been an accepted judicial policy not only in India, prior to this judgment, but also in transnational jurisdictions to filter out unreasonable terms in the contract and declare them bereft of any force. In fact Lord Denning J called for vigil on the part of courts to prevent any abuse of unequal bargaining power. In his own words: [8]

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2 See, for example, Reasonable notice of the exemption clauses; Notice of the exemption clauses must be contemporaneous to the contract; Theory of fundamental breach; Strict construction of the exemption clauses; Unreasonable terms *etc.*

3 English Unfair Contract Terms Act, 1977 provides that in respect of any loss caused by the breach of the contract, any restricting or excluding clause shall be void unless it satisfies the requirement of reasonableness. A term will be regarded as reasonable if it is fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made.

4 American Restatement (American Law Institute 2nd edn., 1981), s. 211 (Part 3).

5 The Monopolistic and Restrictive Trade Practices Act, 1969 and Consumer Protection Act, 1986 deal with the unfair trade practices but not precisely with the unreasonable terms in the contract.

6 See for example *Lilly White* v. *Mannuswami*, AIR 1966 Mad. 13-14; *M. Siddalingappa* v. *T. Nataraj*, AIR 1970 Mysore 154; *R.S. Deboo* v. *M.V Hundlekar*, AIR 1995 Bom. 68.

7 AIR 2014 SC 1.

8 *Levison* v. *Patent Stream Carpet Cleaning* Co (1977) 3 All ER 498 CA.

> There is the vigilance of the Common Law which, while allowing freedom of contract, watches to see that it is not abused.

This issue of unreasonableness of a term in the contract has to be addressed from the angle of a consumer who is craving to receive goods or services from the other side, commanding monopoly or near monopoly. Where because of the unequal bargaining power the consumer has no scope to negotiate or alter the terms of the contract, this determination of the unreasonable term in a contract should not be based on whether one of the parties is government or not. As rightly said by a learned author that "whatever is not reasonable is not law. If the parties have agreed to something unreasonable they should be treated as if they have not agreed and they should be released.[9]

Competence of parties

An agreement enforceable by law is a contract[10] and all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with lawful object, and are not hereby expressly declared to be void.[11] Every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.[12] These provisions of law deal with the validity of contract but do not clear expressly legal status of the contract where one of the parties is a minor. This was finally decided by the Privy Council in a landmark judgment in *Mohori Bibee* v. *Dharmodas Ghose*[13] by holding that such contracts are void *ab-initio*. This decision was, however, qualified by the Privy Council in a subsequent case of *Subramanyam* v. *Kurra Subba Rao*[14] and held that it is within the competence of the mother of a minor as a guardian to enter into a contract of sale for the purpose of discharging his father's debts. Further developments of seminal importance took place. Subsequently high courts confined the exposition of law *in Mohori Bibee* to cases where a minor is charged with obligations and enforcement of the same is undertaken by the other contracting party. [15] A full bench was constituted by the Madras High Court in Raghava *Chariar* v. *Srinivasa*,[16] to adjudicate on "whether a mortgage executed in favour of a minor, who has advanced the whole of the mortgage money, is enforceable by him or by any other person on his behalf"? In the words of Wallis CJ:[17]

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9 J.H. Baker, "From Sanctity of Contract to Reasonable Expectation", 17 *Current Legal Problems* (1979).

10 The Indian Contract Act, 1872, s. 2 (h).

11 *Id*., s.10.

12 *Id*., s.11.

13 (1903) ILR 30 Cal 539; 30 M.I.A. 114

14 AIR 1948 PC 25.

15 *Raghava Chariar* v. *Srinivasa*, (1916) ILR 40 Mad 308.

16 *Ibid.*

17 *Supra* note 15, para 2.

> The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money.

The above ruling was followed in the subsequent cases[18] also to ensure that the shield created for the protection of a minor in *Mohori Bibee* case should not turn into a sword for him.

This settled legal position was unsettled by the Supreme Court in *Mathai Mathai* v. *Joseph Mary.*[19] The apex court cited only *Mohori Bibee* case and heavily relied on it without any reference to subsequent and more important legal developments on the subject. The apex court in the instant case ruled: [20]

> We hold that the mortgage deed –Ex. AI executed by the uncle of the Appellant and the first Respondent , in favour of the deceased mother of the Appellate, is not a valid mortgage deed in respect of the property covered in the said document for the reason that the deceased mother at the time of execution and registration of the document was a minor, aged 15 years, and she was not represented by her natural guardian to constitute the document as valid as she has not attained majority according to law. Many courts have held that a minor can be a mortgagee as it is a transfer of property in the interest of minor. We feel that this is erroneous application of law keeping in mind the decision of the Privy Council in Mohiri Bibee.

The apex court further elaborated this legal position in the following words: [21]

> As per the Indian Contract Act, 1872, it is clearly stated that for an agreement to become a contract, the parties must be competent to contract, wherein age of majority is a condition for competency. A deed of mortgage is a contract and we cannot hold that a mortgage in the name of a minor is valid, simply because it is in the interest of minor unless she is represented by her natural guardian or guardian appointed by the court. The law cannot be read differently for a minor who is a mortgagor and minor who is a mortgagee as there are rights and liabilities in respect of the immovable property that would flow out of such a contract on both of them.

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18 *Bhaggabhor Mandal* v. *Mohini Mohan Banerjee*, AIR 1918 Cal 1027; *Zafar Ahsan* v. *Zubaida Khatun*, AIR 1929 All 604; *Munia* v. *Perumal* (1914) 37 Mad 390; *Great American Insurance Co. Ltd.* v. *Mandanlal Sonulal* (1935) 59 Bom. 656; *Bholanath* v. *Balbadhra*, AIR 1964 All 527.

19 AIR 2014 SC 2277.

20 *Id.* at 2283.

21 *Ibid*.

The apex court invoked the opinion of Privy Council in *Mohori Bibee* case but ignored its later opinion in *Subramanyam* case and a good number of judicial precedents set by various high courts which had now taken the shape of settled law on the subject. The principal reason behind *Mohori Bibee* decision was to safeguard the interest of minors who are considered *doli incapex* till they attain the age of majority but it was found that this very purpose is defeated when a minor has fulfilled his promise and the other party (a major) is refusing to perform his part of the promise simply because the person on the other side of the contract is a minor. This is the reason that later on courts including Privy Council qualified the principle of law laid down in *Mohori Bibee* case which was not taken into consideration by the Supreme Court in the *Mathai Mathai* case.

The strong argument put forward by the apex court for its opinion was that 'law cannot be read differently for a minor who is a mortgagor and a minor who is a mortgagee'. It is pertinent to mention here that the legislature has, of course in a different context,[22] recognized this kind of difference in order to safeguard the interest of a minor and it was now taken as a settled judicial gloss that *Mohori Bibee* case ratio is applicable only where a minor is charged with obligations and the other contracting party seeks to enforce those obligations against him.

It may be added here that today's minor is not like the minor of 1872 or 1875 when the Indian Contract Act, 1872 (hereinafter ICA) and Indian Majority Act, 1875 respectively were enacted. The minor of those days was *doli-incapex* in real sense of the term. Today's minor is well informed, courtesy to information and communication technology. He is no more ignorant, unthinking, immature and credulous. He is more involved in public life than ever before and has become an active partner in soci- economic life of our country. It has been rightly said by a learned author that "in today's society it does not seem to be possible, much less desirable, for law to adhere to the categorical declaration that a minor's agreement is always absolutely void".[23] It is, therefore, submitted that the opinion of the apex court needs to be reviewed and also section 3[24] of the Indian Majority Act, 1875 which still sticks to 18 and 21 years of age for a person to be competent to contract if he is without or with guardian, respectively.

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22 See, The Specific Relief Act, 1963, s.33, where difference between a minor as a plaintiff and minor as a defendant has been maintained for the purposes of restitution.

23 Avatar Singh, *Law of Contract and Specific Relief* 133(Eastern Book Company, 9th edn.,2012).

24 S. 3 of the Act reads:

> Every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before.
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> In the case, however, of a minor whose person or property or both a guardian has been appointed by a court, or of whose person or property the superintendence is assumed by a court of wards, before the minor has attained the age of eighteen years, when he has completed the age of 21 years.

Concluded contract

Acceptance of an offer is *sine qua non* for the formation of a contract. This acceptance may be express or implied. The express acceptance may be either in writing or may be made orally but can an express acceptance be impliedly read from a written instrument? This issue was debated before the Supreme Court in *Rishi Kiran Logistics Pvt. Ltd.* v. *Board of Trustees of Kandla Port Trust.*[25] The apex court ruled that intention to enter into a binding contract is different from acceptance of an offer. A letter of intent cannot ripen into a contract unless it is accompanied by a formal acceptance. The court ruled that it is at times possible to distill out an acceptance from the language of the letter provided such intention is patently evident from its terms. Citing common experience, it was very rightly held that "it is not uncommon in a contract involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detail contract would be drawn up latter. If such a letter is issued to the contractor, though it may amount to acceptance of offer resulting in a concluded contract between the parties, but the question whether the letter of intent is merely an expression of an intention to place an order in future or whether there is a final acceptance of the offer thereby leading to a contract is a matter that has to be decided with reference to the terms of the letter."[26]

Undue influence

In *Pratima Chowdhury* v. *Kalpana Mukherjee*,[27] the apex court laid down that "when parties are in a fiduciary relationship, the manner of examining the validity of a transaction, especially when there is no reciprocal consideration, has to be based on parameters which are different from the one's applicable to an ordinary case. However, the apex court did not spell out those parameters but stretched it further by taking help of another decision of the same court in *Subhas Chandra Das Mushib* v. *Ganga Prosad Das Mushib*,[28] wherein undue influence was equated with the gift *inter vivos* so far as their essential ingredients are concerned.

It is submitted that the parameters of undue influence are laid down in section 16[29] of the ICA itself which are plain and need no external aid for construction. Broadly speaking, undue influence can be exercised in two ways. In the first place, the combined reading of clauses (1) and (3) of section 16

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25 AIR 2014 SC 3358.

26 *Id*. at 3370.

27 AIR 2014 SC 1304.

28 AIR 1967 SC 878.

29 The Indian Contract Act, 1872, s. 16 reads:

(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

makes it clear that a general rule has been laid down which makes enquiry of undue influence possible in three stages. At the first place, the subsisting relationship between the parties must be such that one is in a position to dominate the will of another. Then that dominating position must have been used to obtain an advantage and if the transaction appears unconscionable, then the burden of proving that the contract was not induced by undue influence is upon the person who is in a dominating position.

At the second place, a deeming provision has been made which presumes that a person is in a position to dominate the will of the another where he holds real or apparent authority over him, or where he stands in a fiduciary relation to the other or where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. The undue influence can be of different forms and can take any colour but has to be tested on the parameters laid down in section 16 and not on the parameters of gift by *inter vivos* as did by the Supreme Court.

Agreement in restraint of legal proceedings

Ever since the ICA was enacted, the legal policy that agreements in restraint of legal proceedings remained unchanged but it was observed that the companies with stronger bargaining power managed to wriggle out of this provision by incorporating a term in their standard form contract which restricted limitation period for enforcing a contractual claim against them. These restrictive clauses were upheld by the courts.[30] In order to plug this loophole in law, section 28 was amended in 1997 and a clause (b) was added to this section.[31] Incidentally, the

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(2) in particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

30 *See Vulcan Insurance Co*. v. *Maharaj Singh* (1976)1 SCC 943; *Baroda Spinning and Weaving Co* v. *Satyanaranyan Marine & Fire Insurance Co*. (1913) 15 Bom. LR 948.

31 The Indian Contract Act, 1872, s.28 reads :

Every agreement (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunal, or which limit the time within which he may thus enforce his rights; or (b) which extinguishes the right of any party

Supreme Court decided *National Insurance Co.* v *Sujir Ganesh Nayak & Co.*[32]in the same year in the same year in which the amendment was made but reiterated the interpretation given by its earlier benches to pre-amended section 28 without regard to the amendment which was then followed by the subsequent courts.[33]

It is in this back drop that the Delhi High Court in *Delhi Development Authority* v. *M/s Bhardwaj Brothers* [34] was called to determine the validity of the clause prescribing time limit for preferring a claim for arbitration. The Delhi High Court took the help of its own opinion expressed in *Punj Lioyd Ltd.* v. *National Highways Authority of India*,[35] which had distanced itself from the opinion of the apex court in *National Insurance* case by stating that though it was pronounced on 21st March, 1997, *i.e,* soon after the amendment of section 28 of the ICA, yet it does not deal with the amended section because of which it had held that the party could agree/ provide for forfeiture of rights, inspite of the fact that the amendment was brought to get over such interpretation of section 28 as existing earlier. A special leave petition (SLP) was filed against *Punj* decision but was dismissed[36] which left this question wide open.

The court, in the instant case, followed its earlier opinion on the same subject in the case but did not rightly follow *National Insurance* case decided by the Supreme Court and held that the clause restricting the time period to prefer claim before the court is void. It is true that the Supreme Court has come up with the contrary opinion in the *National Insurance* case but that opinion, it is submitted, is *per incuriam* as that has been pronounced in ignorance of the amendment made in section 28 in the same year. The final word, it can be safely said, on this subject from the apex court is yet to come, nevertheless, the opinion of the Delhi Court in the instant case represents the correct legal position as the amended provision in plain words declares an agreement void which restricts a party from enforcing his right which is otherwise within the prescribed statutory period of limitation.

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

32 AIR 1997 SC 2049. It was held that though an agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period of limitation than that is prescribed by law would be void as offending Section 28 of the contract but there could be agreement which does not seek to curtail the time for enforcement of the right but which provides forfeiture or waiver of the right itself , if no action is commenced within the period stipulated by the agreement and such an agreement would not fall within the mischief of Section 28 of the Contract Act.

33 See, *Manohar Singh and Sons* v. *Raksha Karamchari Cooperative Group Housing Society* (2010) 114 DRJ 665.

34 AIR 2014 Del. 147.

35 (2009) ILR 5 Del. 191.

36 SLP (C) No.14885-14886/2009 dismissed on Apr. 18, 2012.

Public policy

In *Kulja Industries Limited* v. *Chief Gen. Manager, W.T.Proj. BSNL,* [37] the short question for judicial determination in the present appeal was whether the respondent- BSNL could blacklist appellant for allotment of future contracts for all times to come. The High Court of Bombay, before whom the blacklisting order was assailed by appellant, had answered that question in affirmative. Briefly the facts are; the appellant company emerged successful in two tenders issued by the respondent-BSNL and supplied Permanent Lubricated HDPE Pipe (Telecom Ducts) and installation of O.F. cable through blowing technique. The respondent company alleged that four of its officers abused their official position and fraudulently generated bogus voucher numbers to facilitate payments as if the said bills were genuine, thereby causing wrongful loss to the tune of Rs 7.98/- crores to the respondent –BSNL.

The BSNL authorities filed an FIR against the officials of the appellant company and also blacklisted it permanently on the ground that it had committed gross misconduct and irregularities by receiving excessive payments. The excess money received by the appellant company was refunded but challenged the order of blacklisting on the ground that the contract executed with the respondent did not give power to the respondent to blacklist the appellant company.

The terms of contract, *inter alia*, stipulate that the purchaser (respondent company-BSNL) will be within its right to disqualify any supplier who (a) habitually fails to supply the equipment in time or (b) the equipment supplied by the supplier does not perform satisfactorily in the field or (c) fails to honour his bid without sufficient grounds.

While perusing above terms of the contract, the apex court admitted that its literal construction would mean that the blacklisting of the appellant company is possible only when any one of the three conditions foreseen in the contract is satisfied and not otherwise which would, in the opinion of the apex court, give rise to anomalous situation.

The apex court tried to travel beyond the letters of the contract to cull out from it that which was not expressly incorporated in it. The apex court opined that where a supplier has committed graver offence, failures or violations, than those envisaged in the contract, resulting in much heavier losses and greater detriment to the purchaser in terms of money, reputation or prejudice to public interest, the power to blacklist the supplier can be invoked but any literal interpretation to the contract may not give that power to the respondent company. The net result would be that for serious offences the appellant company may go unpunished simply because all such acts of fraud, mis-representation or the like have not been specifically enumerated as grounds for blacklisting of the supplier.

The apex court ruled that it could not be inferred as true intention of the respondent company, when it drafted conditions of the tender document by which it had reserved to itself the right to disqualify or blacklist bidders for breach or violation committed by them. The court asked a logical question that "if bidders

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37 AIR 2014 SC 9.

who commit a breach of lesser degree could be punished by an order, there is no reason why breach of a more serious nature should go unpunished."[38] The court maintained that "the legal position governing blacklisting of suppliers in USA and UK is not different as it is recognized and often used as an efficacious tool against deviant suppliers and contractors who may have committed acts and omissions or frauds and other breaches."

The court, however, has put a rider on the exercise of this power by declaring that "debarment is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractors." This line of reasoning was adopted by the court on the fact that the erring company is bulk supplier to the respondent and has already refunded the excess money received by it. The court, however, did not give any importance to the fact that the money was refunded only after this fraud was unearthed and FIR was lodged. The bulk supplier had added responsibility as it was the beneficiary of the contract so executed. The initial pressure generated by the apex court against the appellant company for playing fraud was eased out at the end by holding 'debarment is not permanent'.

The High Court of Madhya Pradesh in *S.K Jain* v. *State of MP* [39] added new dimension to the law on blacklisting by invoking writ jurisdiction and held that the principle of proportionality be applied in the matters affecting fundamental rights. The appellant was blacklisted for fraud committed by his subcontractor in whom he reposed absolute trust. The court ruled that the statutory discretion or power, be it administrative or quasi judicial, even if conferred in wide terms, is subject to some implied or inherent limitations. The violation of these implied limitations will invite judicial scrutiny, even if there is no violation of any express conditions. The implied conditions include: the person empowered with the exercise of discretion must exercise it in good faith with a motive to achieve its objective, avoid misconstruction of the statute, not be influenced by irrelevant matters and must not act unreasonably, *i.e*, irrationally or perversely. The court, by applying principle of proportionality, held that action taken by the respondents against the petitioner is wholly disproportionate for the lapse on its part.

This judgment had to deal with a person who reposed trust in another and who, instead of living to it, committed its breach. The person punished was not directly responsible for any fraud. The principle of proportionality was rightly applied and blacklisting of the petitioner for life was converted into a period which was already undergone by the petitioner. This case can be distinguished from the above case decided by the apex court on the ground that the person blacklisted by the respondent BSNL company in that case had committed fraud in connivance with the officials of the respondent company who, by abusing their powers, facilitated siphoning of huge amount of money at the cost of business interest of the company by putting investors money at stake. This judgment of the apex court is bound to encourage fraudsters as they cannot be now blacklisted

38 *Id*. at 15.

39 AIR 2014 MP 12.

for life because of the rider of the Supreme Court by holding that blacklisting cannot be permanent.

Frustration of contract

In *Mathai Mathai* case[40] the Supreme Court was called to delineate scope of the doctrine of frustration as envisaged under section 56 of the ICA. The apex court trod the traditional path by maintaining difference between a statutory and non statutory contract – a difference which cannot as such be distilled out from the language of section 56.

The court held that the doctrine of frustration ordinarily excuses a party from further performance where because of some subsequent events the performance of the contract becomes impossible. The court did not apply this rule to statutory contract and put them on different footing by holding that in statutory contract, where a party takes absolute liability, Section 56 cannot come into play. It is submitted that there has been unanimity in the judicial opinion that where parties have undertaken absolute liability, no supervening impossibility can absolve them from their contractual responsibility, immaterial of the fact whether there is a government contract or private contract. The decision of the apex court puts government contracts on higher pedestal as against private contracts so far as doctrine of frustration is concerned.

In *Gian Chand* v. *M/s York Exports Ltd.*,[41] the apex court endorsed the opinion of the division bench on the application of section 56 of the ICA which itself had overruled the opinion of the single bench. Brief, the plaintiffs (the respondents) and defendants (the appellants) executed an agreement to sell 164 bighas, 7 biswas of land. As a precondition for sale, permission from the competent authority under section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 was necessary and onus to obtain permission was cast on the plaintiffs in the agreement to sell. The plaintiffs managed permission for 145 bighas of land only. As the time for obtaining permission for the entire area expired, the plaintiff sought extension of time from the defendants which was denied and resulted in suit in question.

The apex court ruled out application of section 56 to the given case and upheld the opinion of the division bench in the following words: [42]

> The Division Bench of the High Court held that the finding recorded by the learned single judge on non grant of permission to the entire 164 bighas 7 biswas of land as agreed between the parties to sell in favour of the plaintiffs does not amount to the frustration of contract for the reason that the State Government at first granted permission to the plaintiffs for purchase of 125 bighas and, thereafter, granted permission to purchase 145 bighas of land. Further, the Division

40 *Supra* note 19.

41 AIR 2014 SC 3584.

42 *Id*. at 358.

> Bench of the High Court has held that there is virtually no material on record to show that after the second permission was granted, the plaintiff took further steps to get permission from the State Govt. for purchasing the remaining land.

The above observation of the division bench endorsed by the Supreme Court would certainly not bring the instant case within the confines of section 56 but remaining part of this observation cited hereinafter raises many issues. The remaining part of the observation reads: [43]

> Even if such permission was not granted and permission was refused, the contract between the parties would not stand frustrated. It is further rightly held by the Division Bench of the High Court that the parties at the time of agreement could not have presumed that the permission must be granted. Further, it has been observed that supposing the state Govt. refused to grant permission for purchase of land, and then obviously, it would be a case of the contract not being able to be performed.

It is submitted that the above observation of the division bench expressly declared by the Supreme Court as the correct exposition of law is not in harmony with the earlier decisions[44] on section 56.

It is in place to mention here that many possible explanations have been put forward as justification for application of principle of frustration to a contract executed by the parties where its performance has been rendered impossible by supervening impossibility but the most acceptable are; theory of implied contract [45] and just and reasonable solution.[46] Both these theories were rejected by the Supreme Court long way back in *Satyabrata Gosh*e v. *Mugneeram Bangur & Co.*[47] The apex court ruled:[48]

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43 *Ibid*.

44 See *Satyabrata Goshe* v. *Mugneeram Bangur,* AIR 1954 SC 44; *Naihati Jute Mills Ltd*. v. *Khyaliram Jagannath*, AIR 1968 SC 522.

45 This theory was propounded by Lord Loreburn in *F. A Tamplin Steamship Co. Ltd* v. *Anglo – Mexican Petroleum Products Co. Ltd* (1916) 2 AC 397, 408 which states that a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract.

46 This theory was authored by Lord Denning in *British Moveietonews Ltd*. v. *London & District Cinemas Ltd.* (1951) 1 KB 190, wherein it was said that the court really exercise a qualifying power- a power to qualify the absolute, literal or wide terms of the contract in order to do what is just and reasonable in the new situation.

47 AIR 1954 SC 44.

48 *Id.* at 48.

> These differences in the way of formulating legal theories really do not concern us so long as we have statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word impossibility in its practical and not in literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

As rightly pointed out above by the apex court that section 56 leaves no scope for application of intention of the parties, it is, therefore, not right to observe that the parties at the time of agreement could not have presumed that the permission must be granted as did by the apex court in the present *Gian Chand* case because this finding is exclusively based on the intention of the parties which was rejected by the apex court in *Satyabrata Goshe* case. The courts in India have, however, recognized legislative or government intervention as a ground for frustration of the contract and the parties are excused from performance of the contract where this intervention results in supervening impossibility.

To say that (as did by the apex court in the instant case) the parties at the time of agreement could not have presumed that the permission must be granted, would mean then that the parties from the day one were not interested in executing their contract nor is it correct to propose that where the State Govt. refused to grant permission for purchase of land, it will obviously be a case of the contract not being able to be performed. The dissolution of contract due supervening impossibility or due to non performance of the contract are two different and distinct legal prepositions with far reaching implications for contracting parties.

Unjust enrichment

The Supreme Court in *Jharkhand State Electricity Board* v. *Laxmi Business and Cements Co. P.Ltd.*,[49] made an observation about the application of doctrine of unjust enrichment which gives an impression that this doctrine is applicable only for refund of taxes. Citing *Mafatlal Industries Ltd.* v. *Union of India*, [50] the apex court said that the principle of unjust enrichment has no application for refunds other than taxes.[51] This finding of the apex court, it is submitted, is neither in tune with the judicial precedents[52] nor in accord with the background

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49 AIR 2014 SC 1820.

50 (1997) 5 SCC 536.

51 *Supra* note 49 at 1830.

52 See, *Sri Sri Shiba Prasad Singh* v. *Maharaja Srish Chandra Nandi*, AIR 1949 PC 297(Money paid under mistake is recoverable whether the mistake be of fact or of law) *Sales Tax officer, Banaras* v. *KanhaiyaLal Mukund Lal Saraf*, AIR 1959 SC 1350.

in which this principle was evolved. The precise test is whether, one who is asked to refund money by fulfilling non contractual obligations can retain this money with safe conscience, immaterial of the nature of money, be it taxes or otherwise. The opinion of the apex court in the instant case is fraught with the consequences of constricting the scope of this doctrine without any apparent benefit.

Payment of compensation for breach of contract

The Supreme Court has laid down a debatable proposition in *Maya Devi* v. *Lalta Prasad* [53] by holding that the imposition and recovery of penalty on breach of contract is legally impermissible under the ICA. As regards liquidated damages, the court would have to scrutinize the pleadings as well as evidence in proof thereof, in order to determine that they are not in the nature of penalty, but rather as a fair pr-estimate of what the damages are likely to arise in case of breach of the contract.

The apex court heavily relied on two judgments pronounced in *Sir Chunilal* v. *Mehta and Sons Ltd.* v. *Century Spinning and Manufacturing Company Ltd* [54] and *Fateh Chand* v. *Balkishan Dass.*[55] In the first case, the apex court had laid down that where the parties have deliberately specified the amount of liquidated damages, there can be no presumption that they at the same time intended to allow the party who has suffered by the breach to give a go by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of breach. It is quite clear from this ruling that the issue of liquidated damages being in the nature of a penalty or *interrorem* did not arise.

In the second case, the issue of penalty arose in a different context. The plaintiff namely Fateh Chand had agreed to sell immovable property for Rs.1,12,500/-of which Rs. 1000/ had been received /paid as earnest money. The agreement envisaged payment of further sum of Rs. 24000/- and it stipulated that if the vendee failed to get sale deed registered thereafter, then the sum received *i.e.*, Rs 25000/- would stand forfeited. It is on these facts that the apex court had said that there is no warrant for the assumption made by some of the high courts in India, that section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. The apex court overturned this assumption of various high courts and laid down very clearly that "in our judgment, the expression in Section 74 that the contract contains any other stipulation by way of penalty", comprehensively applies to every contract involving a penalty, whether it is for payment of money on breach of contract or other property or delivery of property in future, or for forfeiture of money or other property already delivered. Duty not to enforce the penalty clause

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53 AIR 2014 SC 1356.

54 AIR 1962 SC 1314.

55 AIR 1963 SC 1405.

but only to award reasonable compensation is statutorily upon courts by virtue of section 74. The court concluded that, in all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of the contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.

Thus the ratio of the above two rulings make it a quite clear that in the first case, the issue of payment of penalty on the breach of the contract was neither in question nor deliberated upon but in the second case the forfeiture of earnest money was in contention and the court laid down the earnest money can be forfeited by way of penalty but it should not exceed to the penalty amount stipulated in the contract.

In-spite of the *Fateh Chand* case ruling pitching a strong case for payment of penalty, the apex court, in the *Maya Devi* case, made a quite opposite observation by holding that the imposition and recovery of the penalty on breach of a contract is legally impermissible under the ICA.[56] As regards the liquidated damages, the court has to peep through pleadings and evidence in proof thereof to ensure that they are not by way of penalty, but rather as a fair estimate of what the damages are likely to arise in case of breach of the contract.

This observation of the apex court, it is submitted, is neither in resonance with section 74[57] nor in accordance with the rulings of the apex court which it cited. Interestingly, Section 74 carries the title "compensation for breach of where penalty stipulated for" and then makes an express declaration that where an amount is named in the contract to be paid in case of breach of contract or contract contains any other stipulation by way of penalty, then in case of breach of contract, the party complaining the breach is entitled to reasonable compensation not exceeding the amount so named in the contract or, as the case may be, the penalty so stipulated.

Section 74 indeed prescribes a cap on the compensation or penalty that too which has been fixed by the parties. This section gives full freedom to the parties to fix any amount to be paid to the wronged party or incorporate stipulation by way of any penalty in case of breach of contract and then makes it clear that the sum so named shall be the upper limit of the amount to be paid as compensation or penalty and leaves it to the discretion of the courts to work out reasonable

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56 *Supra* note 53 at 1361.

57 The first part of the The Indian Contract Act,1872, s.74 reads:

> When a contract has been broken, if sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

compensation that should not exceed to the amount so named or the penalty stipulated for. The amount worked out by a court as reasonable on the basis of the penalty amount so named in the contract is in essence penalty amount to be paid finally by the party responsible for the breach of the contract.

III LAW OF PARTNERSHIP

Partnership Act, 1932

In *Kuriachan Chacko* v. *Registrar of Firms, Thiruvananthapuram*,[58] the Kerala High Court was called to answer a tricky question about the registration and dissolution of the firm. M/s. LIS Ernakulam firm was registered by the petitioners in 2002 for a period of five years and in 2006, it was resolved to extend life of the firm for a further period of 30 years. This resolution was not submitted to the Registrar of Firms till 2013.Then a representation along with minutes of the resolution and affidavit was submitted to the registrar for incorporating necessary changes in the relevant register who refused to do so on the ground that the firm stands already dissolved and no such change can be effected in the register. Hence, the present petition against this order of the registrar.

The Kerala High Court heavily relied on section 42 of the IP, Act which provided for dissolution of firm on the happening of certain contingencies. This section, *inter alia*, provides that if a firm is constituted for a fixed period, it shall be dissolved after the expiry of that term. The court, while taking help of this provision, held that:[59]

> by virtue of the mandate under Section 42, the dissolution of the firm on expiry of the tenure is automatic, more-so, when the alleged amendment sought to be made in 2006 was admittedly not brought to the notice of the respondent to have it incorporated in the register, even when the registered firm was in existence.

The court did not accept the contention of the petitioners that the registration of the firm is optional and not compulsory and the firm is continuing its business and is very much in existence. The court mixed up registration of the firm with its dissolution and came to the conclusion that dissolution of firm is automatic, once the period for which it was constituted had expired.

It is submitted that it is true that the firm lost its registration after the expiry of its term but that does not mean that the firm stands dissolved as section 42 itself provides that the contingent dissolution of the firm is "subject to contract between the parties." The parties had resolved in their resolution that the term of the firm is extended by 30 years and the same was submitted before the court. To say that the firm is unregistered is one thing but to say that the firm stands dissolved is altogether different proposition. The court did accept the status of

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58 AIR 2014 Ker. 109

59 *Id*. at 113.

the firm as an 'unregistered' one, as in the opinion of the court, the concept of an unregistered firm is not envisaged under section 63 of the Act.

This calls for an analysis of section 63.[60] This section makes it mandatory to bring any change in the constitution of the firm in the notice of the registrar. That change may be with reference to incoming, outgoing or continuing partner and does not apply to duration of a firm. The duration of a firm squarely falls under section 42 which makes it loud and clear that the firm shall dissolve upon the expiry of its term "subject to the contract between the parties". Where the life of the firm is extended, it shall continue to carry on its business and cannot be said to have come to an end but where this fact has not been brought to the notice of the registrar, the registration of the firm will come to end as the registration of the firm is not compulsory but optional under section 69. A firm without registration can continue to carry on its business lawfully but cannot avail advantages of a registered firm. This is an established legal position.

IV LAW OF NEGOTIABLE INSTRUMENTS

Dishonour of cheque

In *MSR Leathers* v. *Palaniappan*,[61] the apex court was called to constitute larger bench to resolve an issue of cause of action in case of dishonor of cheque because its division bench had earlier doubted the correctness of the decision pronounced in *Sadanandan Bhadran* v. *Madhavan Sunil Kumar.*[62] The question referred to the larger bench was whether the action of appellant was time barred under section 138(b) of the NI Act or not?

The respondent had issued four cheques to the appellant on 14th August, 1996 which were presented for clearance on November 21, 1996 but were returned by the bank for want of clearance. The appellant did not proceed further at the request of respondent who had promised to settle the dispute but did not live up to his promise, subsequently. Thereafter, the appellant sent a notice to the respondent under section 138(b) of the NI Act, which was duly received by him. The appellant presented these cheques second time before the bank on January 21, 1997 but were again dishonoured for want of sufficient funds. On January 28, 1997, the notice for payment of money was again issued to the respondent which was not favourably considered. The appellant thereafter filed a civil suit before the trial court on March 4, 1997 which ultimately landed before the larger bench of the apex court.

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60 The Negotiable Instruments Act, 1881, s.63 reads:

> when a change occurs in the constitution of registered firm any incoming, continuing or outgoing partner , and when a registered firm is dissolved any person who was outgoing partner immediately before the dissolution, or the agent of any such partner or person specifically authorized in this behalf, may give notice to the Registrar of such change or dissolution, specifying the date thereof; and the Registrar shall make record of notice in the entry relating to the firm in the registrar of firms , and shall file the notice along with the statement relating to the firm filed under Section 59.

61 AIR 2014 SC 642.

Their court dissected section 138 and held that this section has three components which should be satisfied before dishonor of the cheque can constitute an offence and become punishable. These are (i) the cheque must have been presented to the bank within a period of six months from the date from which it is drawn or within the period of its validity, whichever is earlier (ii) the payee or holder in due course of the cheque, as the case may be, ought to make a demand of payment within thirty days after receiving information about the dishonor of the cheque from the bank. (iii) the drawer of such cheque must have failed to make such payment within 15 days of the receipt of such notice.

It was very rightly held that neither section 138 nor section 142 of the NI Act nor any other provision contained in the said Act prevents the holder or the payee of the cheque from presenting the cheque for encashment for any number of occasions within a period of six months from the date of its issuance or within a period of its validity. The payee or the holder has a right to present the same at any number of times within its period of validity.

The court overruled the opinion expressed in *Sadanandan Bhadran's* case and held that "while a complaint based on a default and notice to pay must be filed within a period of one month from the date the cause of action accrues, which implies the date on which the period of 15 days granted to the drawer to arrange the payment expires, there is nothing in section 142 to suggest that expiry of any such limitation would absolve him of his criminal liability should the cheque continue to get dishonoured by the bank on subsequent presentation. So long as it is dishonoured upon presentation to the bank, the holder's right to prosecute the drawer for the default committed by him remains valid and exercisable."[63]

The court admitted that the drawer gets extended period to make payment by reason of fresh presentation of the cheque, followed by a fresh notice in terms of section 138, but that cannot help the defaulter to get absolved on any juristic *principle but should be considered as yet another opportunity to him to be availed off, if he wants to get absolved from any liability* (emphasis added).

The court shed light on the opposite side of the problem by holding that if the opposite is held as correct opinion as enunciated in *Sadanandan Bhadran's* case, then the holder shall be having no option to defer institution of suit even if he wishes to do so in order to enable the drawer to arrange money for his payment. While elaborating possible fall out of *Sadanandan* case, the apex court ruled that the judicial gloss, which shuts the doors for the parties to negotiation and find out possible alternative dispute resolution, without in any way taking away the right of holder to institute proceedings within the period of limitation prescribed by law, should be avoided, and added, " we see no reason why parties should, by a process of interpretation, be forced to launch complaints where they can or may like to defer such action for valid reasons. After all, neither the courts nor the parties stand to gain by institution of proceedings which may become unnecessary, if cheque amount is paid by the drawer."

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62 1998 (6) SCC 51.

63 *Supra* note 61 at 643.

The court took a policy decision in tune with the ground realities by holding that the magistracy in this country is over-burdened by an avalanche of cases under section 138 of NI Act. If only first default gives cause of action and fore closes further presentation of the cheque, as held in *Sadanandan Bhadran's* case ,result in filing of prosecution, avoidable litigation would become an inevitable bane of the legislation that was intended only to bring solemnity to cheques without forcing parties to resort proceedings in the court of law.

The court admitted that though there is no empirical evidence to show that the problem of overburdening of the courts at district level is solely because of the compulsions arising out of the decisions in *Sadanandan Bhadran's* case, yet it is equally difficult to say that the law declared in that decision has not added to court congestion.

The court summed up by stating that the object of NI Act is to enforce commitment of the drawer made in the course of business. There is no reason to give immunity to the drawer who has failed to honour his own cheque, despite statutory notice served upon him, simply because the holder of the cheque has not rushed to the court with a complaint immediately after first presentation of the cheque based on such default.

The judgment can be hailed on the ground that it has rendered real justice as against technical justice that would have made cheques illusory notes dependent upon time which would have neither served businesses nor economy of our country. The scales of justice are in favour of this decision as it has provided an added opportunity to the drawer to mend his ways and live up to his promise. It has also provided yet another opportunity to the holder to present the cheque within its validity period and he gets extended time to recover his money though through second or third notice to the drawer, failing which the drawer will be prosecuted for his inaction.

Territorial jurisdiction

In *Dashrath Rupsingh Rathod* v. *State of Maharashtra*,[64] the Supreme Court was called to adjudicate on scope of section 138 and court's jurisdiction concerning criminal complaints filed under chapter XVII of the NI Act which, in the opinion of the apex court, 'has raised legal nodus of substantial public importance'. This SLP was heard by three judges, all of them concurred but Vikramjit Sen J wrote for himself and on behalf of C.N. Nagappan and T.S. Thakur, JJ wrote a separate but concurring judgment because, in his own words, 'the question of law that arises for determination is not only substantial but of considerable interest and importance for commercial word.'

A good number of important decisions handed down by the apex court in the recent past[65] were discussed and it was laid down that the underlying scheme

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64 AIR 2014 SC 3519.

65 See, *K. Bhaskaran* v. *Sankaran Vaidhyan Balan* (1999) 7 SCC 510; *Harman Electronics Pvt. Ltd*. v *National Panasoni India Pvt. Ltd*., (2009) 1 SCC 720; *Shri Ishar Alloy Steel Ltd*. v. *Jayaswals Neco Ltd* (2001) 3 SCC 609; *Prem Chand Vijay*

of provisions at the outset make it clear that the offence is complete once the cheque in question is dishonoured but the prosecution for such offence can be launched only when cause of action accrues to the complainant. The proviso appended to section 138 postpones the actual prosecution of the accused and gives him yet another opportunity to make payment within the prescribed statutory period. The apex court found a plausible reason in this explanation by stating that the Parliament in its wisdom considered it just and proper to give to the drawer of a dishonoured cheque an opportunity to pay the amount, before permitting his prosecution, inspite of the fact that the offence is complete once the cheque is dishonoured. The apex court found a concession in this approach for the accused as the dishonor will not necessarily lead to penal consequence, if the drawer makes amends by making payment within the time stipulated, once notice for payment is issued to him. The apex court held that the "payment of the cheque amount within the stipulated period will in such cases diffuse the element of criminality that Section 138 attributes to dishonour by way of legal fiction implicit in the use of words "shall be deemed to have committed offence."[66] The court admitted that this scheme may be unique to Section 138 of the NI Act but there is hardly any doubt that the Parliament is competent to legislate so as to provide for situations where a cheque is dishonoured even without any criminal intention on the part of drawer. The court appreciated this stand by holding that this interpretation not only saves the honest drawer but provides an opportunity to even the dishonest drawer to make payment and avoid prosecution.

The territorial jurisdiction of the courts to entertain compliant against the dishonor of the cheque was discussed threadbare for which court travelled a long distance and in that process reversed almost established position by reversing partly[67] *K.Baskaran* case which was being followed on this notion that it is now a settled position. The *Baskaran* represented the most flexible and complainant friendly interpretation which made negotiable instruments the instruments of value and not illusory and valueless papers which can be dishonoured on flimsy and technical grounds. The twin principles which *Baskaran* case *enunciated* and which triggered a whole lot of debate are: (i) the place where a complainant has given demand notice to the accused is the place where a complaint can be instituted in a court of competent jurisdiction and (ii) there is a difference between "giving of and receiving of notice. Clause (b) of proviso to section 138 of the NI Act postulates a demand being made by the payee or the holder in due course of the dishonoured cheque by giving a notice in writing to the drawer thereof.

Kumar v. *Yashpal Singh* (2005) 4 SCC 417; *Mosaraf Hossain Khan* v. *Bhagheeratha Engg. Ltd.,* (2006) 3 SCC 658; *Nishant Aggarwal* v. *Kilash Kumar Sharma*, AIR 2013 SC 2634; *Escorts Limited* v. *Ram Mukerjee* 2013 AIR SCW 5477.

66 See observations made by T.S Thakur J.

67 It was held that "to this extent we respectfully concur with *Bhaskaran* case (AIR 1999 SC 3762) in that the concatenation of all these concomitants, constituents- or ingredients of section 138 of NI Act is essential for the successful initiation or launch of the prosecution. We, however, are of the view that so far as the offence

These two principles were not followed in a co-ordinate bench, namely *Harman Electronics Pvt. Ltd* v. *National Panasonic India Pvt.*[68] wherein the court said that the cause of action cannot arise by any act of omission or commission on the part of accused and it is the place where notice has been received that will determine jurisdiction of a court.

Putting weight behind the opinion expressed in *Harman*, the court in the case *Dashrath* case declared that *Harman* approach is significant and sounds a discordant note to *Bhaskaran* ratio.[69] Adopting the point of view of *Harman* case, the present court held that section 138 of the NI Act is being rampantly misused so far as territorial jurisdiction for trial of the complaint is concerned. With the passage of time, equities have, therefore, transferred from one end of the pendulum to the other. It is not uncommon for the courts to encounter issuance of a notice in compliance with clause (b) of the proviso to section 138 of the NI Act from a place which bears no connection with the accused or with any facet of the transaction between the parties, leave aside the place where the dishonor of the cheque has taken place.[70] Appreciating *Harman* court's approach, the court stated that *Harman* case, in fact, duly heeds the absurd and stressful, fast becoming common place where several cheques signed by the same drawer are presented for encashment and requisite notices of demand are also dispatched from different places.[71] In contrast, the court further said that it appears to us that justifiably so at that time, the conclusion in *Bhaskaran* case was influenced in large measure by curial compassion towards the unpaid payee/ holder, whereas with the passage of two decades the manipulative abuse of territorial jurisdiction has become a recurring and piquant factor. Citing these reasons, the court stated that the liberal approach preferred in *Bhaskaran* now calls for a stricter interpretation of the statute, precisely because of its misemployment so far as choice of place of suing is concerned.

In addition to *Harman*, the court endorsed opinion expressed by the three judge bench of the apex court in *Shri Ishar*, [72] wherein it was laid down that a combined reading of sections 3, 72, and 138 of the NI Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be criminally liable. Clearly, and in our considered opinion rightly, the section had been rendered 'accused- centric.[73]

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itself is concerned the proviso has no role to play. Accordingly, a reading of section 138 NI Act in conjunction with Section 177, Cr. P C leaves no doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed.

68 (2009)1 SCC 720.

69 *Supra* note 64 at 3525.

70 See observations made by Vikramjit Sen and C.N.Nagappan JJ in *supra* note 64.

71 *Supra* note 69 at 3524.

72 *Shri Ishar Aloy Steel Ltd*. v. *Jayaswals Neco Ltd*. (2001) 3 SCC 609.

73 *Supra* note 64 at 3525.

The present court showed preparedness to the magnitude of the impact that this decision shall have to possibly lakhs of cases pending in various courts throughout country and even discussed the idea of having prospective effect to this ruling but changed this idea on the ground that the accused shall have to continue to bear by travelling long distance in conducting their defence and the courts have to carry on their proceedings in-spite of not having jurisdiction. The court came up with a unique formula. In its own words:[74]

> Consequent on considerable consideration we think it expedient to direct that only those cases where, post the summoning and appearance of the alleged accused, the recording of evidence has commenced as envisaged in Section 145(2) of the NI Act, proceeding will continue at that place. To clarify, regardless of whether evidence has been led before the Magistrate at the pre summoning stage, either by affidavit or by oral statement, the complaint will be maintained only at the place where the cheque stands dishonoured. To obviate and eradicate any legal complication, the category of complaint cases where proceedings have gone to the stage of Section 145 (2) or beyond shall be deemed to have been transferred to us from the court ordinarily possessing territorial jurisdiction, as now clarified, to the court where the accused/ respondent has not been properly served shall be returned to the complainant for filling in the proper court, in consonance to our exposition of law. If such complaints are filed / refilled within thirty days of their return, they shall be deemed to have been filed within the time prescribed by law, unless the initial or prior filing was itself time barred.

The avowed reason for overturning the *Bhaskaran* ratio was outlined by the apex court in the following words: [75]

> We need to remind ourselves that an avalanche of cases involving dishonor of cheques has come upon the Magistracy of this country. The number of such cases as of October 2008 was estimated to be more than 38 lakhs by the Law Commission of India in its 213th Report. The result is that cases involving dishonor of cheque is in all major cities choking the criminal justice system at the Magistrate's level.

Surprisingly, without being backed by any empirical evidence, the apex court held that filing of criminal cases far away from the drawer's bank is responsible for "choking of criminal justice system." The court observed: [76]

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74 *Id*. at 3534.

75 *Id*. at 3548.

76 *Ibid.*

> More than five lakh such cases were pending in criminal courts in Delhi alone as of Ist June, 2008. The position is no different in other cities where large number of complaints are filled under Section138 not necessarily because the offences committed in such cities but because multinational and other companies and commercial entities and agencies choose these places for filling the complaints for no better reason than the fact that notices demanding payment of cheque amount were issued from such cities or the cheque were deposited for collection in their banks in those cities.

It appears, from the above ruling, that the apex court is conscious of the pitiable condition of the creditors who received a bare promise in the shape of a "paper" called cheque which is not honoured as it was held: [77]

> We feel compelled to reiterate our empathy with a payee who has been duped or deluded by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit anything resulting in some damage to the payee. The relief introduced by Section 138 of the NI Act is in addition to the contemplations in the IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge an FIR with the police or file a complaint directly to the Magistrate. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journey to the place where the cheque has been dishonoured. All remedies under the IPC and Cr. PC are available to such a payee if he chooses to pursue such course of action, rather than a complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises dependent on his choosing.

After showing this concern and sympathy with the drawee, the apex court took reverse turn and ultimately tilted scales of justice in favour of the accused as it endorsed *Shri Ishar* opinion in which it was held that "the Section had been rendered 'accused centric.'

The opinion of the apex court in the instant case has raised many critical issues. What was the dire need to unsettled the almost settled law laid down in *K Bhaskaran* case?[78] Apparently, the apex court was influenced by the fact that "an avalanche of cases involving dishonor of cheques has come upon the Magistracy

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77 *Id*. at 3534.

78 See *supra* note 64 at 3524. The court admitted that the earliest and the most often quoted decision of this court relevant to the present conundrum is *K. Bhaskaran*.

of this country"[79] but this observation of the apex court is not based on any concrete empirical evidence suggesting that this "avalanche" is because of the relaxation of restrictions of territorial jurisdiction which facilitated filing of multiple criminal cases against the same accused in different jurisdictions on the basis of the dishonoured cheques issued on different dates. The "avalanche" is because of the fact that the legal sanctity which Rajamannar Committee[80] wanted to attach to cheques by penalizing the issuance of cheques without sufficient funds was relegated to the conundrum of legalities and technicalities without their being effective remedies which could have deterred unscrupulous persons from issuing cheques without sufficient funds. Presentation of cheques with different dates by the drawee at different banks will rarely increase number of complaints as the drawee has to otherwise file complaints at different dates. The cheques carrying different dates will result in different limitation period. Even if the complaints are filed in the same court, their total count will remain the same.

The observation of the court that the NI Act is 'accused centric' dehors the rational of amendment made in 1988, after the elapse of more than a century, since the enactment of the NI Act in 1881, which resulted in the incorporation of chapter XVII in the NI Act, containing section 138 with an avowed object to enhance acceptability of the cheques. This acceptability can be increased only when flexible interpretation as enunciated in *Bhaskran* case is adopted and not by creating hurdles in enforcing the promise of payment of money inherent in every negotiable instrument including a cheque. The moot question is: what does it mean to say that section 138 is 'accused centric'? Does it mean that where there are two interpretations possible, court should adopt that interpretation which will favour accused or does this mean that the scheme of the NI Act inherently supports accused? Both these interpretations do not reflect accepted judicial policy not only in India but also in transnational jurisdictions.

It is submitted that it appears that the apex court, in the instant case, laboured hard to tilt the scales of justice in favour of accused by putting onus on the creditors that they should insist that the cheques in question be made payable at a place of the creditors convenience. The court, instead of ensuring that legal provisions be interpreted in such a way that the drawer does not find routes to escape payment, encouraged fraudsters by stating that the "traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings".

The court insisted upon technical justice instead of justice which conforms to natural justice. The precise point which, even if weighed in golden scales, is who is at fault? Is the creditor at fault who has parted with his valuables against a fake cheque, or the person who has issued a cheque without having sufficient

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79 *Id.* at 3548.

80 See Government of India, Report of the Committee on Banking Laws by Dr. Rajamannar, 1975.

funds in the bank? The court on the one hand says that the traders have become reckless in extending credit because of the availability of redress but one other hand says that "all remedies under the IPC and Cr PC are available to such a payee if he chooses to pursue such course of action, rather than a complaint under section 138 of the NI Act. Are these remedies not criminal remedies? Will they not make creditors reckless and incautious, as opined by the apex court, as the likely result in case of criminal remedies with reference to section 138. The opinion of the Supreme Court, it is submitted, will considerably diminish the acceptability of cheques and will defeat the very purpose for which chapter XVII in the NI Act was incorporated based on the report of Dr Rajamannar.

Payment of compensation

The payment of compensation for dishonour of cheques was debated before the Supreme Court in *Somnath Sarkar* v. *Utpal Basu Mallick.*[81]The metropolitan magistrate had convicted the appellant under section 138 of the NI Act and sentenced him to six months imprisonment and to pay compensation of Rs 80,000 under section 357 (3) Cr PC. These convictions were upheld by the additional district and sessions judge. In a revision petition filed against the said orders, the high court upheld the conviction but imposed an additional fine of Rs 69,500/- in lieu of six months simple imprisonment which was challenged before the Supreme Court.

The court put the records straight and held that the power to levy fine is circumscribed under the statute to twice the cheque amount which in no case can be violated. Even in a case where the court may be taking lenient view in favour of the accused by not sending him to prison, it cannot impose a fine more than twice the cheque amount. The court ruled that the high court has in the instant case obviously overlooked the statutory limitation on its power to levy a fine and it appears to have proceeded on the basis as though payment of compensation under section 357 of Cr PC is different from the power to levy fine under section 138 which assumption is not correct.

The apex court further ruled that the power to award compensation is not available under section 138 of the NI Act. The court has to determine the amount of fine first, which in no case can exceed to the outer limit imposed in the relevant section and then the amount of compensation can be paid out of that amount only. The court made it clear that the total amount which the defaulter under section 138 can be asked to pay can in no case exceed double the amount of the cheque which may include award of compensation also.

Offences by company

The Supreme Court in *A. K. Singhania* v. *Gujarat State Fertilizers Co. Ltd.*,[82] took a very pragmatic stand by giving logical interpretation to section

81 AIR 2014 SC 77.

82 AIR 2014 SC 71.

141[83] read with section 138 of the NI Act. The court said that the plain reading of this provision makes it amply clear that every person, who at the time offence was committed was in charge of and responsible to the company, shall be deemed to be guilty of the offence under section 138 of the Act. The court, in the first instance, said that it shall be necessary to allege that the directors were incharge of and responsible to the conduct of the business of the company. It is a necessary ingredient which would be sufficient to proceed against such director. The apex court has then diluted its hard stand by holding that as no particular form is prescribed, it is not necessary to reproduce the exact words of the section. The court maintained that if the reading of the complaint shows and substance of accusation discloses necessary averments that would be sufficient to proceed against such of the directors and no particular form is required. It may not be necessary to allege and prove that such of the directors had any specific role in respect of the transaction leading to issuance of cheque. Section 141 of the Act makes the directors in charge and responsible for the overall conduct of the business of the company within the mischief of section 138 Act and not for a particular business for which the cheque was issued.[84]

This judgment has closed all the escape routes for directors who on one pretext or the other were attempting to defeat the spirit of the law by holding that there is no pointed accusation or they were not directly involved in issuing a cheque. This judgment will raise sanctity of the negotiable instruments and will bring considerable seriousness in the business transactions of the parties who are increasingly using these instruments.

The apex court further qualified the above principle of law in *Mannalal Chamaria* v. *State of West Bengal* [85] by stating that a reading of complaint should show that substance of the accusation discloses that the accused person was in charge of and responsible for the conduct of the business of the company at the

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83 The Negotiable Instruments Act, 1881, s.141 reads:

> Offences by Companies (1) if the person committing an offence under Section 138 is a company , every person who, at the time the offence was committed , was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company , shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence: 22 [Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution.

84 *Supra* note 82 at 75.

85 AIR 2014 SC 2240.

relevant time. Where there is no specific or even a general allegation made against the appellants, such complaint deserves to be dismissed.

Computation of limitation period

The opinion expressed by the Supreme Court in *Rameshchandra Ambalal Joshi* v. *State of Gujarat*,[86] regarding computation of limitation period, while presenting a cheque, has far reaching implications. It will give an extended opportunity to the drawee to get the money promised through the negotiable instrument or else be able to enforce his claim through criminal prosecution.

In the present case, the cheque in question issued on 31st December, 2005 and presented on June 30, 2006 was dishonoured for want of funds. In a complaint under section 138, it was contended by the opposite party that the cheque was time barred. The bone of contention was whether a "month" means a period of 30 days and consequently whether six months would mean a period of 180 days or six months would mean six calendar months.

The apex court at the outset explained the meaning of "month" for which help was taken from section 3(35) of the General clauses Act, 1897 which provides that a "month" has to be reckoned according to the British Calendar. The court opined that "we cannot ignore or eschew the word "British Calendar" while construing "month" under the Act. The period of six months cannot be calculated on 30 days in a month basis."

Turning to the crux of the issue, the apex court ruled that in case of any ambiguity regarding the date of commencement of the period of six months help of section 9 of the General Clauses Act, 1897 can be taken. This section reads as follows:[87]

Commencement and Termination of Time——

> (I)In any Central Act or Regulation made after the Commencement of this Act, it shall be sufficient, for the purposes of excluding the first in a series of days or any other period of time, to use the word "from", and , for the purpose of including the last in a series of days or any other period of time , to use the word "to."

> The apex court summed up the whole issue by stating that when the date mentioned on any cheque indicates that the validity period is to commence "from" that date, the day on which the cheque is drawn has to be excluded and the last day within which such act needs to be done is to be included . The court further explained it by way of illustration in order to remove any doubt by stating that for calculating the period of six months for cheque drawn on 31-12-2005, the first day i.e. 31-12-2005 has to be excluded and the period

86 AIR 2014 SC 1554.

87 See generally, The General Clauses Act, 1897, s.9.

of six months will be reckoned from the next day *i.e.,* from 1-1-2006; meaning thereby that according to the British Calendar, the period of six months will expire at the end of 30th day of June, 2006.[88] This judgment will surely help the cause of the payee who has already given his consideration in lieu of the cheque and is now at the mercy of the drawer who now banks on technicalities to avoid payment which he has once promised by signing the cheque.

V BANKING LAWS

Financial institutions

A perplexing question often confronted by the courts relating to the Securitisation and Reconstruction of Financial Assets And Enforcement of Security Interest Act, 2002 (hereinafter SAREASI Act) is what constitutes a "financial institution" and can financial institutions constituted under different Acts before the enactment of the SARFEASI Act avail procedure laid down under this Act for recovery of money? There has been a vertical division amongst the high courts on these issues and the final word from the Supreme Court is yet to come.

A Division Bench of the High Court of Allahabad in *Yogendra Kumar Jisawal* v. *C.M.M*,[89] following the opinion of High Court of Uttaranchal laid down in *Unique Engineering Works* v. *Union of India*,[90] held that the SARFEASI Act is more procedural than substantive in nature and in the context of enforcement of security, the procedure laid down in the SARFEASI Act has to be followed.

A diametrically opposite view was take by the division bench of the Orissa High Court in *Subash Chandra Panda* v. *State of Orissa*,[91] while interpreting definition of the "financial institutions" given in section 2 (m) of the SARFEASI Act and its ramifications. It was ultimately held that where a borrower was not a financial institution when the transaction took place, the lending institution cannot invoke the provisions of the SARFEASI Act on the basis of any subsequent arrangement.

The above judicial precedents of the sister benches were at the back of the High Court of Andhra Pradesh when it was seized with the similar matter in the *M/s. Deccan Chronicles Holdings Ltd.* v. *Union of India*.[92]

Briefly, in the instant case, the petitioner, a public limited company borrowed two loans of Rs 50 crores, each from M/S India Bulls Financial Services Limited (for short "IBFSL") for which repayment was not made as per the scheduled. The IBFSL was later on merged with its sister concern, M/s India Bulls Housing

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88 *Id.* at 1561.

89 AIR 2010 All. 3. See also *Pradeep Gupta* v. *State of UP*, AIR 2010 All.3.

90 2004 (I) UC 451.

91 AIR 2008 Ori 88.

92 AIR 2014 AP 78.

Finance Limited, which initiated recovery of loan under the SARFEASI Act. The petitioner challenged this action on the ground that IBFSL from which loan was taken was not registered as a "financial company" under section 3 of this Act and its merger with its sister concern will not in any way alter the legal position. It was also contended that the respondent is a housing company governed by the provisions of the National Housing Bank Act 1987, it cannot deviate from the procedure prescribed by this Act.

This court dismissed the opinion of the High Court of Allahabad (in *Yogendra Kumar Jisawal* by calling it "over simplification to treat the entire gamut of the SARFEASI Act as mere procedure". It was also not impressed by the opinion of the Uttaranchal High Court (in *Unique Engineering Works*) which had declared that "the SARFEASI Act is retroactive in nature" and held that whether one employs the term "retroactive" or largely "retrospective", it cannot be permitted to govern the transactions, which were outside its purview, when they were made. The court showed agreement with the opinion of the Division Bench of the High Court of Orissa.[93] but interestingly, this judgment was overruled expressly by the full bench of the same high court in a recent judgment in *Sarthak Builders Pvt Ltd.* v. *Orissa Rural Development Corp. Ltd (FB)* [94] in which it was held: [95]

> On our due consideration of the issue, we are of the view that the view taken in Subash Chandra Panda, (AIR 2008 Ori 88) is not sound law. The view taken in Unique Engineering Works and Pradeep Kumar Gupta, (AIR 2010 All. 3) commends our acceptance.

The High Court of Andhra Pradesh, it appears in the instant case, is not happy with the procedure laid down in the SARFEASI Act for recovery of loan but expressed its helplessness to pronounce on its constitutionality because of the opinion expressed by the Supreme court in *Mardia Chemicals Ltd.* v. *Union of India*[96] in which constitutionality of the SARFEASI Act was upheld. The present court opined that "it is for the Supreme Court to say anything further, if it comes to the conclusion that the beneficiaries under the Act are heckling at the age old legal system." The court, however, did not stop here but went on further by stating that the SARFEASI Act is a radical departure from the established norms of adjudication. The debt relief laws were passed by the Parliament to protect the interest of gullible and innocent borrowers and relieved many from the clutches of indebtedness but the same Parliament took nose dive to safeguard the interest of "superlative corporate lenders". While doing so, the lender was assigned "the status of the adjudicator as well as the executing agency of the decree. Its word is treated as final not only in regulating a debt but also to straight

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93 *Id.* at 85.

94 AIR 2014 Ori 83.

95 *Id.* at 84.

96 (2004) 4 SCC 311.

way take possession of the mortgaged property. The curious part of it is that the debt can be recalled and mortgage can be revoked, even if the time for repayment of the debt has not reached. Citing of default in payment of installment is sufficient to take the drastic step."[97]

The court made it clear that the financial institutions which do not fall within the domain of the SARFEASI Act, at the time of the lending of loan, cannot be brought within its purview by subsequent merger with the financial institution that comes within the ambit of the SARFEASI Act. The court laboured very hard to justify its finding by stating that the entrepreneurs with expertise at their disposal would choose to borrow the amount from the financial institutions that are under regulation by the Reserve Bank of India, though there may be several private money lenders, prepared to advance the amount. The reason is that a semblance of protection against in- discriminate levy of interest or undue squeezing of the borrower at the discretion of the lender is felt, in case the money is borrowed from regulated financial agencies. The court took the help of the Sick Industrial Companies Act, 1985 which lays emphasis on the measures to be taken by the authorities to ensure that sick industries sustain, which includes rescheduling of the loans or to forgo the component of interest.

The court did not give any credence to the fact that the gross fiscal deficit in India is approx.10% of Gross Domestic Product per annum and non performing assets are to the tune of Rs 90,000 crores which is not a good sign of the health of economy of any country. The survey conducted by the Ministry of Finance, Government of India revealed that in 2001, a sum of more than Rs 1,20,000 crores was due to the bank and this was adversely affecting to the country. This prompted the Government of India to constitute first Narasimham and then Andhyarujina Committees[98] to suggest measures for speedy recovery of loans. The Narasimham Committee in its second report observed that the non-performing assets of most of the public sector banks were abnormally high and the existing legal mechanism was highly insufficient.

The court also did not pay any attention to the fact that the debt recovery laws may vary in procedure so far as recovery of loans is concerned but ultimate object is the same. The debt recovery laws, unlike the SARFEASI Act, are tardy and time consuming.[99] The SARFEASI Act has of course prescribed potent

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97 *Supra* note 92 at 82.

98 Committees constituted or banking reforms see generally, *available at:* https:// books.google.co.in/books?id=PXHo8uOIKmMC&pg=PA183&lp g=PA183&dq =Narasimham+and+Andhyarujina+Committees+on+banking+reforms&source= bl&ots=Va7r44Enuf&sig=nxfNOzEC-btrRKBiBJRlc MYhPe0&hl=en&sa= X&ved=0CC4Q6A EwA2oVChMIxfDxm8i5xwIVg9EUCh2tRg5m#v=onepage &q=Narasimham%20and%20 Andhyarujina %20Committees% 20on%20 banking% 20reforms&f=false (last visited on June 10, 2015).

99 *Supra* note 95 at 90. This is endorsed by the full bench in by holding that with the passage of time, the proceedings before the tribunals became synonymous with those of the regular courts.

procedure for recovery of loan and has also prescribed mechanism to ensure its speed recovery. Since the borrowers have to repay loan, it should hardy make any difference to them whether they are required to repay it through SARFEASI Act or through any other relevant legislation. It is only where they are insincere in their repayment that they try to wriggle out from the clutches of the rigorous laws on one pretext or the other.

E-auction of secured assets

The High Court of Madras was called to respond to the question of legality of e- auction of the secured assets in *Tamilnadu Organic Ltd., Chennai* v. *State Bank of India*.[100] The petitioner had raised three pronged issues. First, e –auction is not permissible under the SARFEASI Act which provides for public auction only. Second, service provider for e-auction is an intermediary authorized to conduct auction which is not permissible under law. Third, Information Technology Act, 2000 (hereinafter IT, Act) applies only to contract for the sale or purchase of immovable property and will not apply to sale of secured assets.

The court ruled that there is no difference between the e-auction and public auction. An e-auction sale is as transparent as a sale by public auction with added advantages.

While responding to the second question, the court rightly held that the service providers are platforms used for holding e-auction. They can be equated with the owner of the real space who leases it out for conducting public auction. These service providers neither interfere nor organize independently any e-auction on behalf of the bank concerned. The procedure is secretive in nature and prevents unnecessary interference from influential persons with money and muscle power from causing hurdles in the smooth and successful conduct of the sale of the properties.

The court answered the third question again in favour of the respondent. The contention was that section 1(4), read with item five of the first schedule of the IT, Act makes it abundantly clear that this applies only to the contracts relating to movable property. The court ruled that such a restriction would not apply to the procedures followed by the respondent banks in bringing the secured assets for sale by way of e-auction. The contract of sale and issuance of sale certificates to the purchasers resulting in the conveyance of the properties are done manually.

The court, without expressly saying so, neutralized effect of above provisions of the IT Act which confines its operation to the conveyance of movable property only. From the interpretation of the high court, one can easily work out that all contracts are concluded in different stages. The preliminary stage is information, negotiation and conclusion of the contract and second stage is documentation. The court, it appears, is of the opinion that the preliminary stage of the contracts, whether pertaining to movable or immovable property, is the same and e – service can be put to use for concluding this preliminary stage legally without any apparent violence to the above provisions of the IT Act. The second stage is

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100 AIR 2014 Mad. 103.

that of documentation which is done manually and if it relates to the immovable property, it falls outside the purview of the IT Act.

VI CONCLUSION

The 'standard form contracts' have taken firm roots and have been accepted by businesses as well as consumers but it has been found that at times the contractual obligations in these contracts are couched in such as language that they either prove harsh or unreasonable to the weaker party and this is the reason that the courts have formulated principles from time to time to neutralize their unconscionable effects. One of such principles is that the contractual terms should not be unreasonable. The apex court has now overturned this long established principle and has refused to accept the argument that all the terms in the contract must be reasonable. This observation of the apex court can be read only in the context of the case in hand and cannot be considered as a general binding precedent; otherwise it is bound to operate against the party with unequal bargaining power especially against consumers.

The competence of parties to contract together with its surrounding legal issues were settled by the courts even before independence of Indian, courtesy to some landmark judgments by the Privy Council starting from *Mohori Bibee* case which declared minor's contract void *ab nitio* with an avowed object to safeguard his interest. The Privy Council soon realized that strict adherence to this principle of law will cause injustice to a minor and will defeat the very purpose for which this principle was enunciated as it was observed that the same principle of law was being invoked by major also to get out of the contractual obligations. This is the reason that Privy Council qualified this principle of law in subsequent cases and declared the contract valid and binding on the minor that was executed on his behalf by his guardian. This rule was further fine tuned by holding that *Mohari Bibee* ratio can be invoked only where a minor is charged with an obligation in a contract and the major-an opposite party wants to enforce this obligation. All these legal development took place before independence of India and were followed by the courts even after the independence.

The above settled position was overturned by the apex court by invoking *Mohari Bibee* without any regard to subsequent rulings which is bound to cause injustice to minors- an injustice which the courts, post *Mohori Bibee,* attempted to redress. There is a need to revisit this ruling and also section 3 of the Indian Majority Act, 1875 which gives contractual rights to minors only after attaining the age of 18 year or 21, where guardian is appointed.

The apex court did not deny that a valid contract can come into existence by an implied acceptance but very rightly held that the intention to that effect must be visible from the letters of the document, or from the surrounding circumstances.

The apex court, while delineating scope of section 16 of the ICA, has laid down that fiduciary relationship cannot be equated with the ordinary relationship. The parameters for determining the validity of a transaction, especially when there is no reciprocal consideration, are different from the

one's applicable to an ordinary case. However, the apex court did not dwell deep into those parameters, instead invoked another decision which equated its parameters with the gift *inter vivos*. It is submitted that the parameters of fiduciary relationship as envisaged under section 16 are inbuilt comprehensively in it and this section needs no external aid for its construction, otherwise it is bound to cause confusion and will result in conflicting opinions from the courts in future.

The confusion over the validity of a clause restricting limitation period for enforcing a contractual claim continues in spite of the amendment made in section 28 of the ICA in 1997. This confusion was compounded by the fact that the Supreme Court had decided *National Insurance* case in the same year in which amendment was made and reiterated pre–amendment legal exposition which resulted in conflicting opinions. The opinion of the High Court of Delhi in *Delhi Development Authority* is a correct interpretation which has very rightly ignored the opinion of the apex court in *National Insurance* case and declared that the clause in an agreement, which restricts limitation period, is hit by section 28. The opinion of the apex court can be, at the best, be called a *per incuriam* decision, laid down in ignorance of the relevant law on the subject and cannot constitute a binding precedent.

The question whether a company can be blacklisted for life for committing fraud was answered in negative by the High Court of Madhya Pradesh by propounding principle of proportionality and by the apex court by ruling that the 'debarment cannot be permanent'. One cannot quarrel with the principle of proportionately which is just and reasonable but one can contest the principle of law enunciated by the apex court, especially in the backdrop of scams and scandals so rampant at present which bleed economy of our country. The apex court, while documenting its opinion, came heavily initially on the contractor for following corrupt practices which are against public policy but at the end lost that steam by allowing him to go scot free by holding that the erring company is bulk supplier to the respondent and has already refunded the excess money received by it without giving any credence to the fact that the money was refunded after this fraud was unearthed and FIR was lodged.

The two decisions of the apex court pronounced on frustration of contract during the surveyed year have raised many issues. The apex court attempted to lay down different grounds of frustration of contract, where one of the contracting parties is government, which has no mandate of section 56 of the ICA and then refused to accept legislative or government intervention as a ground of frustration of the contract which is hitherto considered as an established ground of frustration of contract.

The observation of the apex court about the application of doctrine of unjust enrichment gives an impression that this doctrine is applicable only for refund of taxes which is neither in harmony with the long line of the judicial precedents nor in resonance with the background in which this principle was evolved. The precise test for application of unjust enrichment doctrine is whether one who is asked to refund money by fulfilling non contractual

obligations can retain this money with safe conscience, immaterial of the nature of money, be it taxes or otherwise.

The Supreme Court has laid down a very debatable proposition by holding that the imposition and recovery of penalty on breach of contract is legally impermissible under the ICA in spite of the fact that section 74 gives full freedom to the parties to incorporate a stipulation in their contract by way of penalty in case of breach of contract.

In the area of partnership law, the High Court of Kerala did not accept the contention that a firm which lost its registration can still continue its business as an unregistered firm. The court did not appreciate the difference between dissolution of a firm and the firm without registration. The unregistered firms can survive and can carry on their business but the dissolved firm cannot.

The response of the courts in the field of negotiable instruments has been mixed. The court allowed presentation of cheque as many times as can be within the period of validity and the reason cited has been that the magistracy in this country is over-burdened by an avalanche of cases under section 138 of NI Act. However, the same reason was cited by the apex court for denying the right to drawee to institute a complaint in a court of the place where notice was served to drawer by saying that it results into multiplicity of complaints. Though the first opinion is laudable as it will give both the parties extended time to defer institution of the complaint and work out modalities for payment of money, the second ruling is going to relegate cheques to illusory papers because now drawee has to file the complaint at the place where the bank at which the cheque is to be drawn is situated. The apex court overturned the flexible approach adopted in *Bhaskran* which had allowed institution of complaint at a place where demand notice was issued by the drawee. This indeed was the place of convenience of the drawee who obviously deserves more sympathy as against the drawer who breached his promise made in the form of cheque that the payment will be made to the drawee once that cheque is presented to the bank. This ruling of the apex court in the surveyed year will have serious implications on the period of limitation also. The drawee, after making all out efforts to get his payment, files a criminal complaint as a last resort at the last moment. If it is now held that the drawee has to file the complaint at a place where the bank from which the cheque is actually drawn is situated, then a good number of criminal complaints will be debarred by limitation of time. This will dilute their acceptability and will defeat the very purpose for which Dr. Rajamanner's had suggested incorporation of section 138 in the NI Act.

The apex court brought flexibility in the procedure for filing complaint against company's director by opining that no particular form is prescribed for filing a complaint and it is not necessary to reproduce the exact words of the section. It is sufficient, if the reading of the complaint shows and substance of accusation discloses necessary averments against directors. It is not necessary to allege and prove that such of the directors had any specific role in respect of the transaction leading to issuance of cheque.

The apex court has added one day to the limitation period for filing complaint by adopting flexible approach in interpreting "six months" do not

mean 180 days but “six calendar months”.

The divergent views of the high courts on the issue of what constitutes a financial institution under the SAREASI Act and can financial institutions constituted under different Acts before the enactment of the SARFEASI Act avail procedure laid down under this Act for recovery of money, continued this year also and the final word from the Supreme Court on this subject is yet to come.

The legality of e- auction of the secured assets has been upheld very rightly and in that process it has been laid down that there is no bar in the SARFEASI Act to hold e-auction as service provider is not an agent but simply a platform to conduct e-auction. It was also laid down that it is true that the IT Act does not apply to immovable property but there is no harm in concluding preliminary stage of the contract relating to immovable property through internet.