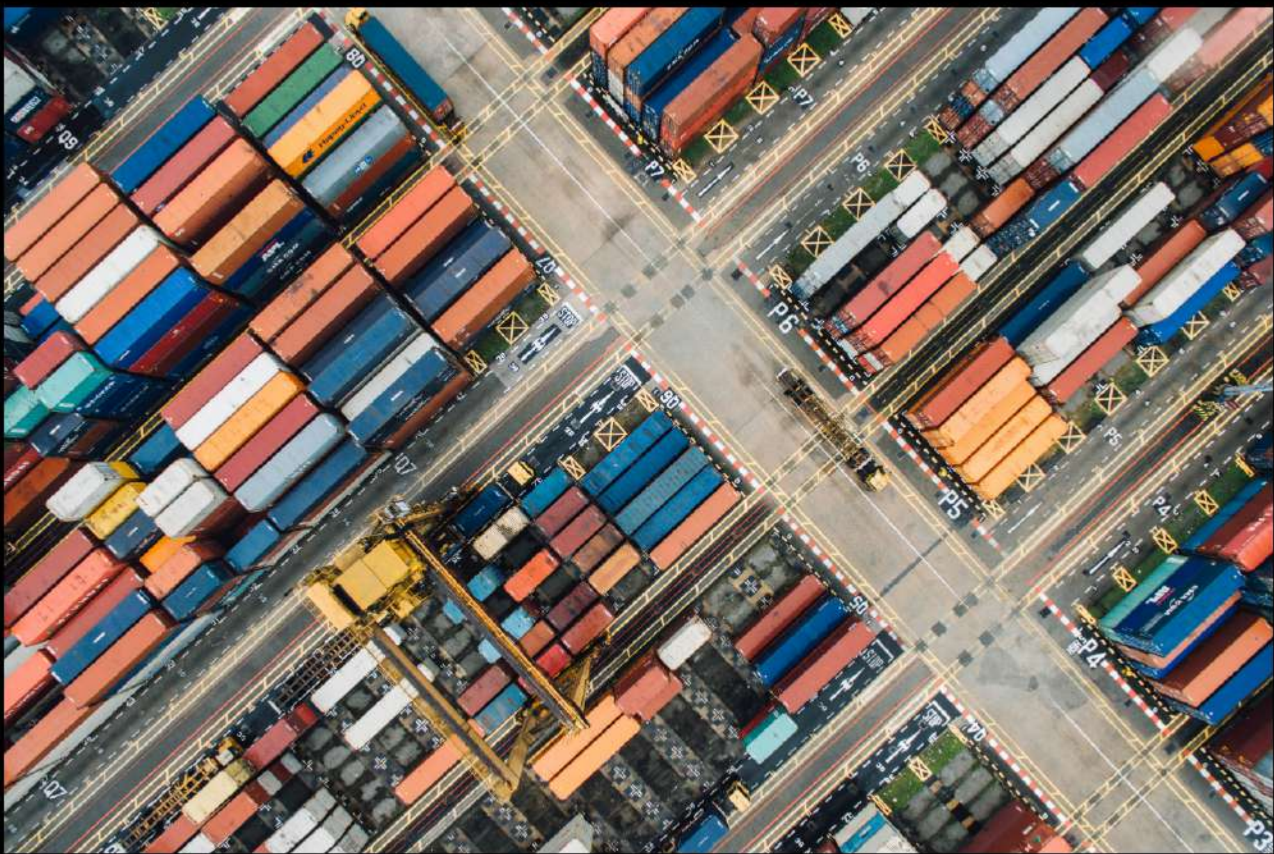
MCCI | Merchants' Chamber of Commerce & Industry



The Legal Eagle

Volume I

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April 2020

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MCCI | Merchants' Chamber of Commerce & Industry

Starting its journey way back in 1901, the Merchants' Chamber of Commerce & Industry (MCCI) has emerged as one of the most dynamic and front-ranking Chambers in the city of Kolkata. Being born in an environment of National Upsurge, it's prime objective has been to provide a sense of integrity, secularity and idealism to the business community of Eastern India. The Chamber today is steadily making it's presence felt across the country and abroad, through well-thought out, meaningful initiatives aimed at taking Indian Industry to a higher growth trajectory.

Historically, the Chamber carries with it a legacy of uniting the business community in Kolkata, forming an organisation and raising its voice of concern against all sorts of injustice in the pre–independence days. It played a significant nationalist role at different times of the last 117 years of it's existence. The Chamber has always been in the forefront of challenges faced and policy-actions taken by the emerging India, championing the cause of indigenous industry as generators of maximum wealth and employment for the millions of people in India.

The MCCI started its function in the name of 'Vaishya Mitra Sabha', which was renamed as the 'Merchants' Committee' in 1904 and membership was opened to all. It plunged itself into the Swadeshi Movement launched by Mahatma Gandhi in 1921. In 1952, the name was changed into 'Merchants' Chamber of Commerce', which was ultimately changed to "Merchants' Chamber of Commerce & Industry" in 2016, to re-affirm and reflect its focus on trade, commerce & industry.

MESSAGES

Vivek Gupta

President
Merchants' Chamber of Commerce and Industry

It is satisfying to see that after the successful publication of the inaugural issue of 'The Legal Eagle', the editorial team is releasing Vol I Issue II of the monthly magazine. COVID-19 has created alarming challenges and the Industry is going through immense hardships and tough waters to tide this rough wave. At this point in time, it is social distancing and adherence to government advisories which we are all adhering to.

I herewith extend my best wishes to the Legal Affairs Committee of the Chamber and the Editorial Board for their efforts towards this knowledge venture.

Happy Reading, Stay safe and Healthy!

Mamta Binani

Chairman, Legal Affairs Committee
Merchants' Chamber of Commerce and Industry

I would like to extend my gratitude to all the contributors and stakeholders and look forward for the same support for the upcoming issues of the magazine. Most importantly, during our fight against COVID-19, the Committee extends its sincere thanks and gratitude to the entire medical fraternity, the police, administration and the support staff who are undergoing great ordeal for the benefit of the entire nation.

It is unprecedented times and we can only pray that the future generation never encounters such times, ever!

Happy Reading !

Editorial Team

The team is grateful to MCCI for having given this opportunity to serve. We will strive to bring quality reading material to your goodselves. Keep guiding!

Shubham Jain

Chanakya National Law University

GUEST ARTICLES

- Check the Letter – A Practical Discussion
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- Insolvency and Bankruptcy Code - Making Directors Personally Liable

Articles are arranged in alphabetical order

Check the Letter – A Practical Discussion

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"Taking undated or post-dated cheques from the debtor upfront for the purpose of repayment may not be a common feature in global market practice but is a peculiar yet common feature in various Indian financing transactions, including complex transactions with innovative structures."

Check the Letter – A Practical Discussion

Cheques, recognised as negotiable instruments within the meaning of section 6 of the Negotiable Instruments Act, 1881 ("**NI Act**"), are often taken by creditors upfront from the debtors for the purpose of repayment in financing transactions in the Indian market. Taking undated or post-dated cheques from the debtor upfront for the purpose of repayment may not be a common feature in global market practice but is a peculiar yet common feature in various Indian financing transactions, including complex transactions with innovative structures.

In cases where post-dated or undated cheques are taken upfront by a creditor or its trustee as a mode of repayment of debt, the principal financing documents typically have relevant provisions which state that upon the debtor's failure to repay the debt or a part thereof, the creditor or its trustee shall be at liberty to deposit such cheques to recover the amounts due under the financing arrangement. A practical point that needs to be assessed is the timeframe by which such cheques should be handed over by the debtor to its creditor or its trustee. This article is intended to shed light on such practical aspects of including cheques as a mode of repayment in financing transactions and when does a cheque duly create a right in favour of the creditor.

Cheques are handed over to the creditor or its trustee along with a covering letter as a condition precedent in financing transactions. More often than not, upon occurrence of a payment default, when the stage comes for deposit of cheques for recovery of the outstanding debts, it is seen that due to the poor financial health of the debtor, such cheques are dishonoured by the debtor's bank on account of insufficiency of funds and the creditor or its trustee seeks legal recourse against the issuer company and their directors under section 138 read together with section 141 of the NI Act.

Section 138 of the NI Act states the following:

> "***138. Dishonour of cheque for insufficiency, etc., of funds in the account.*** – *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that*

account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless–

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation. – For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability."

It is trite law that to attract section 138 of the NI Act, the dishonoured cheque has to be towards payment of an amount of money for the discharge in whole or in part of any legally enforceable debt or any other liability.

In *Sampelly Satyanarayana Rao* v. *Indian Renewable Energy Development Agency Limited*[1] ("**Sampelly Case**"), the Supreme Court of India ("**Supreme Court**") stated that, to determine the applicability of section 138 of the NI Act in a given case, the test to be employed should be "*whether the cheque represents discharge of existing enforceable debt or liability or whether it represents advance payment without there being subsisting debt or liability*". In the instant case, the Supreme Court held that whether a post-dated cheque is for "*discharge of debt or liability*" depends on the nature of the transaction and if on the date of the cheque, liability or debt exists or the amount has become legally recoverable, then section 138 of the NI Act is attracted. The Supreme Court further held that once the loan has been disbursed and instalments have fallen due on the date of the cheque as per the underlying agreement, dishonour of such cheques would fall under section 138 of the NI Act and the cheques undoubtedly would represent the outstanding liability.

In *Indus Airways Private Limited* v. *Magnum Aviation Private Limited*[2] ("**Indus Airways Case**"), the Supreme Court held that issuance of cheque towards advance payment cannot be considered as discharge of any subsisting liability and thus section 138 of the NI Act would not get attracted in such cases.

In *Hitenbhai Parekh Proprietor-Parekh Enterprises* v. *State of Gujarat and Anr.*[3], the Gujarat High Court affirmed the principle laid down by the Supreme Court in the Sampelly Case and the Indus Airways Case and held that in case of cheques bearing only signature of the drawer or blank cheques, for section 138 of the NI Act to be applicable, the cheques should represent discharge of an enforceable debt or liability.

Further, in *Balaji Seafoods Exports (India) Ltd.* v. *Mac Industries Ltd.*[4], the Madras High Court affirmed the same principle as laid down by the Supreme Court in the Sampelly Case and the Indus Airways Case in case of undated cheques and also held that the provision of section 138 of the NI Act is not attracted in case of undated cheques given only as security.

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[1] *Sampelly Satyanarayana Rao* v. *Indian Renewable Energy Development Agency Limited*, Criminal Appeal No. 867 of 2016 (arising out of S.L.P. (Crl.) No. 5410 of 2014).
[2] *Indus Airways Private Limited* v. *Magnum Aviation Private Limited*, 2014 (143) DRJ 25.
[3] *Hitenbhai Parekh Proprietor-Parekh Enterprises* v. *State of Gujarat and Anr.*, 2009 GLH (3)742.
[4] *Balaji Seafoods Exports (India) Ltd.* v. *Mac Industries Ltd.*, 1999(1)C TC 6.

In *Ramakannan* v. *Chettiar and Co., represented by its partner K. Ganesh Krishna through his power agent G. Thangaraj*[5] ("**Ramakannan Case**"), the Madras High Court held that under section 138 of the NI Act, as the validity of a cheque is only 6 (six) months from the date of issuance, the implied authorisation for filling up an undated cheque should certainly be within the limitation of 6 (six) months and not more than such period of limitation. The court further held that filling up such cheques against the limitation prescribed under the NI Act would be against the legislative intent and would create an anomalous situation which may be misused by unscrupulous litigants. It may be noted that at present, the validity of a cheques is 3 (three) months.

In view of the Ramakannan Case, a defence may be raised by the issuer of the cheques that the undated cheques were filled up beyond the limitation period prescribed under section 138 of the NI Act. However, it is unlikely that such defence will be successful given the aforesaid judicial pronouncement completely defeats the entire purpose of the issuance of post-dated and undated cheques as part of commercial transactions.

It may be noted that proceedings under section 138 of the NI Act is quasi-criminal in nature and is not intended as a recovery proceeding given that the provision provides for imprisonment for a term which may be extended to 2 (two) years, or with fine which may extend to twice the amount of the cheque, or with both as punishment. However, it often acts as an effective tool to keep the promoters and directors of the borrowing company on the hook and ensure that they take steps to cure the payment default or propose or enter into any settlement arrangement with the creditor.

In view of the aforesaid judicial decisions, it becomes imperative to examine the date on which the cover letter attaching the post-dated cheques and the undated cheques were given by the issuer of the cheques to the creditor or its trustee. It may be noted that signing of financing documents do not give rise to the debt itself. However, the date of disbursement of a debt upon fulfilment of all conditions precedent under the underlying financing documents is the actual date on which a legally enforceable debt arises. Therefore, in the event such letter pre-dates the date of disbursement of the debt for repayment of which such cheques have been given, chances

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[5] *Ramakannan* v. *Chettiar and Co., represented by its partner K. Ganesh Krishna through his power agent G. Thangaraj*, 2007-1-LW(Crl.)527.

of the creditor or its trustee succeeding in a proceeding under section 138 of the NI Act looks unlikely.

In order to improve the chances for a creditor or its trustee to succeed in a proceeding under section 138 read together with section 141 of the NI Act on account of dishonour of post-dated or undated cheques issued by the debtor, it may be prudent to not mention such cheques as a condition precedent item in the loan agreement and take such cheques from the debtor along with a cover letter preferably signed by a promoter director bearing a date which is on or after the date of disbursement of the loan amount to the debtor's account, thus ensuring that such cheques are towards payment of an amount of money for the discharge in whole or in part of a legally enforceable debt. Alternatively, another way of complying with the principle set out in the Sampelly Case is perhaps for the creditor or its trustee to obtain the cheques as condition subsequent (i.e. after disbursement of the initial tranche of the loan amount). This could ensure that there is an enforceable debt at the time of issuance of such cover letter and the post-dated cheques. Although in theory this may prove to be a viable solution to settle the conundrum, however in practice in the Indian market, it may pose significant challenge to obtain such cheques from the debtors post-disbursement of the loan. Moreover, whilst the position in respect of post-dated cheques is very clear, it may be noted that for undated cheques it is slightly unclear and remains to be seen how it pans out in times to come.

Consumer Protection Turned Consumer Fortification

Karan S. Thukral

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"The position of consumer post-independence has witnessed unforeseeable change and more over the dimensions of law relating to consumer protection has also transformed. Now, the focal point of relevance is being set upon buyers with the status of 'consumer' as they are and have been exploited since time immemorial."

Consumer Protection Turned Consumer Fortification

"Customers are the most important visitor on our premises, they are not dependent on us, and we are dependent on them. They are not an interruption in our work. They are the purpose of it. They are not outsiders in our business. They are part of it; we are not doing them a favour by serving them. They are doing us a favour by giving us an opportunity to do so."

- Mahatma Gandhi

The golden words reiterated by the father of our nation bears within itself the very purpose of a law that was incorporated primarily for the welfare of consumers. The concept of consumer protection is not something that has originated like just another fluctuating trend but in fact traces its origin from the existence of human civilization.

With gradual passage of time, the concept has recurrently been in conflict and is not being given the justice and righteousness it requires. It has been very evident in recent times that the interests and rights of a consumer continue to clash with various business policies and parallel functioning of the same. Whereas on one hand, customers should be the integral focus of a business, on the other hand they have acquired status of merely being a source of their commerce. Tilting direction for this article, light is being shed upon the new development of liaison between the Buyers and Builders in real estate sector.

Even though the real estate sector is one of the globally renowned sectors and comprises within itself almost every arena pertaining to housing, retail, commercial, etc. with tremendous growth but it also brings along with it shortcomings that have become more like an unfruitful and mislaying affair for buyers. The extent of fraudulent activities in housing sector in today's date needs no specific mention and is always in fame for all the bad reasons. The buyers who invest their hard earned money in this particular sector are time and again found to be seeking redressal under the umbrella of Consumer Protection Act, 1986 justifying the same to be 'deficiency' defined under section 2(1)(g) of the Act and demanding appropriate 'services' duly produced in section 2(1)(o) of the same Act. The buyers in these cases are rightfully 'consumers' as per section 2(1)(d) and their status has been backed by judicial precedents delivered by the Apex Court. Until the year 2019, there was hardly any mention of the nature of practices that are taken recourse to by fraudulent builders after which the protectors of law took cognizance of changing scenario and placed their strong foot forward in securing the same.

Having interpreted the evolution of ways through which a guiltless buyer claims his right over the property, the relevant legislations and counter claims emanating from buyers at fault, the Judiciary finally touched the issues that deserved attention and subsequent relief since a very long period.

The year 2019 witnessed various bulwark judgments like ***Pioneer Urban Land and Infrastructure Ltd. & Anr v. Govindan Raghavan on 2nd April 2019; Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors. On 9th August 2019*** wherein not just the standing of a consumer was augmented but a sword was handed to them in order to counteract anything that hinders their right which has lawfully been enshrined in the Constitution of India as well. The approach taken by the supreme justice governing body in India was carried forward by National Consumer Disputes Redressal Commission in judgments such as ***Surinder Kumar Sarna v. Parsvnath Developers Ltd. On 11th April 2019 and Shalabh Nigam v. Orris Infrastructure Pvt. Ltd. on 6th May 2019***.

The Hon'ble Supreme Court of India relied upon the following observation in aforementioned judgment which has been drawn from a judicial precedent;

"***Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power.***"

Securing the economic justice as provided under the Constitution of India, the Apex Court as well as the National Consumer Disputes Redressal Commission has declared alluring advertisements to entrap common people an unfair trade practice given in section 2(1)(r) of the Consumer Protection Act, 1986. The Supreme Court further went on to reiterate that the Builder-Buyer Agreements entered into between the parties which is used as a defense mechanism by builders is merely a document made for harassing the unaware and innocent buyers. Builders insert one sided clauses in such agreements thereby keeping an arbitrary control and supremacy for self but the same becomes an exploitation clause for the buyers. To quote other categories that bear the status of ‘unfair trade practices’ are false representation or offer of bargain prices, non-compliance of prescribed standard, hoarding etc. Non delivery of possession pertaining to a purchased immovable property whose value rests primarily on the time passing by has been clearly reiterated to be ‘Gross Deficiency in services’ and liability from the same cannot be evaded by simply hiding under force majeure circumstances or arbitrarily drafted agreements. A buyer cannot be forced to wait indefinitely after due remittance of his money just because the builder is unable to deliver him the promised possession. Furthermore, the focal strength of wrong doers i.e. the Builders in these cases has always been delivering the possession after a

legal battle of numerous years which has also been showed the actual place it should rightfully hold as per the law. Since investment in an immovable property is not merely a possession but a valuable asset for the purchaser who also expects to enjoy the future benefits the same will bring along, the aforementioned judicial precedents evidently state that a consumer in aforesaid scenarios deserve more than just compensation along with an interest which does justice to his investment.

The most substantial of all the observations has been the one where COPRA is stated not just an additional remedy but the ultimate protector whose patronage can be availed along with the realms of other legislations. The subject Act here has in past been just a way to seek compensation from monopolistic traders and builders however considering the fact that a buyer is coerced to knock doors of redressal machineries when the wrong doer enjoys the monetary comfort for other business prospects, it was more than just necessary to render a strict interpretation.

Summarizing, the position of consumer post independence has witnessed unforeseeable change and more over the dimensions of law relating to consumer protection has also transformed. Now, the focal point of relevance is being set upon buyers with the status of ‘consumer’ as they are and have been exploited since time immemorial. The above corroborated issue demanded justice since long and has finally taken the first step in bringing buyers and sellers at par. However, despite aiming at fortification of consumer than merely protection, the hidden loss of consumer remains unnoticed. The first and foremost intent behind procuring an immovable property is to convert the same into a valuable possession and security for coming generations which seems to be lost in entire hustle of litigation. As much as law tries to secure protection for the aggrieved, it should also prove to be a paragon who puts the wrong to rest and deliver the long demanded justice in its true essence.

Corporate Perversity: A Critical Analysis of Termination of Employees with Special Reference to Specific Relief Act, 1963

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"Termination of employment' in India, in the present state of affairs, is exclusively at the volition of the employer which is per se marred with nepotism and as such in their legal relationship, the employer stands unparalleled as compared to the employee."

Corporate Perversity: A Critical Analysis of Termination of Employees with Special Reference to Specific Relief Act, 1963

Termination of employment' in India, in the present state of affairs, is exclusively at the volition of the employer which is ***per se*** marred with nepotism and as such in their legal relationship, the employer stands unparalleled as compared to the employee. The rationale behind this arrangement is that in such a relation, the only thing that regulates and dominates the parties is the Contract of Employment and the unilateral terms and conditions which the employee is bound to accept. The illegitimate aspect for the dismissal of an employee is triumphantly clothed under the realm of legal considerations by the employer, resulting in the annihilation of the employee without any gaffe as held by the Hon'ble Supreme Court in ***S.S. Shetty v. Bharat Nidhi Limited.***[1] The chaos and instability of the employment is nothing but a result of absence of legal blanket on termination coupled with the dearth of codified legislation to administrate the employment in the corporate sector as existing laws are lackadaisical and does not even whisper about such actions. The recent Terminated Employees (Welfare) Bill, 2020[2] (hereinafter referred to as "***Bill of 2020***") might act as vigilance and would serve as a boon for the white-collar employees who are dismissed on uncorroborated grounds, though it requires some amendments.

With the augmentation of Neo-liberalization, the uncertainties in the lives of people have seen an unprecedented growth. It also justifies inequality to an extent that it indoctrinates the employers to become insensitive to their employees. In fact, it has revived the rejected doctrine 'survival of the fittest' which is predominantly a mode of exercising dominance and unfettered exercise of right as per the whims and fancies endangering the right to life of a human which is per se not mutatis mutandis with the underlying principles of public employment.

The present position is that an employee not being a 'workmen' cannot move the court of law even if the termination is arbitrary, perverse and ex-facie illegal barring a claim of damages to the tune of notice period and nothing else. In fact, the subject suit is also barred by Section 14(1)(c) of the Specific Relief Act, 1963 which provides that the contract, which is in its nature

[1] AIR 1958 SC 12

[2] As introduced in the Rajya Sabha on 07.02.2020

determinable, cannot be specifically enforced. The aforesaid is supplanted with the bar imposed in as much as relying on the concept, 'what cannot be done directly cannot be done indirectly' i.e. if there cannot be specific performance of the contract, there cannot be declaration and injunction to continue such a service contract as per Section 41(e) of the Specific Relief Act, 1963 which provides that injunction will not be granted to prevent breach of the contract, performance of which could not be specifically enforced as also held by the Hon'ble Supreme Court.

In ***Binny Ltd. & Another vs. V. Sadasivan & Others.***[3], the Hon'ble Supreme Court has reiterated the old school principle and held that public policy principles or administrative law principles do not apply to private employment as also reiterated in catena of judgments including, ***Shri Satya Narain Garg through his legal heirs vs. DCM Limited and Ors***.[4], ***GE Capital Transportation Financial Services Ltd. vs. Shri Tarun Bhargava***[5] and in ***Pawan Kumar Dalmia vs. M/s. HCL Infosystems Ltd. & Ors.***[6]

The significant question which arises for deliberation is that only because of the employer is not a state[7], does the treatment to its employees also needs to stand on a different footing? The answer to it as per the prevailing law and judicial precedents is 'YES' but does that not open a Pandora of box raising serious clouds on the approach for a human life, its right and protection. Does the nature of employment decide the application of bare minimum fundamental rights of human and the dependents? In the humble opinion of the authors and while according highest respect to the hallowed seat of justice, time has come to see some sweeping and revolutionary changes in the existing absence of law as compared with the recent advent of the Bill of 2020 which is nothing but a step toward the makeover and is all set to create or reverse the history.

With the advent of the Bill of 2020 and also a hint of change in the judicial approach as introduced in ***Interlink India Private Limited vs. Priyanka Mohan***[8], it will now snatch the

[3] (2005) 6 SCC 657
[4] RFA No.556/2002 decided on 5.12.2011
[5] RFA No.294/2004 decided on 20.3.2012
[6] RFA Nos.180/2004, 235/2004 and 239/2004 decided on 13.3.2012
[7] Within the meaning of Article 12 of The Constitution of India, 1950
[8] CRP No. 215/2019 decided on 27.09.2019 by the Hon'ble High Court of Delhi at New Delhi, India

unbridled power of the employer to terminate the employees on flimsy grounds except those as envisaged in Section 1 of the Bill of 2020 being proven misconduct, cheating; indulging with fraudulent means and appropriate money and having been found guilty by a criminal court of justice. Not only this, it shall also make the employers rethink and strategies their approach in as much as the Bill of 2020 also imposes a condition that if the employee is terminated except for the abovementioned exceptions as carved out in Section 1 and also in accordance with the grounds mentioned in Section 3, such terminated employee shall be entitled to unemployment compensation and health insurance benefits for an epoch of nine months or till the time he gets employed elsewhere, whichever is earlier. Although the bill in itself is revolutionary in nature but in the humble opinion of the Authors the same shall also contain provision with respect to reinstatement in service if the termination is proved to be unjust and arbitrary and in order to do the same, the concerning laws, more specifically the Specific Relief Act, 1963 needs to be proportionally amended and only then the Bill introduced shall subserve the very purpose of its introduction. The goal of New India is to maximize egalitarianism and to minimise inequality. In this context protection of economic interests and dignity of employees of private sector is both moral and constitutional duty of the Indian state.[9]

[9] Statement of Objects & Reasons, Terminated Employees (Welfare) Bill, 2020 as introduced by the Central Government in Rajya Sabha on February 07, 2020.

Insolvency and Bankruptcy Code – Making Directors Personally Liable

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"The IBC provides for a robust and time-bound framework to deal with distressed businesses. It also facilitates in early identification of potential insolvency and in avoiding further erosion of the net worth of a company."

Insolvency and Bankruptcy Code – Making Directors Personally Liable

***Section 66 of the Insolvency and Bankruptcy Code, 2016 ("IBC") provides for liability of directors for fraudulent or wrongful trading during a specified time period, generally referred to as the twilight period. A director can be made liable under this section if he had or ought to have had knowledge of the absence of a reasonable prospect of avoiding commencement of the insolvency resolution process and if he fails to exercise due diligence in minimising the losses of the creditors. The language of Section 66 is broad such that the director may be held personally liable upon being found guilty. In the absence of established jurisprudence and judicial interpretation with respect to the liability of directors under the IBC, this article briefly examines issues pertaining to the same*.**

The IBC provides for a robust and time-bound framework to deal with distressed businesses. It also facilitates in early identification of potential insolvency and in avoiding further erosion of the net worth of a company.

In order to protect the interests of the creditors, the IBC has made the directors of a company liable for losses suffered by such creditors on account of undervalued as well as fraudulent transactions. This has had the effect of extending the fiduciary duty of directors to the creditors of a company.

In order to hold the directors and officers of a company liable for their actions which are detrimental to the interests of the creditors, the IBC has specified a time period which is generally known as the '*twilight period*' in the United States and United Kingdom. The twilight period is the point in time when the director' fiduciary duty towards the creditors of a company commences. During this period, directors are obligated to take decisions which are beneficial to the interests of the company, its assets as well as those of the creditors.

For the purpose of undervalued transactions, the twilight period under IBC is the period of 1 year preceding the insolvency commencement date and the period of 2 years preceding the insolvency commencement date. If any undervalued transaction is found to have been executed by the board of directors or other officers of a company within the said time period, such transaction may be avoided by the company by virtue of Section 48 read with Sections 45 and 46 of the IBC.

In case of fraudulent transactions, the twilight period commences upon the director either acquiring knowledge or ought to have acquired knowledge of the inability of the company to avoid the commencement of corporate insolvency resolution process, and when the director fails to exercise due diligence in minimizing the potential loss to the creditors of the company. Where a director is found to be liable under the aforesaid twilight period for executing a transaction with fraudulent intent or undertaking wrongful trading, he may be directed to make such contribution to the assets of the company as may be deemed fit by the adjudicating authority under Section 66(2) of IBC.

The extension of liability of a director for the acts committed for and on behalf of the company indicates at the legislative intent to permit piercing of corporate veil and holding individuals liable for the acts / omissions, which are otherwise undertaken by individuals in the garb of acting on behalf of a corporate entity. The Supreme Court in the matter of *LIC v. Escorts Limited and Others*[1] upheld the lifting of corporate veil if the same was permitted in a statute. Therefore, while some may be uncomfortable with the extension of the liability of an individual director for the decisions taken in his capacity as an officer of the company, the probable legislative intent is to hold each individual liable for their actions which have a detrimental impact on the interests of the company and its creditors.

Hon'ble National Company Law Tribunal in the context of Section 66 of IBC, in one of the orders, has observed that creation of the charge in the absence of sufficient consideration indicates that the said charge was created with the intent of reducing the unencumbered assets of the company and consequently hampering the recovery of dues by the creditors and accordingly, the tribunal ordered the property to be discharged of all security interest created on it by the company. While such order saw a reversal of a transaction which was detrimental to the interests of the creditors, the tribunal did not analyse or examine the extent of liability of the directors who had approved the creation of the charge. Therefore, at present, the extent to which directors may be required to contribute to the assets of the company is yet to be adjudicated upon.

In addition to the contribution to the assets of the company, Section 69 of IBC prescribes punishment for transactions undertaken by any officer of a company with the intent of

[1] 1986 AIR 1370

defrauding the creditors of the company as imprisonment for a term not less than 1 year, extending up to 5 years or a minimum fine of Rs. 1 lakh, which may extend up to Rs. 1 crore, or both. However, an act investigated under this provision must not be committed more than 5 years before the insolvency commencement date and the relevant officer must fail to prove that no intent to defraud the creditors existed at the time the act was committed.

Provisions extending the liability of directors of a company to its creditors must be interpreted carefully. An errant director may be required to contribute to the assets of a company. However, the said provision does not clarify if the contribution is to be limited to the shareholding or monetary compensation payable to the director or if it may extend to the personal assets held by such director. Further, while failure to exercise due diligence in minimising loss to the creditor has been identified as one of the criteria for holding a director liable, the constituents of 'due diligence' have not been elaborated upon. Directors must be required to contribute to the assets of the company only to the extent such contribution is necessary to bring the company back to the position in which it would have been had the impugned transaction not been executed. While the contribution determined based on the aforesaid reasoning may be a substantial sum of money, it does impose an upper limit on the liability of the directors. Other factors to be considered while interpreting the provisions governing liability of directors and their implementation, may be identified in greater detail by the tribunals and courts with time.

While the IBC creates a fiduciary duty of the directors towards creditors of a company during the twilight period, it also provides for avoidance of transactions or decisions which grant preference to the interests of one creditor to the detriment of the interests of the company through under Section 43. This highlights that commencement of the twilight period does not result in cessation of the duty of the directors to uphold the interests of the company.

Fiduciary obligation of directors towards the creditors of a company are justified on account of participation of the directors in the decision-making procedure. Interpretation and implementation of such provisions require utmost care. An established jurisprudence in this regard will be established with time through practical implementation of relevant provisions of the IBC by the tribunals.

LANDMARK JUDGEMENTS

Chief Information Commissioner

v.

High Court of Gujrat

Makwana Mangaldas Tulsidas

v.

State of Gujrat

COPIES OF COURT DOCUMENTS CAN BE OBTAINED ONLY BY APPLYING UNDER THE COURT RULES AND NOT RTI: SUPREME COURT

CHIEF INFORMATION COMMISSIONER V. HIGH COURT OF GUJARAT

An RTI application was filed by the Respondent seeking the details and certified copies of two other matters. Public Information Officer of Gujarat High Court, in reply, stated that the application must be made to the Deputy Registrar with the required fee stamp. Since the Respondent is not a party to the proceedings, an affidavit also must be attached stating the grounds on which the documents are required, under Rule 151 of Gujarat High Court Rules, 1993. The Respondent filed an appeal against this order under Section 19 of Right to Information Act, 2005, with the Registrar. This appeal was dismissed on the ground that alternate efficacious remedy was already provided for in High Court Rules and thus no copy could be provided under the RTI Act. Respondent filed a second appeal before the Chief Information Commissioner. The Chief Information Commissioner directed the Public Information Officer to provide the information sought by the Respondent. An appeal was preferred against this and was filed in the High Court.

The Learned Single Judge directed the Court to provide the Respondent with the required information. However, the Judge clarified that this supply of information will not be construed as acceptance of applicability of RTI Act. High Court then preferred an appeal to the Division Bench which allowed the same holding that when a particular field is governed by rules which are not declared ultra vires, there is no question of applying fresh rules. They upheld the application procedure under Gujarat High Court Rules and not RTI Act. The order of the Chief Information Commissioner was set aside.

ISSUES

1. Whether Rule 151 of the Gujarat High Court Rules are inconsistent with the provisions of the RTI Act?
2. Whether there are two procedures to obtain information/certified copies – one under the Rules and the other under RTI?

3. Whether, if there is no inconsistency, provisions of RTI can be resorted to for obtaining information?

JUDGMENT

The Court delved into the provisions of Section 2(f), 2(h), 2(i), 2(j) and Section 8(1) of the RTI Act. The Court also interpreted Article 124 and Article 145 of the Constitution of India. The Supreme Court observed Order XIII of the Supreme Court Rules and the procedure therein. Under Rules 149 to 154 of Gujarat High Court Rules, 1993, on filing of application with prescribed court fee stamp, parties are entitled to receive the copies of judgments, orders etc. Third parties shall not be given any copies unless by the order of the Assistant Registrar. The applications made by third parties must be accompanied with an affidavit stating the grounds on which the documents are being asked for. It needs to be noted that the third parties are not barred from accessing documents. All they need to do it file an affidavit stating the grounds. Most of the High Courts across the country and the Supreme Court have stipulated rules with a similar provision. Thereby, the SC concluded that there is no inconsistency between the RTI Act and the Rules formulated by the High Court.

The RTI Act was enacted keeping in mind the importance of transparency and accountability and preservation of confidentiality of sensitive information. The procedure under High Court Rules is not complicated and is very simple. Information held by the High Court are ‘personal information’ of the litigants. Under the guise of seeking information under the RTI Act, the process of the court is not to be abused and information not to be misused.

The Supreme Court has cited various precedents and has held that when the High Court Rules provide for mechanism, the provisions of RTI Act cannot be resorted to. Section 31 of the RTI Act only repeals the Freedom of Information Act, 2002. In the absence of any provision which specifically repeals any law that deals with dissemination of information, the provisions of the RTI Act cannot be interpreted so as to attribute a meaning to them which was not intended by the legislature. When there is a simple procedure in existence, there is no need to make it cumbersome by using the procedure given under the RTI Act. In the absence of inherent inconsistency between the two procedures, overriding effect of the RTI Act will not apply. The information is to be obtained through the procedure laid down in the High Court Rules and RTI Act cannot be resorted to.

EXPEDITIOUS ADJUDICATION OF CHEQUE BOUNCE CASES: SC

MAKWANA MANGALDAS TULSIDAS V. STATE OF GUJARAT

The petition relates to dishonor of two cheques amounting to Rs. 1,70,000/-. This is a matter which should have been originally disposed of in 6 months but was dragged on for seven years in the trial court. The total time taken by this matter to reach the Supreme Court was fifteen years.

ISSUES

Whether it is acceptable for a matter of cheque bounce to take up so much time and not be disposed of expeditiously?

JUDGMENT

Dishonor of cheques became a crime in the year 1988 with the insertion of Chapter XVII in the Negotiable Instruments Act, 1881, under Section 138.The legislative intent behind the abovementioned amendment was to ensure faith in the efficacy of banking operations and credibility in transacting business on cheques. It was to provide a strong criminal remedy in order to deter the high incidence of dishonour of cheques and ensure compensation to the complainant.

One of the major factors, for high pendency is delay in ensuring the presence of the accused before the Court for trial. As per recent study, more than half of the pending cases, i.e. more than 18 lakh cases, are pending due to absence of accused.While summon may be issued through aforementioned modes, bailable warrants and non-bailable warrants are to be executed through police as per Section 72 of Cr.P.C. Many a time, police as serving agency, does not give heed to the process issued in private complaints. Courts also remain ambivalent of this fact, requiring the complainant to pay unjustified process fee, repeatedly and avoid taking action against negligent police officers. The coercive methods tosecure the presence of accused viz. attachment indicated in Section 82 and 83 Cr.P.C., are seldom resorted.

Having regard to the prevailing state of affairs, the Court finds that there is a need to evolve a system of service/execution of process issued by the court and ensuring the presence of the accused, with the concerted efforts of all the stakeholders like Complainant, Police and Banks.Banks, being an important stakeholders in cases of this nature, it is their responsibility to provide requisite details and facilitate an expeditious trial mandated by law.An information sharing mechanism may be developed where the banks share all the requisite details available of the accused, who is the account holder, with the complainant and the police for the purpose of execution of process.

Further, a mechanism should be developed to ensure the presence of the accused even by way of coercive measure, if required, taking effect from Section 83 of Cr.P.C. which allows attachment of property, including movable property. A similar co-ordinated effort may be evolved to recover interim compensation under Section 143A of the N.I. Act as well as fine or compensation to be recovered as per Section 421 of Cr.P.C. The Bank may facilitate mechanism for transferring requisite funds from the bank account of the accused to the account of the holder in due course, as may be directed by the Court.

To work out mechanism for expeditious and just adjudication of cases relating to dishonour of cheques, fulfilling the mandate of law and reduce high pendency, various duty-holders like Banks, Police and Legal Services Authorities may be required to take measures and prepare schemes. The Court decided to hear the parties and has accepted the writ petition on a suomoto basis.

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