provisions of the Family Courts At, 1984, as on today, the Act is to be amended further making it mandatory that the Family Court's Judge shall attend the family Court work only, fix time frame for disposal of maintenance and matrimonial cases, cognizance of offences under Sections 498-A, 499 I.P.C. and the Dowry Prohibition Act, cases of S.Ts and S.Cs to be tried by family Court, to decide the status of a woman appointment of woman Judges, payment of honoraria to the counsellors, in camera trial of the matrimonial disputes, training to Judges of the Family Courts in the true letter and spirit of the Act, to make effective reconciliation and also time frame for execution proceedings in the matter concerning the family disputes.

M/S. BHAGWATI PRASAD PAWAN KUMAR V. UNION OF INDIA, AIR 2006 SC 2331 = (2006) 5 SCC 311 – A CRITIQUE

By

–B.V. NARSIMHA REDDY, B.E., L.L.B.
Consultant in Arbitration and
Contract Management,
Hyderabad

The facts are stated in Paragraphs 2, 3 and 4 of the judgment (see also Paragraph II.3 infra).

The Apex Court relying upon Section 8 of the Contract Act held, "that the offer (made by the respondent by its letter dated 7-4-1993) stood unequivocally accepted. An 'offeree' cannot be permitted to change his mind after the unequivocal acceptance of the offer."

In my humble opinion it is submitted that Section 8 of the Contract Act is not applicable to the facts of this case, nor the appellant was precluded from claiming the balance amount of his claim for the following reasons—

I. Nature of the claim—

1. Section 8 is in Chapter I of the Contract Act, which deals with "Of the Communication, Acceptance and Revocation of Proposals"; in other words Chapter I deals mainly with 'formation of contract'. Chapter II deals with "Of Contracts, Voidable Contracts and Void Agreements"; Chapter III, which deals with "Of Contingent Contracts", is not relevant to the issues involved in this case; Chapter IV deals with "Of the Performance of the Contracts"; Chapter V, which deals with "Of certain relations resembling those created by Contract", is also not relevant to the issues involved in this case; and Chapter VI deals with "Of the Consequences of Breach of Contract."

2. The instant the respondent-Railways accepted the consignment of the goods for delivering them to the appellant a "contract of carriage of goods" came into existence. By its failure to deliver the said goods to the appellant, the respondent failed to perform the said "contract of carriage" and admittedly became liable to compensate the appellant for the loss caused to him on account of non-delivery of the said goods, though the appellant claimed the value of the goods from the respondents, it is, in fact, a claim for compensation for breach of contract.

3. Hence, the payment of compensation for loss suffered on account of breach of contract is governed by Section 73 of the Contract Act. The fact that the respondent

has admitted to pay a lesser sum than that claimed by the appellant shows that the respondent has admitted that it has committed breach of contract and consequently has come under a legal liability to compensate the appellant for the loss suffered by him; Section 73 of the Contract Act entitles the appellant to receive compensation for the loss caused to him thereby. The respondent can settle such a liability in terms of Section 62 of the Contract by substituting the original "contract of carriage" with a new contract to pay mutually agreed compensation to the appellant. However, the parties are free, instead of substituting the original contract with a new contract, to mutually compromise or settle the dispute by way of respondent agreeing to pay mutually agreed compensation to the appellant without abrogating the original 'contract of carriage' and when such compromise or settlement is arrived at by the parties it will constitute an "accord and satisfaction" whereby the respondent gets released of his original obligation. But the respondent, instead of trying for arriving at a 'compromise/settlement agreement", sent cheques for lesser sums, by its letter dated 7-4-1993, than that were claimed by the appellant by putting a condition – see Paragraph II.3 infra. Is the appellant under any 'duty to speak', so as to imply that the appellant must first make a protest before encashment of the cheques, after the receipt of the said letter ? In my opinion, the appellant is not under any 'duty to speak'; the appellant can encash the cheques *sub silentio* and sue for the balance sums for the following reasons—

(i) The respondent, being admittedly a wrongdoer, *i.e*. contract-breaker, cannot unilaterally ascertain and fix the compensation payable to the appellant as it can only be ascertained and fixed by a Competent Authority, *i.e*., Claims Tribunals or Court; the respondent has, therefore committed another wrong by way of unilaterally fixing the amount of compensation payable to the appellant. As the respondent was already under a duty or liability to compensate the appellant for the loss caused to him, it had no right to insist on the appellant accepting the cheques in satisfaction of the claim. The observations of Lord *Denning M.R.* in *D & C Builders Ltd. v. Rees*, (1965) 3 All. ER 837, are apposite, though it was a case of debt of 480 pounds being due to the plaintiff-builders : when reminded by the plaintiff, the defendant's wife said, "My husband will offer you 300 pounds in settlement. That is all you get. It is to be in satisfaction.' …….She had no right to say such thing. She could properly have said : 'We cannot pay you more than 300 pounds. Please accept it on account.' But she had no right to insist on his taking it in satisfaction."

(ii) In *Ferguson v. Davies*, (1997) 1 All. ER. 315, *Henry* LJ, *Aldous* LJ concurring, held –

> "……that the defendant had unequivocally admitted liability for the sum paid by the cheque, and was no giving the plaintiff any additional benefit on top of that. Therefore, there was in law no consideration for the accord suggested."

(iii) Though the above cases are concerned with debt due, they are equally applicable to the case on hand because the sums, for which the respondent has admittedly become liable, can be determined only either by bilateral consensus or by a Competent Authority *Henry* LJ in *Ferugson*'s case (supra), explains the consequences of plaintiff accepting the sum (cheque) tendered by the defendant thus :

> "The point is put attractively by *David Foskett* QC in *The Law and Practice of Compromise (4th Edn. 1996*) p.6 :
>
> 'In other cases a fair analysis of the discussions between the parties may reveal that, whatever other specific differences lie between them, certain matters are not in dispute and may even be admitted. *These undisputed and admitted matters cannot*

thereafter be invested with any contentious character in order to found an argument that they have been the subject of compromise. This situation arises not infrequently where a sum of money is in truth paid "on account" of some (yet to be determined) final figure and an attempt is then made to suggest that it was rendered or paid "in full and final settlement" of an alleged dispute'. (My emphasis)

He gives by way of illustration *Newton Moor Construction Ltd. v. Chalton*, (1981) CA Transcript 555. ……" (in which) "The leading judgment was given by Sir *David Cairns*. First, he found that the letter of 25 October was an admission that 8,847 pounds was due." (the cheque for 8,847 pounds, sent by the defendant against the claim of 18,612 pounds, was paid into the plaintiff's account and met on 30 October, and on the same day the solicitors of the plaintiff wrote to the defendant that the plaintiff is accepting the cheque in part payment "He then concluded:

'(It) was in effect an admission by the defendant that this amount was due, and accordingly, there was no consideration for any agreement that could be said to be implied from the letter of 25 October, the cheque and the acceptance of the cheque. There was no consideration because the admission was complete and binding once made, and that was past consideration by the time that the accord was completed by presentation of the cheque."

In the case on hand also the admission made by the respondent by its letter dated 7-4-1993 was complete and binding, and that was past consideration by the time the appellant's conduct of accepting and encashment of the cheques, *sub silentio* (assuming that the appellant made no protest), resulted in a promise or agreement or accord. In other words, it was only an "agreement without consideration" or "accord" *sans* "satisfaction".

(iv) The respondent admittedly came under a liability (yet to be determined by a Competent Authority) to compensate the appellant, and on account of such admission the appellant was vested with a right to receive compensation from the respondent. In such circumstances, the respondent had no right to say, "The retention of this cheque and/or encashment thereof will automatically amount to acceptance in full and final satisfaction of your above claim without reason (*sic*) and you will be estopped from claiming any further relief on the subject.", so as to attribute a correlated "duty to speak" to the appellant. Hence, the appellant's action in accepting and encashment of the cheque, *sub silentio*, does not preclude the appellant from claiming the balance sum of the claim.

(v) For the aforesaid reasons, the unilateral action of the respondent in writing such a type of letter, *i.e.*, the letter dated 7-4-1993, and the appellant's performance, *sub silentio*, of the condition stipulated therein do not constitute a compromise/settlement of the dispute, which the appellant notified by his letter dated 26-4-1991, as there is neither bilateral consensus nor accommodation of mutual rights.

(vi) In furtherance of the respondent's letter dated 7-4-1993, if the appellant were to accept and encash the cheques, *sub silentio*, the only possible legal consequence that may result is an agreement enforceable by law in terms of Section 8 of the Contract Act. But, for the reasons explained hereinafter, no such agreement enforceable by law comes into existence. Though, by the above conduct of the appellant, it might be implied that the appellant had promised that he would not claim more than the sums for which the cheques were sent, but there was no consideration given by the respondent to make that appellant's implied promise enforceable by law; hence, there cannot also be an 'accord and satisfaction' between the parties to preclude the appellant from claiming the balance sum of his claim.

4. However, as the appellant accepted the cheques sent by the respondent for a lesser sum than the sum, which he may be entitled to receive, under protest, there cannot be any compromise/settlement or 'accord and satisfaction' in the absence of bilateral consensus.

5. Even in case of a debt due, a discharge of the whole debt by accepting a lesser sum than the sum that is due comes about as provided in Section 63 of the Contract Act not because the promisor (debtor) sends the promisee (creditor) a cheque for a lesser sum with a condition, that the retention of the cheque and/or encashment thereof will automatically amount to acceptance in full and final satisfaction of the promisor's whole debt and the promisee will be estopped from claiming any further amount and the promisee accepts the lesser sum so sent without protest, but because the promisee while accepting the lesser sum from the promisor voluntarily and expressly states that he is accepting the lesser sum in satisfaction of the whole debt. However, the appellant's claim is not a debt due from the respondent, it is a liability arising out of a breach of contract committed by the respondent, who has admitted its liability; therefore, the respondent cannot unilaterally quantify the compensation payable to the appellant because such quantification can only be done by a Competent Authority. Just as a promisor (debtor), who is already under a legal obligation to pay, cannot lay down terms while paying a lesser sum to the promisee so as to bring about a discharge of the whole debt, so also a contract-breaker, who is already under a legal liability to compensate the victim of the breach for any loss caused to him thereby, cannot lay down terms while paying compensation lesser than that to which the victim of the breach may be legally entitled to receive so as to bring about a full and final satisfaction of the whole liability of the contract-breaker. Even if the promisee (victim of the breach) accepts the lesser sum tendered by the promisor (contract-breaker') without making any protest in spite of the aforesaid condition, it may induce the promisor to believe that the promisee has accepted the lesser sum in discharge of the "whole liability"; but there is nothing further left for the promisor to act to his detriment by being so induced; in fact, the promisor, a wrongdoer, will be benefited by such conduct of the promisee. Therefore, the conduct of the promisee does not also result in an "estoppel" so as to preclude the promisee (in this case it is the appellant) to claim the 'balance compensation' from the promisor (in this case it is the respondent). In *Dr. Karan Singh v. State of Jammu and Kashmir and another*, 2004 (4) Supreme 483, the Hon'ble Supreme Court explained the principles of estoppel in Para 23 by reiterating the principles laid down in *Gyarsi Bai and others v. Dhansukh Lal and others*, (1965) 2 SCR 154 in the following words :

> "To invoke the doctrine of estoppel three conditions must be satisfied : (1) representation by a person to another; (2) the other shall have acted upon the said representation, and (3) such action shall have been detrimental to the interests of the person to whom the representation has been made."

The Hon'ble Supreme Court further explained the principles of "Abandonment" in Para 24 thereof in the following words :

> "24. In *Sha Mulchand & Co. Ltd. (in liquidation) v. Jawahar Mills Ltd.*, (1953) SCR 351, this Court said :
>
> "Two things are thus clear, namely, (1) that abandonment of right is much more than mere waiver, acquiescence or laches and is something akin to estoppel if not estoppel itself, and (2) that mere waiver, acquiescence or laches which is short of abandonment of right or estoppel does not disentitle the holder of shares who has vested interest in the shares from challenging the validity of the purported forfeiture of shares."

In the same decision the Supreme Court also made it clear that

> "A man who has a vested interest and in whom the legal title lies does not, and cannot, lose that title by mere laches, or mere standing by or even by saying that he has abandoned his right, unless there is something more, namely inducing another party by his words or conduct to believe the truth of that statement and to act upon it to his detriment, that is to say, unless there is an estoppel, pure and simple. It is only in such a case that the right can be lost by what is loosely called abandonment or waiver, but even then it is not the abandonment or waiver as such which deprives him of his title but the estoppel which prevents him from asserting that his interest in the shares has not been legally extinguished, ……."

As there is no "estoppel" to prevent the appellant from claiming the balance compensation, the appellant has also not abandoned his right to claim the balance compensation.

II. Applicability of Section 8 of the Contract Act—

1. Section 9 of the Contract Act indicates that the acceptance of a proposal can be express or implied; if Section 7 of the Contract Act provides the manner of acceptance of a proposal which is said to be express, Section 8 of the Contract Act provides two instances of acceptance of a proposal which are said to be implied. However, whether the acceptance of a proposal is express or implied the consequences are the same, that is to say, an agreement comes into being. If such an agreement consists of a set of promises forming the consideration or part of the consideration for each other, *i.e.*, reciprocal promises, it will be enforceable by law and, hence, it will be a contract. However, if the agreement is only a promise it is not enforceable by law and it is said to be void. The definition of the proposal, as given in Section 2(a) of the Contract act, shows that consideration need not be a part of proposal; it is only signifying the proposer's willingness to do anything or to abstain from doing anything; if such a proposal is accepted by the person to whom such proposal is made, the proposal becomes a promise and in view of the definition as given in Section 2(e) of the Contract Act it is an agreement; but as the promisor has not desired in his proposal as to what the promisee has to do or abstain from doing anything there will be no consideration for such an agreement, which will therefore be a void agreement. In order to bring about an agreement enforceable by law upon promisee's acceptance, the promisor must also include in his proposal/offer the consideration which he desires from the promisee. If the proposal is also accompanied by the consideration which the promisor desires from the promisee and if such a proposal is accepted by the promisee, the consideration desired by the promisor becomes promisee's promise; the promisor's promise and the promisee's promise form the consideration for each other and, hence, they are reciprocal promises, *i.e.* a contract.

2. Section 8 of the Contract Act is in two parts—

(i) Performance of the condition of a proposal is an acceptance of the proposal; or

(ii) The acceptance of any consideration for a reciprocal promise which may be offered with a proposal is an acceptance of the proposal.

Whatever may be the mode of acceptance under Section 8, whether it is under aforesaid part 1 or part 2, an agreement comes into existence, but if such agreement is to be enforceable by law it must be a contract. In the case on hand the Apex Court relied upon the first part of Section 8, *i.e.*, performance of the condition of a proposal. By performing the condition of the

promisor's proposal, the promisee accepts the promisor's proposal, which becomes a promisor's promise; as the promisee suffers some detriment by performing the said condition, it will form the consideration for the promisor's promise. In other words, the promisee, by performing the condition of the proposal, is entitled to enforce the promisor's promise. Hence, even after the promisee's performance of the condition, the promisor's promise remains to be enforced by law; in other words, there are two distinct things, the 'condition of the proposal' and the 'proposal' in the first part of Section 8 of the Contract Act. In addition to the cases of 'reward offered for finder of lost goods', the following cases also support this view :

(1) *Malraju Lakshmi Venkayamma v. Venkata Narasimha Appa Rao*, (1916) 43 IA 138 = 34 IC 921 = AIR 1916 PC 9;

(2) *Nalini v. Somasundaram*, AIR 1964 Mad. 52

3. In the case on hand, against the appellant's two claims of Rs.53,264.00 and Rs.51,686.00 the respondent admitted the claims only to an extent of Rs.9,111.00 and Rs.9,032.00 respectively and sent two cheques for the said admitted sums in favour of the appellant with the following condition :

> "In case the above offer is not acceptable to you, the cheque should be returned forthwith to this office; failing which it will be deemed that you have accepted the offer in full and final satisfaction of your claim.
>
> The retention of this cheque and/or encashment thereof will automatically amount to acceptance in full and final satisfaction of your above claim without reason and you will be estopped from claiming any further relief on the subject."

4. The Apex Court held, "that by encashing the cheques received from the Railways, the appellant accepted the offer by adopting the mode of acceptance prescribed in the offer by the Railways." The appellant, by encashment of the said two cheques, had performed the condition and the appellant has, thus, suffered detriment by way of receiving lesser sum than that to which he was legally entitled to receive. In order to enforce the appellants performance of the "condition" or, in other words, to bind the appellant to the "condition" there must be some proposal in the sense of an act which the respondent has to signify to do or to abstain from doing, which becomes respondent's promise upon the appellant performing the said "condition"; the appellant's performance of the condition by which the appellant promises not to claim any further compensation and the respondent's promise, if at all there is a proposal from the respondent, for consideration for each other and both the promises become enforceable by law. The cheques, acceptance and encashment of cheques constitute ingredients of the "condition" stipulated by the respondent, because if the cheques were not to be treated as a part and parcel of the "condition" there would not be any "condition" at all that could be performed by the appellant. Though the respondent uses the word 'offer' (proposal) in its letter dated 7-4-1993, there is, in fact, no offer/ proposal in its legal sense so that the same can be enforced now by a Court. After the appellant's performance of the said condition, there is nothing left to be performed by the respondent in order to bind the appellant to his promise. The only thing that is there in the respondent's letter is the aforesaid "condition", in other words, the respondent's letter dated 7-4-1993 does not contain any proposal; mere use of the word "offer" does not constitute 'offer'/'proposal'. "It is now well-known that the use of term 'offer' or 'proposal' is not decisive. It, as noticed, would depend upon the facts involved in the matter." – *Bank of India and others v. O.P.*

Swaranakar etc., AIR 2003 SC 858, Paragraph 50 at P. 874. Hence, an agreement enforceable by law does not come into existence by mere performance of the condition by the appellant, *i.e.*, the appellant's act of encashment of cheques. In the absence of a reciprocal promise from the respondent, the appellant's promise becomes a void agreement; in other words, the appellant is not bound by the "condition", which he performed.

5. Moreover, Section 8 of the Contract Act cannot be made applicable to the facts of this case for the following reasons—

(i) Section 8 deals with the formation of a new contract; *i.e.*, reciprocal promise/s that is/are yet to be performed.

(ii) whereas the liability, which the respondent admitted, is a consequence of non-performance of respondent's original obligation of delivering the consigned goods to the appellant;

(iii) the consequences arising out of non-performance of an existing contract can be settled only pursuant to Section 62 of the Contract Act, *i.e.* by way of compromise/ settlement contract or by substituting the original contract with a new contract, or by "accord and satisfaction" (Section 63 of the Contract Act is not applicable as the appellant's claim is not a debt due under the contract).

6. The facts in the case of *Day and another v. Maclea*, (1889) 22 Q.B.D. 610, referred to in the judgment, are analogous to the facts in the case on hand. The plaintiffs, therein, brought an action to recover damages for breach of contract, and, before action was brought, the defendants sent them a cheque for 10*l.* 18*s.* 6*d.*, being less than the amount claimed, with a form of receipt to be signed by the plaintiffs, that the sum was accepted in full satisfaction of the claim. The plaintiffs kept the cheque but refused to accept it in satisfaction, and sent a receipt on account. There it was held that there was no 'accord and satisfaction'. In the case on hand also, there was no 'accord and satisfaction' in view of the appellant accepting the cheque under protest. The facts of the case, therefore, do not come within the purview of Section 8 or Section 62 of the Contract Act. The appellant's encashment of cheques, even if there were to be no protest, does not also constitute, for the reasons explained hereinabove, an "estoppel" so as to preclude the appellant from claiming the balance amount of compensation.

MISCONDUCT - PUNISHMENT - JUDICIAL REVIEW

By

—Mrs. HEMA HARIKRISHNA,
M.B.A., M.Phil., P.G. Dip. HRM (AU) (P.hd.),
Faculty, Samata P.G. College,
Visakhapatnam, A.P.

Many authors and writers expressed their views in the past many a time on the topic. But in view of the latest Judicial Pronouncements of the Apex Court this Article will be of interest to the Lawyers, to concerned Teachers and Students.

Misconduct:

What is Misconduct? It will be of interest to note that there is no definition of Misconduct any where. The Rules and Regulations in the absence of Standing Orders