constitutional amendment *ultra vires* the basic structure. The Supreme Court's powers to examine the constitutional validity of the laws passed by the Legislature and oversee the functioning of the Executive cannot be diluted. This is bound to give rise to two views.

As the Constitution is a living organism, there is need to examine its successes and failures so that necessary course corrections can be introduced. Admittedly, the Courts have used their powers to facilitate a *modus vivendi* rather than articulate clear constitutional principles. Judicial reforms are a must to strengthen the Judiciary.

Judicial activist fervour should not flood the fields constitutionally earmarked for the Legislature and the Executive. That would spell disaster. Judges cannot be Legislators – they have neither the mandate of the people nor the practical wisdom to gauge the needs of different sections of society. They are forbidden from assuming the role of administrators. Governmental machinery cannot be run by the Judges. Any populist views aired by Judges would undermine their authority and disturb the institutional balance. Fidelity to a political or social philosophy not discernible from the constitutional objectives in the discharge of judicial functions is not judicial activism; it is subversion of the Constitution. Any judicial act which is politically suspect, morally indefensible and constitutionally illegitimate must be curbed. "Judicial activism must be used in a restrained manner to fill up any institutional vacuum or failure not as a point of confrontation among various organs of the Government".

FOR BETTER PROOF OF PROMISSORY NOTES AND CHEQUES

By

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The introduction of promissory note owes its origin to the bartering system prevailing in the primitive society. The source of Indian Law relating to such instruments is admittedly the English Common Law. The word 'promissory note' has been defined by several Acts keeping in view the aims and objects of that particular enactment.

Section 4 of the Negotiable Instruments Act, 1881 defines 'promissory note' as an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.

As per Section 2(9) of the Limitation Act, 1908 'promissory note' is defined to be a plain and direct acknowledgment, in writing, to pay a sum specified, at the time therein limited, to the person therein named or sufficiently indicated, or to his order or to bearer.

According to Section 2(22) of the Indian Stamp Act, 1899, 'promissory note' includes a note promising the payment of any sum of money out of any particular fund, which may or may not be available, or upon any condition or contingency which may or may not be performed or happen. Generally speaking, the promissory notes are used in commercial world *i.e.*, to facilitate the activities in trade and commerce. The law relating to

promissory notes is mainly traceable in the Negotiable Instruments Act. Section 118 of the Negotiable Instruments Act deals with the presumptions as to negotiable instruments including the promissory note.

Section 101 of the Evidence Act says 'whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.' Therefore, the burden, of course, initially rests on the plaintiff, who has to prove that the defendant executed the promissory note. The law relating to negotiable instruments was enacted to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit, which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, the trade and commerce activities were likely to be adversely affected, as it was not practicable for the trading community to carry on with it the bulk of the currency in force.

The purpose of the Negotiable Instruments Act is to present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments. The Act intends to legalize the system under which claims upon mercantile instrument could be equated with ordinary goods passing from hand to hand. To achieve the said object, the Legislature in its wisdom thought it proper to make provision in the Act for conferring such privileges to the mercantile instruments contemplated under it. To achieve the said objective, the promissory note, which is a negotiable instrument has to be dealt with.

Most of the money suits are filed on the foot of promissory notes and in almost all the cases, the defence taken is that the promissory notes were fabricated by forging the signatures of the executants. But, it is well settled that any fraud or fabrication of the promissory notes has to be proved by the defendants. The latest judgments of our own Hon'ble High Court are also support the view.

In a recent Division Bench decision of our Hon'ble High Court reported in 2006 (1) APLJ 44 (SN), it was held that the burden of proof in a suit lies on the party who asserts legal right or liability and when the other party alleges fraud the existence of such fraud has to be proved by that party.

In many a cases, the Courts are observing that there is an intention on the part of the defendants to drag on the matter without reaching its finality on some pretext or the other. It is also noticed that by taking the plea of fabrication and forgery, in most of the suits, the defendants are coming forward with the plea of forwarding the promissory notes and cheques to an Expert for opinion with regard to the signatures on them at a belated stage. The said plea was also being taken even when the matter is posted for judgment. Therefore, the Courts are not able to dispose off the matter expeditiously due to the delayed tactics adopted by some unscrupulous borrowers. It is common knowledge that there must be some time taken for receipt of expert opinion.

His Lordship Justice *L. Narasimha Reddy* in a very recent decision reported in 2006 (3) ALT 605, held as under :

> "In an exercise under Section 45 of the Evidence Act, the signature of a party on a disputed document is to be compared with the one, on an undisputed document. The vakalat or the depositions of the parties concerned are treated the basis and the signatures thereon are compared with those on the disputed document. If the signature is in the form of a thumb impression, no difficulty, as such, would arise. Where, however, the signatures are in writing, there is every likelihood of there being variation, either on account of deliberate attempt by the party concerned or due to change of writing with the passage of time."

His Lordship in another recent decision reported in 2006 (3) ALT 607, held as under:

> "The stage at which, an application under Section 45 of the Act must be filed, has its own significance. If the dispute is, as to the execution of document, by one of the parties to the suit, the application must be filed before the evidence of such party is closed. The reason is that, the witness can be confronted with the document, together with the opinion obtained, in relation thereto, during the course of evidence. Sending a document for expert's opinion, after the concerned witness has been examined in chief and cross, renders the very exercise, almost futile. The witness would not be available for being confronted with the evidence. If the matter is examined in this context, it is evident that the petitioner came forward with the instant application, after she has been examined as a witness, both in chief and cross-examination, after her evidence has been recorded, in its entirety. Sending a document for expert's opinion, after the concerned witness, whose signature is in dispute, is examined, would, in most of the cases, amount to filling the lacuna. Strong and cogent reasons need to be furnished, for such a belated application. In this case, the petitioner did not state any reason, worth its name, as to why the application was filed at such a belated stage."

In most of the cases, there is an intention on the part of the executants of the promissory notes in denying their signatures in order to evade their liability by taking the plea that their signatures were forged and the documents were fabricated. From the date of the receipt of the summons, there is every likelihood of getting such intention on the part of the defendants to evade their liability in repaying the amounts taken and, therefore, there is possibility of disguising their signatures put on the summons, on the Vakalat and also on the Written Statements. Even an intelligent borrower may sign the promissory notes in a different style so as to evade his liability even at the time of execution of the promissory notes or issuance of the cheques.

As already observed by His Lordship, if the signature is in the form of thumb impression, no difficulty, as such, would arise. Therefore, it is better to take thumb impression of the borrowers along with their signatures (in case of signatories) on the documents, such as, promissory notes and cheques, *etc*. The defendants though deny their signatures, but they cannot escape from their thumb impressions subscribed by them. The Court can get evidence even that the documents are executed by them and the circumstances under which the documents were issued by them were considered basing on the material produced before it. Further, there is no specific prohibition in any law for the time being in force for getting the thumb impressions even from the signatories in addition to their signatures. Many of the executants of the promissory notes are seeking for sending the documents for expert opinion, thereby the matters cannot be adjudicated expeditiously and trials are being delayed. If the method of taking thumb impressions is adopted, time taken for getting the expert opinion can also be cut short.

Further, while lending amounts under the promissory notes, the lenders must take thumb impressions even from the signatories and the drawee must also insist the drawer to put his thumb impressions on the cheques issued by him in addition to his signatures to prove that the said documents were executed by them.

As per Section 73 of the Indian Evidence Act, the Court can compare the disputed signatures of the party with the admitted ones. But, there may be intention on the part of the party, which was directed to give his signatures before the Court in disguising his signature by signing in a different style. Due to the same, the Court cannot come to a correct conclusion. Therefore, there is every necessity of getting the thumb impressions of

the borrowers on the promissory notes and the cheques issued by them for better proof of the same.

Further, in these days of commercial transactions, there are mush rooming of chit fund companies. Hence, I think it is high time for the Legislature to enact a law insisting for taking thumb impressions even from the signatories on the document for speedy disposal of the matters.

MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969

By

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The Monopolies and Restrictive Trade Practices Act, 1969 came into force on 1st June, 1970. According to the Preamble the aim of the Act is:

> "to provide that the oration of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or; incidental thereto".

Section 2(o) defines restrictive trade practice. According to that provision "restrictive trade practice" means a trade practice which had, or may have, the effect of preventing, distorting or restricting competition in any manner and; in particular.

The Objectives of the Act, therefore, are as follows:

(1) To prevent the operation of the economic system which would result in the concentration of economic power to the common detriment;

(2) To control monopolies;

(3) To prohibit and control monopolistic and restrictive trade practices; and

(4) To deal with the matters connected with the above said objectives or the matters incidental thereto.

Monopolies and Restrictive Trade Practices Commission –Commission-Establishment and Constitution of the Commission (Section 5)

For the purpose of this Act, the Central Government has been empowered to establish a Commission, to be known as "Monopolies and Restrictive Trade Practices Commission". The Central Government is to appoint the Chairman and there are to be not less than two and not more than eight other members.

The Chairman of the Commission shall be a person who is or has been or is qualified to be, a Judge of the Supreme Court or of a High Court. The members of the Commission should be persons of ability, integrity and standing. They should also have adequate knowledge or experience of, or commerce, accountancy, industry, public affairs or administration. Before appointing any person as a member of the Commission, the Government has to satisfy itself that the person so appointed does not and will not, have, any such financial or other interest as is likely to affect prejudicially his function as a member of the Commission. Under Section 6 the maximum term of office of a member shall be five years, but he shall also be eligible for re-appointment (i) A Director General of Investigation and Registration, and (ii) as many Additional, Joint, Deputy or Assistant Directors General of Investigation and registration, as it may think fit.