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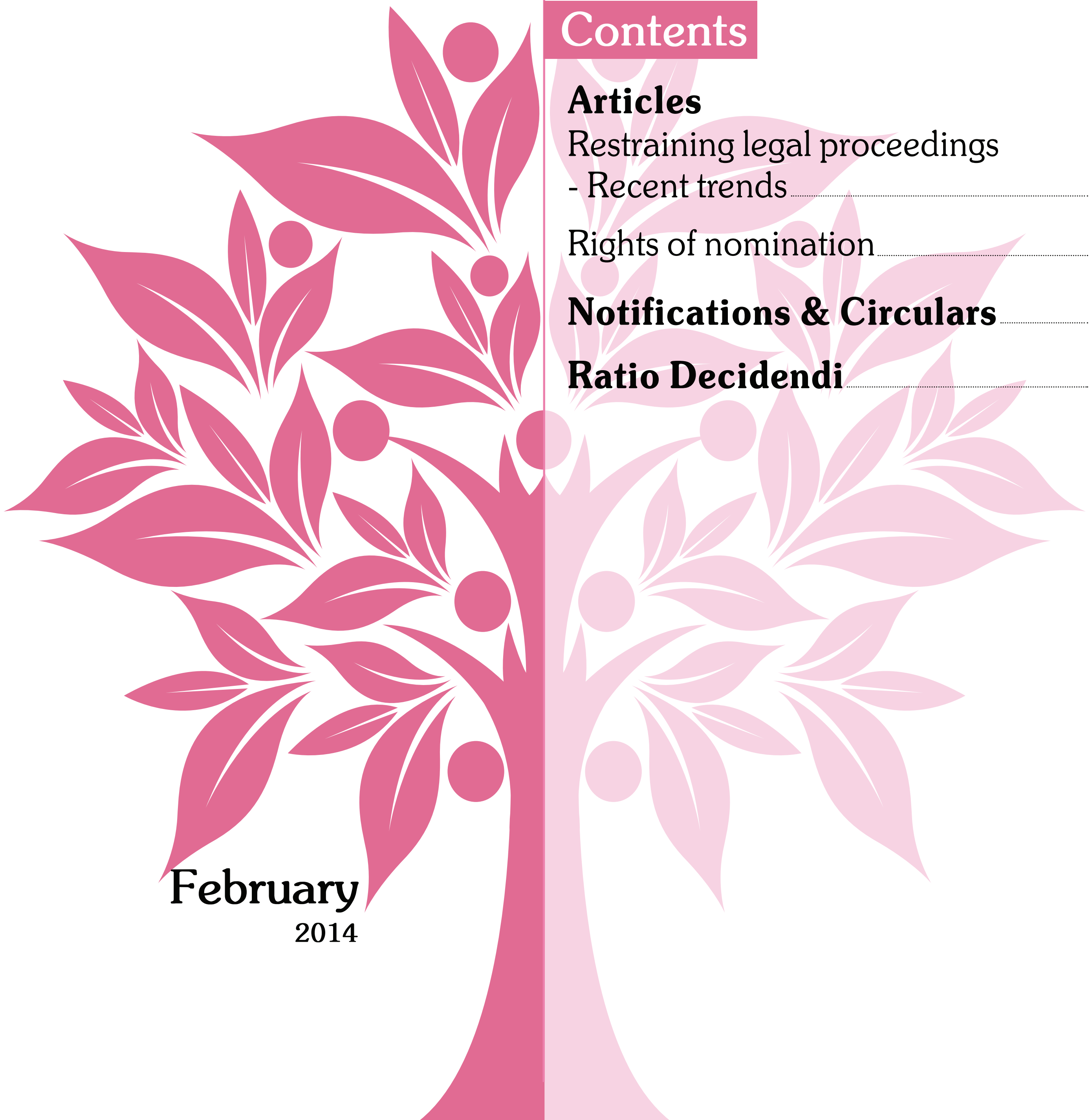

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Articles

Restraining legal proceedings - Recent trends

By **Shikha S. Jaipuriar**

The general law of contract recognizes promises made for consideration as legally enforceable agreements. However, it frowns upon certain promises and prohibits their enforcement, including those that are in restraint of legal proceedings.

Introduction

Section 28 of the Indian Contract Act, 1872 contains one of the seven governing principles to determine when an agreement is void[1]. It provides that an agreement is void if it:-

(a) restricts absolutely a party from enforcing his contractual rights by usual legal proceedings in ordinary tribunals;

(b) limits the time within which a party may enforce his rights as aforesaid;

(c) extinguishes the contractual rights of a party on expiry of a specified period so as to restrict enforcement of rights by any party; or

(d) discharges a party from his contractual liability on expiry of a specified period so as to restrict enforcement of rights by any party.

The Law Commission of India, in its 97th Report[2] had expressed concerns over the inadequacy of Section 28 in dealing with contractual clauses extinguishing the rights. The recommendations led to the amendment of this section in 1997[3] whereby aforesaid conditions (c) and (d) were added. 'The proposal to disallow prescriptive clauses (which extinguished rights or provided for forfeiture of rights or discharge of liability on failure to sue within a certain time) rested on the basis of economic justice, avoidance of hardship to consumers and certainty and symmetry of law.'[4]

Section 28 comes with a handful of exceptions:

(a) Contracts that mandate reference to arbitration to resolve disputes and cap the claims at the amount awarded in such arbitration.

(b) Contracts that refer an existing dispute to arbitration.

(c) Reference to arbitration[5] through statutory provisions.

1 As per Clause (g) of Section 2 of the Act, an agreement not enforceable by law is said to be void.

2 Law Commission of India, Ninety-seventh Report "Section 28, Indian Contract Act, 1872 : Prescriptive Clauses in Contracts", March, 1984

3 The Indian Contract (Amendment) Act, 1996 (1 of 1997) (w.e.f. January 8, 1997)

4 Pollock & Mulla, Indian Contract & Specific Relief Acts, 13th Edition, 2006, at page 879

5 For instance, Section 18 of the Credit Information Companies (Regulation) Act, 2005 provides that if any dispute arises amongst, credit information companies, credit institutions, borrowers and clients on matters relating to business of credit information and for which no remedy has been provided under that Act, such disputes shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration.

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New exception for bank guarantees

Another exception[6] has been carved out permitting banks and financial institutions to stipulate that rights under a guarantee shall be extinguished if no claim is made within specified period not being less than one year.

Genesis of this amendment may also be traced to Law Commission's 97th Report, which noted serious hardship being caused to consumers dealing with big business due to the clause on extinguishment of right under contracts. It, *inter alia,* cited a Kerala case[7] where the rights of a person to enforce a bank guarantee were extinguished on expiry of six months from the date of expiry of bank guarantee, which, according to the Law Commission, was a short period. Accordingly, Section 28 was amended in 1997 whereby a clause on extinguishment of right was made impermissible[8].

In 1998, the Narasimham Committee[9] highlighted the apprehension of banks that they could no longer limit their liabilities under bank guarantees to a specified period. They would have to carry such guarantee commitments for long periods as outstanding obligations. The concern was accentuated by the fact that government departments do not generally return the original guarantee papers and claims under such guarantees could be enforced as late as 30 years[10] causing banks to keep securities and margins for long periods.

As a sequel, the Andhyarujina Committee was set up in 1999, which recommended that a proviso be added to Section 28 to permit banks to stipulate that rights under a guarantee would be extinguished if no claim was made within the specified period which shall not be less than one year. Eventually, the Government decided to amend Section 28 accordingly "to bring finality to redemption of such guarantees"[11].

Choice of jurisdiction

A key aspect of Section 28 is that it only bars absolute restriction on seeking legal recourse. By implication, a limited restriction would not be barred. But parties cannot oust the jurisdiction of all the courts having jurisdiction to decide the cause of action. Similarly, parties cannot confer jurisdiction on a court which it does not possess under law.

The construction of a clause providing for choice of jurisdiction has been the subject matter of several judgements. In *A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem*[12], the Supreme Court was called upon to decide the effect of one such clause. The court examined the maxim of '*expressio unius est exclusio alterius*'[13] and held:

[6] Banking Laws (Amendment) Act, 2012 (4 of 2013)

[7] Kerala Electrical and Allied Engineering Co. Ltd. v. *Canara Bank,* AIR 1980 Ker 151

[8] SLP (C) 16166-16168 of 2011, titled *Union of India* v. *Indusind Bank Ltd.* is presently pending before the Supreme Court of India wherein the court has been called upon to adjudicate on the validity of a term in a bank guarantee limiting period for lodging of a claim in light of the 1997 amendment of Section 28.

[9] Committee on Banking Sector Reforms (1998)

[10] By virtue of a longer period of limitation for claims by government

[11] 'Salient Features of Banking Laws (Amendment) Bill 2012', Press Release of Ministry of Finance, Government of India, dated December 21, 2012

[12] (1989) 2 SCC 163

[13] A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative. (Black's Law Dictionary, 9th Ed.)

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"When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only ', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case."

In the said case, the Court finally held that other jurisdictions having connecting factor were not clearly, unambiguously and explicitly excluded.

More recently, the judicial opinion has veered towards applying the maxim '*expressio unius est exclusio alterius'* more decisively. In *Swastik Gases P. Ltd.* v. *Indian Oil Corporation Ltd.*[14], the three-judge bench of the Supreme Court of India delivered two concurring judgements. R.M. Lodha, J. speaking for himself and Kurian Joseph, J. held:

"... for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary ... Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts."

Madan B. Lokur, J., after adverting to the judgements on exclusion clauses using the word like "only", "alone" etc. and those not employing any such word, held:

"... in the jurisdiction clause of an agreement, the absence of words like "alone", "only", "exclusive" or "exclusive jurisdiction" is neither decisive nor does it make any material difference in deciding the jurisdiction of a court. The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear..."

It appears that the judicial opinion is now somewhat entrenched in honouring the choice of jurisdiction in domestic contracts, unless of course it agitates against the very basic premises of Section 28.

Evolution of Section 28

Among the seven provisions on void agreements in the Act, Section 28 has seen the maximum legislative action. After many recommendations, amendments and judicial pronouncements, Section 28 has evolved to its present form and interpretation (though it is not yet fully settled). Providing a clause on choice of jurisdiction in contracts is a common practice. With its critical impact on enforcement of commercial contracts, it is important that the parties to contract have a clear understanding of its meaning and import so that they may overcome this preliminary objection in any enforcement action with ease.

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[14] (2013) 9 SCC 32

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Rights of nomination

By **Natasha Garg**

A nominee in common parlance is understood as a beneficiary who has been so nominated to receive the benefit of a moveable asset (money) on the death of the person who is the owner of such asset and who has named the nominee in the relevant document. Nomination facility can be availed by an individual for assets/ facilities like insurance policy, bank account, locker, society, demat account, shares, NSC, post office, mutual fund, PF, PPF & gratuity. Nomination is usually done solely for the purpose of simplifying the procedure for settlement of claims of the deceased and is an ideal tool to reduce hardships during the settlement of claims in the event of death of the person who has done the nomination.

The legal position of a nominee has always been accepted to be that of an 'agent' or 'trustee' and nomination is not considered to be a method of testamentary succession as an alternate to a will. High Courts in India have held in different cases that a nominee is only an agent to receive the amount when due and it remains the property of the assured during his lifetime and on death, forms part of his estate subject to the applicable law of succession.

March of law

The Supreme Court in the case of *Sarbati Devi* v. *Usha Devi* [AIR 1984 SC 346] interpreted the role of a nominee in light of the provisions of the Insurance Act and held that mere nomination did not confer on the nominee any beneficial interest in the amount payable under the insurance policy on the death of the assured. The nomination only indicated the hand which was authorized to receive the amount on the payment of which the insurer got a valid discharge of its liability under the policy. During the lifetime of the policy holder, the interest in the policy belonged to the holder alone and the nominee had no right or entitlement under it. On the death of the policy holder, the amount payable under the policy became part of his estate which was governed by the applicable law of succession and may be testamentary or intestate. Therefore, provisions pertaining to nomination under the Insurance Act did not operate as a third kind of succession which could be styled as a statutory testament. A nominee could not be treated as being equivalent to an heir or legatee. The beneficial interest under the policy could, therefore, be claimed by the heirs of the assured in accordance with law of succession governing them. This landmark case reversed the views followed in the earlier cases like *Kesari Devi* v. *Dharma Devi* [AIR 1962 All 355], *Uma Sehgal* v. *Dwarka Dass* [AIR 1982 Del 36] and *S. Fauza Singh* v. *Kuldip Singh* [AIR 1978 Del 276].

The said judgment was followed by a catena of judgments before the Supreme Court. One such case being *Shipra Sengupta* v. *Mridul Sengupta* [(2009) 10 SCC 680] where it was held that the position of nomination is no longer

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res integra and the nominee is entitled to receive the benefit, but the amount so received is to be distributed according to the laws of succession among the legal heirs. In *Vishin Khanchandani* v. *Vidya Khanchandani* [AIR 2000 SC 747] a similar interpretation was given to the role of a nominee with respect to Section 6 of the Government Savings Certificate Act, 1956. Therefore, till this time, though the provisions in respect of nomination in each statute like insurance, government savings, co-operative societies etc. may be worded differently, the legal position of a nominee has been accepted to be that of a trustee and is not considered to be any kind of testamentary succession.

Nomination under the Companies Act

The Bombay High Court has differentiated the position of nominee as led by the Supreme Court in the case of *Sabarmati Devi (supra)*. The Bombay High Court has gone on to cite a difference in the position of a nominee under Section 109A of the Companies Act, 1956 which states that *"on the death of a shareholder, the nominee would become entitled to all rights in the shares to the exclusion of all other persons"*. This means that the nominee will be made the beneficial owner thereof and all the rights incidental to the ownership of the shares would follow upon the death of the shareholder such as right to transfer, right to pledge or even to hold shares. The High Court held that the provisions with respect to nomination in insurance are different from those under Section 109A of the Companies Act as in the former, once the insurance company is paid and is discharged, the amount is paid to the nominee who holds it in trust as there is no other provision thereunder that the nominee would obtain any other right. However, in the latter, the express legislative intent is very clear that the shares specifically vest in the nominee in the event of the death of the shareholder.

Conclusion

Thus, it may be seen that the language used in each statute varies and the consequences therefore also accordingly vary. However, most of these statutes indicate clearly that the purpose of nomination is only to provide a valid discharge to the cooperative society, insurance company or bank or as the case may be and that it does not preclude the legal heirs of the deceased from asserting their claim in the property. The case however is different in the case of shares, where a nomination made during the lifetime of a shareholder, upon his death vests all the rights of the shares in the nominee. In summary, a nominee is considered as a custodian of most of the assets, except shares. On the death of the shareholder, the nominee would become entitled to all the rights in the shares to the exclusion of all other persons. Individuals need to keep this in mind not only at the time of nomination but while writing a will to ensure that the intended person gets the benefit of the asset after the death of the owner/holder.

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Notifications & Circulars

Loan guarantee by holding companies - Clarification on applicability of Section 185 of Companies Act, 2013: The Ministry of Corporate Affairs, through General Circular No. 3/2014 dated 14-2-2014, has clarified that any guarantee given or security provided by a holding company in respect of loans extended by a bank or financial institution to its subsidiary company shall not be prohibited due to applicability of exemption as provided in Section 372A(8)(d) of the Companies Act, 1956 and that such exemption is applicable until Section 186 (corresponding to Section 372A) of the Companies Act, 2013 is notified. The circular also adds that this clarification is applicable only to cases where loans so obtained are exclusively utilized by the subsidiary for its principal business activities.

Section 372A of the Companies Act, 1956, specifically exempts any loans made, any guarantee given or security provided or any investment made by a holding company to its wholly owned subsidiary. However, the new Section 185 of the Companies Act, 2013 prohibits guarantee given or any security provided by a holding company in respect of any loan taken by its subsidiary company except in the ordinary course of business.

FDI in insurance sector – Conditions revised: The Department of Industrial Policy and Promotion has clarified that the present threshold limit of Foreign Direct Investment in the insurance sector which is 26% through automatic route shall include any investment made by Foreign Institutional Investors (FII) and Non-Resident Indians (NRI) in addition to FDI. Further, now, investment may be made only in insurance companies, insurance brokers, third party administrators and surveyors and loss assessors. For the purpose of investment, the definition of insurance company shall be a company formed and registered under the Companies Act, 1956; in which the aggregate holdings of equity shares by a foreign company either by itself or through its subsidiary companies or its nominees, do not exceed 26% paid-up equity capital of such Indian insurance company and whose sole purpose is to carry on life insurance business or re-insurance business. As per Press Note No. 2 (2014 Series), dated 4-2-2014 issued in this regard, definitions of insurance brokers, third party administrators and surveyors and loss assessors shall be as per relevant regulations issued by Insurance Regulatory & Development Authority (IRDA).

Food Business Operators – Last date for renewal of license extended: The time line for renewal of license, for operation of food businesses, obtained under repealed orders under the new Food Safety and Standards (Licensing and Registration of Food Business) Regulations, 2011 has been extended up to 4th August 2014. Food Safety and Standards

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Authority of India has issued Statutory Advisory dated 4-2-2014 for this purpose.

Third party payments for export/import transactions – Conditions relaxed: The Reserve Bank of India has liberalized norms for third party payments in foreign trade transactions. AD Category banks may now not insist that a 'firm irrevocable order backed by a tripartite agreement should be in place' for undertaking remittance in cases where documentary evidence for circumstances leading to third party payments/name of the third party being mentioned in the irrevocable order/invoice has been produced. A.P. (DIR Series) Circular No.100, dated 4-2-2014 also provides that in such cases AD bank should be satisfied with the bona-fides of the transaction and export documents, such as, invoice/FIRC and should consider the FATF statements while handling such transactions. Limit of USD 100,000 eligible for third party payment for import of goods has also been withdrawn.

SEBI - IT Governance Guidelines for depositories: SEBI has issued guidelines to strengthen the Information Technology (IT) governance framework of depositories. As per the guidelines, issued through SEBI Circular No. CIR/MRD/DMS/03/2014, dated 21-1-2014, depositories shall constitute an IT strategy committee at the Board level to provide insight and advice to the Board in various areas such as developments in IT from a business perspective, alignment of IT with business direction, availability of IT resources to meet strategic objectives and the like. Depositories shall also constitute an executive level IT Steering Committee to assist in implementation of the Depository's IT strategy. The depositories shall further formulate an IT strategy document and an Information Security policy besides creating an Office of Information Security and designating a senior official as Chief Information Security Officer (CISO) whose work would be to assess, identify and reduce information technology risks, respond to incidents, establish appropriate standards and controls, and direct the establishment and implementation of policies and procedures.

Ratio Decidendi

FERA / FEMA – Employees seconded to liaison office in India by foreign head office not become employees of Indian office: Delhi High Court has held that expatriate employees of the Head Office (HO) of foreign company, posted in India with the Liaison Office (LO) in India, continue to be employees of the HO. The court negated the findings of the Appellate Tribunal that employees of the HO, seconded to the LO, are its "borrowed employees". In the present case, these deputed employees continued to receive their salaries from the HO. However, in order to meet their day-do-day expenses while they are in India, the LO paid

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the Indian component of their salaries from the amount remitted to it by the HO for that purpose. Show cause notice was issued to the LO-appellant on the ground that salaries paid abroad were actually salaries payable by the LO in India and the same were being paid by the HO without proper permission of the RBI and hence causing of the payment overseas without the previous permission/exemption of RBI, in contravention of Sections 8 and 9 of FERA.

The court, however, held that the liability to pay salaries to such employees continued to be that of the parent corporation and since there was no privity of contract between the LO and the expatriate employees of the HO, there was no liability on the LO to pay their salaries. Relying upon Kerala High Court order in the case of *Abdul Mohammed* - ILR 1988 (1) Kerala 378, it was held that there was no question of the LO having acquired or borrowed from the parent company any foreign exchange to meet any liability owed by the LO to the expatriate employees, seconded to it by the parent company. It was also held that there was further no question of the LO "repaying" its HO the sum paid as salaries. [*Mitsubishi Corporation* v. *Directorate of Enforcement* - Delhi High Court decision dated 3-2-2014 in CRL. A. No. 40 of 2008]

Competition law – Penalty on employee when company not proceeded against: The Competition Appellate Tribunal (COMPAT) has upheld personal penalty on employees of the company after noting that the persons were involved in the process of taking coordinated action together with other producers/directors in boycotting multiplexes for release of films. Employees' contention that they did not do anything in their personal capacity and that CCI should have proceeded against the company, was rejected by the Tribunal while also distinguishing the Supreme Court judgment in the case of *Aneeta Hada* - (2012) 5 SCC 661. The Tribunal held that the said decision, on negotiable instruments, was under the realm of criminal law while contravention of Section 3 of Competition Act lies in civil jurisprudence. It was noted that nature of liability in Section 138 read with Section 141 of the Negotiable Instruments Act is entirely different from the liability of the company contravening Section 3 of the Competition Act which takes care of the 'acts done' by the individuals also.

Noting that the employees were working tirelessly for getting the revenue share hiked for the producers and that they would have been viewed adversely by the company if they would have not succeeded, it was held that it cannot be said that they were not acting in the self-interest. Non-cooperation by the employees was also noted by the Tribunal in this regard. Further, the Tribunal upheld the Commission's view that provisions of intellectual property laws did not have any absolute overriding effect on competition law and that plea of collective bargaining was not available in case

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where acts on part of producers' associations were clearly anti-competitive and *per-se* in violation of Section 3 of Competition Act. [*Nandu Ahuja* v. *Competition Commission of India* – Order dated 17-1-2014 in Appeal Nos. 11to 13/2011]

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