Agreement, Contract, Proposal and Acceptance

DEFINITION OF CONTRACT

THE term "contract" is defined in Section *2(h)* of the Indian Contract Act, 1872, as fol- pvs:

An agreement enforceable by law is a contract

Thus, to arrive at a contract there must be—(1) an agreement, and (2) the agreement " uld be enforceable by law.

| Agreement

\n "agreement" is defined as "every promise and every set of promises forming the E-sideration for each other",[1] and a promise is defined as an accepted proposal. Section 1 -> says: "A proposal, when accepted, becomes a promise." This is another way of say- K :hat an agreement is an accepted proposal. The process of definitions comes down to s: A contract is an agreement; an agreement is a promise and a promise is an accepted ;sal. Hence, every agreement, in its ultimate analysis, is composed of a proposal i one side and its acceptance by the other.

rceable by law

igreement is regarded as a contract when it is enforceable by law.[2] An agreement that ".aw will enforce is a contract. The conditions of enforceability are stated in Section According to this section an agreement is a contract when it is made for some Conxion, between parties who are competent, with their free consent and for a lawful

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5ec::on 2(e).

ie^ion 2(h).

***What agreements are contracts.*—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.**

Nothing herein contained shall affect any law in force in [India] and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Thus, every contract is an agreement, but every agreement is not a contract. An agreement grows into a contract when the following conditions are satisfied:

(1) There is some consideration for it.

(2) The parties are competent to contract.

(3) Their consent is free.

(4) Their object is lawful.

Scope

The law of contract restricts itself to voluntarily created civil obligations. It is not even the whole law of civil obligations. Civil obligations created by the tort or trust law are outside the field of contract because they are not necessarily voluntary choices.[1] The law of contract is also not the whole law of agreements, because there are many agreements that the law will not enforce and, therefore, they remain outside the purview of the law of contract. Many agreements are, e.g. excluded from the range of enforceability under the legal device that the parties must not have intended legal consequences.

PROPOSAL OR OFFER

A proposal and its acceptance is the universally acknowledged process for the making of an agreement. The proposal is the starting point. Section *2(a)* defines "proposal" as follows:

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

The person who makes the proposal is generally called the promisor or "offerer" and the person to whom it is made is called the "offeree", and when he accepts it, he is called

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[1] Even where a relationship is of voluntary nature, it may not necessarily be contractual. For example, the Bombay High Court has held in *Sharad Vaidya (Dr)* v *Paulo Joel Vales*, AIR 1992 Bom 478 that the word "contract" docs not include professional services rendered by a doctor. The liability for negligent service will be tortious not contractual. *R. Rangaraj* v *Legal Representative*, 2000 AIHC 2206, agreement signed by the very party to sell the land, valid for specific performance. *Municipal Board* v *Yadu Nath Singh*, AIR 2004 Raj 79, the contract not adequately signed from the side of the Municipality, no binding force. *M.V. Shankar Bhat* v *Claude Pinto*, (2003) 4 SCC 86, an agreement subject to ratification of others who were not parties, not a concluded contract. *Syndicate Bank* v *R. Veeranna*, (2003) 2 SCC 15: (2003) 4 Bom CR 325 (SC), provision for revision of interest, prior notice for exercising this power not necessary.

the "promisee". In the terminology of Section 2(c) the person making the proposal is called "promisor" and the person accepting the proposal is called "promisee". In view of the above definition, a proposal has two essential parts. It is, in the first place, an expression of the offeror's willingness to do or to abstain from doing something. Secondly, it is made with a view to obtaining the assent of the offeree to the proposed act or abstinence.

Communication of proposal

The first part of the definition of "proposal" lays emphasis upon the requirement that the willingness to make a proposal should be "signified". To signify means to indicate or declare. In the traditional language of the law of contract it means that the proposal should be communicated to the other party. The process of making a proposal is completed by Lie act of communicating it. Section 3 recognises the modes of communication.

> **3. *Communication, acceptance and revocation of proposals.*—The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.**

Thus, a proposal may be made in any way which has the effect of laying before the zfferee the willingness to do or abstain. It may, for example, be made by word of mouth, :r by writing, or it may even be made by conduct.

Implied proposals

A man may express his desire to do something or to get something done by his conduct. "Words are not the only medium of expression. Conduct may often convey as clearly as ords a promise, or an assent to proposed promise." An offer which is made by conduct s called an "implied offer" and the one which is expressed by words, written or spoken, is railed an "express offer". An offer or acceptance can be spelt out from the conduct of the rirties which covers not only their acts but also omissions.[4] An acceptance may likewise made expressly or impliedly, as Section 9 declares:

> **9. *Promises, express and implied.*—Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.**

Coffee Board v *Commr of Commercial Taxes*, (1988) 3 SCC 263: AIR 1988 SC 1487; *P Poppan* v *Karia Gounder*, (2002) CHN 40 (Cal), unenforceability of oral contracts where writing is compulsory. *Oil & Natural Gas Corpn Ltd* v *Essar Steel Ltd*, (2002) 2 Bom CR 379, contract completed through tender, could not be -igncd waiting fulfilment of certain conditions, but work order issued and project completed. The plea thai .here was no contract nol allowed. *Pure Helium (I) Ltd* v *ONGC*, (2003) 8 SCC 593: (2004) 1 ICC 188 (SC), conduct of the parties taken into account. *Varghese* v *DFO Trichur*, (2003) 3 ICC 492: 2003 Ker LT 892 (DB) auction in favour of bidder confirmed, his refusal to sign did not mean there was no contract.

This section was applied by the Supreme Court[2] in a case where on the orders of a go-between man certain goods were supplied by the plaintiff on his own account to the defendants. The defendants clearly and unerringly accepted the goods and paid a part of the price. Accordingly, a liability to pay the balance arose. A bid at an auction is an implied offer to buy. Stepping into an omnibus[3] and consuming eatables at a self-service restaurant, both create implied promises to pay for the benefits enjoyed. Where a person summoned the services of a fire brigade under the mistaken impression that his area was within the free service zone, he had to pay for the services.[4] Where the charterer of a ship chartered for loading steel billets, instead loaded general merchandise, for which the rate of freight was higher, he was held to have done so under an implied promise to pay the higher rate;[5] where the customer of a bank did not object to the charge of a compound rate of interest in accordance with the usual course of business, he was held to have impliedly contracted to pay the compound interest;[6] and where the rules of a yacht club regatta provided that competitors would be liable for damage done by fouling, they were held bound to each other by the rules, and where one of them fouled and sank a yacht, he was held liable.[7]

4. Communication when complete.—The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) B accepts A'.y proposal by a letter sent by post.

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[2] *Haji Mohd Ishaq v Mohd Iqbal and MohdAli & Co, (1978) 2 SCC 493, see at p. 500.*

[3] *Witkie v London Passenger Transport Board, [1947] 1 All ER 258. Upton*

Rural District Council v Powell, [1942] 1 All ER 220.

Steven v Bromley & Sons, [1919] 2 KB 722.

[6] *Haridas Ranchordas v Mercantile Bank of India, (1920) 47 IA 17.*

[7] *Clarke* v *Earl of Dunravan (The Salanita),* 1897 AC 59. The Supreme Court laid down in *Fori Gloster Industries Ltd* v *Sethia Mercantile (P) Ltd*, AIR 1968 SC 1308: (1968) 3 SCR 450 that the evidence of the terms and conditions of a contract can be collected from the bye-laws of an association which are applicable to the transaction in question.

The communication of the acceptance is complete, as against *A,* when the letter is posted; as against *B,* when the letter is received by *A.*

(c) A revokes his proposal by telegram.

The revocation is complete as against *A* when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*\s revocation is complete as against *B* when the telegram is despatched, and as against *A,* when it reaches him.

An offer cannot be accepted unless and until it has been brought to the knowledge of jTe person to whom it is made. An announced reward for tracing a missing child could not be claimed by a person who had traced the child in ignorance of the announcement."

An offer of £100 to any person who would swim a hundred yards in the harbour on the first day of the year would not in my opinion be satisfied by a person who was accidentally or maliciously thrown overboard on that date and swam the distance simply to save his life, without any thought of the offer.

Where an offer has been accepted with knowledge of the reward, the fact that the in- "Drmer was influenced by motives other than the reward will be immaterial. Thus, where :-he information was given about the murderers of her husband by a woman, not so much -'or reward, as to assuage her feelings, she was allowed to recover.[12]

Intention to contract

"here is no provision in the Indian Contract Act, 1872 requiring that an offeror its acceptance should be made with the intention of creating legal relations. But in English law it is i settled principle that to create a contract there must be a common intention of the parties -} enter into legal obligations".[13] It is not every loose conversation that is to be turned into a. contract, although the parties may seem to agree. A husband's promise to send to his ~ ife a monthly amount for herself and the children during the period of their inability to 'tay at one station was not allowed to be enforced.[14] Lord ATKIN explained the principle IUS: "There are agreements between parties which do not result in contract within the -leaning of that term in our law. The ordinary example is where two parties agree to take ; walk together, or where there is an offer and acceptance of hospitality. Nobody would -uggest in ordinary circumstances that these arrangements result in what we know as con- :^acts, and one of the most usual forms of agreement which does not constitute a contract i?pears...to be the arrangements which are made between husband and wife".

Family and social matters.—The intention of the parties is naturally to be known -':r>m the terms of the agreement and the surrounding circumstances. It is for the court in :ach case to find out whether the parties must have intended to enter into legal obliga-

*Latmim v Gauridatta, (1913) I I All U 489. Williams v Carwardine, (1833) 2 LJKB 101. Darlympte v Darlymple, (1811) 161 FR 665, per LORD STOWELL. * Balfour v Balfour, (1919) 2 KB 571.*

lions. In the case of arrangements regulating social relations it follows almost as a matter of course that the parties do not intend legal consequences to follow. In the case of agreements regulating business relations it equally follows almost as a matter of course that the parties intend legal consequences to follow. This does not, however, mean that in family or social matters there cannot be a legally binding contract. All that the law requires is that the parties must intend legal consequences.

The "principle applies to dealings between other relations, such as father and son and daughter and mother". A mother's promise to support the legal education of her grown-up daughter could not be enforced even though the daughter had joined legal education by giving up her service.[15]

Objective test of "Intention "

The test of contractual intention is objective, not subjective. What matters is not what the parties had in mind, but what a reasonable person would think, in the circumstances, their intention to be. Where three ladies, two of them being mother and daughter and the third a paying guest, together made entries in a crossword puzzle in the name of the mother, the expenses being met by one or the other without any rules. The entry was successful one week and the mother refused to divide the prize. But the court held that she was bound to do so, for any reasonable man looking at their conduct would at once conclude that they must have intended to share the prize.[16] An investment in a partnership firm was taken by the Supreme Court to be of a commercial nature putting the onus on the party asserting absence of legal obligation to prove that fact.[17]

Business Matters

"Even in business matters parties may intend to rely on each other's good faith and honour", and not on the courts. Thus, for example, in *Rose & Frank Co* v ./. *R. Crompton:*[18]

> An exhaustive agreement was drawn between one American and two English firms for their dealings in paper tissues. The agreement contained the following clause: 'This arrangement is not entered into as a formal legal agreement and shall not be subject to a legal jurisdiction in the law courts either in the U.S. or in England'. The agreement was terminated by one of the parties contrary to its terms. The American firm brought an action for the breach. It was held that the document did not constitute a binding contract as there was no intention to affect legal relations.

"Intention to contract," said Lord ATKIN LJ "may be negatived impliedly by the nature of the promise.... If the intention may be negatived impliedly it may be negatived expressly.... I have never seen such a clause before, but I see nothing necessarily absurd in businessmen seeking to regulate their business relations by mutual promises which

[15] *Jones* v *Padavatton,* 11969] 2 All ER 616: (1969) 1 WLR 328.

[16] *Simpkins* v *Pays,* [1955] 3 All ER 10: |]9551 I WLR 975. *" CWT* v *Abdul Hussein,* (1988) 3 SCC 562 at p. 568.

[18] [19231 2 KB 261: 1925 AC 445.

*ill short of legal obligations, and rest on obligations of their honour or self-interest or rerhaps both."

The Supreme Court has expressed its reservations about the need for this separate recrement of "intention to contract". The Supreme Court expressed the opinion in a case "-hat an agreement for transfer of a property subject to the condition that the vendee would ^convey it to the vendor on payment of certain sums within three years was capable of -pporting an enforceable obligation though the parties described their arrangement as a gentlemen's understanding.

A clue that intention to be legally bound is an essential requirement under the Indian Imtract Act can be seen in the fact that a proposal has to be made with "willingness" io business on the proposed terms. The use of the word "willingness" shows that in- ^".tion to be bound by the proposal when accepted is an integral part of the concept of -treement.

ineral offers

- - offer may be made to the world at large. The contract is not made with all the world. I :ntract is made only with that person who comes forward and performs the conditions

" ±e proposal. The principle is thus stated in Anson: "An offer need not be made to an - :srtained person, but no contract can arise until it has been accepted by an ascertained rer^on.'"' A leading authority is *Carlill* v *Carbolic Smoke Ball Co.*[2a]

A company offered by advertisement to pay £100 to anyone 'who contracts the increasing epidemic influenza, colds or any disease caused by taking cold, after having used the ball according to printed directions'. It was added that '£1,000 is deposited '•vith the Alliance Bank showing our sincerity in the matter'. The plaintiff used the ;moke balls according to the directions but she nevertheless subsequently suffered :rom influenza. She was held entitled to recover the promised reward.

■ as contended by the defendants that there was no intention to enter into legal relations is it was simply a puffing advertisement; that the.offer was not made to any one person " particular and that the plaintiff had not communicated her intention to accept. The first --iiiment was easily disposed of by BOWEN LJ by saying: "Was it intended that the £100 b :uld, if the conditions were fulfilled, be paid ? The advertisement says that £1,000 is :ged at the bank for the purpose. Therefore, it cannot be said that the statement that i JO would be paid was intended to be a mere puff."

- *-yposals Acceptable by Conduct*

- - Lordship also pointed out that in cases like this communication of acceptance is not -eiessary. "As notification of acceptance is required for the benefit of the person who

-_<£s the offer, he may dispense with notice to himself if he thinks it desirable to do so...

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Anson's LAW on CONTRACT, 23rd Edn, 1971 (Edited by A.G. Guest), p. 40. S93] 1 QB 256.

and if he expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.... I advertise to the world that my dog is lost and that anybody who brings the dog to a particular place will be paid some money, are all the police and other people whose business is to find lost dogs to sit down and write me a note saying that they have accepted my proposal ?"

Section 8 of the Indian Contract Act incorporates this principle.

> **8.** ***Acceptance by performing conditions, or receiving consideration.*****—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.**

Where the acceptance is to consist of an act, as for example, despatching goods ordered by post, the rule is that no further communication of acceptance is necessary".[21]

General Offer of Continuing Nature

Where a general offer is of continuing nature, as it was in the *Smoke Ball case,* it will be open for acceptance by any number of persons until it is retracted or carries a closing date. But where an offer requires some information about a missing thing, it is closed as soon as the first information comes in.

Offer and invitation to treat

An offer should be distinguished from an invitation to receive offers. When a man advertises that he has a stock of books to sell, or houses to let, there is no offer to be bound by any contract. "Such advertisements are offers to negotiate—offers to receive offers—offers to chaffer."[22] An offer is the final expression of willingness by the offeror to be bound by his offer should the other party choose to accept it. This should seem to become more or less obvious from the definition of "proposal" in Section *2(a),* which emphasises that there should be the expression of willingness to do or abstain with a view to obtaining the assent of the other. The offeror must have expressed his willingness to contract in terms of his offer with such finality that the only thing to be awaited is the assent of the other party. Where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate, he does not make an offer, he only invites the other party to make an offer on those terms. This is perhaps the basic distinction between an "offer" and an "invitation" to receive offers. The Privy Council decision in *Harvey* v *Facie*[23] has the merit of explaining this distinction.

> The plaintiffs telegraphed to the defendants, writing: 'Will you sell us Bumper Hall Pen ? Telegraph lowest cash price.' The defendants replied, also by a telegram: 'Low-

[21] *Slate oj Bihar* v *Bengal C&P Works.* AIR 1954 Pat 14; *Ramesh Ramcliandra Neware* v *Shankar Mahadeo Cliefalkar,* (2004) 1 Bom CR 470, allotment of a quarter subject to payment which was delayed and only part payment was made after six months, cancellation and allotment to another was held valid.

[22] *See* BOWEN, *LJ in Carlill v Carbolic Smoke Ball Co, [1893] 1 QB 256.*

[23] 1 893 AC 552.

est price for Bumper Hall Pen, £ 900.' The plaintiffs immediately sent their last telegram stating: 'We agree to buy Bumper Hall Pen for £ 900 asked by you.'

The defendants, however, refused to sell the property at that price. The plaintiffs contended that by quoting their minimum price in response to the inquiry, the defendants had made an offer to sell at that price. But the Judicial Committee turned down the suggestion. Their Lordships pointed out that in their first telegram, the plaintiffs had asked two questions, first, as to the willingness to sell and, second, as to the lowest price. The defendants answered only the second question and gave the lowest price. They reserved their answer as to the willingness to sell. Thus they had made no offer. The last telegram of the plaintiffs was an offer to buy, but that was never accepted by the defendants.[24]

Catalogues and Display of Goods

A shopkeeper's catalogue of prices is not an offer: it is only an invitation to the intending customers to offer to buy at the indicated prices. "The transmission of a price list," observed Lord HERSCHELL "does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited."[25] For the same reason the display of goods in a shop with price chits attached is not an offer even if there is a "self-service" system in the shop.[26] Where a proposal to buy a property for Rs 6000 was reciprocated by saying "won't accepts less than Rs 10,000". This was held to be not a proposal to sell at Rs 10,000. It was an invitation for a proposal at the stated amount.[27] A banker's catalogue of charges is also not an :tfer.[28] A railway timetable is in the same category.[29]

Where in pursuance of a scheme adopted by *Esso,* the petrol station proprietors announced that they would give "The World Cup Coins", one for every buyer of four gallons **of** petrol, it was held that the distribution of the coins was not a contract of sale so as to attract the provisions of the Purchase Tax Act, but was only a gift.[30]

' *Byomkesh* v *Nani Gopal,* AIR 1987 Cal 92. ~ *Grainger & Son* v *Gough,* 1896 AC 325 at p. 334.

Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd, [19521 1 QB 795, affirmed, 119531 1 _ QB 401: [19531 1 All ER 482 CA. ~ Col. D.I. MacPherson v M.N. Appana, AIR 1951 SC 184.

State Aided Bank ofTravancore Ltd v Dhrit Ram, AIR 1942 PC 6.

3 There is no direct authority for this, but ihis seems to be the most likely conclusion. Railway Time Tables include clauses against such contingencies. However, in one English case, namely, *Denton* v *Great Northern Railway,* (1865) 5 E&B 860, the railway company was held liable in damages for fraud in cancelling a train.

a *Esso Petroleum Co Ltd v Commrs of Customs and Excise, [1976] 1 WLR I: 11976] 1 All ER 117.*

Announcement to Hold Auction

An auctioneer's announcement that specified goods will be sold by auction on a certain day is not an offer to hold the auction and he will not be liable to persons travelling up to the place if he changes his mind and does not hold the auction." Even when an auction is held the bid is not an acceptance so as to entitle the highest bidder to get the goods. The highest bid is nothing more than an offer to buy and it requires to be accepted by the auctioneer.[8] It does not matter for this purpose that the auction was held by the Government. Even a Government auction may be cancelled before any bid is finally accepted. After cancelling the auction (in this case the right to fell trees in a forest) the right was handed over to a Government corporation and it was considered to be no argument that a corporation cannot afford to pay an amount equal to private bidders. The Supreme Court also gave this latitude to a Government, as is enjoyed by a private auctioneer, that it may even ignore the highest bid and accept a lower bid. The highest bidder may be found to be an undesirable person for many reasons, e.g., from the mere enormity of the bid.[9] However, one contractor should not be preferred over another without any rhyme or reason, this would be more so in the matter of Government contracts. Where out of the participating bidders or tenderers, any one is called to revise his figure, an equal opportunity should be given to the highest bidder or the lowest tenderer,[10] provided there is otherwise nothing against him.

Fixation of reserve price in an invitation for submission of tenders has been held to be not an offer.[11]

Definiteness of Proposal

A classified advertisement to the effect: "cocks and hens 25s. each" has been held to be not an offer to sell. Similarly, a letter which stated that the writer was prepared to offer for sale his estate for a certain price and allow reasonably sufficient time for verification of data and detail for the completion of the sale, was held to be not a definite offer.[12]

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8 *Spencer* v *Harding,* (1870) 5 CP 561. An auction may be cancelled on account ol inadequacy of the highest bid price, *Swadesh Rubber Industries* v *Sardar Singh,* AIR 1994 P&H 306, following *Bombay Salt & Chemical Industries* v *L.J. Johnson,* AIR 1958 SC 289.

9 *State oJ'U.P.* v *Vijay Bahadur Singh,* (I982) 2 SCC 365: AIR 1982 SC 1234: 1982 All LJ 582. A Government contract is like any other contract between private parties and only those remedies are available for its breach as in other cases. Remedy by way of writ is not available for enforcing Government contract.

10 *Desai & Co v Hindustan Petroleum Co, 1984 Guj LH 864 (Guj).*

11 *Anil Kumar Srivastava* v *State ofU.P.,* (2004) 8 SCC 671: AIR 2004 SC 4299.

12 *Clifton* v *Palumbo,* ı1944| 2 All ER 497. *See* also *Bigg* v *Boyd Gibbins Ltd,* [1971] 2 All ER 183: (1971) 1 WLR 913. *Dresser Rand SA* v *Bindal Agro Chem Ltd,* (2006) I SCC 751, a letter of intent merely indicates a party's intention to enter into a contract on the lines suggested in the letter.

Free Distribution of Articles

Where in pursuance of a scheme adopted by ESSO, the petrol station proprietors announced that they would give "the World Cup Coins", one for every buyer of four gallons of petrol, it was held that the distribution of the coins was not a contract of sale so as to attract the provisions of Purchase Tax Act, but was only a gift.[37]

Voluntary Retirement Scheme (VRS)

The employees were given the right to apply under a voluntary retirement scheme. The authorities had, under the scheme, an absolute discretion to accept or reject the request of an employee. The retirement was to take effect only after the request had been accepted in writing. The scheme was held to be only an invitation to offer. An employee's application had the effect of making an offer. He could withdraw it before it was accepted. A term in the scheme which prevented the employee from withdrawing his request was held to be not binding. It had the effect of a promise not to withdraw the request and there was no consideration for the promise to make it binding.[38]

Offers in standard form contracts

The law of contract has had to face a problem which is assuming new and wide dimensions. The problem has arisen out of the modern practice of concluding contracts in standardised forms. The Life Insurance Corporation of India, for example, has to issue thousands of insurance covers every day and the railway administration has to make innumerable contracts of carriage. It would be difficult for such large organisations to draw out a separate contract with every individual. They have, therefore, printed forms of contract. Such standardised contracts contain a large number of terms and conditions in "fine print" which restrict and often exclude liability under the contract. The individual can hardly bargain with the massive organisations. His only function is to accept the offer whether he likes its terms or not.

This gives a unique opportunity to the giant company to exploit the weakness of the in- ;ividual by imposing upon him terms which often look like a private legislation and which may go to the extent of exempting the company from all liability under the contract. The courts have found it very difficult to come to the rescue of the weaker party particularly

~ *Essn Petroleum Co Ltd* v *Commrs of Customs and Excise,* 1.19761 1 WLR 1: [19761 1 All ER I 17. *' Bank of India* v *O.P. Swarnakar,* (2003) 2 SCC 721: AIR 2003 SC 858; *Stale Bank of Patiala* v *Romesh Chander Kcuioji,* (2004) 2 SCC 651, no withdrawal allowed where the scheme became closed after receiving all applications. *Punjab National Bank* v *Virender Kumar Goel,* (2004) 2 SCC 193, application for retirement accepted, a part of the retirement benefits paid and used by employee, withdrawal not allowable. *K. Apparao* v *Timgbliadra Steel Products Ltd,* (2006) 1 ALJ 808 (All), resignation effective not from the date of acceptance bul from that of actual release, in the meantime withdrawable. To the same effect, *Shambhu Murari Sinha* v *Project & Development India Ltd,* (2002) 3 SCC 437: (2000) 5 SCC 621: AIR 2000 SC 2473. *I' Board of Trustees, Vishakhapatncim Port Trust* v *T.S.N. Raju,* (2006) 7 SCC 664, the employer is not bound :o accept all proposals. *National Textile Corpn (M.P.) Ltd* v *M.R. Jadhav,* (2008) 7 SCC 29, application for VRS not accepted by communication, the employee continued to work till retirement, not entitled to claim VRS ex gratia payment.

where he has signed the document. In such cases the courts have been constrained to hold that he will be bound by the document even if he never acquainted himself with its terms. This has come to be known as the rule in *L' Estrange* v *Graucob Ltd.*[13]

> Mrs *L* signed an agreement without reading it under which she purchased a cigarette vending machine. The agreement excluded liability for all kinds of defect in the machine. The machine was totally defective.

The court found it as a fact that the supplier had made no effort to bring the sweeping exemption term to the notice of Mrs *L.* Even so the court held: "Where a document containing contractual terms is signed, then, in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

The individual, therefore, deserves to be protected against the possibility of exploitation inherent in such contracts. The following modes of protection have been evolved by the courts.

1. Reasonable Notice of Terms

It is the duty of the person delivering a document to give adequate notice to the offeree of the printed terms and conditions. Where this is not done, the acceptor will not be bound by the terms. This was laid down by the House of Lords in *Henderson* v *Stevenson.* In this case a steamer ticket carried a printed term on the back excluding liability for damage to luggage put in the cloak room, without any warning on the face. The House of Lords observed that the plaintiff could not be said to have accepted a term "which he has not seen, of which he knew nothing, and which is not in any way ostensibly connected with that, which is printed and written upon the face of the contract presented to him".

A notice will be regarded as sufficient only if it will "convey to the minds of people in general that the ticket contains conditions". A warning on the face of a token for deposit of luggage in a cloakroom was held to be not sufficient.[14] Where a folded up ticket was handed over to a passenger and the conditions printed on it were also obliterated in part by a stamp in red ink[15] and where, in another case, the words on a ticket, "For conditions see back", were obliterated by the date stamp,[16] it was held in either case that no proper notice of the terms had been given. A notice may be good even if it is in a foreign language.[17]

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[13] 11934) All ER Rep 16: 11934] 2 KB 394.

[14] *Parker* v *SE Rly Co,* 11874-80) All ER Rep 166.

[1] *Richardson, Spence & Co v Routree, 1894 AC 217.*

[16] *Sugar v London. Midland and Scottish Rlx Co, [1941] 1 All ER 172.*
Mackillican v The Combagnie Marikcmes de France, (1880) 6 Cal Series 227.

"Similarly, it has been held that where reasonably sufficient notice of the existence of ±e terms is given, it would be no defence to say that the plaintiff was illiterate or otherwise unable to read."[44]

In the application of this principle the courts have had to distinguish contractual documents from mere receipts and vouchers. A document is said to be contractual if it embodies the contract, that is to say, if the persons to whom it is delivered should know that it - supposed to contain conditions. But where the paper is not supposed to express the : editions of the contract, it will be regarded as a mere voucher, etc. and extra care will ~-ive to be taken to communicate its terms than mere warning upon the face. A receipt :or payment of charges of hiring sea-side resort furniture was held to be not a contractual iocumcnl. A warning on the face excluding liability could not protect the lender from ability for injuries caused in the normal use of the furniture.[45]

> The plaintiff delivered a white satin wedding dress to the defendants for cleaning. On being asked to sign a receipt, she enquired why she was to sign it and was told that she was to take responsibility for any damage to beads and sequins. The plaintiff then signed the receipt without reading it. The receipt, in fact, contained a condition excluding liability for any damage howsoever caused. When the dress was returned there was a stain on it. To the plaintiff's action for damages, the cleaners, pleaded the exemption clause. But they were held liable.[46]

In a Canadian case[47], a vendor fraudulently misrepresented the capacity of a boiler. He was held liable in damages for the fraud, despite the presence of an exemption clause. "A party to a contract cannot rely on an exclusion clause to avoid liability for fraud." Where a statement accompanies the delivery of a document, an oral assurance may prevail over what the document provides.

2. Notice Should be Contemporaneous with Contract

Notice of the terms should be given before or at the time of the contract. A subsequent notification will indeed amount to a modification of the original contract and will not bind the other party unless he has assented thereto. A man and his wife hired a room at a hotel and paid a week's rent in advance. When they went up to occupy the room there was a notice on one of the walls to the effect that: "The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the managers for safe custody." Their property having been stolen owing to the negligence of the hotel staff, the defendants were held liable as the court held that the notice was not a part of the agreement.[48]

*Thompson v London, Midland & Scottish Rtv Co, [19301 1 KB 41. Clmpelton v Barry Urban District Council, [1940] 1 KB 532: [1940] 1 All ER 356 CA. * Curtis v Chemical Cleaning & Dying Co, (1951) 1 KB 805: (1951) I All ER 631.*

Chua v *Van Pelt,* (1977) 74 DLR (3d) 244 BCSC. *" Otleyv Marlborough Court Ltd,* [1949] 1 KB 532: [1949] 1A11ER127CA.

Where tickets are issued by a machine, notice should be given beforehand, for the ticket comes too late. Explaining this in *Thornton* v *Shoe Lane Parking Ltd*,[4''] Lord DENNING MR said: In the present case the offer was contained in the notice at the entrance giving the charges for garaging "at owner's risk". The offer was accepted when the plaintiff drove up to the entrance...and the ticket was thrust at him. The contract was then concluded and it could not be altered by any words printed on the ticket itself.

3. Theory of Fundamental Breach

Another means of getting round the injustice of exemption clauses is by means of the doctrine of fundamental breach. It is a method of controlling the unreasonable consequences of wide and sweeping exemption clauses. Even where adequate notice of the terms and conditions in a document has been given, the party imposing the conditions may not be able to rely on them if he has committed a breach of the contract which can be described as "fundamental".[30]

Every contract contains a 'core' or fundamental obligation which must be performed. If one party fails to perform this fundamental obligation, he will be guilty of a breach of the contract whether or not any exempting clause has been inserted which purports to protect him. Where a dry cleaner's receipt stipulated that in case of damage to the garment only three times of the amount of cleaning charges would be payable, it was held that this limitation upon the amount of liability was not applicable because damage to the garment was caused by a sub-cleaner to whom the garment was handed over. This was quite outside from the scope of contract. The cleaner was liable for the full amount of loss.[18]In *Alderslade* v *Hendon Laundry Ltd*[19], on the other hand, the plaintiff's handkerchiefs were lost in the laundry itself and, therefore, the exemption clause effectively limited the defendant's liability to twenty times the charge made for laundering.

Where a ticket of parcel office of a railway station contained a condition which exempted railway executive from liability for misselecting or loss of any article exceeding £5 in value, it was held that they could not rely on the exemption clause because they had committed a fundamental breach of contract in allowing a stranger (though plaintiff's friend) to take away the goods.[20]

A clause fixing the contractor's liability to a specified amount was held to be not applicable where the work done by him (pipes for carrying moulton plastic was wholly unfit for the main purpose).[21]

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[18] *Davis* v *Wills*, [1945] l All ER 247.

[19] 11945] KB 189CA.

[20] *Alexander* v *Railway Executive*, [1951] 2 KB 882: [1951] 2 All ER 442.

[21] *Harbuit's Plasticine Ltd v Wayne Tank and Pump Co Ltd, (1970) 1 All ER 225.*

[21] *See* Section 3.

It has been laid down by the Court of Appeal[55] that where the goods are lost from the custody of a bailee (a carpet cleaner in this case) fundamental breach would be presumed unless he accounts for the loss. The bailee must show that the loss had not occurred in consequence of a fundamental breach on his part since he is in a better position than the bailer to know what had happened to the goods while they were in his possession. Since the cleaner could not account for the loss, he was not permitted to rely upon a clause by which he had limited his liability to a negligible figure.

4. Strict Construction

Exemption clauses are construed strictly, particularly where a clause is so widely expressed as to be highly unreasonable. Any ambiguity in the mode of expressing an exemption clause is resolved in favour of the weaker party. Where the words are capable of bearing a wider as well as a narrower construction, the narrower construction would be preferred ar.d against the party who has inserted the exemption clause "*contra proferentem*".[56] The Supreme Court held that the power to vary terms relating to quantum of work cannot be --.limited. Any clause giving absolute power to one party to modify the contract terms ~ould amount to interfering with the integrity of the contract. Under the general law of contract, once the contract is entered into, any clause giving absolute power to one party :: modify the terms of the contract at his sweet will or to cancel the contract would be in essence a negation of the contract.[57]

5 Liability in tort

Even where an exemption clause is exhaustive enough to exclude all kinds of liability --.der the contract, it may not exclude liability in tort. In *White* v *John Warwick & Co*
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The plaintiff hired a cycle from the defendants. The defendants agreed to maintain the cycle in working order and a clause in the agreement provided: "nothing in this agreement shall render the owners liable for any personal injuries ...." While the plaintiff was riding the cycle the saddle tilted forward and he was thrown and injured.

t: -■■. as held that although the clause exempted the defendants (even if they were negligent) "-jm their liability in contract, it did not exempt them from liability in negligence. It is, " I'.vever, open to the parties to exclude liability even for negligence by express words or :"ecessary implication. For example in *Rutterv Palmer,*™ a car was given to the defendants
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Levison v Patent Steam Carpel Cleaning Co, (1977| 3 All ER 498 CA.

See Professor Brian Coote, *Breach and Exception Clauses,* (1970) Camb LJ 238. *United India Insurance Co Ltd* v *Pushpataya Printers,* (2004) 3 SCC 694: AIR 2004 SC 1700: (2004) 2 ICC 770 (SC), damage to building by "impact" covered in insurance policy, damage caused by bulldozer moving on the road closely to the building, held, fell within the expression damage by "impact". Even if its meaning was not clear, it was _ to be taken in favour of the insured.

' National Fertilizers v *Puran Chan^ Nangia,* (2000) 8 SCC 343. ™ [1953] 1
WLR 1285. * [1922] 2 KB 87: [1922] All ER Rep 367.

for sale under a contract which provided that while on trial the car would be driven at the customer's risk. An accident took place while the car was on a trial run. The defendants were held not liable, for they had by express words shifted the risk to the customers.

The results of such cases should now be different. The [English] Unfair Contract Terms Act, 1977, expressly provides that any clause in a contract which excludes or restricts liability for death or personal injury resulting from negligence shall be absolutely void. The expression "negligence" is defined in the Act to mean the breach of any common law or contractual duty.

6. Unreasonable Terms

Another mode of protection is to exclude unreasonable terms from the contract. A term is unreasonable if it would defeat the very purpose of the contract or if it is repugnant to public policy. Pointing this out in the *Suisse Atlantique case*[a]\ Lord WILBERFORCE said: "One may safely say that the parties cannot, in a contract, have contemplated that a clause shall have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent."

An example of an unreasonable term is to be found in *Lilly White* v *Mannuswami.*[6'] A laundry receipt contained a condition that the customer would be entitled to claim only fifteen per cent of the market price or value of the article in case of loss. The plaintiff's new *sari* was lost. The term would place a premium upon dishonesty inasmuch as it would enable the cleaner to purchase new garments at 15% of their price, and that would not be in public interest.[62]

Power of removal simpliciter in contract of employment.—A term in a contract of employment being offered by a Government corporation providing for the removal of a permanent employee without inquiry has been regarded by the Supreme Court as unreasonable.[63] The Supreme Court has gone further still to lay down that in all its affairs, including economic and contractual affairs, the State and its instrumentalities have to observe the mandate of Article 14 of the Constitution and offer equal opportunities and make a fair and a reasonable selection of the party, including the selection of a District Government Counsel, on whom contractual benefits are going to be conferred.[64]

[60] 11966] 2 All ER 61 HL: [1967] 1 AC 361 at p. 432.

[61] AIR 1966 Mad 13.
See also *M. Siddalingappa* v *T. Nataraj,* AIR 1970 Mys 154, where a condition that only eight per cent of the cost of a garment would be payable in case of loss was held to be unreasonable; *R.S. Dehoo* v *M. V. Hindelkar (Dr),* AIR 1995 Mad 68, clause providing for 20% of the dry-cleaning charge or half the value of the garment whichever was less was held to be void, dissenting from *Bansi Dhar* v *Ajudhia Pd,* AIR 1925 Oudh 120, to the effect that the court should not interfere in terms and conditions voluntarily settled.

[63] *Central Inland Water Transport Corpn* v *Bwjo Nath Ganguly,* (1986) 3 SCC 156:A1R 1986SC 1571:(I986) 60 Comp Cas 797.

[64] *Shrilekha Vidayartlii* v *State ofU.P.,* (1991) 1 SCC 212. Relying on its own earlier decisions in *Dwarkadas Mafatia & Sons* v *Board of Trustees of the Port of Bombay,* (1989) 3 SCC 293: AIR 1989 SC 1652, the Stale has to show fairness in evicting its tenants; *Mahabir Auto Stores* v *Indian Oil Corpn,* (1990) 3 SCC 752, terminating the agency of a distributor without proper opportunity like show cause and hearing, in reference

7. Exemption Clauses and Third Parties

One of the basic principles of the law of contract is that a contract is a contract only between the parties to it and no third party can either enjoy any rights or suffer any liability under it. This should apply to standard form contracts also. The effect would be that where goods are supplied or services rendered under a contract which exempts the supplier from liability and a third party is injured by the use of them, the supplier is liable to him notwithstanding that he has purchased his exemption from the other party to the contract. If, for example, a contractor agrees to maintain and repair a lift in certain premises under contract with the owner which exempts him from liability, that exemption v-.ould not avail the contractor against a person who is injured owing to bad repairs. If this were not so, the life and security of millions of people would be in the hands of the rwo parties to a contract. They would then make law not only for themselves, but also legislate for countless others. Obviously, therefore, in *Haseldine* v *C.A. Daw & Son Ltd*,[6S] :he above-mentioned lift case, the defendants were held liable for the tort of negligence. GODDARD LJ reminded the contractor "that the duty to the third party does not arise out : f contract, but independently of it".

Just as a third party is not affected by the terms of a contract, so also a third party can- - Dt claim the advantage of them. If, for example, a sea-line company exempts itself from i.-.) liability to its passengers for the negligence of its employees, a passenger injured by ne negligence of an employee will nevertheless be entitled to sue the negligent employ- . r - In another case, a shipping company limited its liability to a fixed amount for any :-s of or damage to goods. The stevedores in England agreed with the company to handle : iigo subject to the same condition, but the plaintiff had no knowledge of this agreement. His consignment having been lost through the negligence of the stevedores, they were "eld not entitled to the protection of the limiting clause.[67]

A different result followed where the exclusion clause not merely protected the career. but also his agents and contractors and the stevedores contracted to unload the ship -i agents for the carrier. They were accordingly held not liable for damage caused to the plaintiff's machinery through their negligence in the act of unloading.[68] Now under the [English] Unfair Contract Terms Act, 1977, a clause which excludes liability for negligence would be enforced only if it is reasonable in the circumstances of the case.

to the life insurance policies issued by the Life Insurance Corporation of India, the Supreme Court has laid down lhat any unfair, unreasonable or irrational terms would be open to judicial review; L/C v *Consumer Education & Research Centre*, (1994) 5 SCC 482, the Supreme Court did not approve a policy which was to be confined to a special class of employees. [S] [19411 2 KB 343.

* So held in *Adter* v *Dickson*, [1954] 3 All ER 397: 11955] 1 QB 158.

Scruttons Ltd v *Midland Silicones'Ltd*, [1962] 1 All ER 1 HL: 1962 AC 446.

New Zealand Shipping Co v A.M. Satlerthwaite & Co, [1974] 1 All ER 1015.

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ACCEPTANCE

Section *2(b)* defines acceptance as follows:

> **When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.**

Thus "acceptance" is the assent given to a proposal, and it has the effect of converting the proposal into promise.

Communication of By external manifestation or overt act.—The definition clearly requires that the assent should be signified. It may be signified or expressed by any act or omission by which the party accepting intends to communicate his assent or which has the effect of communicating/'[9] A very common instance of an act amounting to acceptance is the fall of the hammer in the case of an auction sale. The principle is that there should be some external manifestation (*overt act*) of acceptance. A mere mental determination to accept unaccompanied by any external indication will not be sufficient. In the words of SHAH J[70]: "An agreement does not result from a mere state of mind: intent to accept an offer or even a mental resolve to accept an offer does not give rise to a contract. There must be...some external manifestation of that intent by speech, writing or other act." Such manifestation may be in the form of express words, written or spoken or may be signified through conduct.[22]

It has been observed by the Supreme Court that under certain circumstances, the offeree's silence, coupled with such conduct as takes the form of a positive act, may constitute an acceptance.[23]

Acceptance by Conduct

Another common example of acceptance by conduct is action in terms of the offer. All cases of general offers, which are kinds of unilateral promises, demand some act in return for the promise to pay. In express recognition of this principle, Section 8 provides that "performance of the conditions of a proposal, of the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal". Such proposals demand acceptance by performance. Acceptance of money after prior

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[22] *Cotton Corpn of India Ltd* v *Bombay Dyeing & Mfg Co Ltd,* (2006) 5 Bom CR 105 (Bom), a term in the proposal thai if it was not rejected up to a certain date, it would be deemed to have been accepted was helc to be of no effect.
Bharat Petroleum Corpn Ltd v Great Eastern Shipping Co Ltd, (2008) l SCC 503.

information that higher rates of interest would be charged, and retention of goods sent on approval amount to acceptance of the consideration offered along with a proposal.[73]

Communication to Offeror

Further acceptance must be communicated to the offeror himself. A communication to my other person is as ineffectual as if no communication has been made. To take, for example, *Felthouse* v *Bindley:*[74]

> The plaintiff offered by means of a letter to purchase his nephew's horse. The letter said: "If I hear no more about the horse, I consider the horse mine at £33.15s." To this letter no reply was sent. But the nephew told the defendant, his auctioneer, not to sell the horse as it was already sold to his uncle. The auctioneer by mistake put up the horse for auction and sold it. The plaintiff sued the auctioneer on the ground that under the contract the horse had become his property and, therefore, the defendant's unauthorised sale amounted to conversion. But the action failed.

The court said: "It is clear that the nephew in his own mind intended the uncle to have ne horse, but he had not communicated his intention to the uncle." The case is also an - Jthority for the propositions that an offeror cannot impose upon the offeree the burden of refusal. The offeror cannot say that if no answer is received within a certain time, the offer rail be deemed to have been accepted. "It is not open to an offeror to stipulate against an -^willing offeree that the latter's silence will be regarded as equivalent to acceptance. He :annot force him to take a positive course of action under penalty of being contractually round if he does not."

" *Gaddar Mid* v *Tata Industrial Bank,* ILR (1927) 29 All 674: AIR 1927 All 407; *L/C* v *Brazinha D'Souza,* MR 1995 Bom 223, a proposal was received with premium amount which was kept in suspense for compli- _Tce of formalities. This did not amount to acceptance of the proposal. No contract arose immediately. *L/C* v *Prasanna Devaraj,* AIR 1995 Kcr 88, acceptance of cheque of premium, proposer died before consideration ""the proposal by authorities, no contract. L/C v *Venkadarn Koteseswaramma,* (2003) 1 Bankmann 152, - gning of policy documents can be at a subsequent stage. In this case the proposal was accepted and medical was done. Acceptance arose, the proposer died within 5 days. Where the cheque issued for payment of finst premium was dishonoured, the insurer was not liable to pay any claim laid by the insured himself and wt by a third party, *National Insurance Co Ltd* v *Seema Malhotra,* (2001) 3 SCC 151: 2001 SCC (Cri) 443: AIR 2001 SC 1197. *Sultan Sadik* v *Sanjay Raj Suhba,* (2004) 2 SCC 377: AIR 2004 SC 1377, a contract of ;"npIoyment is also created by proposal and acceptance. Acceptance of the application should be communicated to the applicant who may then complete the contract by joning. A letter of intent does not amount to a r-oposal or its acceptance. *Hermann Suerken GmbH & Co* v *Selco (Shipyard Pte) Ltd,* (1991) 3 CLJ 2289 5 ngapore HC; *Branch Manager, National Insurance Co Ltd* v *Hamza,* AIR 2004 Kant HCR 977, motor ■chicle insurance policy which was issued subject to be made effective as stated in the policy, no liability for incident between the issuance and effective date.

863) 7 LT 835.

Communication from Acceptor

The natural corollary of this principle is that the communication of acceptance should be from a person who has the authority to accept. Information received from an unauthorised person is ineffective. Thus, in *Powel* v Lee:[24]

> The plaintiff was an applicant for the headmastership of a school. The managers passed a resolution appointing him, but the decision was not communicated to him. One of the members, however, in his individual capacity, informed him. The managers cancelled their resolution and the plaintiff sued for breach of contract.

Rejecting the action the court observed: "There must be notice of acceptance from the contracting party in some way. Information by an unauthorised person is as insufficient as overhearing from behind the door."

When Communication not Necessary

In certain cases, however, communication of acceptance is not necessary. The offeror may prescribe a particular mode of acceptance, then all that the acceptor has to do is to follow that mode. There may be an offer which impliedly indicates that acting on its terms will be a sufficient acceptance. Announcement to pay reward for discovering a lost thing is an offer of this kind. Again the offeror may have acquiesced in a certain conduct on the part of the offeree as equivalent to acceptance. In such a case also no formal communication of acceptance is necessary.

Mode of Communication

Acceptance should be in prescribed manner.—Acceptance has to be made in the manner prescribed or indicated by the offerer. An acceptance given in any other manner may not be effective, particularly where the offerer clearly insists that the acceptance shall be made in the prescribed manner. An American case[25] illustrates this:

> *A* offered to buy flour from *B* requesting that an acceptance should be sent by the wagon which brought the offer. *B* sent his acceptance by post, thinking that this would reach the offeror more speedily. But the letter arrived after the time of the wagon. *A* was held to be not bound by the acceptance.

What would have been the result if the mail had reached earlier than the wagon ? According to Winfield[26] and Cheshire and Fifoot[27], in that case the offeror would have been bound unless "he had an exclusive preference for reply by wagon". A minor departure from the prescribed mode of communication should not upset the fact of acceptance provided that the communication is made in an equally expeditious way, "for, in a case where the offeree was told to reply 'by return of post' it was said by the Court of Exchequer

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[24] (1908) 24 TLR 606.

[25] *ElUason* v *Henshaw*, (1819) 4 Wheaton 225.

[26] Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499 at pp. 515-16.
Cheshire & Fifoot, LAW OF CONTRACT, 8th Edn, 1972, p. 40.

Chamber that a reply sent by some other method equally expeditious would constitute a valid acceptance".

This Anglo-American rule has, however, not been strictly followed in the Indian Contract Act. Section 7 which deals with the matter, provides as follows:

> **7. *Acceptance must be absolute.*—In order to convert a proposal into a promise, the acceptance must—(1) be absolute and unqualified; (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.**

The section no doubt requires that acceptance should be made in the manner prescribed :n the proposal. But a departure from that manner does not of itself invalidate the acceptance. A duty is cast on the offeror to reject such acceptance within reasonable time and if -e fails to do so, the contract is clinched on him and he becomes bound by the acceptance, "he section thus marks a visible departure from the English law and should, therefore, oe read without reference to the English law on the subject".[79]

There is, however, one advantage to the acceptor in following the prescribed mode. By living his acceptance in that mode, he has done all that the offeror required him to do and " e is entitled to the contract even if the acceptance does not reach the offeror.

Where no manner is prescribed.—Where no mode of acceptance is prescribed, accept- lace must "be expressed in some usual and reasonable manner". Mail is, of course, a very "iasonable manner in such cases.

Vhen is contract concluded?

Communication complete when posted.—When the parties are at a distance and ire contracting through post or by messengers, the question arises when is the contract - included? Does the contract arise when the acceptance is posted or when it is received? The question first arose in England in *Adams* v *Lindsell.*[m]

> On September 2, 1817, the defendants sent a letter offering to sell quantity of wool to the plaintiffs. The letter added "receiving your answer in course of post". The letter reached the plaintiffs on September 5th. On that evening the plaintiffs wrote an answer agreeing to accept the wool. This was received by the defendants on September 9th. The defendants waited for the acceptance up to September 8th and not having received it, sold the wool to other parties on that date. They were sued for breach of the contract.

ASHWORTH J in *Gaddar Mai* v *Tata Industrial Bank,* ILR (1927) 29 Ail 674: AIR 1927 All 407. 318) 106 ER 250, KB.

It was contended on their behalf that till the plaintiff's answer was actually received there could be no binding contract and, therefore, they were free to sell the wool on 8th. But the court said:

> If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum* (without end).

The result of the decision is that a complete contract arises on the date when the letter of acceptance is posted in due course. This rule was affirmed by the Court of Appeal in *Household Fire & Accident Insurance Co* v *Grant.*™

> The defendant in this case had applied for allotment of 100 shares in the plaintiff company. A letter of allotment addressed to the defendant at his residence was posted in due time, but it never reached the defendant. Nevertheless he was held bound by the acceptance.

THESIGER LJ stated the rule thus: "An acceptance which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror, is no binding acceptance.... But if the post be treated as the agent of both parties, then as soon as letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and to receive the acceptance....The acceptor, in posting the letter has "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound. How, then, can a casualty in the post office, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract?"

The Indian Contract Act, in Section 4 adopts a rather peculiar modification of the rule. According to the section, when a letter of acceptance is posted and is out of the power of the acceptor, the proposer becomes bound. But the acceptor will become bound only when the letter is received by the proposer. The section runs as follows:

> **4. *Communication when complete.*—The communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.**

The provision makes no difference in the position of the offerer. The offerer becomes bound when a properly addressed and adequately stamped letter of acceptance is posted.

The only difference that the section makes is in the position of the acceptor. In England when a letter of acceptance is posted, both the offeror and the acceptor become irrevo

cably bound. But in India the acceptor does not become bound by merely posting his acceptance. He becomes bound only when his acceptance "comes to the knowledge of the proposer". The gap of time between the posting and the delivery of the acceptance can be utilised by the acceptor for revoking his acceptance by a speedier communication which will overtake the acceptance. [Section 5]

When Parties in Direct Communication

The rule, that the communication of an acceptance is complete as against the proposer •-hen the letter is posted, is probably intended to apply only when the parties are at a distance and they communicate by post. In England also its operation has been confined :nly to cases where the post is used, and illustration (h), appended to Section 4 also sup- roses communication by post. "Where, however, the parties are in each other's presence :r. though separated in space", they are in direct communication, as for example, by telephone, no contract will arise until the offeror receives the notification of acceptance. This appears from the speeches delivered in *Entores Ltd* v *Miles Far East Corporation.*[*2] "The facts of the case were that an offer was made from London by Telex to a party in Holland and it was duly accepted through the Telex, the only question being as to whether :~e contract was made in Holland or in England. The Court of Appeal held that Telex is a ~iethod of instantaneous communication and "the rule about instantaneous communica-
- Ons between the parties is different from the rule about the post. The contract is only ::>mplete when the acceptance is received by the offeror; and the contract is made at the r!ace where the acceptance is received."

Where, however, the proposal and acceptance are made by letters, the contract is made ii the place where the letter of acceptance is posted.

Supreme Court Approval of Entores Ruling

The principle of the *Entores* case has been endorsed by the Supreme Court in *Bhagwan- ' Goverdhandas Kedia* v *Girdharilal Parshottamdas &* Co.[83] In this case, the plaintiffs -ade an offer from Ahmedabad to the defendants at Khamgaon to purchase certain goods -~ i the defendants accepted the offer. The question was whether the conversation resulted n a contract at Khamgaon or at Ahmedabad. It was held by a majority that the contract _~ose at the place where the acceptance was received.

-absolute and unconditional

7. *Acceptance must be absolute.*—In order to convert a proposal into a promise, the acceptance must be absolute and unqualified.

Counter proposals.—Any departure from the terms of the offer or any qualification rates the acceptance unless it is agreed to by the person from whom the offer comes. ~ other words, an acceptance with a variation is no acceptance; it is simply a counter

~ 1955| 2 All ER 493: [19551 2 QB.327: 11955| 3 WLR 48. -JR 1966 SC 543: (1966) 1 SCR 656.

proposal, which must be accepted by the original promisor before a contract is made. In *Hyde* v *Wrench*.** an offer to sell a farm for £1,000 was rejected by the plaintiff, who offered £950 for it. This was turned down by the offeror and then the plaintiff agreed to pay £1,000. The court held that the defendant was not bound by any such acceptances.

Partial Acceptance

Acceptance should be of the whole of the offer. The offeree cannot accept a part of its terms which are favourable to him and reject the rest. Such an acceptance is another kind of counter-proposal and does not bind the offeror unless he agrees to the qualified acceptance. Thus, an application for shares on the condition that the applicant should be appointed cashier, could not be accepted without the appointment.[28]

But even "where the acceptance of a proposal is not absolute and unqualified the proposer may become bound, if, by his subsequent conduct, he indicates that he has accepted the qualifications set up".[29] If, for example, in the above case, [allotment of shares without fulfilling condition) instead of rejecting the acceptance, the offeror had pledged the shares or accepted dividends, that would be a waiver of the condition.[30]

Inquiry into Terms of Proposal

A mere inquiry into the terms of a proposal is not the same thing as a counter-proposal. In a negotiation for the sale of a quantity of iron, the proposal was "I would now sell for 40s. net cash, open till Monday." The offeree inquired by wire whether the offeror would accept 40s. for delivery over two months or less. The offeror, treating this as a rejection, sold off the goods. He was held liable for the breach. To seek an explanation of the terms is something different from introducing new terms.[31] Where all the proposed terms were accepted and the counter-proposal related only into the technical details of the proposal, the acceptance had the binding effect.[32]

Acceptance with Condition Subsequent

If an acceptance carries a condition subsequent, it may not have the effect of a counterproposal. An acceptance with a warning that if the money was not sent the contract would be deemed to have been broken.[33]

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[28] *Ramanbhai* v *Ghasiram*, ILR (1918) 42 Bom 595.

[29] *Bhagwandas* v *Shiv Dial*, 1913 Punj Rec No 92, p. 325.

[30] *Hargopal v People's Bank of Northern India. AIR 1935 Lah 691.*

[31] *UPSEB v Gael Electric Stores, AIR 1977 All 494.*

[32] *Fair Air Engineers (P) Ltd v N.K. Modi, (1996) 6 SCC 385.*
S.D. Katherine Stiffles v M.P. Carr Mackertich, 164 IC 732.

An acceptance by a person to whom a proposal is not addressed is no acceptance. A discount offer meant for acceptance of any customer was held to be not acceptable by a group of persons acting in concert.'"

Acceptance of Counter-proposal

When a counter-proposal is accepted, a contract arises in terms of the counter-proposal, and not in terms of the original proposal.

Provisional Acceptance

An acceptance is sometimes made subject to final approval. A provisional acceptance of this kind does not ordinarily bind either party until the final approval is given. Meanwhile, the offeror is at liberty to cancel his offer. The Punjab High Court in *Union of India* v *S. Narain Singh"*[1] observed as follows:

> Where the conditions of auction sale of liquor shop expressly provide that the acceptance of the bid shall be subject to the confirmation of the Chief Commissioner, there will be no complete contract till the acceptance of the highest bid is confirmed by the Chief Commissioner and the person whose bid has been provisionally accepted is entitled to withdraw his bid.

The bidder will have the right to withdraw his bid even where it is a condition of the auction sale that a bid which has been provisionally accepted cannot be withdrawn.

It is a question of fact in each case whether the parties intend to be bound by the provisional agreement or whether that is only a tentative arrangement. In *Winn* v *Bull"* the parties entered into an agreement for a lease "subject to the preparation and approval of i formal contract". When the final draft was prepared the parties could not agree on its terms. Holding that there was no contract, JESSEL MR said that this was an agreement subject to the terms being approved and the terms were not approved. In *Branca* v *Cobar-* r o A n agreement for the sale of the lease and goodwill of a mushroom farm contained the terms of payment, a forfeiture clause and finally concluded: "This is a provisional agreement until a fully legalised agreement drawn up by a solicitor and embodying all the conditions herewith stated is signed." Lord GREENE MR held that the parties intended to be bound by this "provisional agreement" until it was replaced by a formal contract containing the same terms.

When a provisional acceptance is subsequently confirmed, the fact should be notified lo the offeror, for it is only then that he becomes finally bound. An acceptance is not complete till communicated. A mere noting of acceptance in the auction file inside the

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Steel Authority of India Ltd v *Salem Stainless Steel Suppliers,* (1994) i SCC 274. ^ AIR 1953 Punj 274. [E] (1877) 47 LJ Ch 139: 7 Ch D 29.

.1947] 2 All ER 101: [1947] KB 854 CA.

office is not enough. Even if the bidder comes to know of that fact of his own, that will not do.[w]

Acceptance and Withdrawal of Tenders

A tender is in the same category as a quotation of prices. It is not an offer."" When a tender is approved, it is converted into a standing offer. A contract arises only when an order is placed on the basis of the tender. These principles were laid down by the Bombay High Court in the well-known case of *Bengal Coal Co Ltd* v *Homee Waclia and* Co[1]".

> The defendants signed an agreement which, among other terms, provided: 'The undersigned have this day made a contract with Messrs Homme Wadia for a period of 12 months for the supply of a kind of coal from time to time as required by the purchasers.' Certain orders were placed and were complied with by the defendants. But before the expiry of 12 months they withdrew their offer and refused to comply with further orders. They were accordingly sued for breach of contract.

The court observed as follows:

> There is no contract, but simply a continuing offer, and that each successive order given by the plaintiffs under it was an acceptance of the offer as to the quantity ordered, and that thus the offer of the defendants and each successive order of the plaintiff together constituted a series of contracts. The defendants could not revoke their offer as to orders actually given, but except as to them, they had full power of revocation.

The Supreme Court has observed: "As soon as an order was placed a contract arose and until then there was no contract. Also each separate order and acceptance constituted a different and distinct contract."[34] A tenderer can withdraw his tender before its final acceptance by a work or supply order even if there is a clause in the tender restricting his right to withdraw. A tender will, however, be irrevocable where the tenderer has, on some consideration, promised not to withdraw it or where there is a statutory prohibition against withdrawal." The Supreme Court justified the forfeiture of earnest money when a tender was withdrawn against its terms which did not permit withdrawal up to 45 days. The withdrawal was violation of tender rules.[10]"

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Just as the tenderer has the right to revoke his tender as to future orders, so also the acceptor of the tender has the right to refuse to place any orders whatsoever. The Supreme Court has also laid down in *Union of India* v *Maddala Thathaiah*[101] that a clause in a tender authorising the party inviting tenders to terminate the contract at any time for the future supplied does not destroy the very basis of the contract and the clause is valid.

No Obligation to Accept Lowest Tender

A party inviting tenders is not bound to accept any tender nor necessarily to accept the lowest tender.[102] It would, however, be an unfair trade practice to pick and choose arbitrarily between tenderers. That would defeat the very purpose of inviting tenders and would be a fraud on the face of tenderers. Lowest tenderer may be ignored and the higher one may be selected for the award of the contract if there is a *bona fide* ground against the lowest tenderer if tender rules permit latitude of that kind.[103]

LAPSE OF OFFER

Acceptance should be made before the offer lapses. An offer lapses in the circumstances provided for in Section 6.

6. *Revocation how made.*—A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of time prescribed in such proposal for its acceptance or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

AIR 1966 SC 1724: (1964) 3 SCR 774.

Deepak Kumar Sarkar v *State of WAS.,* AIR 2004 Cal 182, there was a clause in the tender documents for rejection or acceptance of any lender without assigning any reason. No liability for not acccpting any tender. *Cama Hotels Ltd* v *Airports Authority of India,* AIR 2004 Gau 349, no *mala fide* shown in the withdrawal of a tender by Authorities, a mere apprehension on the part of the petitioner that this was done to favour his business rival was not sufficient to warrant interference by writ petition. *Sri Sankaranarayna Construction _ Co* v *Konkan Rly Corpn Ltd,* (2004) 2 Bom CR 676, the obligation ordinarily is to accepi the lowest tender. *Tamside case,* 11976] 3 Alt ER 665; followed in *N. Kunhraman* v *Municipal Corpn,* (1992) 1 Kcr LJ 191, rejection of the lowest tender by an clcctcd council was not interfered with because the decision did not seem to be unreasonable; *Balm Ram Gupta* v *MTNL,* AIR 1995 Del 223, rules permitted the authority price preference, second lowest tenderer invited, decision not interfered with by the court. *Tata Cellular* v *Union of India,* (1994) 6 SCC 651: AIR 1994 SCW 3344 and *Nestor Pharmaceuticals* v *Union of India,* AIR 1995 Delhi 260, no irregularity shown in the acceptance of tenders. *Jyothi Krishna* v *State Bank of Hyderabad,* AIR 1993 AP 327, the condition of earnest money was satisfied though not literally and the same was not allowed as a ground of rejection. The court issued the writ of mandamus. *W.B. SEB* v *Patel Engg Co Ltd,* 2001) 2 SCC 451, technical jobs for which tenders were invited from qualified tenderers, not allowed lo be ■ ^ allotted to persons not possessing re'quisite qualifications. *Tata Cellular* v *Union of India,* (1994) 6 SCC 651: AIR 1994 SCW 3344, on scope of judicial interference.

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

1. Notice of revocation

The provisions relating to communication of proposal, acceptance and revocation are to be found in Sections 4 and 5.

4. *Communication when complete.*—The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to *B* at a certain price.

The communication of the proposal is complete when *B* receives the letter.

(b) B accepts *A*'s proposal by a letter sent by post.

The communication of the acceptance is complete, as against *A*, when the letter is posted; as against *B*, when the letter is received by *A*.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against *B* when *B* receives it.

B revokes his acceptance by telegram. *B*'s revocation is complete as against *B* when the telegram is despatched, and as against A when it reaches him.

***Revocation of proposals and acceptances.*—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.**

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to *B. B*

accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when *B* posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A* but not afterwards.

Section 5 provides that "a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards". As against the proposer, the communication of acceptance is complete "when it is put in a course of transmission to him, so as to be out of the power of the acceptor". It means, therefore, that the communication of revocation to be effective must reach the offeree before he mails his acceptance putting it out of his power. A revocation becomes effective only when it reaches the offeree. *Henthorn* v *Fraser*[m] illustrates this:

The secretary of a building society handed to the plaintiff in the office of the society an offer to sell a property at £ 750 giving him the right to accept within fourteen days. The plaintiff resided in a different town and took away with him the offer to that town. The next day at about 3.50 p.m. he sent by post his letter of acceptance. This letter was received at the society's office at 8.30 p.m. But before that at about 1 p.m. the society had posted a letter revoking its offer. The revocation and the acceptance crossed in the course of post. The plaintiff received the letter of revocation at 5.30 p.m. The revocation was held to be ineffective.

Revocation of Time-Bound Proposcds

Where an offer gives the offeree an option to accept within a specified period, it may be •• ithdrawn even before the expiry of that period unless there is some consideration for seeping it open. The decision of the Madras High Court in *Alfred Schonlank* v *Muthu- nayna Chetti*[m] is an illustration in point:

The defendant left an offer to sell a quantity of indigo at the plaintiff's office allowing him eight days' time to give his answer. On the 4th day, however, the defendant revoked his proposal. The plaintiff accepted it on the 5th day.

Holding the acceptance to be useless, the court said: "Both on principle and on authority is clear that in the absence of consideration for the promise to keep the offer open for a :.me, the promise is mere *mudum pactum."*

Withdrawal of General Proposals

•'-'here an offer of a general nature is published through newspapers, it can be withdrawn by the same media and the revocation will be effective even if a particular person, subsequently to the withdrawal, happened to perform its terms in ignorance of the withdrawal.

1862] 2 Ch 27. To the same effect: *Manchester Diocesan Council for Education* v *Commercial & General Investments Ltd,* [19691 3 All ER 1593: [1970] I WLR 241 See also *Katyanji Vithaldas & Sons* v *State of M.P.,* (1996) 10 SCC 762, revocation two days after acceptance communicated by Governmenl was held to be ineffective.

1892) 2 Mad LJ 57.

Revocation of a Bid

In the case of an auction, "the assent is signified on the part of the seller by knocking down the hammer". "A bid may be retracted before the hammer is down." In *Union of India* v *Bhim Sen Walaiti Ram:'"*[6]

> A liquor shop was knocked down to a bidder at a public auction. This was subject to the confirmation by the Chief Commissioner who had the power before granting the licence to inquire into the financial condition of the bidder. The bidder had to pay one- sixth part of the price immediately and in case of any default on his part the Government had the power to reauction the shop and the shortfall if any was recoverable from the bidder. He failed to pay one-sixth part and, therefore, the Chief Commissioner did not confirm the bid and ordered the resale. Resale realised much less than the original bid and the question of bidder's liability to pay the shortfall arose.

The Supreme Court said: "It is not disputed that the Chief Commissioner has disapproved of the bid offered by the respondent. If the Chief Commissioner had granted sanction in favour of the respondent, then there would have been a completed transaction and he would have been liable for any shortfall on the resale."

The reason why the bidder has the liberty to withdraw is that the contract is concluded only when the bid is confirmed and formal communication of it is given to the bidder.

2. Lapse of time

An offer lapses on the expiry of the time, if any, fixed for acceptance. Where an offer says that it shall remain open for acceptance up to a certain date, it has to be accepted within that date. It has been suggested by the Calcutta High Court that in such a case it is enough if the acceptor has "posted the acceptance before the stipulated time", even if it reaches the offeror after the stipulated date. The court said, "that an effective date on which the option of acceptance is exercised by a party is to be ascertained from the date when the acceptance is put in transmission and the letter is posted". Where no time for acceptance is prescribed, the offer has to be accepted within reasonable time. What is "reasonable time" will depend upon the facts and circumstance of each case.

3. By failure to accept condition precedent

Where the offer is subject to a condition precedent, it lapses if it is accepted without fulfilling the condition.

4. By death or insanity of offeror

An offer lapses on the death or insanity of the offeror, provided that the fact comes to the knowledge of the offeree before he makes his acceptance.

[106] (1969) 3 SCC 146: (1970) 2 SCR 594.

REVOCATION OF ACCEPTANCE

According to English law an acceptance once made is irrevocable.

In India, on the other hand, acceptance is generally revocable. An acceptor may cancel his acceptance by a speedier mode of communication which will reach earlier than the acceptance itself. Section 5 is the relevant provision:

> **5. *Revocation of proposals and acceptances.*—An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.**

Thus, the communication of revocation should reach earlier than the acceptance itself. What will be the result if they reach together ? The section does not make this point clear. But the only illustration appended to the section seems to show that in such a case also the acceptance will be deemed to have been revoked. The illustration is as follows:

> *A* proposes, by a letter sent by post, to sell his house to *B. B* accepts the proposal by a letter sent by post. *B* may revoke his acceptance at any time before or at the moment when the letter communicating it reaches *A,* but not afterwards.

That this should be the principle is further borne out by *Countess of Dunmore* v *Alexander:*[01]

> A proposal of service made by a letter was sent through an agent. The agent received the acceptance and forwarded it to the principal, but the principal was away that day. The next day the agent received the revocation and forwarded it to the principal, who received the two letters.

The revocation was held to be effective, the court saying that "the admission that the two letters were received together puts an end to the case."

(1830) 9 Shaw 190.

Consideration

SECTION 25 of the Indian Contract Act opens with the declaration that "an agreement made without consideration is void,....'"

Definition

Consideration has been variously defined. The simplest definition is by Blackstone: "Consideration is the recompense given by the party contracting to the other."[2] In the words of Pollock, "Consideration is the price for which the promise of the other is bought, and the promise thus given for value is enforceable."[35] Another simple definition is by PATTERSON, J:[36] "Consideration means something which is of some value in the eye of law.... It may be some benefit to the plaintiff or some detriment to the defendant." But the most commonly accepted definition is that by LUSH, J in *Currie* v *Misa*[37]*:* "A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other."

In Section *2(d)* of the Indian Contract Act consideration is defined as follows:

> **When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise.**

This is rather a practical definition. The purpose is to emphasise the simple fact that consideration is some act, done or promised to be done, at the desire of the promisor. The definition of consideration in Section *2(d)* requires, in the first place, that the act or abstinence, which is to be a consideration for the promise, should be done *at the desire of the promisor,* secondly, that it should be done by the *promisee or any other person* and, lastly, that the act or abstinence may have been already executed or is in the process of being

The section then goes on to provide certain exceptions to the rule.

COMMENTARIES.

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Sir Frederick Pollock in POLLOCK ON CONTRACTS, 13th Edn, p. 133. *" Thomas* v *Thomas,* (1842) 2 QB 851 at p. 859. [5] (1975) LR 10 Ex 153 at p. 162.

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35 A3 221.

14 Cal 64.

ncollar v Sendanatha Mudaliar, AIR 1918 Mad 311.

done or may be still executory, that is to say, it is promised to be done. These requirements constitute the chief elements of the definition.

At the desire of the promisor

The definition of consideration in Section *2(d)* clearly emphasises that an act or abstinence which is to be a consideration for the promise must be done or promised to be done n accordance with the desire of the promisor. For example, in *Durga Prasad* v *Baldeo:*[38]

> The plaintiff, on the order of the Collector of a town, built at his own expense, certain shops in a bazaar. The shops came to be occupied by the defendants who, in consideration of the plaintiff having expended money in the construction, promised to pay him a commission on articles sold through their agency in the bazaar. The plaintiff's action to recover the commission was rejected.

- rr Done at Request

i re other hand, an act done at the promisor's desire furnishes a good consideration for us promise even though it is of no significance or personal benefit to him. The decision rffce Calcutta High Court in *Kedar Nath* v *Gorie MohamecF* has become well-known in ::nnection.

> I: was thought advisable to erect a town hall at Howrah provided sufficient subscrip- i: a could be got together for the purpose. To this end the Commissioners of Howrah ^jnicipality set out to work to obtain necessary funds by public subscription. The rrfradant was a subscriber to this fund for Rs 100 having signed his name in the sub- кт:prion book for that amount. On the faith of the promised subscriptions the plaintiff smeied into a contract with a contractor for the purpose of building the hall. But the :erendant failed to pay the amount and contended that there was no consideration for Hi promise.
>
> mas however, held liable.

of Charitable Nature

2sr_sion of the Calcutta High Court was followed by the Madras High Court in two r roth of which the court laid down that "a promise to pay a subscription becomes L~.e as soon as any definite steps have been taken in furtherance of the object and rhrrh of the promised subscription".[8] In one of these cases:

> x- sjm of Rs 5000 was promised by the defendant as a personal contribution for the of constructing a bridge. He was held liable to pay the amount on the comple- : * lie bridge.[9]

.-*Ramnad* v *Mohd Ibrahim,* AIR 1933 Mad 524: 64 MLJ 574.

- romissory Estoppel and Government Agencies

Promises made by or on behalf of the Government or its instrumentalities which are in- ended to be acted upon and have been acted upon cannot be revoked as against those who : langed their position by virtue of those promises.[15]

PRIVITY OF CONTRACT AND OF CONSIDERATION Promisee or any other person

The second notable feature of the definition of consideration in Section *2(d)* is that the act ihich is to constitute a consideration may be done by "the promisee or any other person", k means, therefore, that as long as there is a consideration for a promise, it is immaterial -ho has furnished it. This principle had its genesis in the English common law, having >sen adopted by the Court of King's Bench as early as 1677 in *Dutton* v *Pooled* On nlure of the defendant's promise to his father to give £1000 to his sister on her marriage f father forebears to sell the wood, the daughter and her husband sued the defendant for lie amount. The defendant was held liable because it is true that the plaintiff was neither rrivy to the contract nor interested in the consideration yet the whole object of the agree- ~ient was to provide a portion to the plaintiff.

Position of Non-party Beneficiary

Nearly two hundred years later in 1861 in *Tweddle* v *Atkinson"* the Court of Queen's Bench refused to follow this principle:

> The plaintiff's marriage was proposed with the daughter of one *G* and in consideration of this intended marriage *G* and the plaintiff's father entered into a written agreement by which it was agreed that each would pay the plaintiff a sum of money. *G* failed to do so and the plaintiff sued his executors.

^though the sole object of the contract was to secure a benefit to the plaintiff, he was not allowed to sue as the contract was made with his father and not with him.

The case laid the foundation of what subsequently came to be known as the doctrine f 'privity of contract" which means that a contract is a contract between the parties only -id no third person can sue upon it even if it is avowedly made for his benefit. This was affirmed by the House of Lords in *Dunlop Pneumatic Tyre Co* v *Selfridge* & Co.[18]

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Union of India v *Anglo-Afghan Agencies,* AIR 1968 SC718; *Motilal Padampat Sugar Mills Co Ltd* v *State of U.P.,* (1979) 2 SCC 409: AIR 1979 SC 621; *Union of India* v *Godfrey Philips India Ltd,* (1985) 4 SCC 369: AIR 1986 SC 806, excise concessions, not permitted to be withdrawn in reference to finalised transactions; *D.C.M.* v *Union of India,* (1988) 1 SCC 86: AIR 1987 SC 2414, alteration of position on the basis of promise enough, prejudice not necessary. * Court of King's Bench, (1677) 2 Levinz 210: 83 LR 523.

123 ER 762: 1 B & S 393: 30 LJ QB 218: 4 LT 468. ' 1915 AC

847.

The plaintiffs (Dunlop & Co) sold certain goods to one Dew & Co and secured an agreement from them not to sell the goods below the list price and that if they sold the goods to another trader they would obtain from him a similar undertaking to maintain the price list. Dew & Co sold the motor tyres to the defendants (Selfridge & Co) who agreed not to sell the tyres to any private customer at less than the list prices. The plaintiffs sued the defendants for breach of this contract.

It was held that assuming that the plaintiffs were undisclosed principals, no consideration moved from them to the defendants and that the contract was unenforceable by them.

Stated, in other words, the two fundamental propositions of English law are:

(1) Consideration must move from the promisee and the promisee only. If it be furnished by any other person, the promisee becomes a stranger to the consideration and, therefore, cannot enforce the promise.

(2) A contract cannot be enforced by a person who is not a party to it even though it is made for his benefit. He is a stranger to the contract and can claim no rights under it.

Privity of consideration

The former of these two propositions is not at all applicable in India. Here, in view of the clear language used in defining consideration in Section *2(d),* it is not necessary that consideration should be furnished by the promisee. A promise is enforceable if there is some consideration for it and it is quite immaterial whether it moves from the promisee or any other person. An illustration is the decision of the Madras High Court in *Chinnaya* v *Ramaya.*[39]

An old lady, by deed of gift, made over certain landed property to the defendant, her daughter. By the terms of the deed, which was registered, it was stipulated that an annuity of Rs 653 should be paid every year to the plaintiff, who was the sister of the old woman. The defendant on the same day executed in plaintiff's favour an *iqrarnama* (agreement) promising to give effect to the stipulation. The annuity was, however, not paid and the plaintiff sued to recover it.

It was clear that the only consideration for the defendant's promise to pay the annuity was the gift of certain lands by the old woman to the defendant. The defendant, therefore tried to defend herself on the ground that the promisee (the plaintiff) had furnished nc consideration. Briefly, the whole situation was this: the defendant's promise was given t< the plaintiff, but consideration was furnished by the plaintiff's sister. The court could hav easily allowed the plaintiff to recover the annuity as consideration given by "any othe person" is equally effective. The court reached the same result but on a somewhat diffei ent ground. It appeared that the plaintiff was already receiving from her sister an annuit of like amount out of the estate and when the estate was handed over to the defendai

[39] (1882) 4 Mad 137: 6 Ind Jur 402.

it was stipulated that the payment to the plaintiff should be continued and she promised accordingly. That means that the failure to keep the promise would have deprived the rlaintiff of an amount which she was already receiving and it is a legal common place ■-hat if a promise causes some loss to The promisee, that is sufficient consideration for the rromise. Thus, the plaintiff had given consideration.

Privity of contract

The rule of ' privity of contract", which means that a stranger to contract cannot sue, -as taken firm roots in the English Common law. The decision of the House of Lords in *Beswick* v *Beswick*[20] rested on this approach.

> *B* was a coal merchant. The defendant was assisting him in his business. *B* entered into an agreement with the defendant by which the business was to be transferred to the defendant. *B* was to be employed in it as a consultant for his life and after his death the defendant was to pay to his widow an annuity of £5 per week, which was to come out of the business. After *B's* death, the defendant paid *B's* widow only one sum of £5. The widow brought an action to recover the arrears of the annuity and also to get specific performance of the agreement.

The Court of Appeal held that she was entitled to enforce the agreement. The plaintiff was *iZ*: wed to enforce the agreement in her personal capacity, although she was not a party to r and it was considered not necessary to infer a trust in favour of the plaintiff.

B 3t the House of Lords[21] did not approve the approach initiated by Lord DENNING MR icc found for the plaintiff on a different ground. Lord REID said that the plaintiff "in her :t'5onal capacity has no right to sue, but she has a right as administratrix of her husband's
- aie to require the appellant to perform this obligation under the agreement".

fashion in India

> India also there has been a great divergence of opinion in the courts as to how far

- ranger to a contract can enforce it. There are decisions which declare that a contract **an** a :>t be enforced by a person who is not a party to it. There is no provision in the Conrad Act either for or against the rule. The Privy Council extended the rule to India in its decxsiofi in *Jamna Das* v *Ram Autar*.[22]

> 4 borrowed Rs 40,000 by executing a mortgage of her Zamindari in favour of *B.* -bsequently she sold the property to C for Rs 44,000 and allowed C, the purchaser, to ~r:ain Rs 40,000 of the price in order to redeem the mortgage if he thought fit. *B* sued r :"or the recovery of the mortgage money, but he could not succeed because he was no rarrv to the agreement between *A* and *C.*

3AI1ER 1 CA. fer»:r*v *Beswick*, 1968 AC 58: |HI 30IA 7: ILR 34 All 63.

(1967) 2 All ER 1197HL.

It was said that the undertaking to pay back the mortgage was given by the defendant to this vendor. "The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt."

There is, however, another line of thinking also which is mainly based upon an observation of the Privy Council in *Khwaja Muhammed Khan* v *Hussaini Begum P* Their Lordships observed:

> .... In India and among communities circumstanced as the Mahommedans, among whom marriages are contracted for minors by parents and guardians it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts.

This statement has been taken by some High Courts as laying down the rule that the Indian Courts are not bound by the rule in *Tweddle* v *Atkinson.* Accordingly it has been observed by the Madras High Court[24] that the right of the third party beneficiary to sue is "firmly established by the Privy Council decision in *Khwaja Muhammad Khan* v *Hussaini Begum.*

The Supreme Court of India has expressed itself in favour of the rule in *Tweddle* v *Atkinson.* In *M.C. Chacko* v *State Bank ofTravancore*[40]*'.*

> The Highland Bank was indebted to the State Bank ofTravancore under an overdraft. One *M* was the manager of the Highland Bank and his father *K* had guaranteed the repayment of the overdraft. *K* gifted his properties to the members of his family. The gift deed provided that the liability, if any, under the guarantee should be met by *M* either from the bank or from the share of property gifted to him. The State Bank attempted to hold *M* liable under this provision of the deed.

But he was held not liable. "The State Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot enforce the terms of the contract".

Exceptions to "Privity Rule"

In the course of time, the courts have introduced a number of exceptions in which the rule of privity of contract does not prevent a person from enforcing a contract which has been made for his benefit but without his being a party to it. Some of the most commonly known exceptions may be considered here.

23 (1910) 37 IA 152: 12BomLR 638; *Coats Viyella India Ltd* v *India Cement Ltd,* (2000) 9 SCC 376, a contracting party cannot shift liability under the contract on to a third party which has no contractual relationship with the other contracting party.

24 *Munisami Naicken v Vedachala Naicken, AIR 1928 Mad 23.*

40 (1969) 2 SCC 343: AIR 1970 SC 504: (1970) 1 SCR 658.

1. Trust or charge

A person in whose favour a charge or other interest in some specific property has been : reated may enforce it though he is not a party to the contract. The decision of the Privy Touncil in *Khwaja Muhammed Khan* v *Hussaini Begum*[26] is illustrative of this principle.

> The appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time) he would pay to the respondent Rs 500 a month in perpetuity for the betel-leaf expenses and charged certain properties with the payment, with power to the respondent to enforce it. The husband and wife separated on account of a quarrel and the suit was brought by the plaintiff-respondent for the recovery of the arrears of this annuity.
>
> was held that the respondent, although no party to the agreement, was clearly entitled 3 proceed in equity to enforce her claim.

An example of a trust is Rana Uma Nath Bakhs Singh v Jang Bahadur.[21]

> U was appointed by his father as his successor and was put in possession of his entire estate. In consideration thereof *U* agreed with his father to pay a certain sum of money and to give a village To *J,* the illegitimate son of his father, on his attaining majority.

1: -as held that in the circumstances mentioned above a trust was created in favour of *J* ":: the specified amount and the village. Hence he was entitled to maintain the suit.

Constructive trust is created in favour of an addressee of insured articles and he can : aim compensation from the Central Government on non-delivery of such articles.[28] An irfine company made arrangement with a hotel for accommodating its passengers. One :: :he passengers so accommodated was injured because of negligent maintenance of the : ::el premises. His action directly against the hotel-keeper was allowed. The court said .-a: the doctrine of privity of contract is subject to many exceptions, one of them being a beneficiary can sue on a contract which is meant only to provide some benefits to inn.[29]

Marriage settlement, partition or other family arrangements

Where an agreement is made in connection with marriage, partition or other family --angeinents and a provision is made for the benefit of a person, he may take advantage

* 1910) 37 IA 152: 12 Bom LR 638. AIR 1938 PC 245.

Chaudhari Amir Ultah v *Central Govt,* 1959 All LJ 271. *Punjab National Bank* v *Khazan Singh,* AIR 2004 P&H 382, financier of a vehicle is the beneficiary of the insurance policy on the vehicle entitled to be impleaded in a proceeding under an accident claim.

Mans Mittelbachert v *East India Hotels Ltd,* AIR 1997 Del 221 at p. 230; *Prithvi Singh* v *Banshi Lai,* AIR 2004 Raj 100, landlord gave a piece of land to his tenant in lieu of the latter permitting passage to a person ho had purchased a part of the property. Denial of such passage to the purchaser on the ground that there •as no privity between him and the tenant was held to be improper.

purse and *B*, a finder, delivers it to him. *A,* in recognition of this service, promises to pay *B* a sum of money. This promise is given for an act which was done before any promise existed, and therefore, cannot be said to have been done as a price for the promise. The promise is to pay for a wholly past act and is, therefore, no more than an expression of gratitude. The past act may explain why the promise was given and may, thus be a motive for the promise, but it furnishes no legal consideration.[35] The consideration and the promise ought to go together. A recent authority is *Mc Ardle, Re*[36] where a promise to pay for improvements made to a property was not allowed to be enforced as the improvements were made before the promise.

Past act at request good consideration

However, an important exception is almost as old as the rule itself. It was established as early as (1616) in *Lampleigh* v *Brathwait*[37] that a past act done at request will be good consideration for a subsequent promise. The facts were:

> The defendant, having committed a murder, requested the plaintiff to labour and to do his endeavour to obtain pardon from the King. The plaintiff did his best to obtain the King's pardon, riding and journeying at his own expense. Afterwards the defendant promised the plaintiff to give £ 100 and then refused to pay. He was, however, held liable.

The modern version of this rule is that in such cases it is ordinarily in the contemplation of the parties that the service rendered at request would be ultimately paid for and that the subsequent promise is nothing but a fixation of reasonable compensation for the service.

Besides this, two more exceptions have been admitted. A promise to pay a time-barred iebt and a negotiable instrument issued for a past consideration are both valid.

It is not necessary for the courts in India to follow the English rule as to past consideration. A past consideration may arise in two ways—

. *Past Voluntary Service*

A past voluntary service is adequately covered by the provision in Section 25(2). A voluntary service means a service rendered without any request or promise and there is a -bsequent promise to pay for the same. For example: "If A saves *B* from drowning, and 5 later promises *A* a reward." Then in English law "A cannot rely on his action as consid- ;-ation for *B's* promise for it is past in point of time."[38] But in India the promise would re enforceable by virtue of Section 25(2) which provides that "a promise to compensate,

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See *Roscoral* v *Thomas*, (1842) 3 QB 234: 11 LJ QB 214: 114 ER 496, where a horse having been sold, a subsequent warranty for its soundness was held to be based upon past consideration. * ;i951] 1 Ch 669: [1951] 1 All ER 905.

1615) Hob 105: 1 Sm LC (13th Edn) 148: 80 ER 255. Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, (23rd Edn, 1972) p. 86.

wholly or in part, a person who has already voluntarily done something for the promisor" is enforceable. The Act gives the following two illustrations to explain this: "A finds B's purse and gives it to him. *B* promises to give *A* Rs 50. This is a contract. *A* supports *B's* infant son. *B* promises to pay A's expenses in so doing. This is a contract."

2. Past Service at Request

The only area of uncertainty should be about requested services, because this is not adequately covered either by Section *2(d)* or by Section 25(2). Section *2(d)* requires that the act should be done at the promisor's desire. This presupposes the existence of a promise to pay for the act and when construed literally the provision cannot apply to an act done at request but without any promise to pay. But the provision can be construed to include an act which has been done at request and for which a promise to pay is given subsequently. Even if no subsequent promise is given the courts can, following the principle laid down in *Upton Rural District Council* v *Powell,*[39] infer an implied promise. Every request for an act carries an implied promise to pay. The Bombay High Court in *Sindha Shri Ganpatsingji* v *Abraham,*[40] held that services rendered to a minor at his request and which were continued after majority at the same request, were good consideration for his promise to pay.

Past and Executed Consideration

A *past* consideration should, however, be distinguished from *executed* consideration. Past consideration always consists of an act done without any promise. But executed consideration means an act which has been done in response to a positive promise. Where, for example, a reward is offered for finding a lost article, the offer can be accepted only by producing the article to the offeror and that is also a consideration for the promise. It is, thus, an example of a consideration which has already been executed.

Executory Consideration

Consideration may consist of an act which is only promised to be done at some future time. There may be a simple exchange of promises and each promise is a consideration for the other. For example: *A* agrees to sell and *B* to buy a quantity of goods at a stated price. In other words, *A* has promised to sell and *B* has promised to pay. Until the goods are actually delivered to *B* under the contract, the consideration is executory.[41]

39 [1942] 1 All ER 220.
40 1LR (1896) 20 Bom 755.
41 *Pankaj Bhargavav Molunder Nath,* (1991) I SCC 556, where the court in reference to Sections 8 and 51 said that mere reciprocal promises are sufficient to constitute a contract.

SUCH ACT, ABSTINENCE OR PROMISE IS CALLED CONSIDERATION

Consideration must be of some value

Consideration, as defined in the Act, means some act, abstinence or promise on the part of the promisee or any other person which has been done at the desire of the promisor. Does it, therefore, mean that even a worthless act will suffice to make a good consideration if it is only done at the promisor's desire. If, for example: *A* promises to give his new Rolls Royce car to *B*, provided *B* will fetch it from the garage. The act of fetching the car cannot by any stretch of imagination be called a consideration for the promise. Yet it is the only act the promisor desired the promisee to do. Such an act no doubt satisfies the ^"ords of the definition, but it does not catch its spirit. It is for this reason that the English common law has always insisted that "consideration must be of some value in the eyes :f the law". *White* v *Bluett*[42] may be cited as an illustration in point. Here, a father, who gave less property to one of his sons, and was persistently troubled by that son, promised to release him from an outstanding loan if he stopped complaining. POLLOCK CB said: "It - ould be ridiculous to suppose that such promises could be binding. In reality there was no consideration whatever."

In India also it has been laid down that consideration "shall be 'something' which ~.ot only the parties regard but the law can also regard as having some value". Thus, a ransfer of property "in consideration that the transferee shall accept the responsibility nd discharge those recurrent religious service and ceremonies",[43] a promise by a wife to :ay off her husband's debts and to maintain his mother made in consideration of enjoying :ertain properties,[44] a mother's promise to pay her junior son a sum of money which was iae to him, if the elder brother did not pay,[4S] a promise to pay certain bills if the promisee "inded over a guarantee and the guarantee turned out to be unenforceable,[46] were held to re for valuable consideration.

But Need not be Adequate

I: is not, however, necessary that consideration should be adequate to the promise. "The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the court when it is sought to be enforced." This is the English rule and : applicable in India also, for the *Explanation 2* attached to Section 25 lays it down so : early that "an agreement to which the consent of the promisor is freely given is not void

[C] (1853) 23 LJ Ex 36.

Kamacharya v *Shiv Nivaschaiya,* (1918) 20 Bom LR 441: 46 IC 19. *Kulasekaraperumal* v *Pathakutty,* AIR 1961 Mad 405: 74 Mad LJ 16. CWTv *Her Highness Vijayaba,* (1979) 2 SCC 213: AIR 1979 SC 982. *Haigh* v *Brooks,* (1839) 10 A & E 309: 50 RR 399.

merely because the consideration is inadequate". This is further fortified by illustration *i)* to the section which is as follows:

> *A* agrees to sell a horse worth Rs 1000 for Rs 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

The best known English authority is *De La Bere* v *Pearson:*[41]

> The defendants, who were newspaper proprietors, offered to answer enquiries from readers of the paper desiring financial advice. The plaintiff wrote to them asking for a safe investment and also for the name of a good stockbroker. The editor recommended a person who, unknown to him, was, in fact, an undischarged bankrupt. The plaintiff, in reliance on the recommendation, sent sums for investment and they were immediately misappropriated. In an action against the defendants, the question was whether there was sufficient consideration for the offer of the advice. It was held that there was sufficient consideration.

Inadequacy as Evidence of Imposition

However, the Act provides in Explanation 2 to Section 25 that "the inadequacy of consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given". Illustration (g) to the section explains this:

> *A* agrees to sell a horse worth Rs 1000 for Rs 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the court should take into account in considering whether or not A's consent was freely given.

The same result would follow where the consideration is so markedly inadequate as to be unconscionable and there is a serious inequality of bargaining power between the parties. A lady was injured as a result of the defendant's negligent driving. Soon thereafter she confronted an insurance adjuster and signed up a release agreement of all her claims for just 331 dollars. Subsequently she sued the defendant in tort and her damages were assessed at 21,000 dollars. She was held to be not bound by the agreement. She was still suffering from her injuries; she received no independent advice and was, therefore, in a much weaker position as compared with a professional claim adjuster.[48]

Forbearance to Sue

Forbearance to sue has always been regarded as valuable consideration. "Forbearance to sue" means that the plaintiff has a right of action against the defendant or any other person and on a promise by the defendant he refrains from bringing the action. The Patna High Court observed in a case that:[42]

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[41] [1908] I KB 280. See A *Lakshmanaswami Mudaliarv LIC,* AIR 1963 SC 1185.

[42] *Debi Radha Rani v Ram Dass, AIR 1941 Pat 282.*

Where a wife who is ready to sue her husband for maintenance allowance has forborne to sue on husband's agreeing to pay her monthly allowance by way of maintenance, the contract is supported by consideration as wife's forbearance to sue amounts to consideration for husband's agreement for payment of maintenance allowance.

The compromise of doubtful rights has also been regarded as sufficient consideration for an agreement. But there must be a *bona fide* claim and not merely one which is set _p frivolously or vexatious. A claim set up on the basis of a false or forged will cannot tain an agreement.

'An agreement to avoid further litigation is not an agreement devoid of consideration."[50] has been held that "where an agreement has been arrived at between certain members of family that is designed to promote grace and goodwill, this by itself is a good considera- n to support the transaction".[51]

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sideration must be something more than what the promisee is already bound to do. A son may be bound to do something by law or by contract. "Performance of a legal duty no consideration for a promise." A Madras case illustrates this:[52]

The plaintiff had been served with summons requiring him to give evidence before a court of law. The defendant, who was a party to the case, gave him a promissory note promising to pay a sum of money for his trouble. The note was held to be void for want of consideration.

A promise to pay a sum of money to a police officer for investigating into a crime will without consideration if he is already bound to do so by law. "But doing or agreeing do more than one's official duty will serve as consideration." The English case of *sbrook Brothers Ltd* v *Glamorgan County Council*[53] is another illustration of services red outside the scope of official obligations.

On the occasion of a strike a colliery manager applied for police protection for his colliery and insisted that it could only be efficiently protected by billeting a police : rrce on the colliery premises. The police superintendent was prepared to provide what his opinion was adequate protection by means of a mobile force, but refused to billet rolice officers at the colliery except on the terms of the manager agreeing to pay for the force so provided at a specified rate. It was held by a majority that there was nothing legal in the agreement, nor was it void for want of consideration.

Brzma v *Nigappa,* (1868) 5 BHC 75 (Appeal Civil).

Lmif Jahan Begam v *Mohd Nabi Khan,* AIR 1932 All 174; *CWT* v *Her Highness Vijayaba,* (1979) 2 SCC 213: AIR 1979 SC 982.

R $ashannah Chetti v P. Ramaswami Chetti, (1868) 4 MHC 7. ***1925*** *AC 270.*

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Chetti v P. Ramaswajni Chelti, (1868) 4 MHC 7.

Performance of Contractual Obligations

(A) *Pre-existing contract with promisor.*—Compliance with legal obligations imposed by a contract with the promisor can be no consideration for a promise. An illustration is supplied by *Ramchandra Chintaman* v *Kalu Raju*\[5A]

> The plaintiff accepted a *vakalatnama* from the defendant to act for him in a certain suit on receiving his usual fee. Subsequently the defendant agreed to pay him a certain sum as a special reward (*inam*), if the suit was decided in his favour. The suit was decided in favour of the defendant, who, however, did not pay the amount. The plaintiff, therefore, brought the present suit against him.

It was said that "The plaintiff, having accepted a *vakalatnama* was already bound to render his best service as a pleader. There was no fresh consideration proceeding from the plaintiff when he obtained the agreement."

In *Stilk* v *Myrick,*[43] two seamen having deserted a ship on voyage, the captain promised to pay their wages to the others if the latter would work the ship home, the agreement was held to be void for want of consideration. But where, sailors refused to complete a voyage because of war risks, not originally contemplated, but remained on duty on the promise of extra pay, they were allowed to recover it.[44] The principle would seem to be that where conditions have arisen under which a party is entitled to refuse to go ahead with his contract, a promise to pay him extra if he will not do so is valid. It follows that a promise and existing obligation can amount to good consideration provided there are practical benefits to the promisee.[45]

Promise to pay Less than Amount Due

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[43] (1809) 2 Camp 317: 11 RR 717: 170 ER 1168.

[44] *Liston* v *Owners ofSS Carpathian,* [1915] 2 KB 42: 1926 LJ 147: 11 LR QB 322: 29 LT 495.

[45] *Selectmore Ltd, Re,* (1995) 2 All ER 537 CA.

On the same principle, a promise to pay less than what is due under a contract cannot be regarded as a consideration. This rule was laid down in the *Pinnel case.*[46]* Payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole. But the gift of a horse, hawk or robe, etc, in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc, might be more beneficial to the plaintiff than the money in respect of some circumstances. The rule has been criticised because it enables a creditor to accept a horse, canary or tomtit in satisfaction but not a less sum of money. Despite this criticism the ru le was unanimously affirmed by the House of Lords in *Foakes* v *Beer*[47] Dr Foakes was ordered by a judgment decree to pay £2000 to Mrs Beer. The doctor, not being able to pay up at once, made an agreement with her under which he paid £200 immediately and agreed to pay the balance by instalments and she in her turn

[46] (1602)5 Co Rep 117a.

[47] (1884) 9 App Cas 605.

agreed not to enforce the judgment. When the balance was fully paid, she sued the doctor to recover interest on the judgment debt. The House of Lords held that she was entitled to the payment of the judgment debt and to interest to the date of final payment as there was no consideration for her promise to accept anything less than the sum to which she was entitled.

A promise to pay more than the sum due under an existing contract may be equally void. The courts have tried to avoid the awkward results of the rule by admitting exceptions to it.

1. Part-payment by third party.—Part-payment by a third party may be a good consideration for the discharge of the whole of the debt.

> The father of a debtor wrote to the creditor, offering an amount less than that of the debt in full settlement of the debt, and enclosing a draft for that amount, and the creditor cashed and retained the proceedings of the draft, and afterwards brought an action against the debtor for the balance of the debt. It was held that the creditor must be taken to have accepted the amount received by him on the terms upon which it was offered, and therefore, he could not maintain the action.[60]

2. Composition.—Payment of a lesser sum is a good satisfaction for a larger sum -here this is done in pursuance of an agreement of compromise entered into by the debtor ~ith his creditors.

3. Payment before time.—Thirdly, payment of a lesser sum before time, or in a different mode, or at a different place than appointed in the original contract or "the gift of i horse, hawk or robe, etc, in satisfaction is good".

4. Promissory estoppel.—The following statement of BOWEN LJ is an instructive expression of the principle of promissory estoppel:[61]

> If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed....

A landmark in the development of this principle is the much debated case of *Central London Property Trust Ltd* v *High Trees House Ltd:*[62]

> The plaintiffs gave to the defendants a tenancy of a block of flats at a ground rent of £ 2,500 a year. As a result of the 2nd World War, the flats could not be fully let and, therefore, the plaintiffs agreed to reduce the rent by half the amount. In 1945, war conditions ceased to exist, and the flats became fully occupied, but the defendants

Hirachand Punamchand v *Temple*, [1911] 2 KB 330 at p. 331 CA.

Birmingham and District Land Co v L.& N WRly Co, (1888) 40 Ch D 268 at p. 286.

"[4947] 1 KB 130: (1947) 68 LQR 283.

continued to pay only the reduced rent. The plaintiffs' action to recover the full rent as reserved in the original lease from the middle of 1945 was successful.

One of the questions was what was the consideration for the agreement to reduce the rent? The plaintiffs having deliberately agreed to forego the rent and the defendants having acted on that promise up to the time of action, the plaintiffs were estopped from alleging that there was no consideration for the promise.[48]

The Indian Contract Act, 1872 in Section 63 clearly provides that "every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit". The section has the following illustrations:

0*b) A* owes *B* 5000 rupees. A pays to *B* and *B* accepts, in satisfaction of the whole debt, 2000 rupees paid at the time and place at which the 5000 rupees were payable. The whole debt is discharged.

(c)*A* owes *B* 5000 rupees. C pays to *B* 1000 rupees, and *B* accepts them, in satisfaction of his claim on A. This payment is discharge of the whole claim.

(d) *A* owes *B* under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount gives to *B* and *B,* in satisfaction thereof, accepts the sum of 2000 rupees. This is a discharge of the whole debt whatever may be its amount.

(e) A owes *B* 2000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including *B,* to pay them a composition of eight annas in the rupee upon their respective demands. Payment to *B* of 1000 rupees is a discharge of B's demand.

(B) Pre-existing contract with third party.—Where a person has contracted to do an act, and a third person promises to pay him a sum of money if he would go ahead with the performance, is there a consideration for the promise? A situation like this arose in *Shad- well* v *Shadwell.*[M] On hearing the plaintiff's engagement to a girl named EN, the defendant's uncle happily wrote him a letter in which he promised to pay to plaintiff £150 yearly during his life and until his income annually amounts to 600 guineas. . . . The question was what was the consideration for the uncle's promise? The majority found sufficient consideration to sustain the promise because the promise of the annuity might have been intended as an inducement to the marriage.

This principle was followed by the High Court of Madhya Pradesh in *Gopal Co Ltd \ Hazarilal Co.*[49]

The plaintiff was under a contract to purchase some bales of cotton from a mill, bu: refused to fulfil a substantial part of his contract as the prices of cloth had fallen down The defendants, who were the sole selling agents of the mill and who had guaranteed

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[48] Where certain employees were induced to change their department by holding out promises of better servic: conditions, the Supreme Court did not permit the Government to resile from its promise. *Bhim Singh* v *Sum ofHaryana,* (1981) 2 SCC 673.

[49] AIR 1963 MP 37.

the performance of the contract requested the plaintiff to take the whole of the quota of bales fixed for delivery in the first month and promised that they would buy from the plaintiff a part of such bales at the contract price or pay him Rs 25,000 at his option. The plaintiff complied with their request and elected to take Rs 25,000.

The court said that it appears that the second agreement brings into existence a new con- ract between different parties and therefore a promise to do a thing which the promisee s already bound to do under a contract with a third party can be good consideration to i jpport a contract.

Exceptions to consideration

I?ntracts under Seal

In **the** words of Anson: "English law recognises only two kinds of contract, the contract de by deed, that is, under seal, which is called a deed or speciality, and the simple con- **Tact.**" A contract under seal means a contract which is in writing and which is "signed, r iled and delivered".

Exceptions under S. 25

1* :ian law, however, does not recognise any such exception. But Section 25 of the Con- **ract** Act lays down a few exceptions—

25. *Agreement without consideration void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation* ***mw.—An agreement made without consideration is void, unless—***

(1) it is expressed in writing and registered under the law for the time being in force for registration of [documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

***Explanation* 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.**

***Explanation* 2.—An agreement to which the consent of the promisor is freely given is aot void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent to the promise was fre.ely given."**

Illustrations

(a) A promises, for no consideration, to give to *B* Rs 1000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, *B* Rs 1000. A puts his promise to *B* into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. *B* promises to give A Rs 50. This is a contract.

(d) A supports *B's* infant son. *B* promises to pay A's expenses in so doing. This is a contracL

(e) A owes *B* Rs 1000, but the debt is barred by the Limitation Act. A signs a written promise to pay *B* Rs 500 on account of the debt. This is a contract.

(/) A agrees to sell a horse worth Rs 1000 for Rs 10. A's consent to the agreement was freelj given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs 1000 for Rs 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

1. Natural Love and Affection.—The first exception is thus stated:

An agreement without consideration is void, unless it is expressed in writing and registered under the law for the time being in force for the registration of documents, and if made on account of natural love and affection between parties standing in a near relation to each other. Now, who is a near relative ? The Act provides no guidance, nor has the expression been judicially construed. The expression will without doubt include parties related by blood or marriage. Again, what is meant by natural love and affection ? There is always some degree of instinctive love and affection between parties nearly related. But this instinct may sometimes be overruled by external circumstances. Thus, for example, in *Rajlukhy Dabee* v *Bhootnath Mookerjee:*[50]

The defendant promised to pay his wife a fixed sum of money every month f her separate residence and maintenance. The agreement was contained in a registered document which mentioned certain quarrels and disagreements between the two.

The Calcutta High Court refused to regard the agreement as one covered by the exception. The Court could find no trace of love and affection between the parties whose quarre had compelled them to separate.

With this should be contrasted the decision of the Bombay High Court in *Bhiwa Shivaram:*[51]

A sued *B,* his brother, for a share in certain lands. But the suit was dismissed as solemnly affirmed that the property was not ancestral; *B* then agreed by register writing to give A one half of the same property. The present suit was brought to obtai that share.

[50] (1900) 4 Cat WN 488.
[51] (1899) 1 Bom LR 495.

The plaintiff admitted that he and his brother had long been on bad terms. But in spite of the strained relations, the court held "that this is just the case to which Section 25(1) should be held to apply. The defendant had such natural love and affection for his brother -.hat in order to be reconciled to him, he was willing to give him his property".[68]

2. Past voluntary service.—Secondly, a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable. In : iher words, a promise to pay for a past voluntary service is binding. Thus, where services : ere rendered for a company not then in existence, a subsequent promise to pay for them could not be brought within the exception.[69] But a promise made after attaining majority

pay for goods supplied to the promisor during minority has been held to be within the exception. The court regarded the supply to be voluntary, the contract being not binding. Another situation covered by the exception is where the promisee has done something for vie promisor "which the promisor was legally compellable to do". A subsequent promise j3 pay for the act is enforceable.

3. Time-barred debt.—Lastly, a promise to pay a time-barred debt is enforceable. The promise should be in writing. It should also be signed by the promisor or "by his ^ent generally or specially authorised in that behalf'. The promise may be to pay the ihole or any part of the debt. The debt must be such "of which the creditor might have eoforced payment but for the law for the limitation of suits".

Is it necessary that the promise should be given by the person who was liable for the iginal time-barred debt ? But the Madras High Court has expressed the opinion that a rromise to pay by any person other than the debtor should be within the exception.[70] An iimission by the legal heir of a deceased debtor in the court that he was willing to pay the principal time-barred amount was held to be a promise to pay making him liable.[71]

The promise referred to in Section 25(3) must be an express one and cannot be held to sufficient if the intention to pay is unexpressed and has to be gathered from a number ""circumstances.

Thus, a debtor's letter to his creditor "to come and receive" what was rae to him, was held to disclose no express promise. As against it, in another case, where acknowledgment of a debt was coupled with an agreement to pay interest, it was held be an agreement with a promise to pay within the meaning of Section 25(3).[72] The

also *CWT* V *Her Highness Vijayaba,* (1979) 2 SCC 213: AIR 1979 SC 982, where a mother's promise to -zr junior son to pay a sum of money which was due to him if his elder brother failed to pay, was held to be utended to secure family peace and that was a sufficient consideration for the promise. *Jupudi Venkata Vi- . tr.a Bhashar* v *Jupudi Kesava Rao.* AIR 1994 AP 134, would-be adoptee's promise that he would not claim izything in the adoptive parents' coparcenary rights was held to be valid. It was not a consideration for the iioption.

• j*ram Chand* v *Basant Kaur,* (1911) Punj Rec No 31, p. 91. See also *Kundan Bibi* v *Shree Narayan,* (1906) 1 Cal WN 135, where a bond executed by a person for a loan allowed during his minority as well as at the 2aie of the execution, was held valid.

ath Govinda Nair v Parekalalhil Achutan Nair, AIR 1944 Mad 678. , Sate Bank of India v Dalip Chandra Singh Deo, AIR 1998 Ori 129. btbi Prasad v Bhagwati Prasad, AIR 1943 All 63.

Bombay High Court has given a new turn to this exception by holding that a statement in a balance sheet of a firm signed by a partner showing that the firm was liable to the plaintiff in respect of the stated sum became an implied promise to pay.[52]

Gift actually made [S. 25 Explanation I]

The provisions as to consideration do not affect as between donor and donee the validity of any gift which has actually been made. A gift of movables which has been completed by delivery and gift of immovables which has been perfected by registration cannot be questioned as to their validity only on the ground of lack of consideration. They may be questioned otherwise. Where a gift of property was made by registered deed and attested by two witnesses, it was not allowed to be questioned by the donor on the ground that she was the victim of fraud which she was not able to establish.[53]

Inadequacy of consideration [S. 25 Explanation II]

For notes *see* under Adequacy of Consideration *(supra).*

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[52] *R. Suresh Chandra & Co \ Vadnese Chemical Works, AIR 1991 Bom 44.*

[53] *Vasant Rajaram Narvekar* v *Ankushu,* (1995) 3 Bom CR 196; *K. Balakrishnan* v *K. Kamalam,* (2004) 1 SCC I 581: AIR 2004 SC 1257: (2004) 2 ALD 79 (SC), gift by mother to her minor son under gift deed with the right to be in the property up to her life time. The son kept it with his father and did not repudiate on attaint: majority. Thus, accepted and became irrevocable.

Capacity to Contract

: - CTION 10 of the Contract Act requires that the parties must be competent to contract. I: ipetence to contract is defined in Section 11.

***11. Who are competent to contract.*—Every person is competent to contract who is of the lie of majority according to the law to which he is subject, and who is of sound mind, and ■ aa: disqualified from contracting by any law to which he is subject.**

section declares the following persons to be incompetent to contract—(1) minors, of unsound mind, and (3) persons disqualified by law to which they are sub-

MINOR

ity is generally eighteen years, except when a guardian of minor's person has been appointed by the court, in which case it is twenty-one.[2] The age of i zerson is to be determined "according to the law to which he is subject".

■iiior's agreement

that the parties to a contract must be competent and Section 11 says T>:C competent. But neither section makes it clear whether, if a minor enters ~ :t would be voidable at his option or altogether void. These provisions : -tie naturally given rise to a controversy about the nature of a minor's : rntroversy was only resolved in 1903 by the Privy Council in *Mohori- Ghose?* by declaring that the agreement would be void. The ruling

■*anr.* c v *Suyog Co-op Housing Society Ltd,* AIR 2003 NOC 118 (Guj): 2002 AIHC 3401, op-??; to sell land before it became a legal person by registration. Not enforceable. Section 3.

■ *Zzl* 539. *Lakhwinder Singh* v *Paramjit Kaur,* AIR 2004 P&H 6: (2004) 1 ICC 151, " -:-or executed by the minor's power of attorney holder, held not binding, the buyer K i matter.'*Ram Ashish Chaudhary* v *State of U.P.,* 2003 All LJ 330 (All), appoint- „re is teachers held, void *ab initio. M.S. Madhusoodhanan* v *Kerala Kaumudi (P)*

of the Privy Council has been generally followed by the courts in India and applied both to the advantage and disadvantage of minors. The decision of the Privy Council in *Mir Sarwarjan* v *Fakhruddin Mohd Chowdhury*[4] went against the minor's interest.

> A contract to purchase certain immovable property had been made by a guardian on behalf of a minor, and the minor sued the other party for a decree of specific performance to recover possession. His action was rejected.

The court said that it was not within the competence either of the manager of the minor's estate or of the guardian of the minor, to bind the minor or the minor's estate by a contract for the purchase of immovable property.

In the modern circumstances of society it does not seem to be possible to adhere to the categorical declaration that a minor's agreement is always "absolutely void". Minors are appearing in public life today more frequently than ever before. The Privy Council had, therefore, to modify its earlier decisions and held in *Srikakulam Subrahmanyam* v *Kurra Subba Rao*[5] that the transfer of the inherited property of a minor effected by his guardian to pay off an inherited debt was binding on him being for his benefit.

Effects of minor's agreement

A minor's agreement being void, ordinarily it should be wholly devoid of all effects. If there is no contract, there should, indeed, be no contractual obligation on either side. Consequently, all the effects of a minor's agreement must be worked out independently of any contract.

No estoppel against minor

After some controversy it is now settled by a preponderance of authority that a minor who has made an agreement by misrepresenting his age may disclose his real age and seek declaration that his agreement is void. There is no estoppel against him.

No liability in contract or in tort arising out of contract

"A minor is in law incapable of giving consent, and, there being no consent, there could be no change in the character" or status of the parties. In England it was laid down as early as 1665 in *Johnson* v *Pye*[6] that "an infant who obtains a loan of money by falsely representing his age cannot be made to repay the amount of the loan in the form of damages for deceit". A minor cannot be held responsible for anything which would be an indirect way of enforcing his agreement. This principle has been generally followed in India. The

Ltd, (2004) 9 SCC 204, minor's share of property sold by legal guardian to his father who in turn transferred it further, valid.

(1912) 39 Cal 232 (PC).

[5] (1947-48) 75 1A 115: AIR 1948 PC 95: ILR 1949 Mad 141 PC.

[6] (1665) 1 Sid 258: 82 ER 1091.

- alcutta High Court, for example, refused to hold a minor liable in tort for money lent : - a bond.[7]

Where the tort is independent of contract, the mere fact that a contract is also involved, - ill not absolve the infant from liability. Where an infant borrowed a mare for riding only, re was held liable when he lent her to one of his friends who jumped and killed her.[8] In *.'minings* v *Randall,*[9] the defendant, an infant, had hired a horse to be ridden for a short : amey and took it on a much longer journey, with the result that it was injured, the court "r'.d the defendant not liable, upon the ground that the action was founded in contract, and r at the plaintiff could not turn what was in substance a claim in contract to one in tort.

Doctrine of Restitution

T an infant obtains property or goods by misrepresenting his age, he can be compelled : restore it, but only so long as the same is traceable in his possession. This is known as the equitable doctrine of restitution. Where the infant has sold the goods or converted rem, he cannot be made to repay the value of the goods, because that would amount to n:orcing a void agreement.[10] Again, the doctrine of restitution is not applied where the "rant has obtained cash instead of goods. The well-known authority is *Leslie (R) Ltd* v *Sieill.*[11]

An infant succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him £ 400 on the faith of his being adult.

Their attempt to recover the amount of principal and interest as damages for fraud failed. Trey then claimed the return of principal moneys under the quasi-contract which also failed. Finally, the money-lenders relied upon the doctrine of restitution that the infant " 3uld be compellable to restore the money but this was also rejected.

Where an infant invokes the aid of the court for the cancellation of his contract, the .: jrt may grant relief subject to the condition that he shall restore all benefits obtained by nn under the contract, or make suitable compensation to the other party.

The scope of relief possible against a fraudulent minor in India was examined in *Mo- '.:nbibee* v *Dharmodas Ghose.*[12]

The plaintiff, a minor, mortgaged his houses in favour of the defendant, a moneylender, to secure a loan of Rs 20,000. A part of this amount was actually advanced to

Hari Mohan v *Dutu Miya,* (1934) 61 Cal 1075. An agreement by a minor to release his rights in a property is equally infructuous. *Wall Singh* v *Solian Singh,* AIR 1954 SC 263 at p. 265. *Burnani* v *Haggis,* (1863) 4 CBNS 45: 8 LT 328. 1799) 8 Term Rep 335.

There has been, however, one case in England, namely, *Stocks* v *Wilson,* [1913] 2 KB 235, where an infant ■was held liable to account for the value of certain furniture and other articles which he had resold after obtaining them from the plaintiff by misrepresentation of age. The decision was criticised a year later by Lord SMSUMNER in *Leslie (R) Ltd* v *Sheitt,* [1914] 3 KB 607, and is not likely to be followed. __ ;I914] 3 KB 607.

1903) 30 IA 114: 30 Cal 539.

him. While considering the proposed advance, the attorney, who was acting for the money-lender, received information that the plaintiff was still a minor. Subsequently, the infant commenced this action stating that he was under age when he executed the mortgage and the same should, therefore, be cancelled.

The relief of cancellation had to be granted as the plaintiff was entitled to it under Section 39 of the Specific Relief Act, 1877. The money-lender's only request was that the relief should be made subject to the condition of the minor repaying to him the sum of Rs 10,500 advanced as part of the consideration for the mortgage. He first relied upon Section 64 of the Contract Act, according to which, a person who, having the right to do so, rescinds a voidable contract, shall have to restore to the other party any benefit received by him under the contract. The Privy Council held that this section applies only to voidable contracts and cannot apply to the agreement of a minor, which is absolutely void. Similarly, no relief was allowed under Section 65 of the Act, as this section applies only to contracts which subsequently either become void or are discovered to be void. "This section like Section 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was. and never could have been any contract." The court could have ordered refund of consideration under Section 41 of the Specific Relief Act, 1877, but only if justice require; it. Justice would not require a money-lender to be compensated if he had knowledge or | suspicion of the borrower's minority. In a subsequent case, *Khan Gul* v *Lakha Singh,*[54] the Lahore High Court ordered a minor to refund Rs 17,500 which he had taken in advance for the sale of land when he refused to complete the contract.

The Allahabad High Court in *Ajudhia Prasad* v *Chandan Lai*[55], refused to follow th extended view of restitution and held that a minor who had taken money by mortgaging his houses was not bound to restore the money.

Relief under Specific Relief Act

The Law Commission of India preferred the view of the Lahore High Court and accordingly the controversy has now been set at rest by the new Specific Relief Act, 1963. Hi principle of restitution is contained in Section 33 of the new Act. The net result of trc amendment may be stated in the following two propositions:

(1) Where a void or voidable contract has been cancelled at the instance of a par thereto, the court may require him to restore such benefits as he has receive: under the contract and to make any compensation to the other party whici justice may require.

(2) Where a defendant successfully resists any suit on the ground that the contra.- by reason of his being incompetent, is void against him, he may be required:

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[54] ILR (1928) 9 Lah 701: AIR 1928 Lah 609.

" AIR 1937 All 610 (FB).

[55] [1911-13] All ER Rep 425: [1912] 2 KB 419.

restore the benefits, if any, obtained by him under the contract, but only to the extent to which he or his estate has benefited thereby.

Sub-section (1) of the above provision incorporates the principle that he who seeks eq- - ty must do equity. The courts have the discretion to require the minor-plaintiff to restore the advantages he has obtained under a void agreement. A good illustration is *Jagar Nath Singh* v *Lalta Prasad,*[15] where the Allahabad High Court said:

Where persons who are in fact under age induce others to purchase property from them, they are liable in equity to make restitution to the purchasers for the benefit they have obtained before they can recover possession of the property sold.

But the court will not compel any restitution by a minor even when he is a plaintiff,

- ".ere the other party was aware of the infancy so that he was not deceived,[16] or where the :e>er party has been unscrupulous in his dealings with the minor,[17] or where, though the

:r has misrepresented his age, the other party was so zealous to enter into the transac- n that the false representation exerted no influence on him[18], or where the other party

> no material before the court for coming to the conclusion that justice requires return the money paid to the minor.[19]

ficial contracts

law declared by the Privy Council in the *Mohoribibee* case that a minor's agreement 'absolutely void" has been generally followed, but it has been growingly "confined to where a minor is charged with obligations and the other contracting party seeks to ; those obligations against the minor". Accordingly, a minor is allowed to enforce .: " tract which is of some benefit to him and under which he is required to bear no on. In *Raghava Chariar* v *Srinivasa*[2]*",* the following question was referred for the on of a Full Bench of the Madras High Court:

Whether a mortgage executed in favour of a minor who has advanced the whole of re mortgage money is enforceable by him or by any other person on his behalf?

The unanimous opinion of the Full Bench was that the transaction was enforceable by or on behalf of the minor.

> the same principle it has been held that "a minor is capable of purchasing immov- rroperty and he may sue to recover the possession of the property purchased upon

31 All 21.

■*i^ndal* v *Mangaram Coram,* AIR 1961 Pat 21; *Shiamlal* v *Ram Piari,* (1910) 32 All 25; *Radhey Shiam* i-'^-.Ml, (1918) 48 IC 478; *Hari Mohan* v *Dulu Miya,* (1934) 61 Cal 1075. In all these cases the minor :: remitted no fraud and, therefore, he was allowed to recover the property sold without restoring the on obtained by him. *Said* v *Bishambar Nath,* AIR 1924 All 156. *il* v *Ma Hda On,* 1939 Rang 545. *Prasad Singh* v *Sheo Gopal Lai,* 1904 96 All 342. -J Mad 308: AIR 1917 Mad 630TFB).

tender of the purchase money".[21] A transfer which has already been executed in favour of a minor can, of course, be much less impeached.[22] "A lease, however, is not like other transfers of property and a lease to a minor has been held to be void."[23] A minor may also enforce a promissory note executed in his favour.[24] "There is nothing in the Contract Act to prevent an infant from being the promisee." "The law does not regard a minor as incapable of accepting a benefit."[25]

A gift of some property under a deed executed by the mother in favour of her minor child was held to be binding on the mother. The fact that the mother had reserved to herself the possession and enjoyment of the property did not destroy the effectiveness of the gift.[26]

All these cases proceed on the principle that the minor has already given the full consideration to be supplied by him and there is nothing that remains to be done by him under the contract. He is now a mere promisee and prays the court for recovering the benefit stipulated.[27] But where the contract is still executory or the consideration is still to be supplied, the principle of the *Mohoribibee* case will prevent any action on the contract. Thus, for example, in *Raj Rani* v *Prem Adib*[2i]

> The plaintiff, a minor, was allotted by the defendant, a film producer, the role of an actress in a particular film. The agreement was made with her father. The defendant subsequently allotted that role to another artiste and terminated the contract with the plaintiff's father.

The Bombay High Court held that neither she nor her father could have sued on the promise.

Where a minor has given consideration under a contract, but the consideration given to him has failed, he may have restitution. Thus, where a minor bought a zamindari property on payment of money, but he was ousted on a suit by a third party, it was held "that the minor was at any rate entitled to recover from the vendor the sum which he had paid as purchase money".[29]

21 *Ulfat Rai v Gauri Slianker, (1911) 33 All 657.*

22 SEE *JAYKANT* V *DURGASHANKAR,* AIR 1970 GUJ 106. CITED, PONNUSWAMI AND PURI, CASES AND MATERIALS : CONTRACTS, P. 313 (1974).

23 *Ibid.*

24 *Sharafath Ali v Noor Mohammad. AIR 1924 Rang 136; Sathrurazu v Basappa, (1913) 24 MLJ 363.*

25 *Ibid.*

26 *K. Balakrishnan* v *K. Kamalam,* (2004) 1 SCC 581: (2004) 2 ALD 79 (SC): AIR 2004 SC 1257, a minor accept a gift, there is a presumption of its acceptance, revocation after 25 years not effective, the son had • repudiated the gift.

27 *See, for example, Hanmant Lakshman v Jayarao Narsinha, (1888) 13 Bom 50.*

1 AIR 1949 Bom 215.

Walidad Khan v Janak Singh, AIR 1935 All 370.

"When an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid." This is the principle of the well-known case of *Valentini* v *Canali:*[30].

The plaintiff, a minor, agreed with the defendant to become a tenant of his house and to pay £ 100 for the furniture therein. He paid £ 68 in cash and gave a promissory note for the balance. The plaintiff occupied the premises and used the furniture for some months and then brought an action for the refund of the consideration paid by him.

The court ordered the cancellation of the promissory note, but refused to order refund of the sum paid.

Contracts of Marriage

A contract for the marriage of a minor is also prima facie for his or her benefit. "It is customary amongst most of the communities in India for parents to arrange marriages retween their minor children and the law has to adapt itself to the habits and customs of the people."[31] It has, therefore, become well-established, almost without any controversy, ""that while the contract of marriage could be enforced against the other contracting party it the instance of the minor, it cannot be enforced against the minor".[32]

Contracts of Apprenticeship

Contracts of apprenticeship are another species of contracts which are for the benefit of minors. The Indian Apprentices Act, 1850 provides for contracts in the nature of contracts : f service which are binding on minors. The well-known English case on the subject is *Roberts* v *Gray,*[33]

The defendant, an infant, agreed with the plaintiff, a noted billiards player, to join him in a billiards-playing tour of the world. The plaintiff spent time and money in making arrangements for billiards matches, but the defendant repudiated the contract. The plaintiff succeeded in recovering damages for the breach of the contract.

The contract was held to be one for necessaries as it was for the infant's "good teaching :r instruction whereby he may profit himself afterwards". It was suggested in *Raj Rani* v *ᶻremAdibᴹ*, that in such a case the minor would not have been personally liable in India. Section 68 makes his estate liable for necessaries supplied and in this case before any raining was given he repudiated the contract.

[1] f 1889) 24 QBL 166: (1889) 59 LJ QB 74.

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BEAUMONT, CJ in *Khirnji Kuverji* v *Lalji Karamsey,* (1941) Bom 211,215-16: AIR 1941 Bom 129. This will, however, be subject to the present marriage laws. For example, a contract of the marriage of a minor against the provisions of Hindu Marriage Act, 1955, will not be enforceable. ~ *Kumari Shahnoor Md Tahssen* v *State of U.P.,* AIR 2007 NOC 437 All: (2007) 1 ALJ 185, marriage of a

minor Muslim girl against *Sliariat,* held void entitling father to take back custody. 7 ;i913] 1 KB

520. mw^owaYS.

Orclinaiy Trade Contracts not included in Beneficial Contracts

This category of beneficial contracts does not include ordinary trade contracts. In *Cowern* v *Nield*, for example, a minor was carrying on business as a hay and straw merchant. He received a cheque from the plaintiff for the supply of clover and hay. He delivered the clover which was rejected as bad and failed to deliver hay. The plaintiff's action for recovering back the amount of the cheque failed.

Option to Retire from Beneficial Contracts on Majority

A minor will have the option of retiring from a contract of beneficial nature on attaining majority provided that he exercises the option within a reasonable time. Where a minor in pursuance of a marriage settled his after-acquired property and after attaining majority he received a large sum of money under the will of his father which came under the settlement, and, therefore, he attempted to repudiate the settlement, the House of Lords held that the repudiation coming five years after attaining majority was too late.[56]

Ratification

A person cannot on attaining majority ratify an agreement made by him during his minority. Ratification relates back to the date of the making of the contract and, therefore, a contract which was then void cannot be made valid by subsequent ratification. If it is necessary, a fresh contract should be made on attaining majority. And a new contract will also require a fresh consideration. In a case before a Full Bench of the Allahabad High Court the facts were:[57]

> A minor borrowed a sum of money executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan plus interest.

It was held by a majority of two as against one that the suit upon the second bond was not maintainable, as that bond was without consideration and did not come under Section 25(2) of the Contract Act.

Where a person, after attaining majority has not only ratified but also paid the debt incurred by him during minority, he cannot afterwards recover it back.[58] Where in addition to the consideration already given during minority, a further advance is made or a fresh consideration given after majority, a promise to pay the whole of the amount, in the opinion of the Calcutta[59] and Allahabad[60] High Courts, becomes binding.

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[56] *Edwards* v *Carter*, 1893 AC 360: [1891-4] All ER Rep 1259. A minor was granted the right, on attaining majority, to avoid the lease of his land created by the guardian and then the same effect followed as if the lease was void from its inception, *G. Annamalai Pillai* v *Distt Revenue Officer*, (1993) 2 SCC 402. *Suraj Narain* v *SukhuAhir*, ILR (1928) 51 All 164.

[58] *Anand Rai v Bhagwan Rai, AIR 1940 All 12.*

[59] *Kundan Bibi v Sliree Naravan, (1906) 11 Cal WN 135.*

Narain Singh v *Chiranjilal*, ILR (1914) 46 All 568: AIR 1924 All 730: *MC Nagalakshmi* v *MA Farocj*, AIR 2007 Kar 105, sale of property including minor's share, readmitted it on attaining majority, became bound to

Liability for necessaries [S. 68]

Section 68 of the Contract Act provides for the liability for necessaries supplied to persons incompetent to contract.

68. *Claim for necessaries supplied to person incapable of contracting, or on his account.*— If a person, incapable of entering into a contract or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

A supplies *B,* a lunatic, with necessaries suitable to his life. *A* is entitled to be reimbursed from *B's* property.

A supplies the wife and children of *B,* a lunatic, with necessaries suitable to their condition in life. *A* is entitled to be reimbursed from *B's* property.

Meaning of Necessaries

The liability is only for necessaries, but there is no definition of the term "necessaries" tn the Act. "What is necessary" is a relative fact, to be determined with reference to the fortune and circumstances of the particular minor; articles, therefore, that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries, where the usage of society renders them proper for a person in the rank of :fe in which the infant moves. The infant's need of things may also sometimes depend -pon the peculiar circumstances under which they are purchased and the use to which ney are put. For instance, articles purchased by an infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles may not be so considered. "Wedding presents for the bride of the infant may be necessaries."[41] But where such marriage is forbidden by law, the position will be different.[42] Similarly, "the debt incurred fx performing the funeral obsequies of the father of a minor" is a necessary.[43] Where a minor is involved in a litigation threatening his property[44] or liberty,[45] expenses reason- irly incurred on his defence may be recovered from his estate."

ae extent of his share.

.'*ogan Ram* v *Mahadeo Prasad,* (1909) 36 Cal 768, 770. " *Titki Lai* v *Komal Chand,* AIR 1940 Nag 327; ILR 1940 Nag 632. *Bechu Singh* v *Baldeo Prasad,* AIR 1933 Oudh 132.

Thus in *Kedar Nath* v *Ajudhia Prasad,* (1883) Punj Rec 165, 522, money advanced to save a minor's estate from execution sale was held to be necessary.

Thus in *Sham Charan Mai* v *Choudhry Debya Singh,* (1894) 21 Cal 872, where a minor was facing a criminal prosecution for dacoity, the court said: "The liberty of the minor being at stake, the money advanced must be taken to have been borrowed for necessaries." In *Watkins* v *Dunnoo Baboo,* (1881) 7 Cal 140, the court said: "proceedings properly taken to preserve a minor from complete ruin and destitution must be regarded as necessary".

In *Peters* v *Fleming*,[46] the court took judicial notice that it was prima facie not ui sonable that an undergraduate at a college should have a watch, and consequently a watch chain; and that, therefore, it was a question of fact whether the watch chain supplie credit was such as was necessary to support himself properly in his degree. PARKE B "All such articles as are purely ornamental are to be rejected, as they cannot be reqi for anyone."

To render an infant's estate liable for necessaries "two conditions must be satisfiei the contract must be for goods reasonably necessary for his support in his station in and (2) he must not have already a sufficient supply of these necessaries". The sup has to prove, "not only that the goods supplied were suitable to the condition in life c infant, but that he was not sufficiently supplied with the goods of that class". This i principle of *Nash* v *lnman*[A1] where an undergraduate in the Cambridge University, was amply supplied with proper clothes according to his position, was supplied b plaintiff with a number of dresses, including eleven fancy waistcoats, the price was to be irrecoverable.

Nature of Liability

There are two theories relating to the liability of a minor's estate for necessaries. Ao ing to one of the theories the liability does not depend upon the minor's consent. It £ because the necessaries have been supplied to him and is, therefore, *quasi*-contract! nature.

In India the subject has been dealt with in the chapter on "Certain Relations resem those created by Contract". The chapter provides for obligations of *quasi* contractu; ture.[48] Further, the liability is not personal, but is only that of the minor's estate. Th has a very little contractual element.

PERSONS OF UNSOUND MIND

In English law a person of unsound mind is competent to contract, although he may ; his contract if he satisfies the court that he was incapable of understanding the coi and the other party knew of it. The contract is voidable at his option. It becomes bii on him only if he affirms.[49] The position of a drunken person is also the same. If he n a contract while drunk, he may, when sober, elect to avoid it or to affirm it.[50]

Section 12 explains as to who is a person of unsound mind.

46 (1840) 6 M & W 42: 9 LJ Ex 81.

47 [1908] 2 KB 1.

48 Chapter V of the Contract Act. That a minor is incapable of giving consent has been expressly recogni the Supreme Court in *Padma Vithoba Chakkayya* v *Mohd. Multani*, AIR 1963 SC 70, 74.

49 *Imperial Loan Co v Stone, [1892] 1 QB 599.*
Mathews v *Baxter*, (1873) LR 8 Ex 132.

12. *What is a sound mind for the purposes of contracting.*—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

In India, on the other hand, the agreement of a person of unsound mind is, like that of i minor, absolutely void. According to Section 12, "a person is said to be of sound mind :":r the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interest". However, a person who is usually of unsound mind may make a contract when he is of i ?und mind. But a person who is usually of sound mind may not make a contract when he as. of unsound mind. An illustration is the decision of the Patna High Court in *Inder Singh • Parmeshwardhari Singh*[51]. A property worth about Rs 25,000 was agreed to be sold by i person for Rs 7000 only. His mother proved that he was a congenital idiot, incapable ɾ understanding the transaction and that he mostly wandered about. The sale was held : o be void.

A sale deed of property was executed at a time when the transferor was suffering from ucoholic psychosis, which was proved by medical certificate. A very valuable land was ;ı for a paltry amount. The Supreme Court ordered the sale deed to be set aside. The :: art said that unsoundness of mind is a finding of fact. There could be no interference in it in second appeal.[52]

■

AIR 1957 Pat 491. In another case of the same kind, *Jyolirindra Bhattacharjee* v *Sona Bala Bora,* AIR 1994 Gau 99, where also in a sale of immovable property, the symptoms like mental imbalance, filing cases against family members, remaining away for long periods, transferring property to render the family home- kss, were picked up to hold that the vendor was not mentally sound when he executed the sale deed. *Kimtu* v *Lachhi Devi,* 1999 AIHC 2533 (HP), selling the property of an insane by wife whose power of attorney was not valid, the purchaser also did not take care to verify facts, he resold it, the property was recovered back , without having to pay anything for improvements, etc.

Chacko v *Mahadevan,* (2007) 7 SCC 363: AIR 2007 SC 2967.

Free Consent

FREE consent is an essential requirement of a valid contract. The expression "free consent" is defined in Section 14:

14. *"Free consent" defined.*—Consent is said to be free when it is not caused by:

(1) coercion, as defined in Section 15, or

(2) undue influence, as defined in Section 16, or

(3) fraud, as defined in Section 17, or

(4) misrepresentation, as defined in Section 18, or

(5) mistake, subject to the provisions of Sections 20,21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Factors vitiating consent.—Consent is said to be free when it is not caused by: (1) coercion [S. 15]; or (2) undue influence [S. 16]; or (3) fraud [S. 17]; or (4) misrepresentation [S. 18]; or (5) mistake [S. 20], Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. Section 2(0 defines voidable contract as:

An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

Where consent is caused by mistake, the agreement is void. A void agreement is not enforceable at the option of either party. Section 2(g) explains the meaning of a void agreement:

An agreement not enforceable by law is said to be void.

COERCION

An agreement to which consent is caused by coercion is voidable at the option of the party whose consent was so caused. "Coercion" is defined in Section 15:

15. *"Coercion" defined.*—"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (XLV of 1860), or the unlawful detaining.

or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code (XLV of 1860), is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes *B* to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (XLV of 1860).

A afterwards sues *B* for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code (XLV of 1860), was not in force at the time when or place where the act was done.

Consent is said to be caused by coercion when it is obtained by pressure exerted by either of the following techniques—(1) committing or threatening to commit any act forbidden by the Indian Penal Code; or (2) unlawfully detaining or threatening to detain any property.

Acts forbidden by Indian Penal Code

"It is clear that coercion as thus defined implies a committing or threatening to commit some act which is contrary to law."[1] A clear illustration would be consent obtained at the point of a pistol, or by threatening to cause hurt, or by intimidation. An intriguing question in this connection was before the Madras High Court in *Chikham Amiraju* v *Chikham Seshamma.*[2]

By threat of suicide, a Hindu induced his wife and son to execute a release in favour of his brother in respect of certain properties which they claimed as their own.

It was held by a majority "that the threat of suicide amounted to coercion within Section 15 and the release deed was, therefore, voidable".

"To threaten a criminal prosecution is not *per se* an act forbidden by the Indian Penal Code. Such an act could only be one forbidden by the Indian Penal Code if it amounted to a threat to file a false charge."[3] This was pointed out by the Privy Council in *Askari Mirza v Bibi Jai Kishori*[4] where a minor contracted by misrepresenting his age and then entered iato a contract to avoid the threatened prosecution. This was held to be no coercion. Where the plea was that the plaintiff was dispossessed of premises forcibly under threat

Cobardhan Das v *Jai Kishen Das.* (1900) 22 All 224. ' (1912) 16 IC 344.

.*tasjidi* v *Ayisha,* (1880) Punj RecNo 135, p,398. (1912) 16 IC 344.

that he would be arrested and detained under the Maintenance of Internal Security Act, the court said that such threats would fall within the mischief of Section 15.[61]

Detention of Property

An illustration of detention of property is provided by an early case. The plaintiff had pledged his plate with the defendant for £20. When he went to redeem it the pledgee insisted that an additional £10 interest was also owed. The plaintiff paid this to redeem his plate and then sued to recover it back. The court allowed it.[62]

Refusal by a Government Department to release the payment of a contractor unless he gave up his claim for extra rates amounted to coercion under the category of detention of property.[63]

Undue influence

Section 16 of the Contract Act defines undue influence.

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

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

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

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

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

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872.

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[61] *Kishan Lai Kalra* v *NDMC,* AIR 2001 Del 402: (2001) 92 DLT 67; *Akshay Kumar Patil* v *New India Assurance Co,* AIR 2007 Delhi 136, in a case of mediclaim insurance policy, the insured was forced and pressurised to exclude cover for cardiac ailments, consent not lawful.

[62] *Astley* v *Reynolds,* (1731) 2 Str 915: 93 ER 939.

Superintending Engineer, Irrigation Deptt v *Progressive Engg Co,* (1997) 4 Andh LD 489 DB, AR *Thresia* v *Johny,* (2002) 3 Ker LT 722 (Ker): (2003) 1 CCC 154: (2003) 4 ICC 297, withdrawal of a permission as a result of which the timber of the affected party could not be further handled, did not amount to withholding his property. *U.P. Coop Cane Unions Federations* v *West U.P. Sugar Mills Assn,* (2004) 5 SCC 430: AIR 2004 SC 3697, fixation of sugar prices in the exercise of statutory power, no coercion.

Illustrations

(a) A, having advanced money to his son, *B* during his minority, upon *B's* coming of age obtains, by misuse of parental influence, a bond from *B* for a greater amount than the sum due in respect of the advance. *A* employs undue influence.

(b) A, a man enfeebled by disease or age, is induced by *B's* influence over him as his medical attendant, to agree to pay *B*, an unreasonable sum for his professional services. *B* employs undue influence.

(c) A, being in debt to *B*, the money-lender of his village, contracts a fresh loan on terms - hich appear to be unconscionable. It lies on *B* to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. *A* accepts the foan on these terms. This is a transaction in the ordinary course of business, and the contract is rot induced by undue influence.

ility to Dominate Will of Other

icnetimes the parties to an agreement are so related to each other that one of them is le to dominate the will of the other. The person who occupies the superior position may r. ail upon the other to obtain his consent to an agreement to which he, but for the influ- ce so exerted, would not have consented. A spiritual adviser (guru), for example, in a se before the Allahabad High Court,[8] induced the plaintiff, his devotee, to gift to him whole of his property to secure benefits to his soul in the next world. Such a consent --id to be obtained by undue influence.

jtions of Dominion over Other

en is one party said to be able to dominate the will of the other ? The answer is, in all ics where there is active trust and confidence between the parties or the parties are not equal footing. For example, in *Williams* v *Baylex*:[9]

Where a father, being afraid of the bank manager's threatened prosecution of his «n, agreed to give an equitable mortgage to the bank on his property in return for the xomissory notes which were forged by his son, the agreement was held by the House f Lords to be voidable.

In particular, however, and without prejudice to the generality of the principle, the Act s down, in sub-section (2) of Section 16, that a person is deemed to be in a position to rinate the will of another in the following cases—

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

latum Singh v *Umadat Pandey*, (1890) 12 All 523. •66) LR 1 HL 200: [1861-73] All ER Rep 227.

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

Real or Apparent Authority

A person in authority is definitely able to dominate the will of the person over whom the authority is held. The authority may be real or apparent. Persons in authority would include an income tax officer in relation to an assessee; a magistrate or police officer in I relation to an accused person and the like. The expression "apparent authority" would include cases in which a person has no real authority, but is able to approach the other with a show or colour of authority.

Fiduciary Relation

Fiduciary relations are of several kinds. Indeed every relationship of trust and confidence] is a fiduciary relation. And confidence is at the base of innumerable transactions of mar.-' kind. This category is, therefore, a very wide one. It includes the relationship of solicitor and client,[10] trustee and *cestui que trust,*[11] spiritual adviser and his devotee,[12] doctor anj| patient,[13] a woman and her confidential managing agent,[14] parent or guardian and child. 1 and creditor and debtor.[16] The duty of the person in whom confidence is reposed was explained by the Court of Appeal in *Moody* v *Cox."* A solicitor sold certain property t; one of his clients. The client subsequently alleged that the property was considerab".;- overvalued. SCRUTTON LJ pointed out that "in relations of trust and confidence betweeJ the parties you may get the duty, first of all, that the party who has influence must mat:: a full disclosure of everything that he knows material to the contract, and, secondly, thai the party who has the influence must not make a contract with the party over whom h: has influence unless he can satisfy the court that the contract is an advantageous one t: the other party".

Mental Distress

The last category of persons whose will is vulnerable to all sorts of influence is that "persons in mental distress". A person is said to be in distress when his mental capacir- is temporarily or permanently affected. It may be due to extreme old age or mental : - bodily illness or any other cause. Such a person is easily persuaded to give consent tc a

10 *Pushong* v *Mania Halwani*, (1868) BLR AC 95, where a poor woman agreed to give one-half of the properni which she might recover with the assistance of her incharge (*Mookhtaar). Raghunath* v *Varijvandas*, (1906) 30 Bom 579.

12 *Mannu Singh v Uniadat Pandey, (1890) 12 All 523.*

13 *Mitchell* v *Homfrey*, (1881) 8 QBD 587.

14 *Wajid Khan v Raja EwazAli Khan, (1891) 18 IA 144; Palanivelu v Neelavathi, AIR 1937 PC 50.*

15 *Lakshmi Dass v Roop Lall, (1907) 30 Mad 169.*

16 *Dialaram* v *Sarga*, AIR 1927 Lah 536. " [1917] 2 Ch 71:

[1916-17] All ER Rep 548 CA.

contract which may be unfavourable to him. In a case before the Madras High Court, a poor Hindu widow, who was in great need of money to establish her right to maintenance, ■ras persuaded by a money-lender to agree to pay 100 per cent rate of interest.[18] This is . clear instance of undue influence being exerted upon a person in distress, and the court reduced the interest to 24 per cent.

Urgent need of Money, no Distress

Mere urgent need of money on the part of the borrower is not, of itself, a sufficient evidence of mental distress. Thus, where a person was facing criminal prosecution at the -.stance of his father borrowed on exorbitant terms a sum of money to defend himself, : was held that he was not in such mental distress as would enable a money-lender to crminate his will.[19]

'\itutory Compulsion, no Distress

K contract made under statutory compulsion cannot be regarded as one under undue in- f .ence. In a case before the Supreme Court, a cane grower had the freedom to offer cane c the factory of his area or not, but if he made an offer, the factory was bound under an Vet to accept. The court pointed out that in such a case the consent, though compulsory, s lot caused by undue influence, fraud, misrepresentation or mistake. The compulsion **if** '.aw is not coercion.[20]

3-crden of proof

in action to avoid a contract on the ground of undue influence the plaintiff has to prove main points. He must show, in the first place, that the other party was in a position to ioninate his will, and, secondly, that he actually used his influence to obtain the plaints consent to the contract.

iption of undue influence

:?nain cases presumption of undue influence is raised. Once it is shown that the dent was in a position to dominate the will of the plaintiff, it will be presumed that he : have used his position to obtain an unfair advantage. It will be then for the defend- :: show that the plaintiff freely consented.[21] For example, in *Lancashire Loans Ltd* v

ee Annapurni v Swaminatha, (1910) 34 Mad 7.

bektmath Prasad v Sarju Prasad, AIR 1924 PC 60.

***i** Sugars Ltd* v *State of* AP..A1R 1968 SC 599: (1968) 1 SCR 705; *U.P. Coop Cane Union Federation U.P. Sugar Mills Assn,* (2004) 3 SCC 430: 2004 All LJ 2483, compulsory pricing for sale was not : influence, nor did it affect the nature of the transaction as a sale.

i *Mohan Kul* v *Pratima Maity,* (2004) 9 SCC 468: (2004) 1 ICC 67, burden of proving fairness lies : person standing in fiduciary relationship.

i 1 KB 380: [1933] All ER Rep 201 CA.

The defendant was a married girl of full age. She gave a security for the loan which her mother took from a company. The only advice she had was from the solicitor of the company.

It was held that even a married woman may not necessarily be independent of the infu- ence of her mother. The presumption is raised in the following cases:

1. *Unconscionable Bargains*

Where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable, that is, unfair, the law presumes that the consent must have been obtained by undue influence. The burden is shifted to the stronger party to prove that he did nothing to overbear the will of the other. An instructive illustration is the decision of the Privy Council in *Wajid Khan* v *Raja Ewaz Ali Khan?*

An old and illiterate woman, incapable of any business, conferred on her confidential managing agent, without any valuable consideration, an important pecuniary benefit under the guise of a trust.

Their Lordships said that "all the facts of the case go to show that there was active undue influence".

Unconscionableness in Money-Lending Transactions.—Unconscionable bargains have been witnessed mostly in money-lending transactions and in gifts. But the principle is not confined to such transactions only. Thus where, in a case before the Bombay High Court,[64] a poor farmer, being unable to pay back a loan, executed a sale deed in favour of the creditor of his property three times the value of the sum due, the court granted relief by setting aside the sale and allowing the farmer to pay back the lender within a fixed period.

2. *Inequality of Bargaining Power or Economic Duress*

In recent years the English courts have inferred undue influence merely from inequality of bargaining power. The decision of the Court of Appeal in *Lloyds Bank* v *Bundy*[65]can be taken as the starting point. The plaintiff, a fanner, with a single asset, namely, his farmhouse, where his whole family resided, willingly agreed, at the suggestion of the bank, to charge his farmhouse to secure the overdrawn account of his businessman son. The financial condition of his son deteriorated still more and the banker sought to take the possession of the house. But he was not allowed to do so, the court feeling that the

[64] *Bhimbat* v *Yeshwantrao*, (1900) 25 Bom 126.
[65] [1975] 1 QB 326.

nnsaction was caused by undue influence. The farmer would do anything to help his xi and the banker exploited his vulnerability to the advantage of the bank. Had he been - ised that what he was doing would throw him out of his own home, he might not have icted on the banker's suggestion.

JL Contracts with pardanashin women

A contract with a *pardanashin* woman is presumed to have been induced by undue in- ~-ence. She can avoid the contract unless the other party can show that it was her "intel- .rent and voluntary act". There is, however, no statutory or judicial definition of the term *' -crdanashin* woman". In the opinion of the Bombay High Court[26] a woman does not bene *pardanashin* simply because "she lives in some degree of seclusion". The concept jnbably means a woman who is totally "secluded from ordinary social inter-course".[27]

In the above cited Bombay case, a lady who appeared before the Registrar for registration of certain documents, stood as a witness, put in tenants, fixed and received rents from rem in respect of her house, could not be treated as the pardanashin woman.

Once it is shown that a contract is made with a *pardanashin* woman, the law presumes Jue influence. The burden lies on the other party to show that no undue influence was - ed. that the contract was fully explained to her and that she freely consented.

lescission [S. 19-A]

ssion of contract for undue influence is allowed under the provisions of Section 19- {This section reads:

19-A. ***Power to set aside contract induced by undue influence.*****—When consent to an isreement is caused by undue influence, the agreement is a contract voidable at the option >f the party whose consent was so caused.**

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations

(a) A's son has forged *B's* name to a promissory note. *B,* under threats of prosecuting A's son, obtains a bond from A for the amount of the forged note. If *B* sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs 100 to *B,* an agriculturist, and, by undue influence, induces *B* to execute a bond for Rs 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering *B* to repay the Rs 100 with such interest as may seem just.

2 - ■< *Ismail* v *Amir Bibi,* (1902) 4 Bom LR 146, 148.

See *Hodges* v *The Delhi and London Bank,* (1901) 127 IA 168 at pp. 175-176. For a full view of the section see under "Limits of Rescission" *(infra).*

MISREPRESENTATION [S. 18]

A contract the consent to which is induced by misrepresentation is voidable at the option of the deceived party. Misrepresentation means misstatement of a fact material to the contract. Misrepresentation is defined in Section 18.

18. "Misrepresentation" ***defined.*—"Misrepresentation" means and includes—**

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

The section includes the following types of misrepresentation: *1. Unwarranted*

Statements

When a person positively asserts that a fact is true when his information does not warran it to be so, though he believes it to be true, this is misrepresentation. In a Bombay case.- for example:

The defendants chartered a ship from the plaintiffs, who stated that the ship wa certainly not more than 2800 tonnage register. As a matter of fact the ship had nev« been in Bombay and was wholly unknown to the plaintiffs. She turned out to be of th registered tonnage of more than 3000 tonnes.

It was held that the defendants were entitled to avoid the charter-party.

A statement is said to be warranted by the information of the person making it wht he receives the information from trustworthy sources. It should not be a mere hearsay, a Calcutta case:[30]

B told the plaintiff that one C would be the director of a company. *B* had obtain* this information not from C directly, but from another person, called *L.* The inform tion proved untrue.

Where a representation acquires the status of being a term of the contract, and it tui out to be untrue, the disadvantaged party may, not only avoid the contract but also sue[1] damages for breach. Where in the course of negotiations for the sale of lamb, the sel stated that the whole of the lot was fully serviced, whereas this was not so, the buyer v allowed damages for the breach of the warranty.[66]

[29] *Oceanic Steam Navigation Co v Soonderdas Dharmasey, (1980) 14 ILR Bom 241.*

[30] *Mohanlal v Sri Gungaji Cotton Mills Co, (1900) 4 Cal WN 369.*

[66] *Richview Construction Co* v *Raspa,* (1975) 11 Ontario Reports (2d) 377.

A land was purchased expressly for the construction of a duplex. The seller represented that he saw no difficulty in any such use of the land. But a permission to build such a complex was refused unless a sewage costing some 3000 dollars was provided. Though the misrepresentation was innocent, the buyer was allowed to avoid the sale.[32] Where an advertisement in a local newspaper said the land to be 9000/5600 square feet, and that :t had a "beautiful reflective pool", but it turned out that the property was not beautiful and that the reflective pool showed a massive crack and water seepage, the buyer was not allowed to rescind the option to purchase. The court said that the statement in the advertisement had not become incorporated as an implied term of the option to buy and the plaintiffs had seen the reflective pool before they made the offer to purchase.[33] Where the seller of a car stated that the car had done only 20,000 miles, the representation being untrue, the buyer was allowed to recover compensation for the misrepresentation.[34]

2. Breach of duty

-Any breach of duty which brings an advantage to the person committing it by misleading the other to his prejudice is a misrepresentation. "This clause is probably intended to meet all those cases which are called in the court of equity—cases of "constructive fraud", in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud or deceit. In one such case:[35]

> The plaintiff, having no time to read the contents of a deed, signed it as he was given the impression by the defendant that it contained nothing but formal matters already settled between them. The deed, however, contained a release in favour of the defendants.

Accordingly, the plaintiff was allowed to set aside the deed.

Where, a husband undergoing vasectomy operation was not warned that there was a slight risk of his wife becoming pregnant, the surgeon was held responsible to the man md his wife for the pains of unwanted pregnancy. The court said that the plaintiffs were entitled to damages for distress, pain and suffering, since the personal distress of both plaintiffs and the pain and suffering of the birth was a separate head of claim which was not cancelled out by the relief and joy felt after the birth of a healthy baby and there was no reason in principle why damages could not be recovered for the discomfort and pain □fa normal pregnancy and delivery.[36]

7 *Alessio*v *Jovica*, (1973) 42 DLR (3d) 242, Canada.

Chuan Bee Realty P Ltd v Teo Chee Yeow, (1996) 2 SLR 758. See Luh Luh Lan, An Overview of the Advertising Laws and Regulations in Singapore, 2001 JBL 399. Dick Bently Production Ltd v Harold Smith Motors Ltd, (1965) 2 All ER 65. Oriental Banking Corpn v John Fleming, (1879) 3 Bom 242.

Thake v *Maurice*, [1986] 1 All ER 497 CA; *Parkinson* v *St James and Seacroft University Hospital NHS Trust*, (2001) 3 All ER 97 CA, liability for failed sterility operation, disabled and deformed child attributable to negligence. *Samira Kohti**v *Dr. Prabha Manchanda*, (2008) 2 SCC 1: AIR 2008 SC 1385, consent for diagnostic surgery, removal of the patient's uterious and ovaries, held unauthorised and unwarranted by

3. Inducing Mistake about Subject-Matter

Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement is also misrepresentation. The subject-matter of every agreement is supposed by the parties to possess certain value or quality. If one of the parties leads the other, however innocently, to make a mistake as to the nature or quality of the subject-matter, there is misrepresentation.

A second-hand car dealer attached a disclaimer to the car under sale stating that the mileage reading was incorrect. The dealer knew the true mileage of the car but did not disclose it. It was held that the dealer was bound to disclose the real position because he knew it and also knew that the odometer materially understated the mileage. The court said that although, in the ordinary way, dealers were under no positive duty to disclose the defects and disadvantages of their wares, they were required to volunteer the truth, in sc far as they knew it with regard to the inaccurate mileage reading. The disclaimer serious'.;, understated the fact. The defendants knew not only that the reading was incorrect but thai it was grossly and potentially misleadingly so.[37]

Suppression of Material and Vital Facts

Misrepresentation may also arise from suppression of vital facts. Cases of concealment or suppression will fall either under sub-section (2), when it amounts to a breach of duty or under sub-section (3) when it leads the other party to make a mistake about the subjec:- matter of the agreement. For example, in *R* v *Kylsant*,[38] the prospectus of a compar.;- stated that the company had regularly paid dividends, which created the impression thi: the company was making profits, whereas the truth was that the company had been running into losses for the last several years and dividends could only be paid out of war tirr.r accumulated profits. The suppression of this fact was held to be a misrepresentation.

Misrepresentation should be of facts material to the contract. Mere "commendator. expressions" such as men of business will habitually make about their goods are not sufficient to avoid the contract. In a sale of land, for example, "a mere general statement thr the land is fertile and improvable, whereas part of it has been abandoned as useless, ca~- not, except in extreme cases, as, for instance, where a considerable part is covered wirr water, or otherwise irreclaimable, be considered such a misrepresentation as to entitle a purchaser to be discharged".[39] But, where, in the sale of a hotel, the tenant was describe: "as a most desirable tenant", when his rent was in arrears, this was held to be a materia!

consent. Treatment should not go beyond consent, consent should be voluntary and without coercion, patk-a should have the capacity and competence to give consent, should have minimum adequate level of infonr_- tion about the nature of the procedure involved, doctors duty to disclose the necessary information.

37 *Farrand* v *Lazarus*, (2002) 3 All ER 175 (QBD, DC).

38 [1932] 1 KB 442: [1931] All ER Rep 179; *ShivKant Yadav v Indian Oil Corpn*, (2007) 4 SCC 410: AIR 2CC SC 1534, misstatement about income is the application for petroleum dealership, the fact was material abc»« the applicant's financial status, letter of intent allowed to be cancelled.

Dimmock v *Hallet*, (1866) LR 2 Ch App 21 *per* TURNER LJ at p. 27.

39

misrepresentation.[40] In the matters of matrimony, the qualification of the spouse is a material fact. Where the girl was in possession of high academic qualifications and agreed to a jess qualified person because she was told that he was in an attractive job whereas he was : nly an apprentice in a factory. She was allowed to avoid the marriage.[41]

The fact that the girl was married before and was widow at the time of remarriage was "eld to be a vital fact. Its non-disclosure enabled the husband to get a decree of nullity.[42]

Change of Circumstances

TTiere is often a gap of time between the representation of a fact and the ultimate contusion of the contract. Any change of circumstances in the meantime affecting the fact "^presented must be brought to the knowledge of the other party. This was pointed out by ne Court of Appeal in *With* v *O'Flanagan.*[43]

tducement

k is further necessary that misrepresentation must be the cause of the consent, in the sense, that but for the misrepresentation, the consent would not have been given. The *Explanation* to Section 19 provides:

> ***Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.**

If the plaintiff would have consented in any case, he can hardly complain. Again "the "rrresentation must be made with the intention that it shall be acted upon by the other rt>'". If a person to whom the statement was not addressed voluntarily chooses to act icon the false representation, he is not entitled to rescission.[44]

E cpression of opinion

mere expression of opinion cannot be regarded as a misrepresentation of facts even if fee opinion turns out to be wrong. But in some cases, a statement of opinion may also Junt to misrepresentation.

In Bisset v Wilkinson:[45]

Certain lands were sold. The seller was aware that the land was required for sheep- rarming and, therefore, expressed the opinion that 'the land had a carrying capacity of

***Smith** v Land and House Property Corpn, (1884) 28 Ch D 7. i--Ju Sharma*

v Ram Prakash Sharma. AIR 1997 All 429.

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-.*2 Qureshi* v *Afaq Qureshi,* AIR 2002 MP 263; *Deva Pd Reddy* v *Ramini Reddy,* AIR 2002 Kant 356, the ■isband was fully aware of the fact that the wife was earlier married and divorced. This fact was mentioned .- --he matrimonial advertisement and the Church Marriage Register Book which was signed by both parties. Tie plea of the husband that the grant of divorce was not by a court of competent jurisdiction was barred by caoppel.

" 1936] 1 All ER 727: [1936] Ch 575.

'–!< v *Gurney,* (1873) LR 6 HL 377: (1874) 43 LJ Ch 19. r E7 AC 177:

(1926) All ER Rep 343.

2000 sheep'. The land turned out to be unsuitable for sheep-farming and the purchaser refused to pay the price.

Their Lordships found no ground for enabling the buyers to avoid the agreement. The court said that where relief is sought on the basis of misrepresentation, it is necessary that there should be representation of a specific fact. A representation of fact may be inherent in a statement of opinion. But it depends upon the material facts of the transaction, the knowledge of the parties respectively and their relative positions, etc. The most material fact in the case was that both parties were aware that the vendor had not and no other person had carried on sheep-farming in that unit of land. "In these circumstances the purchasers were not justified in regarding anything said by the vendor as to the carrying capacity as being anything more than and expression of opinion on the subject."

Where a claim was made through an advertisement that the defendants were the "top flight cabaret performers in Europe", the court said that it was a statement of opinion. The hotel which engaged them on the basis of the claim could not terminate the contract on the ground of misrepresentation.[46] An advertisement for sale of residential property claimed that foreigners were eligible to purchase it. This was held to be the statement of an existing fact[47] "There is a difference between an indiscriminate praise and specific promises or assertion of verifiable facts."[48]

Means of Discovering Truth with Ordinary Diligence

A party cannot complain of misrepresentation if he "had the means of discovering the truth with ordinary diligence". This is recognised by way of an *Exception* stated along with Section 19. The statement is as follows:

> ***Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.**

A person who bought a quantity of rice, was precluded from alleging misrepresentation about its quality because he lived very near the place where the goods were lying and, therefore, might have discovered the truth with ordinary diligence.[49] But where the truth cannot be discovered with ordinary diligence, the party guilty of misrepresentation cannot rely on the defence.

Where a misstatement has been made and the other party had the means of discovering the truth, but, instead of using such means, prefers to rely upon the statement, he too can *j*

46 *Hotel de L'Europe Ltd* v *Currie-Freyer,* (1955) 2 MC 225 (Singapore CA). The hotel was able to prove that the defendants had given only one performance previously at a private party.

47 *Teb Pek Cheong* v *Wong Soon Kwong,* Singapore HC (unreported). See 2001 JBL 403.

48 Treitel G.H., LAW OF CONTRACT, (1995, 9th Edn).

Shoshi Mohun Pal Chowdhry v Nobo Kristo Poddar, (1874) 4 Cal 801.

; '-aid. For example, in *Redgrave* v *Hurd*,[50] a medical practice was under sale. The seller -.srepresented the income which it produced, but gave documents to the purchaser from • ruch he could have verified, but he did not do so and preferred to rely upon the state- nents. On learning the truth he sought to avoid the contract and was allowed to do so.

FRAUD

Intentional misrepresentation of facts, speaking broadly, is called "fraud". According a Section 17:

17. *"Fraud" defined.*— "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one who having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

Illustrations

(a) A sells, by auction, to *B,* a horse which *A* knows to be unsound. *A* says nothing to *B* about the horse's unsoundness. This is not fraud in A.

(b)B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell *B* if the horse is unsound.

(c)B says to A—"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here A's silence is equivalent to speech.

(d) A and S, being traders, enter upon a contract. A has private information of a change in prices which would affect *B's* willingness to proceed with the contract. A is not bound to inform *B.*

Assertion of facts without belief in their truth [S. 17(1)]

-i English law "fraud" was defined in the well-known decision of the House of Lords in *Detry* v *Peek.*[51] In this case:

A company's prospectus contained a representation that the company had been au- iiorised by a special Act of Parliament to run trams by steam or mechanical power. The authority to use steam was, in fact, subject to the approval of the Board of Trade, out no mention was made of this. The Board refused consent and consequently the

1881) 20 Ch D 1: [1881-85] All ER Rep 77 CA.
* IS89) 14 App Cas 337.

company was wound up. The plaintiff, having bought some shares, sued the directors for fraud. But they were held not liable.

They were not guilty of fraud as they honestly believed that once the Parliament had authorised the use of steam, the consent of the Board was practically concluded. It follows, therefore, that the person making a false representation is not guilty of fraud if he honestly believes in its truth. Thus intentional misrepresentation is of the essence of fraud. The first three clauses of Section 17 deal with this kind of fraud.

Active concealment [S. 17(2)]

"Active concealment" is something different from mere "passive concealment". Passive concealment means mere silence as to material facts. In active concealment a party takes positive steps to prevent the information from reaching the other party and this is a fraud.[67]

Concealment by mere silence is no fraud.—False impression is ordinarily conveyed by deliberate misstatement of facts. But it may also be done by concealment of material facts. Ordinarily, of course, mere silence is no fraud, even if its result is to conceal "facts likely to affect the willingness of a person to enter into a contract".[68] In a case before the Supreme Court,[69] a candidate, who had full knowledge of the fact that he was short of attendance, did not mention this fact in his examination form. This was held to be no fraud, it being the duty of the University to scrutinise forms and to call for verification or information in case of doubts.

When silence is fraud.—But then how far may silence go? Silence may become deceptive in certain cases.

1. Duty to Speak.—Contracts uberima fides.—The first such case is when the person keeping silence is under duty to speak. Duty to speak arises where one contracting party reposes trust and confidence in the other. The duty to disclose the truth will arise in all cases where one party reposes, and the other accepts, confidence. Duty to speak also arises where one of the parties is utterly without any means of discovering the truth and has to depend on the good sense of the other party. A contract of insurance is a contract of absolute good faith because it has to depend on the disclosures made by the assured.[5,

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[67] For an example of active concealment see *Mithoolal Nayak* v L/C, AIR 1962 SC 814: 1962 Supp (2) SCR 571: (1962) 32 Comp Cas 177; *Amina* v *Hassn Koya*, (2003) 6 SCC 93: AIR 2004 SC 1227: 2003 SCC (Cri) 1276, 5 months old pregnancy could not have been concealed. The defendant married her, accepted the child and some 4 years later divorced her. Bound to pay maintenance. *Shailash Harinarayan Bajaj* v *Creative Outerwear Ltd*, (2003) 6 Bom CR 758, fraud played in court proceedings. *B.R. Chowdhury* v *Indian Oil Corpr. Ltd*, (2004) 2 SCC 177, concealment of the fact of previous employment under the Government for getting dealership, allowed to be terminated.

[68] Section 17 (Explanation). *See* for example, illustrations (a) and (£>).

[69] *Shri Krishna v Kurukshetra University, (1976) 1 SCC 311: AIR 1976 SC 376.*

P.J. Chacko v *Chairman, LIC of India*, AIR 2008 SC 424, non-disclosure in insurance proposal that the insured had undergone an operation Adenoma Thyroid, held, policy voidable. The insured was estopped from saying that even if the fact had been disclosed, it would not have affected the transaction.

ɹ the absence of any such relationship there is no duty to speak and mere silence, even if : amounts to misrepresentation, will be no fraud. For example, in *Haji Ahmad Yarkhan* v *bdul Gani Khan*[56], the plaintiff could not recover the expenses incurred over the engage- Tent of his son which had to be broken off because the girl's side suppressed the fact that rje girl was suffering from epileptic fits.

2. *Where Silence is Deceptive.*—Silence is sometimes itself equivalent to speech. \ person who keeps silent, knowing that his silence is going to be deceptive, is no less railty of fraud.

3. *Change of Circumstances.*—Sometimes a representation is true when made, but, - may, on account of a change of circumstances, become false when it is actually acted .ron by the other party. In such circumstances, it is the duty of the person who made the

sentation to communicate the change of circumstances. It was held to be sufficient i' .itle an allottee to avoid the allotment where changes in directorate took place before allotment.[57]

4. *Half truths.*—Even when a person is under no duty to disclose a fact, he may me guilty of fraud by non-disclosure if he voluntarily discloses something and then

half the way. A person may keep silence, but if he speaks, a duty arises to disclose whole truth. "Everybody knows that sometimes half a truth is no better than down- Tα falsehood."[58]

mise made without intention of performing [S. 17(3)]

ue-up a person to a promise with no intention of performing from one's side and with intention of only preventing the other from dealing with others, is an example of a ise made without the intention of performing it. This is the third type of fraud in- ed in the definition in

Section 17. A purchase of goods without any intention of pay- the price is a fraud of this species.[59] A builder entered into a large number of bookings, ly three times the available units of accommodation and collected moneys. This was by the Supreme Court to be fraud because he should have known that he would not able to perform the contract with all of them. There was no provision for interest on the sit money. Inspite of this he was held liable to pay interest. The court said that there fraud causing inducement for booking by the purchasers: such fraud creates liability outside the agreement.[60]

1937 Nag 270.

*Sqjagopala Iyer v South Indian Rubber Works, (1942) 2 MLJ 228. ^ER Lord MACNAUGHTAN in Gluckstein v Barnes, 1900 AC 240 at p. 250. dough v L & NWRly Co, (1871) 7 Ex 21; Whitaker, Re, (1875) 10 Ch 449. * Delhi Development Authority v Skipper Construction Co (P) Ltd, (2000) 10 SCC 130.*

Any other act fitted to deceive [S. 17(4)]

The fourth kind of fraud identified by Section 17 is any act which is fitted to deceive. Naturally means any act which is done with the obvious intention of committing fraud. For example, a husband persuaded his illiterate wife to sign certain documents telling her that by them he was going to mortgage her two lands to secure his indebtedness and in fact mortgaged four lands belonging to her. This was an act done with the intention of deceiving her.[70]

Any act or omission specially declared to be fraudulent [S. 17(5)]

The fifth and the last category of frauds included in the definition of Section 17 is intended to cover all such acts which under any other branch of law are regarded as fraudulent. In insolvency law there is, for example, the concept of fraudulent preference and in the Transfer of Property Act, there is the concept of fraudulent transfer.

Distinction between Fraud and Misrepresentation

Misrepresentation and fraud have many points in common. Both render the contract voidable; there is a false representation in both; in either case it is necessary that the consent should have been caused by the fraud or misrepresentation and finally, where there is fraud by silence, the fact, that there were "means of discovering the truth by ordinary diligence", is a good defence. This is so in misrepresentation also. Yet the following points of distinction are also noticeable:

Firstly, fraud is more or less an intentional wrong, whereas misrepresentation may be quite innocent.[71]

Secondly, fraud, in addition to rendering the contract voidable, is a cause of action in tort for damages. Simple misrepresentation is not a tort but under Section 75 of the Contract Act, "a person who rightfully rescinds a contract is entitled to compensation for an) damage which he has sustained through the non-fulfilment of the contract".

Lastly, a person complaining of misrepresentation can be met with the defence that he had, "the means of discovering the truth with ordinary diligence", but excepting fraud b> silence, it does not lie in the mouth of the person committing fraud to say that his victim was too easily deceived or had the means of discovering the truth. "Fools have to be protected against knaves."

Right of rescission and its limits [S. 19]

A contract the consent to which is caused by coercion, undue influence, fraud or misrepresentation is voidable at the option of the party whose consent was so caused. Section 19 provides:

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[70] *Ningawwa v Byrappa Shiddappa Hireknrabar, AIR 1968 SC 956: (1968) 2 SCR 797.*

[71] *S.P. Chengalvaraya Naidu* v *Jagannath,* (1994) 1 SCC 1: AIR 1994 SC 853, the Supreme Court emphasise: the deliberateness in fraud.

19. *Voidability of agreements without free consent.*—When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

***Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.**

***Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.**

Illustrations

{a) A, intending to deceive *B,* falsely represents that five hundred maunds of indigo are made annually at A's factory and thereby induces *B* to buy the factory. The contract is voidable at the option of *B.*

(.*b*) A, by a misrepresentation, leads *B* erroneously to believe that five hundred maunds of indigo are made annually at A's factory. *B* examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs *B* that A's estate is free from encumbrance. *B* thereupon buys the estate. The estate is subject to a mortgage. *B* may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(f*i) B,* having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance *B* is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(<?) A is entitled to succeed to an estate at the death of *B\ B* dies: C, having received intelligence of *B's* death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

The right to rescind is subject to certain infirmities which defeat it in the following circumstances:

: By Affirmation

'"••"here the party, after becoming aware of his right to rescind, affirms the contract, the -ght of rescission is lost. Affirmation may be express or implied. An implied affirmation nkes place when he does some act inconsistent with his right to rescind. An interesting -lustration of implied affirmation is to be found in *Long* v *Lloyd.*[6i]

The defendant induced the plaintiff to buy his lorry by falsely convincing him that it was 'in excellent condition'. On the very first journey the plaintiff discovered serious defects, but accepted the defendant's offer to bear half the cost of repairs. The lorry completely broke down on the next journey and the plaintiff then claimed rescission.

The court held that his acceptance of the offer of repairs amounted to "a final acceptance".

It has been observed by the Supreme Court that "if it can be shown that the party defrauded has at any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined forever".[72]

2. *By Lapse of Time*

Rescission must be claimed within reasonable time after discovering the misrepresentation. Where shares were allotted to a person on the basis of a misleading prospectus in July and in December he moved to set aside the contract, it was held that the unexplained delay of five months precluded him from obtaining the relief[73]

3. *Rights of Third Parties*

The right of rescission is lost as soon as a third party, acting in good faith, acquires rights in the subject-matter of the contract. Where a person obtains goods by fraud and, before the seller is able to avoid the contract, disposes them of to a *bona fide* party, the seller cannot then rescind.[74]

Method of rescinding contract [S. 66]

The usual method of rescinding a contract is by giving a notice to the other party of the intention to rescind. This is provided in Section 66 which is as follows:

66. *Mode of communicating or revoking rescission of voidable contract.*—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

But where the other party cannot be contacted, a public notice or one to a public authority will do. In *Car and Universal Finance Co Ltd* v *Caldwell,*[61] a car was taken awa> against a worthless cheque and the owner informed the police and the Automobile Association, that was held to be sufficient rescission, and a subsequent sale was not bindin; upon the owner.

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[72] *Ningawwa v Byrappa Shiddappa Hireknrabar, AIR 1968 SC 956: (1968) 2 SCR 797.*

[73] *Chiristineville Rubber Estates Ltd, Re, (1911) 81 LJCh 63; Jagannath Prasad, Re, AIR 1938 All 1931.*

[74] *Phillips v Brooks Ltd, [1919] 2 KB 243.*

Restitution

Rescission is always subject to the condition that the party seeking rescission must be in a position to restore the benefits he may have obtained under the contract. Section 64 declares that:

> **64. *Consequences of rescission of voidable contract.*—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.**

-- person avoiding a loan bond on the ground of undue influence has to pay back the Dan, the court only reduces the rate of interest to what may seem to be reasonable in the :rcumstances.

Even where the party seeking rescission is not in a position to restore to the defendant IE *status quo ante,* the court may allow rescission by doing what is practically just in r£ circumstances. Where a wife wanted to set aside on the ground of misrepresentation rs separation deed made with her husband, under which she had already received some maintenance but she was not able to restore the money, the court allowed her relief holding that the money may be set off against costs to which she was otherwise entitled.[68]

Damages for innocent misrepresentation

Rj person who is the victim of a fraud is entitled to sue for damages, fraud being a tort Jtso. But the victim of an innocent misrepresentation was not allowed to recover any pensation for any loss that might have been occasioned to him by the misrepresenta- . Liability in tort for negligent or innocent misrepresentation is still groaning for rec- ition. However, much of the sufferings of the victims of innocent misrepresentations e now been relieved by the (English) Misrepresentation Act, 1967. Under the Indian tract Act this type of relief is provided under Section 75.

> **75. *Party rightfully rescinding contract entitled to compensation.*—A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained Jirough the non-fulfilment of the contract.**
>
> *Illustration*
>
> *A,* a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in r.ery week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B,* in conse- r.ence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has retained through the non-fulfilment of the contract.

n v *Hulton,* [1917] 1 KB 813: [1917] All ER Rep 595.

MISTAKE

Definition of consent

Mistake may operate upon a contract in two ways. It may, firstly, defeat the consent altogether that the parties are supposed to have given. Secondly, the mistake may mislead the parties as to the purpose which they contemplated. The cases in which the consent is defeated or rendered unreal fall under Section 13. This section defines "consent" as follows:

> **13. *"Consent" defined.*—Two or more persons are said to consent when they agree upon the same thing in the same sense.**

An agreement upon the same thing in the same sense is known as true consent or *consensus ad idem*, and is at the root of every contract. Thus if two persons enter into an apparer.: contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in mind, no contract would exist between them: *Raffles* v *Wichelhaus.*[75]

Definition of mistake

Where the mistake does not defeat consent, but only misleads the parties, Section 20 should apply. This section provides:

> **20. *Agreement void where both parties are under mistake as to matter of fact.*—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.**
>
> ***Explanation.*—An erroneous opinion as to the value of the thing which forms the subject- matter of the agreement is not to be deemed a mistake as to a matter of fact.**

Illustrations

(a) A agrees to sell to *B* a specific cargo of goods supposed to be on its way from England a Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had bee» cast away and the goods lost; Neither party was aware of these facts. The agreement is void.

0*b*) A agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time : 1 the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of *B,* agrees to sell it to *C. B* was dead at the tiros of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 20 will come into operation: (1) when both the parties to an agreement a*rs* mistaken, (2) their mistake is as to a matter of fact, and (3) the fact about which they an mistaken is essential to the agreement.

Two of these points are further supplemented by Sections 21 and 22. Section 21 emphasises that mistake should be of fact and not of law.

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[75] Lord HANNEN in *Smith* v *Hughes,* (1871) LR 6 QB 597 at p. 609: 40 LJ QB 221: 25 LT 329.

21.*Effect of mistakes as to law.*—A contract is not voidable because it was caused by a mistake as to any law in force in India; but a mistake as to a law not in force in India has the same effect as a mistake of fact.

Illustration

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

Section 22 deals with a situation where only one party is mistaken.

22.*Contract caused by mistake of one party as to matter of fact.*—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

A~hat Constitutes an Essential Fact

'•"hat facts are essential to an agreement? The answer is naturally linked with the nature promise in each case. The plaintiff was a wholesale dealer under a Rationing Order. He *as entitled to transport charges variable according to distance for collecting goods from I-overnment godowns. He was paid at the rate applicable to a zone less than 25 miles in : ranee. The distance, in fact, exceeded 25 miles but both parties were unaware of it. As soon as the mistake was discovered future payments were made according to the actual nstance. The plaintiff's claim for the arrears up to the time of rectification was dismissed, court saying that the mistake did not relate to an essential fact.[70] Speaking broadly, : r¯ain facts are essential to every agreement. They are:

(1) the identity of the parties;

(2) the identity and nature of the subject-matter of the contract; and

(3) the nature and content of the promise itself.[71]

ke as to identity

-ption of False Name

"take as to identity occurs where one of the parties represents himself to be some ~n other than he really is. Thus, for example, in *Jaggan Nath* v *Secy, of State for*
e -.72

A person, called *S,* a brother of the plaintiff, represented himself as the plaintiff, and "hereby induced a Government agent to contract with him.

ij>. Kochudevassy v State of Kerala, AIR 1982 Ker 90.

:ee *Ganga Retreat & Towers Ltd* v *State of Rajasthan,* (2003) 12 SCC 91, explaining aspects of mistake. 1386) 21 Punj Rec No 21, p. 37. The Supreme Court has observed that mistake of identity will prevent ■ ,:osent in the sense of an agreement of two persons in the same sense. *Central National Bank Ltd* v *United tdustrial Bank Ltd,* AIR 1954 SC 181: 1954 SCR 391.

The court finding that the Government's agent was deceived by the conduct of the plaintiff and his brother as to the person with whom he was dealing, held, that there was no valid agreement and no contract.

Mistake caused by takeover of business

In the above case, the Government's offer was meant for *S* and his brother posing as 5 accepted it. There was no real consent. It means that an offer which is meant for one person cannot be accepted by another. Another illustration is *Boulton* v *JonesP*

> The plaintiff had taken over the business of one Brockle-hurst. The defendant usee to deal with Brockle-hurst and not knowing of the change sent him an order for cer tain goods. The order was received by the plaintiff who sent the goods. The defendan came to know of the change only when he received an invoice and by that time he hai already consumed the goods. The defendant had a set-off against Brockle-hurst anc therefore, refused to pay the price. The plaintiff sued him.

Four unanimous judges held the defendant not liable.

Mistake of Identity Caused by Fraud

This principle was affirmed by the House of Lords in *Cundy* v *LindsayP*

> The plaintiffs received orders in writing from a fraudulent man, called, *Blenkar* The order papers had a printed heading: "*Blenkarn & Co,* 37 *Wood Street".* There w a well-known and respectable firm, named *Blenkiron & Co,* in the same street. T plaintiffs, believing that the order had come from this firm, sent a large quantity handkerchiefs. *Blenkarn* received the goods and disposed them of to the defendan who acted in good faith. The plaintiffs sued the defendants.

It was held that there was no contract between the plaintiffs and *Blenkarn* and, therefc he had no right to sell the goods. The plaintiff intended to contract with *Blenkiron &* and consequently no contract could have arisen between them and *Blenkarn.*

The scope of operative mistake as to identity becomes reduced when the parties ari each other's presence. In *Phillips* v *Brooks Ltd*:[15]

> A man, called North, after selecting some pearls & a ring worth £3000 in the pi; tiff's shop, signed a cheque of the amount representing himself to be George I lough. Plaintiff after checking the reference in the directory accepted the cheque gave him the ring, rest to be taken after the cheque was cleared. Before the fraud discovered he pledged the ring with defendants who in good faith gave him mo Plaintiff sued the defendants. It was held that plaintiffs intended to contract wit! person present before him.

The court of appeal in *Ingram* v *Little*,[76] however, again emphasised that even where ies are present face to face, mistake as to identity may stand between them and pre- nt them from reaching the point of true consent.

Three lady joint owners of a car advertised it for sale. A man came to offer an acceptable price but with a cheque. The ladies refused to accept the cheque. He introduced himself as Hutchinson, a leading businessman and gave his address and telephone number etc. Ladies confirmed the particulars and accepted the cheque. He resold the car to defendant and absconded. When cheque proved worthless the ladies sued the defendant. The court held the defendant liable because the ladies wanted to contract only with real Hutchinson not with the person who came to them.

re Identity is Specially Important

re, however, the identity of the other party is of vital importance to the offeror, a [a]ke as to identity will prevent an agreement from arising. Importance of identity must nd upon the nature of the promise in each case. In *Said* v *Butt:*[17]

The plaintiff knew that on account of his adverse criticism of some members of a _~eatre, he would not be allowed to be present at the first performance of a play at the iieatre. A ticket was obtained for him by one of his friends without disclosing that was for him. But the defendant, the managing director of the theatre, refused him ission on the night in question. And the plaintiff sued him for inducing breach of tract.

it was held that there was no contract between him and the theatre, **e as to**

subject-matter

r fact essential to every agreement is the identity or quality of the subject-matter contract. Mistake as to subject-matter may take various forms.

-existent Subject-Matter

ject-matter may have ceased to exist before the contract was made. This happened *rier* v *Hastie*[78] where goods sold were on their way to England on board a ship, nown to the parties the goods having been heated on the way had already been :he contract was held to be void.

ke as to Title or Rights

ponding to mistake as to the existence of the subject-matter is mistake in cases . unknown to the parties, the buyer is already the owner of that which the seller pur- » sell to him. The parties intend to effectuate a transfer of ownership: such a trans

fer is impossible...."[79] For example, in *Cooper* v *Phibbs*[w] an uncle had told his nephew, not intending to misrepresent anything but being in fact an error, that he (the uncle) was entitled to a fishery, and the nephew, after the uncle's death, acting in the belief of the truth of what the uncle had told him, entered into an agreement to rent the fishery from the uncle's daughter, whereas it actually belonged to the nephew himself. The House of Lords held that the mistake was such as not only to make the contract voidable, but also liable to be set aside on such terms as the court thought fit to impose.

3. *Different Subject-Matters in Mind*

Where the parties, due to a reasonable mistake of fact, have different subject-matters in mind, the agreement will be void for want of true consent. In *Raffles* v *Wichelhaus*:[76]

The defendant bought off the plaintiff a quantity of Surat Cotton "to arrive *ex Peerless* from Bombay". Two ships with the name Peerless sailed from Bombay, one in October, which the defendant had in mind and the other in December which the plaintiff had in mind.

The court said: "The defendant meant one Peerless and the plaintiff another. That being so, there was no *consensus ad idem* and therefore no binding contract."

4. *Mistake as to Substance of Subject-Matter*

Another kind of mistake as to subject-matter may relate to its substance, nature or quality. The parties may be mistaken as "to the existence of some fact or facts forming an essential and integral element of the subject-matter". The decision of the Privy Council in *Sheikh Bros Ltd* v *Ochener*,[82] on appeal from Kenya and decided under Section 20 of the Indian Contract Act, provides an instructive illustration.

The appellant-company, the lessor of a forest in Kenya, granted a licence to the respondent to cut, process and manufacture all sisal growing in the forest. The respondent, in return, undertook to manufacture and deliver to the appellant 50 tons of sisal fibre per month. But it turned out that the leaf potential of the sisal area was not sufficient to permit the manufacture of the stipulated quantity and the respondent was sued for the breach.

The agreement was held to be void.

An agreement to compromise a suit already decided in favour of the plaintiff, but unknown to the parties, is void for the same reason.[83] But the acquisition of a land, which is the subject-matter of a sale, after the contract is made will not upset the contract;[84] Where

79 Lord ATKIN in *Bell* v *Lever Bros*, 1932AC 161 at p. 218.

80 (1867) LR 2 HL 149: 16 LT 678 HL.

81 Exch (1864) 2 H & C 906: 159ER375: 133 RR 853.

82 1957 AC 136 (PC).

83 *Bibi Soloman v AbdoolAzeez, (1881) 6 Cal 687. Jodha Mai v Associated Hotels of India, AIR 1950 Lah 106.*

76 1 QB 31: [I960] 3 All ER 332. 3 KB 497.

5 HLC 673: 25 LJ Ex 253: 10 ER 1065: (1852) 8 Exch 40: 101 RR 329.

be expectations of the parties are frustrated by subsequent events, their contract may fall irder Section 56 but cannot be declared void *ab initio* under Section 20.[85] In such cases rere is no mistake as to existing facts.

Mistake as to Quality of Subject-Matter

-L mistake as to the quality of the subject-matter as distinguished from its substance may -:: render the agreement void. *Smith* v *Hughes*[86] is well known for this distinction between quality and substance.

> The defendant wanted to buy old oats for his horses. The plaintiff showed him the sample of the oats he had, but said nothing about their age. The defendant kept the sample for twenty-four hours and then placed an order for the oats. After a portion of them was delivered to him he found that they were new and, therefore, rejected them on the ground that he was mistaken about their quality.

3ut the court could find no ground entitling the buyer to reject.

The effect of mistake as to quality has been further explained by the House of Lords n *Bell* v *Lever Bros,*[87]

> Lever Bros appointed one Bell as a managing director for five years on an annual salary of £ 8000 to manage one of their subsidiaries in Africa. Much before the expiry of this term his services had to be dispensed with on account of the merger of the subsidiary with a third company. Bell agreed to retire on a compensation of £ 30,000. After this sum was paid, it was discovered that during his term of service, Bell had made secret profits and was, therefore, guilty of breach of duty which entitled the company to dismiss him without compensation. The company, therefore, claimed the return of the money on the ground inter alia that it was paid under a mutual mistake of fact.

ret their action failed. It was held by a majority "that the mutual mistake related not to ne subject-matter, but to the quality of the service contract".

[1] listake as to nature of promise

The principle is well established by authorities that when a deed of one character is ex- rt uted under the mistaken impression that it is of a different character, then it is wholly : :d and inoperative. Thus where a gift deed is signed under the impression that it is only i power of attorney, the deed is inoperative.[88] If a mistake of this kind is common to both : irties, the agreement is void under Section 20, the parties being mistaken about the very --aiure of the promise. But more frequently a mistake of this kind is brought about by the ~raud of one party. One of the parties, being under a duty to do so, fails to disclose to the ther the true nature of the document and thereby induces him to sign the same under the

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Chandumal Jhaleria v *Clive Mills,* AIR 1943 Cal 257. * (1871) LR 6 QB 597 at p. 609: 40 LJ QB 221: 25 LT 329.

1932 AC 161. \ *Sarat Chandra* v *Kanailal,* AIR 1929 Cal 786.

belief that he is signing some other instrument of a different nature. In such a case there is no real agreement as the consent is nullified by the mistake. In a case of this kind before the Patna High Court:[77]

> The plaintiff appointed the defendant to look after his cultivation and his affairs as he had become too old to manage them himself. The defendant asked him to grant him a lease of his land. The plaintiff agreed to it and placed his thumb-impression upon a deed which was in fact a gift of the land. The court held the deed to be void *ab initio.*

In a similar case before the Madhya Pradesh High Court,[78] the court said:

> There is a clear distinction between a fraudulent misrepresentation as to the character of a document and as to its contents. Where the misrepresentation is as to the character of the document, the transaction is wholly void.[79]

Where Contract Fails to Express Parties' Intention

Where an agreement as finally made fails to express or embody the agreement between the parties as originally made, it can be had rectified so as to bring it in accord with the intention of the parties. An easy illustration is the decision of the court of appeal in *Hatog* v *Colin & Sheild.*[80]

> The defendants contracted to sell to the plaintiff 3000 Argentine hare skins, but by a mistake they offered the goods at so much per *pound* instead of so much per piece. The price per piece was roughly one-third that of a pound. The negotiations preceding the agreement took place on the basis of price per piece and that was also the usual practice of the trade. The buyers sued for the goods.

The court held that it was a mistake on the part of the defendants which caused the offer to go forward in that way, and that anyone with any knowledge of the trade must have realised that there was a mistake.

If relief of this kind were not allowed, the result would be that one party would take an unconscentious advantage of the mistake of the other known to him. The Calcutta High Court granted a similar relief in *New India Rubber Works (P) Ltd* v *Oriental Fire & General Insurance Co LtdP*

> A policy of insurance, which had expired, covered risks arising out of fire, riot and strike. The company sent a renewal form to the assured showing the premium for the above risks. The assured sent lesser amount being equal to cover fire risk only. The company issued a policy in usual terms covering the risks of fire, riot and strike. The

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[77] *Raja Singh v Chaidhoo Singh, AIR 1940 Pat 201.*

[78] *Pratap* v *Puniya,* AIR 1977 MP 108.
Raina J relied upon the Supreme Court decision in *Ningawwa* v *Byrappa Shicldappa Hireknrabar,* AIR 1968 SC 956: (1968) 2 SCR 797: (1968) 2 SCA 97.

[80] [1939] 3 All ER 566.

factory was destroyed by fire due to riot. The company contended that insofar as the policy purported to cover the risk of riot and strike, it was void for mistake.

It was held that the company was entitled to take this defence.

The principles relating to this matter have been re-examined by the court of appeal in *Joscelyne* v *Nissen,*[94]

Documents Mistakenly Signed or Non Est Factum

The defence of *non est factum* enables a person who has signed a contract to say that it is not his document because he signed it under some mistake. It was evolved by the courts to relieve illiterate or blind people from the effect of a contract which they could not read and which was not properly explained to them. But subsequently it was extended to others. This extension occurred in *Foster* v *Mackinnon.*[95] A person was induced to sign the back of a paper the face of which was not shown to him, and he was told that it was an ordinary guarantee the like of which he had signed before and under which no liability came to him, when, in fact, the paper was a bill of exchange and he was sued by a holder in due course as an indorser. The court held that "the defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived not merely as to the legal effect, but as to the actual contents of the document.

It was held by the House of Lords in *Gallie* v *Lee*[96], where—

Mrs *G,* a widow, then aged seventy-eight years, wanted to help her trusted nephew and intended to transfer to him her house on the condition that he was to permit her to reside there for the rest of her life and she handed the title deeds to him. The nephew came to her with one Lee and Lee told her to sign a document saying that it was a deed of gift to the nephew and everything was in order. She had broken her spectacles so that she could not read. She put her signature which was witnessed by her nephew. The document was an assignment in favour of Lee. He mortgaged the house with the building society and, having defaulted in payment, the society claimed possession. She pleaded *non est factum.*

The Supreme Court of India considered the principle of *Foster* v *Mackinnon* in *Ningawwa Byrappa Shiddappa Hireknrabar*[91], and concluded on the facts that where a husband

** [1970] 1 All ER 1213: [1970] 2 QB 86: [1970] 2 WLR 509 CA. " (1869) LR

4 CP 704: 38 LJ CP 310: 20 LT 887.

^ [1969] 2 Ch 17: [1969] 1 All ER 1062: [1969] 2 WLR 901. Reported as *Saunders* v *Anglia Building Society,*

[1970] 3 All ER 961: 1971 AC 1004. " AIR 1968 SC 956: (1968) 2 SCR 797: (1968) 2 SCA 97; *Padanivelu* v *Sadsiva Padayachi,* 2000 AIHC 2477 (Mad), illiterate lady alleged that her thumb impression was obtained by telling her that the document was a mortgage deed and not a sale deed. Sale amount was also low, sale deed held void. *Palaniarnmal* v *Rangasamy,* 1999 AIHC 4394 (Mad), family release deed got signed by playing tricks upon illiterate family members. They were held entitled to partition of the property without getting the release deed cancelled. *Ketaki Babu* v *Laxmi Devi,* (2004) 3 Supreme 340, signature upon sale deed obtained without reading out the document, held voidable and* not void ab initio.

obtained the signature of his wife to a gift deed without making any misrepresentation as to its character, but subsequently included two more plots in the deed, the transaction was only voidable and not void.

Limitations

Mistake operates to avoid an agreement subject to the following limitations:

1. *Mistake of Both Parties*

Under Section 20 an agreement is void by reason of mistake when both parties are mistaken as to a matter of fact essential to the agreement. This is further supplemented by the declaration in Section 22 that "a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". It should, however, be borne in mind that where the mistake, even if it is of one party only, has the effect of nullifying consent as defined in Section 13, no contract will arise. There is no real consent where mistake prevents the parties from coming to an agreement upon the same thing in the same sense.

The mistake of both parties of which Section 20 speaks may be either common or mutual. "In common mistake both parties make the same mistake. Each knows the intention of the other and accepts, but each is mistaken about some underlying and fundamental facts. The parties, for example, are unaware that the subject-matter of their contract has already perished."[98] Common mistake will definitely render the agreement void if the parties are mistaken about the existence of the subject-matter. This type of mistake occurred in *Couturier* v *Hastie*[99] where the subject-matter, unknown to the parties, was extinct at the time of the contract;

In *Leaf* v *International Galleries,*[100] a picture was sold, the seller representing that it was by John Constable, when it turned out to be different. The picture was thus essentially different from what it was supposed to be, yet the contract was held to be only voidable.

2. *Erroneous Opinion*

The explanation to Section 20 provides that "an erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact". In a case before the Travancore-Cochin High Court[101], a property which was subject to a subsisting lease was sold. The lessee had the right to receive value of the improvements, but the agreement of sale was silent about this. The court held "that there was no mistake. It could only be an erroneous opinion which the parties had formed as to the real value of the subject-matter."

[98] Cheshire and Fifoot, THE LAW OF CONTRACT, 202 (8th edn, 1972).
" (1856) 5 HL Cas 673: 25 LJ Ex 253: 10 ER 1065: (1852) 8 Exch 40: 101 RR329. 100
[1950] 2 KB 86: [1950] 1 All ER 693.

Kochuvareed v *Mariappa,* AIR 1950 Tra-Co 10.

3. Mistake of Fact and not of Law
4) [S . 2 1]

Mistake should be of fact and not of law, for, Section 21 declares that "a contract is not voidable because it is caused by a mistake as to any law in force in India." The section carries an illustration:

> A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

But a mistake as to a foreign law will avoid.
A mistake as to the effect of registration upon the validity of a document has been regarded by the Supreme Court as a mistake of law.[102]

WB Kalyanpur Lime Works Ltd v State of Bihar, AIR 1954 SC 165: 1954 SCR 958.

Legality of Object

THE fourth and the last requirement for the formation of a valid contract is that the parties must contract for a lawful object. A contract, the object of which is opposed to the law of the land may be either unlawful or simply void, depending upon the provisions of the law to which it is opposed.

UNLAWFUL AGREEMENTS

Section 23 renders certain considerations and objects as unlawful.

23. *What considerations and objects are lawful and what not.*—The consideration or object of an agreement is lawful, unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to *B* for 10,000 rupees. Here *B's* promise to pay the sum of 10,000 rupees is the consideration for A*'s* promise to sell the house, and A's promise to sell the house is the consideration for *B's* promise to pay the 10,000 rupees. These are lawful considerations.

(.*b*) A promises to pay *B* 1000 rupees at the end of six months, if C, who owes that sum to *B,* fails to pay it. *B* promises to grant time to *C* accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A promises, for a certain sum paid to him by *B,* to make good to *B* the value of his ship if it wrecked on a certain voyage. Here A*'s* promise is the consideration for *B's* payment, and *B's* payment is the consideration for A'J promise, and these are lawful considerations.

(d) *A* promises to maintain *B's* child, and *B* promises to pay A 1000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) *A, B* and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

if) A promises to obtain for *B* an employment in the public service, and *B* promises to pay 1000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal to obtain for *B* a lease of land belonging to his principal. The agreement between A and *B* is void, as it implies a fraud by concealment by A on his principal.

(h) *A* promises *B* to drop a prosecution which he has instituted against *B* for robbery, and *B* promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) *A's* estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. *B,* upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which *B* has paid. The agreement is void, as it renders the transaction, in effect a purchase by the defaulter, and would so defeat the object of the law.

(/') A, who is *B's* mukhtar, promises to exercise his influence, as such, with *B* in favour of *C,* and C promises to pay 1000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to *B* for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

Object and Consideration

The section covers the illegality of both the object of the contract and the consideration for it. The "object" and "consideration" may in some cases be the same thing but may also re different. For example, where money is borrowed for the purpose of the marriage of a minor, the consideration for the contract is the loan and the object the marriage. In a case :ɾ this kind before the Madras High Court,[1] the court found that the marriage in question -as hit by the provisions of the Child Marriage Restraint Act of 1929. Thus, the object -as to defeat the provisions of the Child Marriage Restraint Act.

Where the object or consideration falls within any of the following categories, the resulting agreement is unlawful:

1. Forbidden by law

'•'"here the object of an agreement is forbidden by law, the agreement is unlawful. "Law" n this connection means the law for the time being in force in India and, includes Hindu - id Mohammedan laws also. A simple illustration is the sale of liquor without licence. The sale is void and the price irrecoverable.[2] Cases on this point have mostly been found

Chandra Sreenivasa Rao v Korrapati Raja Rama Mohana Rao, AIR 1952 Mad 579. Koteswar Vittal Kamath v K. Rangappa Baliga & Co, (1969) 1 SCC 255.

in agreements involving breach of laws enacted for the protection or promotion of public interest. Reference may be made to only one such case before the Madras High Court:

> Th e plaintiff was licensed under an Excise Act to work a liquor shop. The Act forbade the sale, transfer or sublease of the licence or the creation of a partnership to run the shop. The plaintiff took the defendant into partnership.

The agreement of partnership was held void as it would defeat the policy of law if unapproved persons could find their way into working liquor shops. An agreement indirectly defeating the provisions of an Act would be equally void. Much, however, depends upon the object of a particular statute and the object of the agreement as interpreted by the court. If the intention of the Legislature is to forbid an act in public interest, a contract to do the forbidden act will obviously be void. But if the intention is merely to regulate an act by prescribing certain terms and conditions, a contract to do the act without fulfilling the statutory requirements may not be void, even if the parties have to pay a penalty for the breach of the statute.[82]

Reviewing all the earlier authorities, the Calcutta High Court has emphasised that decisions must rest on the definiteness of the prohibition against sale, etc.[5] The Supreme Court held that a condition in a contract of carriage against Section 10 of the Carriers Act, 1865 was void.[83] Where a stage carriage permit was granted to a State Road Transport Corpn, it was not allowed to allot the same to a private operator for working it as a nominee.[84] A suit for refund of price paid in advance for the sale of a woman has been held to be not maintainable.[85] An agreement for sub-division of family pension among family members was held to be void being against pension rules.[86]

2. Defeat any law

Sometimes the object of, or the consideration for, an agreement is such that, though not directly forbidden by law, it would, if permitted, defeat the provisions of some law. Such an agreement is also void. Easy illustrations are to be found in agreements relating to bail bonds.

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[81] *Nandlal* v *Thomas J. Williams,* 171 IC 948. The formation of a partnership to run a licensed cinema was held to be unlawful because the licence was granted on individual basis, *Satchidananda* v *Ranjan Kumar,* AIR 1992 Cal 222; *Biharilal Jaiswal* v *CIT,* (1996) 1 SCC 443.

[82] *Mannalal Khetan v Kedar Nath Khetan, (1977) 2 SCC 424 at pp. 430-31.*

Mafizuddin Khan Chowdhury v Habibuddin Sheikh, AIR 1957 Cal 356. [6] *M.G. Bros Lorry Service*

v Prasad Textiles, (1983) 1 SCC 61: AIR 1984 SC 15.

[7] *Brij Mohan* v *MPSRTC,* (1987) 1 SCC 13: AIR 1987 SC 29.

[85] *Nihal Singh* v *Ram Bhai,* AIR 1987 MP 126; *Nutan Kumar* v *IlndADJ,* (2002) 8 SCC 31: AIR 2002 SC 3456. an agreement of lease of land in violations of the Rent Control Act was held to be not void. The lessee had no status and was ejectable. He was like a trespasser, A suit for his ejectment was not barred by S. 23. *Gokuldas Exports* v. *Jain Exports P Ltd,* (2003) 10 SCC 338: (2003) 157 ELT 243, no question of breach where the act in question was due to statutory prohibition.

Chongtuoklwwi v Union of India, AIR 2008 Gau 6.

An accused is required under the Criminal Procedure Code to furnish a surety in the sum of five thousand rupees for his good behaviour. He deposits the sum with the defendant and persuades him to become surety. After the period of suretyship is over the accused sues the defendant for the amount.[10]

Tne Allahabad High Court held the agreement void and the money irrecoverable.

An agreement which defeats the law of a friendly country would be equally void. An ^lustration is *Regazzoni* v *K.C. Sethia.*[n]

The Government of India had, by regulations made under the Sea Customs Act, 1878, prohibited the export of goods to South Africa. The plaintiff and the defendant, being aware of the prohibition and in a bid to overcome the embargo, agreed that a larger quantity of jute bags would be shipped from India and made available in Genoa for resale to South African buyers. The defendant failed to deliver the goods and the plaintiff sued for damages.

The court of appeal held that while the English courts will not enforce foreign revenue or penal laws, they will not entertain an action based on a transaction which is knowingly intended to involve a breach of such laws.

"Law" in this connection means the rules of law for the time being in force in India und includes Hindu and Muslim laws. The Bombay High Court, for example, held in a :ase[12] that according to Mohammedan Law, it is not competent to parties contracting a marriage to enter into a separation deed by which the husband covenanted that his wife might live with her parents.

3. Fraudulent

An agreement made for a "fraudulent" purpose is void. Where the parties agree to impose a fraud on a third person, their agreement is unlawful. Where, for example, a debtor agreed to pay a separate commission, or to give a preference, to a creditor in order to induce his consent to a composition which is proposed with other creditors, the object of the agreement is fraudulent.[13] In another case, there were two decree-holders against i debtor and one of them, the plaintiff, had the debtor's property attached and brought to sale. The plaintiff agreed with the defendant, a prospective buyer, that he would not bid against the defendant and that the defendant would pay him off. The property was thus knocked down to the defendant for a very small price. It was held that the whole object of the arrangement was fraudulent as it deprived the other decree-holder of what he would

Fateh Singh v *Sanwal Singh,* (1878) 1 All 751. [1956] 2 QB 490.

Abdul Piroj Khan Nobab v Hussenbi, (1904) 6 Bom LR 728. Atamal Ramoomal v Deepchand Kessurmal, AIR 1939 Sind 33.

have got if the sale had been competitive. Accordingly the plaintiff could not recover anything from the defendant.[87]

An interesting illustration is provided by the facts of *Scott* v *Brown Doering McNab* & Co.[88]

> The plaintiff entered into a contract with a broker that he should purchase the shares of a particular company at a premium so as to induce a public belief that the shares were worthy of being bought at a premium. Later he discovered that the broker had sold his own shares to him and had bought no shares in the market at all. He applied to the court for rescission for the fraud committed on him.

No relief was allowed to him. The object of the agreement was to commit a fraud on the public. The sole object of the purchase was to cheat and mislead the public. *Ex turpi causa non oritur actio.*

An agreement between two bidders not to bid against each other with an understanding that the successful bidder would give half the property to the other was been held to be not against public policy.[89]

4. Injurious to person or property

Any agreement between two persons to injure the person or property of another is unlawful. If the object of an agreement is such that it involves or implies injury to the person or property of another, the agreement is unlawful. A person borrowed a sum of one hundred rupees and executed a bond promising to work for the plaintiff without pay for a period of two years. In case of default the borrower was to pay exorbitant interest and the principal sum at once. The court held that the contract contained in the bond was indistinguishable from slavery, which involves injury to the person and was, therefore, void.[90] A bond to pay an exorbitantly high rate of interest in case the borrower left the lender's service would also be void. An agreement to commit a crime or a civil wrong, for example, to assault or beat a person or to deceive him or to publish a libel against him[91], all fall in this category.

Another example is the case of a person who, armed with a loaded shotgun, had gone to another's farm to look for his wife. In the ensuing struggle between the two the gunman fell down. The gun was inadvertently discharged killing the other. The administrator of the deceased's estate claimed damages under the Fatal Accidents Act and the defendant (gunman) in turn claimed indemnity from his insurance company where he had a policy

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[87] *Ram Nath Misra* v *Rajendranath Sanyal,* 142IC 525; *Kedar Nath Motani* v *PrahladRai,* (1960) 1 SCR 439, 447, 861: AIR 1960 SC 213, 216. Since the purpose of bribery is to defeat law, it would also fall under this section. *Gulabchand* v *Kudilal,* AIR 1966 SC 1734: (1966) 3 SCR 623.

[88] [1891-4] All ER Rep 654: [1892] 2 QB 724.

[89] *Sujan Singh* v *Mokham Chand,* AIR 1983 P&H 180. But *see* S. 33*(Jb)* of the Monopolies and Restrictive Trade Practices Act, 1969 which declares such agreements to be a restrictive trade practice.

" *Ram Sarup v Bansi Mandar, (1915) 42 Cal 742.*

Brown Jenkinson & Co Ltd v Percy Dalton (London) Ltd, [1957] 2 QB 621.

igainst accident liability. The accident, being the result of his own improper conduct, he *as not allowed to recover.'[9]

f. Immoral

"he law does not allow an agreement tainted with immorality to be enforced. What is minoral" depends upon the standards of morality prevailing at a particular time and approved by the courts. But certain kinds of act have been regarded as immoral since times immemorial and will perhaps always be so regarded. One such act is interference th marital relations. Thus, where a married woman was given money to enable her to n divorce from her husband the lender promising to marry her subsequently, the ney was not allowed to be recovered.[20]

In *Fender* v *St John Mildmay*[21] the House of Lords had to face a difficult case on this t. The defendant had sexual relations with a nurse on the basis that he would marry after his divorce. On the basis of this adultery his wife obtained decree nisi for di- ~e, he promised the nurse to marry as soon as the decree was made absolute. But later married another woman. The plaintiff sued him. It was held that she was entitled to ver compensation for breach of promise.

■*alings with Sex Workers*

ings with prostitutes have always been regarded as immoral. "If articles are sold or thing is hired to a prostitute for the purpose of enabling her to carry on her profession, er the price of the article sold nor the rent of the thing hired can be recovered."[22]

al Cohabitation

promise to pay for past sexual immorality or illegal cohabitation has been held in land to be enforceable if under seal. If it is not under seal, it cannot be enforced as consideration is no consideration.[23] The Allahabad High Court allowed a woman to ver arrears of allowance promised to her for past cohabitation.[24] But in a subsequent "ion the same High Court held that where cohabitation is adulterous, that is to say, re either party is married, whether past or future, it will not support a promise. Adul-

■ is not merely immoral, but is also illegal.[25]

■

JZray v *Barr,* [1971] 2 QB 554, CA.

Vijli v *Nansa Nagar,* (1885) 10 Bom 152. B8AC 1.

Cffitl v *Wright,* [1911] 1 KB 506; *Gangamma* v *Kupammat,* AIR 1939 Mad 139; *Pearce* v *Brooks,* (1966) _? 1 Ex 213, where a lender of cab to a prostitute for her profession was not allowed to recover the cab

me.

Ieaumont v Reeves, (1846) 8 QB 483. £ -jraj Kuer v

Bikramjit Singh, (1881) 3-All 787.

'.See Mary Hill v William Clark, (1905) 27 All 266; Godfrey v Parbati, AIR 1938 Pat 308.

The promises to pay for future cohabitation and for past cohabitation for the purpose of securing the continuance of the cohabitation are unforceable. In *Dwarampudi Naga- ratnamba* v *Kunuku Ramayya,*[26] certain joint family properties were gifted in consideration of past cohabitation. The Supreme Court held the gift void because the *Karta* had no power to gift them. The Rajasthan High Court has held that a gift deed to be enforceable which was executed by a person in favour of a woman with whom he had adulterous cohabitation.[27] A gift requires no consideration.

Dancing Girls

Help given or promised to a dancing girl is not tainted with immorality.[28] The Supreme Court has pointed out in *Gherulal Parakh* v *Mahadeodas Maiya*[92] "that the case law both in England and India confines the operation of the doctrine to sexual immorality.

6. Public policy

An agreement is unlawful if the court regards it as opposed to public policy. The term "public policy" in its broadest sense means that sometimes the courts will, on considerations of public interest, refuse to enforce a contract. Explaining the scope of the expression "public policy" and the role of the judge, C. REDDY J of the Andhra Pradesh High Court observed:[93]

> The twin touchstones of public policy are advancement of public good and prevention of public mischief and these questions have to be decided by judges not as men of legal learning but as experienced and enlightened members of the community representing the highest common factor of public sentiment and intelligence.

Indorsing this view, the Supreme Court added that going by prevailing social values, contract having tendency to injure public interest or public welfare is opposed to pub! policy.[94]

A wife who is entitled to maintenance can give up her right in consideration of a lu sum payment, but surrender of the right to claim revision of the amount in the conte of rising prices would be opposed to public policy.[95] A contract of sale in considerati

26 AIR 1968 SC 253: (1968) 1 SCR 43.

27 *Pyare Mohan* v *Narayani,* AIR 1982 Raj 45. *Sandhya Chatterjee* v *Salil Chandra Chatterjee,* AIR 1980 244, there is nothing immoral in the agreement of husband to provide a separate residence to his wife.

28 *Khubchand* v *Beram,* (1888) 13 Bom 150.

92 AIR 1959 SC 781: 1959 Supp (2) SCR 406: (1959) 2 SCA 342.

93 *Ratanchand Hirachand v Askar Nawaz Jung, AIR 1976 AP 112.*

94 *Rattan Clumd Hira Chand* v *Askar Nawaz Jung,* (1991) 3 SCC 67. *Secy, Jaipur Development Authoriyt\ Daulat Mai Jain,* (1997) 1 SCC 35, acquisition of land, part reallotted to the owner, against public pel r buyer from him of that part got on title.

95 *Muniammal* v *Raja,* AIR 1978 Mad 103.

:f the purchaser providing expenses of the marriage of a minor girl is opposed to public policy being in violation of the prohibition of marriage of children.[33]

Heads of Public Policy—

Trading with Enemy

1 is now fully established that the presumed object of war being as much to cripple the eremy's commerce as to capture his property, a declaration of war imports a prohibition t[1] :ommercial intercourse and correspondence with the inhabitants of the enemy's coun- and that such intercourse, except with the licence of crown, is illegal." "The doctrine ɪт dies to all contracts which involve intercourse with the enemy or tend to assist the etemy, even though no enemy be a party to the contract."

L Trafficking in Public Offices

agreement by which it is intended to induce a public officer to act corruptly is contrary ct public policy. An agreement, for example, by which a sum of money was provided 63 a charity on the condition that the latter would procure a knighthood for the plaintiff held void and the money irrecoverable.[34] A sale of seats in a public institution, e.g., a medical college, is equally opposed to public policy. The Madras High Court did not rermit the recovery of a sum of money paid to a person to enable him to procure a seat in i T.edical college. Any attempt to pervert selection by merit is highly injurious to public nrrerest.[35] Money paid to a public officer to procure a mining right was also not permitted D be recovered.[36] A contract between *A* and *B* for wielding influence with Government E-iiorities to secure a decision in favour of *B*, has been held by the Supreme Court to be ccposed to public policy.[37]

L *Interference with Administration of Justice*

K contract the object of which is to interfere with the administration of justice is obvi- Lily opposed to public policy. It may take any of the following forms:

a) Interference with the course of justice.—Any agreement which obstructs the or- imary process of justice is void. An agreement to delay the execution of a decree[38], and promise to give money to induce a person to give false evidence[39], have been held void.

Hanuman Basappa Chowdliary \ Lasumawwa, (2002) 5 Kant LJ 405, surrender of rights under S. 125 CrPC, against public policy. *Geeta Satish Gokarna* v *Satish Shankerao,* AIR 2004 Bom 345, dissolution of marriage on consent terms providing against maintenance, not allowed. *Sunil Pannalat Bantliia* v *City & Industrial Development Corpn of Maharashtra Ltd,* (2007) 10 SCC 674: AIR 2007 SC 1529, transfer of allotted riots in accordance with Regulations, transferee carried out construction, no violation of public policy. *Parkinson* v *College of Ambulance,* [1925] 2 KB 1. *S'.V.P. Pandian* v *M.M. Roy,* AIR 1979 Mad 42.

Kuju Collieries Ltd v Jharkhand Mines Ltd, (1974) 2 SCC 533: AIR 1974 SC 1892. Ratan

ChandHira Chand v Askar Nawaz Jung, (1991) 3 SCC 67. Sand Kishore v Kunj Beharilal, AIR

1933 All 303. Kq Pa Tu v Azimulla, AIR 1940 Rang 73:

An extreme illustration is an agreement to perform "puja" to secure success to the defendant in a litigation, which was held void.[40]

(b) *Stifling prosecution.*—It is in public interest that criminals should be prosecuted and punished. Hence an agreement not to prosecute an offender or to withdraw a pending prosecution is void if the offence is of public nature. Such agreements are called agreements to stifle prosecution. However, the law allows compromises in respect of com- poundable offences. But the compromise of a non-compoundable offence is not allowed. An illustration is to be found in the decision of the Supreme Court in *V. Narasimharaju* v *V Gurumurthy Raju*:[41]

> In the dissolution and settlement of accounts of a partnership firm, one of the partners filed criminal complaints against his co-partners alleging forgery in and manipulation of accounts by taking in a fake partner. Subsequently, the partners entered into an agreement to refer the matter of arbitration in pursuance of which the complainant did not offer any evidence and his complaint was accordingly rejected. When the question of enforcement of the arbitrator's award arose, it was held that the agreement was for unlawful consideration.

Where a compromise agreement is made before any complaint is filed, it would not amount to stifling prosecution, even if it is implemented after the filing of a complaint which is then withdrawn. This was pointed out by the Supreme Court in *Ouseph Poule* v *Catholic Union Bank Ltd*.[42]

> A bank found that the goods in a godown, which was pledged to it against a loan, were either fraudulently overvalued or withdrawn in collusion with bank officials. The borrowers agreed to make up for the deficiency by hypothecating more property. Some delay having taken place in the hypothecation, the bank filed a complaint which was withdrawn after the hypothecation was completed. The agreement was held to be valid.[43]

(c) *Maintenance and 'Champerty'.*—Explaining "maintenance" Lord HALDANE says: "It is unlawful for a stranger to render officious by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence."[44] Lord DENNING defined maintenance as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse.[96]

40 *Sati Bhagwan Das Shastri v Raja Ram, AIR 1927 All 406.*

41 AIR 1963 SC 107: (1963) 3 SCR 687.

42 AIR 1965 SC 166: (1964) 7 SCR 745.

43 See *Sanclhya Chatterjee* v *Salil Chandra Chatterjee,* AIR 1980 Cal 244, withdrawal of a suit for judicial separation on promise of separate maintenance not against public policy. The Supreme Court distinguished the motive in withdrawing a prosecution from the consideration for it. The withdrawal of a prosecution with good motive, such as for providing relief to the victims of a disaster, was held to be not opposed to public policy, *Union Carbide Corpn* v *Union of India*, (1991) 4 SCC 584: AIR 1992 SC 317.

44 *Nevite v London Express, 1910 AC 368.*

96 *Trepca Mines Ltd (No 2), Re, 1963 Ch 199, 219.*

""Champerty" in its essence means "a bargain whereby one party is to assist the other in recovering property, and is to share in the proceeds of the action." But a fair agreement to assist a person in the enforcement of his legal rights may be held valid even if the person providing the assistance is to be reimbursed out of the proceeds of the action. Much, however, depends upon the quantum of share which the financier has stipulated to get in the fruits of the action. A stipulation for 3/4th share in the property, if recovered, has been held to make the agreement champertous.[46] On the other hand, in *Ram Swarup* v *Court of Wards"* which went up to the Privy Council, the agreement provided that the financier should bear all the expenses of the case and in return therefor get a three anna share of the immovable property recovered, provided that it should be increased to four annas should lie case go to the Privy Council, the agreement was held to be valid. An agreement to pay for legal services a certain amount of money for successful cases and 20% less for cases lost has been held to be champertous. The amount paid over could not be recovered back and that remaining unpaid could not be claimed.[48]

4. *Marriage Brokerage Contracts*

An agreement to procure the marriage of a person in consideration of a sum of money is called marriage brokerage contract. Such agreements are void. A typical illustration •vould be an agreement for the sale of a girl.[49] The custom of paying bride price to the parents of a girl is well-known in India. According to the decisions of the Punjab, Calcutta and Madras High Courts, an agreement to pay money to the parent of a minor to induce him to give the minor in marriage is void.[50] Where, however, the money has already been paid, but the marriage fails to go through, it has been held in a few cases that the money may be taken back.[51] An attempt to make gain of material nature, for example, dowry, out of a marriage would be equally opposed to public policy.

5. *Unfair or Unreasonable Dealings*

Where the parties are not economically on equal footing and there is a wide gap in the bargaining power of the parties, where one of them is in a position to exploit and the other is vulnerable and the contract made with that other is apparently unfair, it can in circumstances be also regarded as opposed to public policy. For example, the Supreme Court laid down in *Central Inland Water Transport Corpn* v *Brojo Nath Ganguly*[52] that a *m*

_ *Nuthuhi Venkatswami* v *Katta Nagi,* AIR 1962 AP 457. (1940) Lah 1

(PC).

Aratra Potato Co Ltd v Taylor Joyson Garrett, (1995) 4 All ER 695. ' Girdhari Singh v Neeladhar Singh, (1912) 10A11LJ 159; Gopi Tihadi v Gokhei Panda, AIR 1954 Ori 17. Wazarimal v Rallia, (1889) Punj Rec No. 128; Baldeodas v Mohamaya, (1911) 15 CWN 447; Kalavangunta v Lakshmi Narain, (1909) 32 Mad 185.

Ganpata v *Lahana,* AIR 1928 Nag 89; *Gopikrishna* v *Janah Pandit,* AIR 1951 Pat 519. [2] (1986) 3 SCC 156: AIR 1986 SC 1571: (1986) 60 Comp Cas 797; *Hindustan Times* v *State ofU.P.,* (2003) 1 SCC 591: AIR 2003 SC 250, deduction of 5% amount from advertisement bill of newspapers imposed by the State Government which amount to form part of pension fund of working journalists, held arbitrary and violative of Article 14.

Government corporation imposing upon a needy employee a term that he can be removed just by three months' notice or pay in lieu of notice and without any grounds is an exploitation and every ruthless exploitation is against public policy.

As between parties whose bargaining power is fairly matched and the standard contract with all its clauses has not only been duly signed but also is one which has been widely used over the years, this will create a presumption of fairness.[53] A clause enabling the contracting authority to vary the quantum of work upwards or downwards to be computed by adding up all variations both upwards and downwards has been held to be based on good reasons and there is nothing unconscionable if the power is exercised for legitimate cause.[54] A clause in a contract of hiring of three vessels for a period of 3 years entitled the hirer to terminate the agreement after one year without assigning any reason. The clause was held to be not unconscionable or opposed to public policy. It was also covered by Section 14(l)(c) and (e) of the Specific Relief Act, 1963.[55]

VOID AGREEMENTS

Giving the meaning of a void agreement, the Act says in Section *2(g):*

***(g)* An agreement not enforceable by law is said to be void.**

The following types of agreement are declared to be void:

(1) Agreements unlawful in part [S. 24]; (2) Agreements without consideration [S. 25]; (3) Agreements in restraint of marriage [S. 26]; (4) Agreements in restraint of trade [S. 27]; (5) Agreements in restraint of legal proceedings [S. 28]; (6) Unmeaning agreements [S. 29]; (7) Wagering agreements [S. 30].

If a contract is, on the face of it, capable of legal performance, the fact that one party was entertaining an undisclosed intention of performing it unlawfully or of using it as a part of an unlawful scheme, would not disentitle the other party from enforcing it. If there is any doubt about the real nature or purport of the agreement, that construction should be preferred which admits of lawful performance.

The fact that one party entertains the

53 *Bihar SEB* v *Green Rubber Industries*, (1990) 1 SCC 731, 740: AIR 1990 SC 699.

54 *National Fertilizers* v *Puran Chand Nangia*, (2000) 8 SCC 343: AIR 2001 SC 53. *Sociste Pepper Grenolde* v *Union of India*, AIR 2004 Del 376, a clause that only one party will appoint arbitrator has been held to be valid.

55 *Oil and Natural Gas Corpn Ltd* v *Streamline Shipping Co P Ltd*, AIR 2002 Bom 420. *Thakar Kanaiyalal Rasiklal* v *State of Gujarat*, AIR 2003 Guj 14, under a settlement, the plaintiffs were allowed to perform *pooja* for 20 years in a temple. They enjoyed that right but after the expiry of 20 years, they claimed a hereditary right to continue *pooja*. The court said that the claim was barred by Order 23 Rule 1, CPC and was also against the principles of public policy. *K.E. Aboobacker* v *P.P. Vasu*, 2004 AIHC 551 (Ker): AIR 2004 NOC 262 (Kerala) demand of premium (*pakidi*) by landlord for giving premises was held to be not only penal but also against morals and public policy. *Rohit Dhawan* v *G.K. Malhotra*, AIR 2002 Del 151, doctrine of perpetuity could not be applied to an agency, because otherwise one party may completely ruin the business of the other. *BCPP Mazdoor Sangli* v *NTPC*, AIR 2008 SC 336, an agreement under which the service conditions of employees were altered and they were transferred from a public sector undertaking to a private concern, was held to be opposed to public policy.

motive of defeating the execution of the decree which may be passed against him is immaterial.[56]

sreements unlawful in part [S. 24]

24. *Agreements void, if considerations and objects unlawful in part.*—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of *B.* a legal manufacture of Indigo, and an illegal traffic in other articles. *B* promises to pay *A* a salary of 10,000 rupees a year. The agreement is void, the Dbject of A's promise, and the consideration for *B's* promise, being in part unlawful.

The provision in the section is a natural effect of the principle of illegality laid down by Section 23. Where the object or consideration is illegal in part and is not severable from ie rest, the whole agreement goes down. Where a single transaction is intended to serve or more than one objects and though only a part of the transaction in unlawful, the -hole transaction becomes tainted. Where the object is one, but there are several consid- irauons for the same and, if any one of those or any part of any one of those considera- 10ns is void, the agreement is void as a whole.

The section comes into play when a part of the consideration for an object or more than : ze objects of an agreement is unlawful. The whole of the agreement would be void un- less the unlawful portion can be severed without damaging the lawful portion. A promises a pay a fixed sum of money on monthly basis to a married woman for living in adultery ith the promisor, which is unlawful, and for keeping his house, which is lawful, the ihole agreement was held to be void because it was impossible to apportion the single amp sum between the lawful object and the unlawful one.[57]

Where the legal part of an agreement is severable from the illegal, the former would be enforced. A Muslim husband agreed by a registered deed to hand over to his wife the totality of his earnings and not to do anything without her permission and, if he did so, she would be at liberty to divorce him. The latter part of the agreement was unlawful. It was served from that part under which he promised to hand over all earnings and this part was enforced giving it this meaning that he was bound to give only maintenance amount and not every bit that he might earn.[58]

°° *M.K. Usman Koya* v *C.S. Santha,* AIR 2003 Ker 191: (2003) 4 ICC 239. *Alice Mary Hill* v *William Clark,* (1905) 27 All 266.

Poonoo Biln v *Fyaz. Buksh,* (1874) 15 BLR App 5; *Canbank Financial Services Ltd* v *Custodian,* (2004) 8 SCC 355, contract party lawful and partly unlawful, but severable, lawful part can be given effect to.

58

Agreements without consideration [S. 25]

Section 25 declares that an agreement without consideration is void. This is, of course, subject to a few exceptions, which have already been considered along with "consideration".

Restraint of marriage [S. 26]

26. *Agreement in restraint of marriage void.*—Every agreement in restraint of the marriage of any person, other than a minor, is void.

It is the policy of law to discourage agreements which restrain freedom of marriage. The restraint may be general or partial, that is to say, the party may be restrained from marrying at all, or from marrying for a fixed period, or from marrying a particular person, or a class of persons, the agreement is void. The only exception is in favour of a minor.[97]

A penalty upon remarriage may not be construed as a restraint of marriage. Thus, an agreement between two co-widows that if any of them remarried she should forfeit her right to her share in the deceased husband's property, has been upheld, the court pointing out that no restr aint was imposed upon either of the two widows to remarry.

[98]

Restraint of trade [S. 27]

27. *Agreement in restraint of trade void.*—Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Freedom of trade and commerce is a fundamental right protected by the Constitution of India. Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, skill or talent, by any contract that he enters into."[99] "Every man should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit."

Madhub Chander v *Raj Coomat*[&] is the first case in which the scope of the section came up for determination before the Calcutta High Court.

> The plaintiff and the defendant were rival shopkeepers in a locality in Calcutta. The defendant agreed to pay a sum of money to the plaintiff if he would close his business in that locality. The plaintiff accordingly did so, but the defendant refused to pay.

The court held the agreement to be void. The court drew support from the use of the word "absolutely" in Section 28, which deals with restraint of legal proceedings. As this word is absent from Section 27, therefore, the court concluded, that it was intended to prevent not merely a total restraint but also a partial restraint.

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[97] *Moharum Ali* v *Aysha Khatun*, (1915) 19 CWN 1226, where a condition in a marriage contract that if the husband married another woman, the first wife would divorce him was upheld.

[98] *Rao Rani v Gulab Rani, ILR 1942 All 810.*

[99] *Per* JAMES *V C in Leather Cloth Co v Lovsont, (1869) LR 9 Eq 345.*

(1874) XIV Bengal Law Reports 76. *See* Q, *Restraint of Trade*, (1902) 4 Bom LR 101.

This interpretation of the section has been generally accepted. "The section has abolished the distinction between partial and total restraints of trade. Whether the restraint is general or partial, unqualified or qualified, if the agreement is in the nature of a restraint of trade, it is void."[63]

In England the law relating to restraint of trade was elaborately considered by the House of Lords in *Nordenfelt* v *Maxim Nordenfelt Guns & Ammunition Co Ltd.*[M]

> The case involved sale of goodwill by an inventor and a manufacturer of guns and ammunition who agreed with the buyer company: (1) not to practise the same trade for 25 years, and (2) not to engage in any business competing or liable to compete in any way with the business for the time being carried on by the company. He afterwards entered into agreement with another manufacturer of guns and ammunition and the company brought an action to restrain him.

It was held that the first part of the agreement was valid being reasonably necessary for the protection of the purchaser's interest. But the rest of the covenant by which he was prohibited from competing with the company in any business that the company might carry on was unreasonable and, therefore, void.

The difference of approach is that in England a restriction will be valid if it is reasonable; in India it will be valid if it falls within any of the statutory, or judicially created exceptions.

Profession, Trade or Business

The Indian courts can only see whether the activity restrained falls within the purview of Section 27 or not. Thus, for example, where it was necessary to do so, the High Court of Kutch regarded an agreement to monopolise the privilege of performing religious services in a village as being opposed to public policy and void under Section 27,[65] though it may be doubted whether the words "profession, trade or business" as used in the section were intended to cover the religious services of a priest.

Collusion between Bidders and Tenderers

In a case before the Madras High Court:[66]

> A postal authority invited tenders for licence for carrying mail. The plaintiff, a bus owner, abstained from tendering on the promise of the defendant, another bus owner, to pay him some money. The latter obtained the contract but refused to pay the money.

63 *Khemchand Manekchand v Dayaldas Bossarmal, AIR 1942 Sind 114. 1894 AC 535.*

55 *Rewashankar Samji* v *Vedji,* AIR 1951 Kutch 56; *Pothi Ram* v *Islam Fatima,* AIR 1915 All 94, an agreement between the two landlords not to use their lands on the same day for the same purpose, held to be not a profession, trade or business. *ZaheerKhan* v *Percept D'Mark (India) (P) Ltd,* AIR 2004 Bom 362, a contract restricting a party's future freedom to carry on his affairs in a manner he likes and with person's of his choice, held to be an unreasonable restraint of trade. °° *Mohd Isack* v *Daddapaneni,* AIR. 1946 Mad 289.

The court said that tendering to obtain a contract is not in the nature of a trade or calling. The court compared the case with an agreement between intending bidders and said that such an agreement was considered as being not opposed to public policy in a few previous cases.[67] Special stress was laid upon a decision of the Privy Council where it was held that a court sale by public auction does not become void if a person had deterred others from bidding.

The court reluctantly followed its decisions in a subsequent case where on an auction sale of a fishery, the villagers colluded that only one of them shall bid for all of them and thereby the public authority was misguided as to the real value of the fishery. The agreement between the villagers was held to be valid.[68]

All these matters should now be taken in the light of the provision in Section 33(0 *(jb)* of the Monopolies and Restrictive Trade Practices Act, 1969 which is to the effect that an agreement as to making of bids, or excluding a person from bidding, at an auction for sale of goods, shall be a restrictive trade practice and, therefore, void unless it is necessary in public interest as spelled out in Section 38 of that Act. The clause is wide enough to cover cases of secret agreements as to participation in an auction according to pre-planned terms.

There is no special provision relating to collusive tendering or bidding in the [English] Restrictive Trade Practices Act, 1976. But it seems clear that such bid agreements fall within Sections 6(1 *)(a)* and 1 l(2)(a) of that Act, as relating to the prices to be quoted for goods or services. The agreements by which parties confer authority upon an association or an individual, to adjust prices which they are to quote are also within these provisions.

Freedom of Press

An agreement by which a newspaper company was sought to be restrained from commenting upon the conduct of a land speculator has been held to be against public interest. Free press is an instrument of great public service.

Restrictions in Lease

A grant by way of lease of business premises on the condition that only a particular type of business would be undertaken there and under a particular name and style was held to be not a restraint of trade. It was an opening to a trade and not a restraint.[69]

67 *Privy Council opinion in Mohcl Mirza Rowther v Savvasi Vijya Roghunanda, ILR 23 Mad 227, upheld. Pattipati Ramalingaiah v*

68 *Nagulanganta Subbarami, AIR 1951 Mad 390. Vidya Wati v Hans Raj, AIR 1993 Del 187.*

69

EXCEPTIONS

There are two kinds of exceptions to the rule, those created by statutes and those arising from judicial interpretations of Section 27.

Statutory exceptions

1. *Sale of Goodwill*

The only exception mentioned in Section 27 of the Contract Act is that relating to sale of goodwill. It is thus stated:

> **One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.**

Apparently the object is to protect the interest of a purchaser of goodwill. "It is dif- ncult to imagine that when the goodwill and trade of a retail shop were sold the vendor might the next day set up a shop within a few doors and draw off all the customers." Therefore, some restriction on the liberty of the seller becomes necessary.

There should be a real goodwill to be sold. "Goodwill" being an abstract property, is *ot easy to define. In essence goodwill means the advantages of the good name, reputa- _an and connections of the firm.

The agreement has to specify the local limits of the restraint. The seller can be retrained within certain territorial or geographical limits and the limits must be reasonable. Reasonableness of restrictions will depend upon many factors, for example, the area in hich the goodwill is effectively enjoyed and the price paid for it.

2. *Partnership Act*

ere are four provisions in the Partnership Act which validate agreements in restraint :: a trade. Section 11 enables partners during the continuance of the firm to restrict their —utual liberty by agreeing that none of them shall carry on any business other than that : c the firm. Section 36 enables them to restrain an outgoing partner from carrying on a ilar business within a specified period or within specified local limits. Such agree- r. ent shall be valid if the restrictions imposed are reasonable. A similar agreement may "т made by partners under Section 54 upon or in anticipation of dissolution by which they TLi\ restrain each other from carrying on a business similar to that of the firm. An agree- -ent by a retiring partner not to carry on a similar business on the land belonging to him ic : ining the factory of the firm has been regarded as reasonable and, therefore, binding - the person buying the land from him.[70]

* *fhikmi Chand* ***v*** *Jaipur Ice & Oil Mills, AIR 1980 Raj 155.*

Under judicial interpretation

1. *Trade Combinations*

It is now almost a universal practice for traders or manufacturers in the same line of business to carry on their trade in an organised way. Thus, there are combinations of ice manufacturers, grain merchants, sugar producers, etc. The primary object of such associations is to regulate business and not to restrain it. They bring about standardised goods, fixed prices and eliminate ruinous competition. Thus, "regulations as to the opening and closing of business in the market, licensing of traders, supervision and control of dealers and the mode of dealing are not illegal",[100] even if there is incidental deprivation of the trade liberty. But the courts would not allow a restraint to be imposed disguised as trade regulations. An agreement between two companies that one would not employ the former employees of the other has been held to be void by reason of its generality. This was the situation in *Kores Mfg Co* v *Kulok Mfg Co Ltd*[11].

> Both companies were engaged in manufacturing similar products involving technical processes in which employees were likely to get knowledge of trade secrets and confidential information. The companies agreed that neither would employ, without the written consent of the other, any person who had been the employee of the other for any time during the previous five years.

The agreement was held to be void. In a case before the Bombay High Court.[101]

> Four ginning factories entered into an agreement fixing uniform rate for ginning cotton, and pooling their earnings to be divided between them in certain proportions.

The action was for division of profits and there being nothing in it against Section 27 it was enforced.

2. *Solus or Exclusive Dealing Agreements*

Another business practice in vogue is that a producer or manufacturer likes to market his goods through a sole agent or distributor and the latter agrees in turn not to deal with the goods of any other manufacturer. A producer may, for example, agree to sell all his output to one consumer who, in turn, agrees not to buy his requirements from any other source. As long as the negative stipulation is nothing but an ordinary incident of or ancillary to the positive covenant, there is hardly anything obnoxious to Section 27. Thus, an agreement by a manufacturer of *dhotis* to supply 1,36,000 pairs of certain description to the defendant and not to sell goods of that kind to any other person for a fixed period,[102] an El pGr80U to send all the mica produced by him to the plaintiffs, and not to

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[100] *Municipal Committee, Khurai v Kaluram Hiralal, AIR 1944 Nag 73.*

[101] *Haribhai* v *SharafAli,* ILR (1897) 22 Bom 861.

[102] *Carliles Nephew & Co v Ricknauth Bucktermull, ILR (1882) 8 Cal 809.*

d them to any other firm, nor to keep any in stock[75]; an agreement by the Coca Cola mpany to grant their distributorship to a company in India on the condition that the lat- company would not manufacture, bottle, sell, deal or otherwise be concerned with the 'ucts, beverages of any other brands or trade marks or trade names during the subsist- e of the agreement including the period of one-year notice,[76] and an agreement by a er of goods for Calcutta market, not to sell them in Madras, have all been held outside scope of Section 27 and therefore valid. Such negative stipulations do not have the *t* of restraining the manufacturer. On the contrary, he is encouraged to exercise his ness because he is assured of a certain market for the products of his labour.[77]

But where a manufacturer or supplier, after meeting all the requirements of a buyer, surplus to sell to others, he cannot be restrained from doing so. In *Sk Kalu* v *Ram 2 Bhagat:*[78]

A seller of combs entered into an agreement with all the manufacturers of combs in the city of Patna whereby the latter undertook during their lifetime to sell all their rroduct to *RS*, and to his heirs and not to sell the same to anyone else.

agreement was held to be void.

The House of Lords held even a twenty-one year period of exclusive dealing to be easonably long. The case was *Esso Petroleum Co Ltd* v *Harper's Garage (Stourport)*
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Esso had an agreement with two garages which was to bind one for about four-and- i-half years and the other for 21 years. During this period they had to buy the whole of iieir requirements from Esso and to operate the garages in accordance with Esso co- : peration plan. The garage which was bound for 21 years was also mortgaged to Esso against a loan which was repayable in instalments lasting for 21 years and not earlier.

i Lordships unanimously held that the agreement fell within the sphere to which the ne of restraint applies and the period of 21 years being not reasonable, it was void, "Jie tie with the other garage for four years and five months was reasonable.

An agency for the sale of the goods of a German company in India which carried a restraining the Indian company from selling similar goods for 5 years after the ter- ion of the contract was held to be not enforceable.[80]

ha Naidu v Haji Badsha Sahib, ILR (1902) 26 Mad 168. : *rat Bottling Co*

Ltd v Coca Cola Co, (1995) 5 SCC 545.

ept D Mark (India) P Ltd v *Zaheer Khan,* (2004) 2 Bom CR 47, negative covenant in a contract that the enantee would not sell a similar product of a competitor was held not necessarily in restraint of trade, could also be in furtherance of trade. *Rabi Lochan Deogharia* v *Union of India,* (2003) 2 ICC 927 (Cal), bility criteria for distribution of dealership was in the hands of the evaluation committee. Writ court id not interfere unless there was malafides or unfairness.] 8 CWN 388.

AC 269: [1967] 1 All ER 699: [1967],2 WLR 871. *ngge Gesellsehaft*

M B H v C A E C India Ltd, AIR 1988 Bom 157.

3. Restraints Upon Employees

During employment.—Agreements of service often contain negative covenants preventing the employee from working elsewhere during the period covered by the agreement. "Trade secrets, the names of customers, all such things which in sound philosophical language are denominated as objective knowledge — these may not be given away by a servant; A servant may, therefore, be restrained from taking part in any business in direct competition with that of his employer. Thus, in *Charlesworth* v *MacDonald:*[103]

> A agreed to become assistant for three years to *B* who was a physician surgeon practising at Zanzibar. The appointment was subject to the clause against practising. A left the service within a year and began to practise there on his own account.

But he was restrained from doing so during the period of three years.

The principle was applied by the Bombay High Court in *V.B. Deshpande* v *Arvind Mills Ltd**[104]. The defendant took employment as a weaving master in a mill and agreed not to serve in that capacity for three years anyone else in any part of India. An injunction was granted to restrain him in terms of the agreement. Similarly, a stage actor who contracted to work with one company was restrained by means of an injunction from jumping to another company during the period of the contract.[105]

After Termination of Employment

An agreement to restrain a servant from competing with the employer after the termination of employment may not be allowed by the courts. In *Brahamputra Tea Co* v *E. Scarth,*[M] an attempt was made to restrain a servant from competing for five years after the period of service, the court disallowed it.

The principles thus established have been approved by the Supreme Court in *Niranjan Shankar Golikari* v *Century Spinning & Manufacturing Co Ltd:**[5]

> A company manufacturing tyre cord yarn was offered collaboration by a foreign producer on the condition that the company shall maintain secrecy of all the technical information and that it should obtain corresponding secrecy arrangement from its employees. The defendant was appointed for a period of five years, the condition be

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[103] ILR (1898) 23 Bom 103; see further *Sociedade De Fomento Industrial Ltd* v *Ravindranath Subraya Kamat.* (2000) 1 Mah LJ 148, a contract of retainership contained a clause that up to the currency of the engagement the employee would not undertake directly or indirectly by himself or by family members or by any person as his agent any activity competing with the business of the plaintiff companies, this was held to be not void.

[104] AIR 1946 Bom 423.

[105] *Makhanlal Natta v Tridib Ghosli, AIR 1993 Cal 289.*

ing that during this period he shall not serve anywhere else even if he left the service earlier.

SHELAT J held the agreement to be valid.

The Supreme Court has laid down in *Superintendence Co of India Ltd* v *Krishan Mur-* :: ' - that a restraint beyond the term of service would be prima facie void and the only pound on which it could be justified is by bringing it within the scope of the exception, ~-at is, by showing that it is necessary for the protection of the employer's goodwill.

Protection of Trade Secrets

I»ne of the principles is that a master is not entitled to restrain his servant after the termi- "ition of employment from offering competition, but he is entitled to reasonable protects :n against exploitation of trade secrets. In *Mason* v *Provident Clothing Co*[87] the House : f Lords did not allow an employer to restrain his canvasser for a period of three years liter the termination of his service.

On the other hand, in *Fitch* v *Dewes*[88] the House of Lords allowed a covenant by -hich a solicitor's clerk was restrained from practising within 7 miles of the city, it being "rasonably necessary for promoting the interest of both parties. As compared with it, a -estrictive covenant purporting to prevent a former employee being engaged in any simi- jr business within a radius of 25 miles of the employer's business was too wide and was iccordingly void.[89] In another case:[90]

A restraint upon a ladies' hairdresser that she should not work after the termination of Z£r employment at a competitive place for 12 months and within half a mile of the place, ■ as held to be reasonable.[91] In a *Canadian case*:[92]

The defendants were employees of a company which carried on a topographical survey business. During their service they attempted to obtain a valuable contract for the plaintiff company, but failed to do so. Thereafter, the defendants resigned and ob-

(1981) 2 SCC 246; *Sanmar Speciality Chemicals Ltd* v *Dr Biswajit Roy,* AIR 2007 Mad 237, clause against disclosure of confidential information after cessation of employment and taking any competitive job, injunction against employee not issued at the initial stage of the case for enforcing the clause. *VFS Global Services ^ P Ltd* v *Suprit Roy,* AIR 2008 NOC 1502, another similar agreement.

1913 AC 724: [1911-13] All ER Rep 400 HL. *Sandhya Organic Chemicals P Ltdv United Phosphorus Ltd,* AIR 1997 Guj 177 and employee was under covenant not to divulge any confidential and secret information, the court said that it would not go beyond the term of employment, injunction refused. *PoLywjir* P^pero *Lid* v *Gurmit Singh,* AIR 2002 Del 530, the plaintiffs failed to prove their exclusive proprietary right in their industrial designs against some of their former employees so as to prevent them by an injunction from doing the same business. There was no contract with them on the particular subject-matter.

* [1921] 2 AC 158: [1921] All ER Rep 13 HL. *Spencer* v *Marchington,* The Times, Feb. 1, 1988.

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Financial Collection Agencies Ltdv Batey, The Times, May 1973: (1973) New LJ 469. *Marion White*

Ltdv Francis, [1972] lWLR 1423. (1971) 23 DLR (3rd) 632, Ontario court of appeal.

tained the contract for themselves, but without using any confidential information of the plaintiff.

The court held that there is an implied term in a contract of employment that a former employee may not make use of his former employer's trade secrets, but with this exception, he is entitled to compete and that even if the contract of employment had contained covenant not to compete in respect of possible future contracts, such covenant would have been an unreasonable restraint of trade and void.

No restriction was allowed to be imposed upon an employee when his term of employment was not for a specified period and he had left the job.[106] An employee of Star TV wanted to resign, but his resignation was not being accepted. On the contrary, a case was filed against him for a declaration that he had no right to resign or to join a rival firm. The court refused to issue an injunction for enforcing a negative covenant. The court said that the question whether the employee had gained knowledge of some trade secrets, whether he was imparted special training and was in possession of confidential information were matters which could be determined at the trial and till all this was sorted out, a negative covenant in matters of personal service could not be enforced. Freedom of contract includes freedom of occupation. There was nothing to suggest that the employer was likely to suffer irreparable loss without the injunction. Merely because the employer could face some inconvenience or competition was not a ground for enforcing a negative covenant. It is not in public interest to restrain healthy competition.[107]

Restraint of legal proceedings [S. 28]

It is a well-known rule of English law that "an agreement purporting to oust the jurisdiction of the courts is illegal and void on grounds of public policy". Any clause in an agreement providing that neither party shall have the right to enforce the agreement by legal proceedings is void. Section 28 of the Indian Contract Act renders void two kinds of agreement, namely: (1) An agreement by which a party is restricted absolutely from enforcing his legal rights arising under a contract by the usual legal proceedings in the ordinary tribunals. (2) An agreement which limits the time within which the contract rights may be enforced.

28. *Agreements in restraint of legal proceedings void.—**Every agreement,—***

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

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[106] *Weiler International Electronics P Ltd v Punita Velu Somasundaram, (2003) 3 Bom CR 59.*

[107] *Star India P Ltd* v *Laxmiraj Seetliaram Nayak,* (2003) 3 Bom CR 563 (Bom). The court cited *Lalbhai Dal- patbhai & Co* v *Chittaranjan Chandulal Pandya,* AIR 1966 Guj 189 in which the court explained all the fundamental principles concerning negative stipulations in a contract of service during the period of service and after it.

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent.]

***Exception 1.—Saving of contract to refer to arbitration dispute that may arise.*—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.**

***Suits barred by such contracts.*—When such a contract has been made, a suit may be brought for its specific performance ; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.**

***Exception 2.—Saving of contract to refer questions that have already arisen.*—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.**

Enforcement of Contractual Rights not to be Restrained

Explaining the section GARTH CJ of the Calcutta High Court observed in *Coringa Oil Co* v *Koegler*[15]*:* "This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would...be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals".

Limitation of Time

Another kind of agreement rendered void by the section is where an attempt is made by the parties to restrict the time within which an action may be brought so as to make it shorter than that prescribed by the law of limitation.[96] According to the Indian Limitation Act, for example, an action for breach of contract may be brought within three years from the date of breach. If a clause in an agreement provides that no action should be brought after two years, the clause is void. Clauses in a standard form insurance policy curtailing limitation to 12 months of the occurrence of the event or 3 months of the rejection of the claim were not permitted to be invoked to bar claims filed within three years.[97] However, in a similar case before the Bombay High Court, a clause providing that "no suit shall be brought against the company in connection with the said policy later than one year after

[35] [1876] 1 Cal 466 at pp. 468-69.

See Muni Lai v Oriental Fire & General Insurance Co Ltd, (1996) I SCC 90.

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«, Harshad Coop Mktg Society Ltd v United India Fire and General Insurance Co Ltd, AIR 1992 Bora 341: Article 44 (b) of the Limitation Act, 1963.

the time when the cause of action accrues", was held valid.[108] The case had been adversely criticised.[109] But such clauses were upheld by the Supreme Court.[110] The clause which had been held by the Supreme Court to be valid prohibited all proceedings whether by arbitration or regular suit unless they were started within 12 months from the date of the loss. A suit was fded for recovery of the amount due under an insurance policy. A clause in the policy provided that suits must be filed within 12 months from the date of disclaimer. The clause was held to be not valid. A suit filed within three years from that date was held to be maintainable.[111]

Effect of Amendment

The amendment of the section in 1997 has brought about this change that all clauses which reduced the normal period of limitation would be void to that extent. Thus the artificial distinction between a clause cutting short the period of limitation and a clause providing for extinction of rights after a specified period has been eliminated.[112]

Forfeiture and Surrender of Rights

Cases of this sort were distinguished from those which provided for surrender or forfeiture of rights if no action was brought within the stipulated time. A clause in a policy of life insurance provided: "If a claim be made and rejected and an action or suit be not commenced within three months after such rejection...all benefits under the policy shall be forfeited."[113] The clause was held valid. The reason why clauses of this kind had been allowed was that the extent of loss or damage can be measured with a certain amount of accuracy when the matters were fresh. "Lapse of time in such cases may result in all kinds of claims which are not capable of determination with any amount of exactitude and when memories of men may become rather hazy."[114] The principle was applied to Government contracts also.

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108 *Hirabhai v Manufacturers Life Insurance, 14 Bom LR 741.*

109 *Baroda Spg and Wvg Co Ltdv Satyanarain Marine and Fire Insurance Co, (1914) 38 Bom 344; New Asiatic Insurance Co v BS Coop Bank, AIR 1966 Pat 69, where a clause requiring notice of loss within ten days was upheld.*

110 *Vulcan Insurance Co Ltd v Maharaj Singh, (1976) 1 SCC 943: AIR 1976 SC 287.*

111 *State ofA.P.* v *United Indian Insurance Co Ltd,* (1998) 2 Andh LT 74 DB. To the same effect is the decision in *Sujir Ganesh Nayak & Co* v *National Insurance Co Ltd,* AIR 1996 Ker 49; *Muni Lai* v *Oriental Fire & General Insurance Co Ltd,* (1996) 1 SCC 90, prohibiting prescription of shorter limitation than prescribed by the Limitation Act, 1963.

112 *Continental Construction Ltd* v *Food Corporation of India,* AIR 2003 Del 32, a contract made before the amendment under which the work was also executed before the amendment, was to be governed by the unamended section and was not to be declared void under the new provision.

113 *Girdharilal v Eagle Star Insurance Co, (1923) 27 CWN 955.*

The Supreme Court observed in *Food Corpn of India* v *New India Assurance Co Ltd,* (1994) 3 SCC 324: AIR 1994 SC 1889, that agreements limiting time for assertion of rights are not void, the purpose of providing such time-limit being to put the other party on notice and not to restrict the statutory period of limitation.

A clause in a Government contract provided that the President of India shall be discharged from all liability under the contract unless arbitration or a suit is commenced within six months from the expiration of the period.

The clause was held to be valid.[105] Explaining the distinction between extinction of rights i-id limitation of time, the court said:

The distinction may be a fine one but it is nonetheless a fundamental distinction. The arrangement in the one case takes it for granted that the right as well as the liability exists, but the time for enforcing it is sought to be limited, while in the other case the parties agree that the right as well as liability shall stand extinguished if a particular event occurs.

All these decisions have not to be taken in the light of the amendment of the section in "-997 which provides that a clause providing for extinction or surrender of rights would also be void if the time prescribed is less than the ordinary period of the limitation.

Where the need for reduction of time to sue has already been taken care of by a statute, --ere cannot be further reduction. Under Section 10 of the Carriers Act, 1865 notice of :ss or damage must be given within six months otherwise the right to sue is lost. A con- ract provided that such notice must be given within 30 days of the arrival of the goods. This being contrary to statutory provisions was held to be void.[106]

Absolutely": Partial Restriction as to Jurisdiction

Section 28 will come into play when the restriction imposed upon the right to sue is absolute", in the sense that the parties are wholly precluded from pursuing their legal remedies in the ordinary tribunals. A partial restriction will be valid.[107] An illustration of rartial restriction is the decision of the Calcutta High Court in *Continental Drug Co Ltd Chemoids & Industries Ltd.*[m]

Pritlivi Nath Mulla v *Union of India*, AIR 1962 J&K 15: Approved in *National Insurance Co Ltd* v *Sujir Ganesh Nayak & Co*, (1997) 4 SCC 366: AIR 1997 SC 2049, Claim not allowed after the expiry of prescribed time.

M.G. Bros Lorry Service v Prasad Textiles, (1983) 1 SCC 61: AIR 1984 SC 15.

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Man Roland Druckimachinen Ag v *Multicolour Offset Ltd*, (2004) 7 SCC 447, choice of jurisidction not violative of the Constitution.

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AIR 1955 Cal 161; *Dilip Kumar Ray* v *Tata Finance Ltd*, AIR 2002 Ori 29, hire-purchase agreement specified a place of suit which was otherwise permissible, suit at any other place, not maintainable. *Shriram City Union Finance Corpn Ltd* v *Rama Mishra*, (2002) 9 SCC 613: AIR 2002 SC 2402, it is open to parties to choose any one of the two competent courts to decide their dispute. It is not open to any of the parties to choose a different jurisdiction afterwards. *Hanil Era Textiles Ltd* v *Puromatic Filters (P) Ltd*, (2004) 4 SCC 671: AIR 2004 SC 2432, a part of the cause of action arose at Bombay and a part at Delhi, clause in the agreement provided for proceedings to be taken at Bombay, held not opposed to public policy. Order was placed at Bombay and also accepted there and part payment also made there. Also to the same effect. *New Moga Transport Co* v *United India Insurance Co Ltd*, (2004) 4 SCC 677; *Kotak Mahindra Finance Ltd* v *T. Thomas Education Trust*, (2003), 5 Bom CR 579, no part of the cause of action had arisen at Bombay, a \ provision in the contract that it was subject to Bombay jurisdiction was held to be not valid, the fact that the plaintiff resided or carried on business there, did not have the effect of conferring jurisdiction on the Bombay

The contract in question fell under the concurrent jurisdiction of both the Bombay and Alipore Courts, but the contract provided that 'any dispute arising between the parties, settlement of the same legally or otherwise, will be decided in Bombay. The clause was held to be valid.

Generally three jurisdictions are available: the place of the making of a contract, that of its performance and the defendant's place of business or residence. If out of these three jurisdictions, at least one is left open, it will not offend Section 28, provided that the jurisdiction which is left open is an available jurisdiction under the Civil Procedure Code and is a convenient one, i.e., available at reasonable expense and not inaccessible.[109]

A bilateral agreement under which an option is provided for choosing the jurisdiction of a particular country was held to be not opposed to public policy.[110]

EXCEPTIONS

1. Reference of future disputes to arbitration

The section does not render void a contract by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable. An arbitration clause in an agreement provided that all disputes in connection with the contract shall be submitted to arbitration not later than 28 days after the architect's final certificate. It was held that the right to refer ceased after 28 days. It was alive for that period only.[111]

A provision in a contract that the decision of the conservator of forests shall be final[112] and a clause in a contract of insurance that arbitration would be a condition precedent for

courts. *Nailesh H Doshi* v *0 P Pharma,* (2003) 1 ICC 152 (AP), jurisdiction cannot be conferred on a court by agreement which does not otherwise have it.

109 *EID Parry (India) Ltd* v *Savani Transport,* AIR 1980 AP 30; *Globe Transport Corpn* v *Triveni Engg Works,* (1983) 4 SCC 707*; A.B.C. Laminart (P) Ltd* v *A.P. Agencies,* (1989) 2 SCC 163: AIR 1989 SC 1239; *All Bengal Transport Agency* v *Hari Krishna Banik,* AIR 1983 Gau 7, action allowed at New Gong, the place of business, though Matta, which was highly inconvenient being very remote, was the only jurisdiction allowed by the contract; *Prakash Road Lines (P) Ltd* v *R.M. Gounder,* AIR 1985 Mad 84, action allowed at Madras though the contract provided for Bangalore as exclusive jurisdiction. If the term as to jurisdiction has binding efficacy, the jurisdiction of the other courts would be excluded even though the cause of action might have arisen there, *Angile Insulations* v *Davy Ashmore India Ltd,* (1995) 4 SCC 153.

Nirmala Balagopal v *Venkateswarlu Balagopal,* AIR 2004 Mad 255; *Rhodia Ltd* v *Neon Laboratories Ltd.* AIR 2002 Bom 502 at p 513, the parties agreed that their disputes would be resolved through English courts. They were bound by their agreement. The agreement was executed in a country to which the parties did not belong. Their choice of the law of a third country was held to be binding on them. The court considered its own earlier decision in *National Thermal Power Corpn* v *Singer Co,* (1992) 3 SCC 551: AIR 1993 SC 998: AIR 1993 SCW 131, the agreement provided that the English law was to apply to the interpretation of their agreement. *Hari Shankar Jain v Sonia Gandhi,* (2001) 8 SCC 233: AIR 2001 SC 3689: AIR 2001 SCW 3557, the foreign law would have to be pleaded and proved like any other fact. *Kruz* v *Stella Musical Varanstaltunga Gmbtt,* 1992 Ch 196, agreement on choice of forum.

111 *New Delhi M C v Tirath Ram Ahuja, AIR 1980 Del 185.*

112 *Satish Kumar v Surinder Kumar, AIR 1970 SC 46.*

ay action against the company, have been held to be valid."[3] An arbitration clause re- rains binding even where the contract has ended by breach or otherwise. It is, therefore, iieoretically possible that a contract may come to an end, and the arbitration agreement ~-ay not. It is also possible that the arbitration clause may not be valid but the rest of the ; intract may be valid."[4]

1. Reference of existing questions to arbitration

This exception saves contracts to refer to arbitration questions that have already arisen.[115] ■•"here the parties agreed to refer their disputes to arbitration, they were held to be bound : :• do so. The fact that the arbitrators were situated in a foreign country could not by itself re enough to nullify the arbitration when the parties accepted the arrangement with their ;yes wide open and willingly. More so when the parties appointed arbitrators and partici- rated in proceedings."[6]

Uncertain agreements [S. 29]

29. *Agreements void for uncertainty.*—Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

(a) A agrees to sell to *B* "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(.b) A agrees to sell to *B* one hundred tons of oil of specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut oil only, agrees to sell to *B* "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.

(d) /I agrees to sell to *B* "all the grain in my granary at Ram Nagar". There is no uncertainty to make the agreement void.

(;) A* agrees to sell to *B* "one thousand maunds of rice at a price to be fixed by *C*\ As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(/) A agrees to sell to *B* "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

An interesting illustration is *Guthing* v *Lynn.'*[11] A horse was bought for a certain price coupled with a promise to give £5 more if the horse proved lucky. The agreement was held to be void for uncertainty. The court had no machinery to determine what luck, bad

National Insurance Co v Calcutta Dock Labour Board, AIR 1977 Cal 492. Jawahar Lai

Barman v Union of India, AIR 1962 SC 378: (1962) 3 SCR 769.

See *Union of India* v *Kishorilal Gupta & Bros,* AIR 1959 SC 1362: (1960) 1 SCR 493, where a contract is valid, the arbitration clause is binding.

" Atlas Export Industries v Kotak & Co, (1999) 7 SCC 61.

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\ (1831) 2 B Ad 232.

or good, the horse had brought to the buyer. Such cases have generally arisen in connection with sale of goods, there being uncertainty as to the price.

For example, where goods are sold, the price being payable subject to 'hire purchase terms"[8] or clause[119] or at such price as should be agreed upon between the parties,[120] the agreement in each case was held to be void for uncertainty as to price. Where the price is left to be fixed by a third party, there is no uncertainty and the agreement will be enforceable. Similarly, if the agreement is totally silent as to price, it will be valid, for, in that case, Section 9 of the Sale of Goods Act, 1930 will apply and reasonable price shall be payable.[121]

Agreement to agree or negotiate

An agreement to agree in the future is void, for there is no certainty whether the parties will be able to agree.

The decision of the House of Lords in *May & Butcher* v *R.*[ni] lays down a guiding principle. There was an agreement for the sale of tentage with a stipulation that the price, dates of payment and manner of delivery "shall be agreed upon from time to time". The agreement was held to be devoid of all content.

Preliminary negotiations taking definite shape

Where, on the other hand, the preliminary negotiations have crystallised into a definite shape, the parties can be compelled to contract on those terms. This is borne out by the following two decisions. One of them is that of the House of Lords in *Hillas & Co* v *Arcos Ltd.*[m]

> The contract was to purchase for the year 1930, '22,000 standards of soft wood goods of fair specification' with an option to buy 1,00,000 for the year 1931. When the option for 1931 was sought to be exercised, the seller said that this part of the agreement was not enforceable because it did not specify any particulars.

118 *Scammel* v *Ousten*, 1941 AC 251.

119 *Bishop & Baxter v Anglo-Eastern Trading Co, 1944 KB 12; British Electrical & Associated Industries v Matley Pressing Ltd, (1953) 1 WLR 280.*

120 *May & Butcher* v *R,,* (1934) 2 KB 17. See also *Classic Finance Ltd* v *Grapco Mining & Co Ltd*, AIR 1997 Cal 397, an agreement for arbitration provided for appointment of arbitrator by a appointing authority but the identity of such authority was not indicated nor it was capable of being made out, agreement void.

121 *M.S. Madhusoodhanan* v *Kerala Kaumudi (P) Ltd*, (2004) 9 SCC 204: AIR 2004 SC 909, transfer of shares, consideration left to be determined at a later date, transfer held not void for uncertainty because of S. 9, Sale of Goods Act. *Jharna Majumdar* v *Suprobhat Bhowmick*, (2002) 4 ICC 959 (Cal) uncertain tenancy terms, court cannot undertake to remove such uncertainties. *Govt of Maharashtra v Deokar's Distillery*, (2003) 5 SCC 669: AIR 2003 SC 1216, agreement to increase wages with retrospective effect upheld, being a welfare measure.

122 [1934] 2 KB 17.

123 [1932] All ER Rep 494.

The agreement was, however, allowed to be enforced. The other case is *Mallozzi* v *Carapelli:*[m]

The contract was for the sale of oats and maize to be shipped from Argentina to the West Coast of Italy. The port of discharge was to be agreed between the parties when the ship would cross the Straits of Gibraltar. The seller ordered, without consulting the buyer, the cargo to be discharged at Naples. The buyer suffered two-fold loss, viz., owing to congestion at that port and further transport. The seller contended that that term being left to future agreement the contract was void.

But the court saw no element of uncertainty.

Partial uncertainty: "Capable of being made certain"

An uncertainty about a part of the contract may not have the avoiding effect. In a contract to sell 3000 tons of steel reinforcing bars, the buyer accepted, but subject to "the usual conditions of acceptance only". There being no evidence of any such usual conditions, the buyer was held to be bound by the rest of the contract.[125] Where only the mode of payment of the price was not settled, but everything else was, the Supreme Court regarded the contract to be effective.[126]

An agreement relating to land which was signed by both parties contained the words: "subject to proper contract to be prepared by the vendor's solicitors". The buyer refused to accept the final draft as prepared by the solicitors. He sued for the refund of his advance deposit and succeeded. There was no concluded contract but only an agreement about the parties' future contract.[127] A clause in the assignment of a trade mark providing that the assignment agreement would be renewed by mutual consent at the expiration of the term was held to be not capable of creating any right in either party to have the agreement renewed.[128] An agreement of tenancy stipulating payment of rent on the market basis has been held to be not void.[129]

Lock-out agreement

A lock-out agreement by which one party for good consideration agrees for a specified period of time, not to negotiate with anyone (sale of business and premises in this case) except the other party in relation to the sale of his property, can constitute an enforceable agreement. Such an agreement enables the would be buyer to purchase for a price an exclusive right of negotiations for finalising the deal. However, an agreement to negotiate in

[124] [1975] 1 Lloyd's Rep 229.

[125] *Nicolene Ltd* v *Simmonds,* [1953] 1 QB 543: [1955] 2 WLR 717: [1953] 1 All ER 882.

[126] *Kollipara Sriramulu* v *T. Aawathanarayana,* AIR 1968 SC 1028: (1968) 3 SCR 387. In *Dhanrajamal Gob- indram* v *Shamji Kalidas & Co,* AIR 1961 SC 1285: (1961) 3 SCR 1020 it was held that a sale agreement subject to the usual *force majeure* clause was not void for vagueness.

[127] *Chillinworth* v *Esche,* (1923) 129 LT 808.

[128] *B D A Ltd v State of U.P., AIR 1995 All 277. Remington Rand of India Ltd v Solianlal, AIR 1984 Cal 152.*

[129]

good faith for an unspecified period is not enforceable and nor can a term to that effect be implied in a lock-out agreement for an unspecified period. The vendor would not be able to know when he can withdraw from on-going negotiations.[130]

Option for Renewal of Tenancy

An option for renewal of a tenancy or lease is an enforceable option. But an option clause which provides for renewal of a lease on such terms as may be agreed upon by the parties at the time of renewal would make it invalid and unenforceable for uncertainty.[131]

Wagering Agreements [S. 30]

30. *Agreement by way of wager, void.*—Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294-A of the Indian Penal Code not affected.—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing to which the provisions of Section 294-A of the Indian Penal Code (XLV of 1860) apply.

Definition of "wager"

Section 30 only says that "agreements by way of wager are void". The section does no[1] define 'wager'. The most illustrative definition of 'wager' is that given by HAWKINS J ir *Carlill* v *Carbolic Smoke Ball Co.*[115]

A wagering contract is one by which two persons, professing to hold opposite view touching the issue of a future uncertain event, mutually agree that, dependent on th determination of that event, one shall pay or hand over to him, a sum of money or othe stake; neither of the contracting parties having any other interest in that contract tha the sum or stake he will so win or lose, there being no other real consideration for th making of such contract by either of the parties. It is essential to a wagering contra that each party may under it either win or lose, whether he will win or lose being di pendent on the issue of the event, and, therefore, remaining uncertain until that issue known. If either of the parties may win but cannot lose, it is not a wagering contract

130 *Watford v Miles*, (1992) 1 All ER 453 HL.
131 *Aboobacker Keyi v Govindan Sons, (1990) 2 KLT 551.*

115 [1892] 2 QB 484 at p. 490.

The first thing essential to wager is that the performance of the bargain must depend upon ae determination of an uncertain event. A wager generally contemplates a future event; ru: it may even relate to an event which has already happened in the past, but the parties ire not aware of its result or the time of its happening.[133]

I lutual Chances of Gain or Loss

"he second essential feature is that upon the determination of the contemplated event such party should stand to win or lose. If there are no such mutual chances of gain or loss, rere is no wager. Thus, in *Babasaheb* v *Rajaram:*[m]

> Two wrestlers agreed to play a wrestling match on the condition that the party failing to appear on the day fixed was to forfeit Rs 500 to the opposite party, and the winner was to receive Rs 1125 out of the gate money. The defendant failed to appear in the ring and the plaintiff sued him for Rs 500.

_ -as held that the agreement could not be looked upon as one of wagering in law.

A chit fund does not come within the scope of "Wager".

3 Neither Party to have Control over the Event

Thirdly, neither party should have control over the happening of the event one way or the «ber.

- So other Interest in the Event

—ity. neither party should have any interest in the happening of the event other than the Bus or stake he will win or lose. This is what helps the distinction between a wagering i-rsement and a contract of insurance. Every contract of insurance requires for its validly die existence of insurable interest. An insurance effected without insurable interest is ■ more than a wagering agreement and, therefore, void. "Insurable interest" means the rsi of loss to which the assured is likely to be exposed by the happening of the event E jred against. In a wager, on the other hand, neither party is running any risk of loss i- :ept that which is created by the agreement itself.

" we::ilative Transactions

agreement to settle the difference between the contract price and market price of cer- ■■ goods on a specified day has been repeatedly held to be a wager. As transactions of 7 kind are always expressed in the form of an agreement for sale or purchase of goods, :ften becomes difficult to ascertain the real object of the parties. Yet the intention of

Ue Anson's PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 22nd Edn, 1964 (Ed. by A.G. Guest) p. 301 where the learned writer says that the parties may bet upon the "result of an election which is over, if the parties do not know in whose favour it has gone". *See also* Cheshire and Fifoot, THE LAW OF CONTRACT, 6th Bin. (1964) p. 232, where it is sai4 that "wager may relate to past, present or future events". ^iIR 1931 Bom 264.

the parties is the only deciding factor. The intention of the parties is gathered from the circumstances surrounding their agreement. Thus, where a rice mill owner agreed to sell 1,99,000 bags of rice, worth about a crore of rupees, when his actual capacity was much less, the Privy Council held the agreement to be a wager.[135]

Effects of Wagering Transactions

A wagering agreement being void cannot be enforced in any court of law. Section 30 expressly declares that "no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made". Thus, the amount won on a wager cannot be recovered. In a case before the Calcutta High Court,[136] a promissory note given on a wagering debt was held to be not enforceable. A subsequent substituted agreement for the same consideration was also not enforceable.[137] Similarly, money deposited with a person to enable him to pay to the party winning upon a wager cannot be recovered.

Collateral transactions.—It has been laid down by the Supreme Court, following previous authorities, in *Gherulal Parakh* v *Mahadeodas Maiya,*[lx] that "though a wager is void and unenforceable, it is not forbidden by law". Hence a wagering agreement is not unlawful under Section 23 of the Contract Act, and transactions collateral to it are enforceable. "Accordingly an agent who paid the losses on wagering transactions was allowed to recover the amount paid by him from his principal."[139] The Supreme Court held in *Gherulal Parakh* v *Mahadeodas Maiya*[m] that a partnership to enter into wagering transactions is not illegal under Section 23 of the Contract Act and therefore a partner who paid the losses on wagering transactions could recover proportionate indemnity from his co-partners.

EXCEPTIONS

1. Horse-race

The section does not render void a subscription or contribution, or an agreement to subscribe or contribute, toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards to the winner or winners of any horse-races.

135 *Kong Yee Lone and Co v Lowjee Namjee, (1901) 28 IC 239: 29 Cal 461.*
136 *Badridas Kothari v Meghraj Kothari, AIR 1967 Cal 25.*
137 *Hill v William Hill (Park Lane) Lid, [1949] 2 All ER 452 HL.*
138 AIR 1959 SC 781: 1959 Supp (2) SCR 406: (1959) 2 SCA 342.
139 *Shibo Mai* v *Lachman Das,* ILR (1901) 23 All 165.

2. Crossword competitions 5 [S. 23]

"If skill plays a substantial part in the result and prizes are awarded according to the results of the solution, the competition is not a lottery. Otherwise it is."[141] Thus, literary competitions which involve the application of skill and in which an effort is made to select the best and most skilful competitor, are not wagers.[142] But where prizes depend upon a chance, that is a lottery.[143] The Madhya Pradesh High Court has characterised lotteries as wager. An agreement for payment of prize money on a lottery ticket was held to be coming within the category of wagering agreement as contemplated by Section 30. The court further said that the provisions of neither a Central Act nor that of a State Act controlling the activities relating to lottery would change the basic nature of the transaction. A suit for recovery of the prize money was not allowed. The lottery in question was organised by the Raffle Committee, Indore, for raising funds for a Table Tennis Trust with permission from the State Government.[144]

ILLEGAL AND VOID AGREEMENTS

Unenforceable

The Contract Act draws distinction between an agreement which is only void and the one in which the consideration or object is also unlawful. An illegal agreement is one which is actually forbidden by the law [S. 23]; but a void agreement may not be forbidden, the law may merely say that if it is made, the courts will not enforce it [Ss. 25 to 30]. Thus, every illegal agreement is also void but a void agreement is not necessarily illegal. Another similarity between an illegal and a void agreement is that in either case the main or the primary agreement is unenforceable. Nothing can be recovered under either kind of agreement and if something has been paid it cannot be recovered back. Thus, "a guilty party has no right of action on an illegal contract".[145] Money lent for an illegal purpose is not recoverable.[146] Money paid to procure a seat in a Medical College could not be

[141] Lord HEWART CJ in *Coles* v *Odhams Press*, [1936] 1 KB 416.

[142] *Moore* v *Elphick*, [1945] 2 All ER 155.

[143] *Boucher* v *Rowsell*, [1947] 1 All ER 870.

[144] *Subhash Kumar Manwaniv State of M.P.*, AIR 2000 MP 109. The court cited the decision in *Shekhar Chand Jain* v *Ramnarayan Gend*, (FA No 10 of 1975 decided on 3-2-1977 and short noted in (1977) 2 MP WN 1181. The DB upheld the dismissal of a similar suit based on a lottery ticket by relying on the decision of the Bombay High Court in the case of *Sir Dorabji Jamsetji Tata Ltd* v *Edward P Lance*, (1981) ILR 42 Bom 676: AIR 1917 Bom 138. In that case (*Shekhar Chand Jain)* it was a state lottery and a suit founded on a ticket sold in the lottery was dismissed holding that though the State lottery was not illegal, it was nonetheless in the nature of wager. The court cited the decision of the Supreme Court in *B.R. Enterprises* v *State of U.P.*, (1999) 9 SCC 700: AIR 1999 SC 1867, the Supreme Court refused to recognise lottery as a trade or profession. Even the State sponsored lotteries have the same element of chance as private lotteries, there being no application of skill in either case. The State sponsorship only creates public confidence by ruling out fraud, etc. Imposing a tax on lottery does not give if the status of trade or profession. *Kedar Nat'nMotani* v *PrahladRai*, AIR 1960 SC 213, 217: (1960) 1 SCR 861,870. *CHT Ltd* v *Ward*, [1963] 3 All ER 835: [1965] 2 QB 63 (CA), money lent for betting purposes.

recovered.[147] Where a contract is lawful in its inception, but is performed in an unlawful manner, no recovery may be allowed. In a contract of transport, the lorry was overloaded, which was an offence under the Road Traffic Act and the goods having been damaged during the journey, the consignor was not allowed to recover the loss. His manager had knowledge of the overloading.[116]

EXCEPTIONS

1. *Where Contract still Executory*

Where the contract is still executory in the sense that no part of the illegal purpose has been carried into effect, the money paid or goods delivered under it may be recovered. In a case,[117] a debtor executed a transfer to deceive his creditor, but before any creditor could be deceived, he repented and sought to recover back the property, which he was allowed to do. In subsequent cases the principle of *locus poenitentiae* has been confined to cases where the repentance is not due to the failure of the illegal object, but occurs much before any attempt is made to carry out the illegality. This seems to emerge from *Bigos* v *Bowstead*,[118] where the court did not allow certain share certificates to be recovered which were delivered as a security under an agreement to exchange privately the English currency with Italian, one party having backed out.

2. *Parties not "in Pari Delicto"*

"It is settled law that where the parties are not *in pari delicto* the less guilty may be able to recover money paid, or property transferred, under the contract. The possibility may- arise in three situations: Firstly, the contract may be of a kind made illegal by a statute in the interest of a particular class of persons of whom the plaintiff is one. Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property, or to refuse to account for money received, on the grounds of an illegal transaction."[119] One illustration is the decision of the Privy Council in *Mistry Amar Singh* v *Kulubya*,[152] Certain land was given to a non- African under a lease in violation of a law for the protection of Africans in Uganda. The action was by the African party for recovery of rent and possession. The other part} pleaded illegality. But the action was allowed.

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[116] *Ahsmore, Benson Pease Ltd vAV Dawson Ltd, [1973] 2 All ER 856: [1973] 1 WLR 828.*

[145] *Ibid.*

[118] [1951] 1 All ER 92 QB.

[119] *Sita Ram* v *Radha Bai*, AIR 1968 SC 534: (1968) 1 SCR 805.

Transactions arising out of an agreement to do an illegal act, if they are such that when taken separately from the illegal act, they would be valid, they would remain valid and enforceable notwithstanding the illegality of the agreement.[153]

Machine tools delivered under an illegal sale were allowed to be recovered. The court of appeal laid down that a man's right to his property will be enforced as against a person in possession even if he obtained possession under an unlawful agreement.[154] The Supreme Court of India applied this principle in *Surasaibalini Debi* v *Phanindrci Mohan Majumdar,*[155] where a person was allowed to recover possession of his property and business which he had made over to his brother-in-law for evasion of taxes.

When a contract is repudiated on account of its illegality, the innocent party may recover compensation "proportionate to the amount of work done". In *Clay* v *Yates*[156], a book having been printed, the printer refused to print the dedication because it was libellous, it was held that the printer could recover on *quantum meruit* basis for the work done by him. The Supreme Court has emphasised that a landlord and his tenant cannot be regarded as on par in all respects and, therefore, where the tenant had to pay Rs 2000 to the landlord to secure possession, the landlord's assurance that the amount would be adjusted towards rent was binding on him.[157]

-. Collateral Transactions

The only material difference between an illegal and void agreement relates to their effect upon the collateral transactions. A collateral transaction means a transaction subsidiary to :le main transaction. For example, where money is given to a person to enable him to pay a wagering debt, the wager is the main transaction and the loan is subsidiary to it. If the main transaction is illegal, for example, smuggling, a collateral transaction like money oven to enable a person to smuggle, will also be tainted with the same illegality and the money will be irrecoverable.[158] But if the main transaction is only void, its collateral ransactions will remain enforceable.

5. Severance

"**-••**"here an agreement is only partly illegal, the court will enforce the part which is not Tegal provided that it is severable from the rest of the agreement. A contract to provide r.: ney to a person to enable him to establish his share in an estate in return for a promise n pay back the money and also a share in the amount that would be recovered from the

~ *B.O.I. Finance Ltd* v *Custodian,* (1997) 10 SCC 488: AIR 1997 SC 1952: (1997) 89 Comp Cas 74. _ *Bowmakens Ltd* v *Barnet Instruments Lid,* [1944] 2 All ER 579: 1945 KB 65 CA. \IR 1965 SC 1364: (1965) 1 SCR 861.

?56) 25 LJ Ex 237: (1856) I H & N 73. **N** *tdSalimuddin* v *Misri Lai,* (1986) 2 SCC 378: AIR 1986 SC 1019.

'- -'-*Ira Sreenivasa Rao* v *Korrapati Raja Rama Mohana Rao,* AIR 1952 Mad 579, money given for an real marriage not recoverable.

estate has been held by the Supreme Court to be a composite contract for one consideration and the two types of payment were not severable.[120]

Where the contract is severable, it would make no difference that the parties had knowledge of the fact that their contract contained an illegal element:

> A house was leased out on rent subject to the condition that the lessee, in addition to paying the controlled rent, would also purchase certain chattels from the lessor for an agreed price. The price, being much more than the natural value of the goods, the transaction in essence amounted to paying a premium for the possession of the house. The lessee occupied the premises but offered to pay only the natural price of the goods.

The lessor sought eviction on the ground that the whole agreement was unlawful. The court did not agree with him. The arrangement had two aspects, namely, the agreement of lease and the promise to pay a premium. The latter part was unlawful and it being severable from the rest, the lease was valid.[121]

In another case,[122] a husband promised to his wife separate maintenance, she agreeing on her part not to sue him as long as he paid, nor to sue for divorce even if he lived in adultery. The husband defaulted with the payments and contended, as against the wife's action, that, owing to the exoneration for adultery, the whole agreement was unlawful. The court allowed the wife's action saying that only that clause of the agreement was unlawful by which the husband had bought his freedom from the consequences of adultery.[123]

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[120] *Rattan Chand Hira Chand v Askar Nawaz Jung, (1991) 3 SCC 67.*

[121] *Ailion* v *Spiekermann*, (1976) 2 WLR 556: [1976] 1 All ER 497.

[122] *Goodinson* v *Goodinson*, [1954] 2 All ER 255: [1954] 2 QB 118: [1954] 2 WLR 1121.

[123] See also *Bennett* v *Bennett*, 1952 KB 249: [1952] 1 All ER 413 (CA).

3. *Where recovery possible without relying on illegal agreement*

Discharge of Contract

5

Modes of discharge

AFTER the formation of a valid contract, the next stage is reached, namely, the fulfilment of the object the parties had in mind. When the object is fulfilled the liability of either party under the contract comes to an end. The contract is then said to be discharged. But "performance" is not the only way in which a contract is discharged. A contract may be discharged:

(1) By Performance [Ss. 37-67]; (2) By Impossibility of Performance [S. 56]; (3) By Agreement [Ss. 62-67]; and (4) By Breach [S. 39],

DISCHARGE BY PERFORMANCE

Performance of contingent contracts

The expression "contingent contracts" is defined in Section 31 of the Contract Act:

> **31. "*Contingent contract" defined.*—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.**

Illustration

A contracts to pay *B* Rs 10,000 if fi's house is burnt. This a contingent contract.

It is a sort of a conditional contract and the condition is of uncertain nature. A contract which is subject to a certain or an absolute type of condition cannot be regarded as a contingent contract. A contract, for example, to pay a sum of money on the expiry of a time or on death of a person is not a contingent contract because these events are of a certain nature. The time or the person in question will definitely expire and the money will become payable. When the condition is of uncertain nature, then only the contract can be regarded as truly contingent. For example, a contract to pay a sum of money on the destruction of a premises by fire, is a contingent contract, for that contingency may or

may not happen. From this point of view, all contracts of insurance, except life insurance, are contingent contracts.[124]

The section emphasises that the contingency contemplated by the contract must be collateral to the contract. It means that a contract has already arisen or a subsisting contract is there, but its performance cannot be demanded unless the contemplated event happens or does not happen. Such a contract has to be distinguished from a proposal which does not result in a contract unless the condition is first fulfilled. For example, an offer to pay a sum of money on the discovery of a missing dog is not a contract at all. It becomes a contract only when the dog is searched out and then it is no more contingent. On the other hand, a contract to pay a sum of money on the loss of a ship is a contingent contract. The contract is already there and is not to arise on loss, but the performance can be demanded only on the loss of the ship. A contract to buy land which is under dispute made with a party to the dispute and to become operative if he wins the case, is a contingent contract, its performance being wholly dependent upon the result of the litigation.

A contract will be no less contingent where the happening or non-happening of the contingency depends upon the will of a party. A situation of this kind was before the Madras High Court in *Secy of State for India* v *A.J. Arathoon.*[125] The case involved supply of timber to a Government Department. The timber was to be approved by the superintendent of a factory. He did not approve the timber actually supplied. The supplier sued the Government for breach of contract contending that the timber corresponded with its description in the contract and, therefore, it should have been approved. The fact of approval being collateral to the performance of the contract, its performance could not be demanded till such approval.

Where enforcement depends upon the happening of an event [S. 32]

32. ***Enforcement of contracts contingent on an event happening.*****—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.**

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with *B* to buy *B*'s horse if *A* survives *C.* This contract cannot be enforced by law unless and until Cdies inA's lifetime.

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[124] *ChandulalHarjivandas* v C/7", AIR 1967 SC 816, 818: (1967) 1 SCR 921, 925: 63 ITR 627; *Valiammal Ran- garao* v *Muthukumaraswamy,* (1982) 3 SCC 508. Commission payable on success of litigation, this part was held to be a contingent contract. *N. Peddanna Ogeti Balayya* v *Katta V. Srinivasayya Setti Sons,* AIR 1954 SC 26. A contract of life insurance is also a contingent contract to a certain extent. *CEPT* v *Ruby General Insurance Co Ltd,* AIR 1957 SC 669: 1957 SCR 1002; *Chandulal Harjivandas* v *CIT,* AIR 1967 SC 816: (1967) 1 SCR 921: 63 ITR 627.

[125] (1879) 5 Mad 173.

Illustration

A agrees to pay *B* a sum of money if *B* marries *C. C* marries *D.* The marriage of *B* to *C* must now be considered impossible although it is possible that *D* may die, and that C may afterwards marry *B.*

When the event for which the parties are waiting is linked with the future conduct of a person, i.e., the contract is enforceable if a certain person is to act in a certain way, the event shall be considered to have become impossible if that person does something which makes it impossible that he should act in that way in any definite time or without further contingencies being fulfilled. For example, in *Frost* v *Knight* the defendant promised to marry the plaintiff on the death of his father. While the father was still alive he married another woman. It was held that it had become impossible that he should marry the plaintiff and she was entitled to sue him for the breach of the contract.

Time-bound contingency

35. *When contracts become void which are contingent on happening of specified event within fixed time.*—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

***When contracts may be enforced, which are contingent on specified event not happening within fixed time.*—Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.**

Illustrations

(a) A promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(,b) A promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Impossible events

36. *Agreements contingent on impossible events, void.*—Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay *B* 1000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay *B* 1000 rupees if *B* will marry A's daughter *C. C* was dead at the time of the agreement. The agreement is void.

Parties' duty to perform or offer to perform

Section 37 lays down the obligation to perform.

> **37. *Obligation of parties to contracts.*—The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.**
>
> **Promises bind the representative of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.**
>
> *Illustrations*
>
> *(a) A* promises to deliver goods to *B* on a certain day on payment of Rs 1,000. *A* dies before that day. A's representatives are bound to deliver the goods to *B,* and *B* is bound to pay Rs 1,000 to A's representatives.
>
> *(,b) A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by A's representatives or by *B.*

Section 37 says that "the parties to a contract must either perform or offer to perform, their respective promises...." Thus each party is bound to perform his obligation under the contract, unless the performance is dispensed with or excused under the provisions of the Contract Act, or of any other law.[7]

The promisor must offer to perform his obligation under the contract to the promisee. The offer is called "tender of performance". It is then for the promisee to accept the performance. If he does not accept, "the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract".[8] This is the effect of Section 38 which is as follows:

Syndicate Bank v *R. Veeranna,* (2003) 2 SCC 15: (2003) 5 Kar LJ 1. had the right under the agreement to vary interest upwards up to a certain percentage. The exercise of this power did not require that the borrower should have been put on notice. *United India Insurance Co Ltd* v *Kiran Combers & Spinners,* (2007) I SCC 368, the insurer having certified that the insured building was a first class construction, it was held that the insurer could not be given the benefit of any structural defect not noticed by it. A party who promised to sell property on obtaining permission from Income Tax Authorities was not excused from offering performance by saying that he could not manage the clearance certificate. The contract remained alive and enforceable. The buyer had been put in possession of a part of the premises. The seller could not be allowed to take advantage of his own wrong. *Travancore Rubber & Tea Co Ltd* v *CIT,* (2000) 3 SCC 715: AIR 2000 SC 1980: (2000) 243 ITR 158. The obligation of the parties to perform continues till the contract is determined according to its terms. *Bihar SEB* v *Umi Special Steel Ltd,* (2000) 8 SCC 560: G. *Anbalagan vT.N. Civil Supplies Corpn Ltd,* (2004) 2 Banking Cases 569 (Mad) the contractor was willing to perform and his ability was not disputed. He was no doubt obliged to perform what he had undertaken to do under the contract. *Jai Durga Finvest (P) Ltd* v *State ofHaryana.* (2004) 3 SCC 381: AIR 2004 SC 1484 the contract under the mining lease could not be performed because of certain acts and omissions on the part of the Government; forfeiture of security money not allowed. *Food Corpn of India* v *Surana Commercial Co,* (2003) 8 SCC 636, where the obli gation of the contracting party was conversion of *arhar* (whole pulse) into *dal* and the work was completed and accepted by the other party, obligation of the contractor came to an end. *United India Insurance Co Ltdv Pushpalaya Printers,* (2004) 3 SCC 694: AIR 2004 SC 1700: (2004) 2 ICC 770 (SC) insurance cover against damage to building by "impact", damage was caused by a bulldozer which passed close-by but without actually touching the building, held, it was damage by impact.

Offer of performance

38. *Effect of refusal to accept offer of performance.*—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions—

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to *B* at his warehouse, on the 1st ofMarch, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, /t must bring the cotton to *B's* warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

The refusal to accept a tender of performance amounts to breach. The tender of performance, in order to have this effect, must fulfil the following conditions:

1. Offer must be unconditional [S. 38(1)]

The tender of performance must be unconditional. A tender becomes conditional when it is not in accordance with the terms of the contract. For example, a tender of an amount less than what is due under the contract is not an effective tender.

2. Proper time and place and ability to do the whole [S. 38(2)]

The tender must be made at proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. In *Startup* v *MacdonalcP*.

The defendant bought of the plaintiff ten tonnes of linseed oil to be delivered within the last 14 days of the month of March. The plaintiff tendered on the last of the four

teen days at 9 o'clock at night. The defendant refused to accept owing to the lateness of the hour.

He was held liable for the breach as the jury found that, though the hour was unreasonable, yet there was time for the defendant to have taken in and weighed the goods before midnight. He should, therefore, have accepted the tender and "then no doubt, the contract would have been literally performed".

In the case of an obligation to pay a debt, the mere fact that the payment was tendered and refused does not discharge the debtor from his liability to pay the debt.[10] This principle of old standing has been endorsed by the Supreme Court in a case[11] where the debtor had the right on paying back his loan to recover vacant possession of his premises, and his tender having been refused, it was held that he was not discharged from his obligation to pay before he could recover his possession.

By whom contract should be performed [S. 40]

40. *Person by whom promise is to be performed.*—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it.

Illustrations

(ia) A promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B* or by causing it to be paid to *B* by another; and if A dies before the time appointed for payment, his representatives must perform the promise or employ some proper person to do so.

(b) A promises to paint a picture for *B. A* must perform this promise personally.

If there is something in the contract to show that personal performance was intended, then the contract will have to be performed by the promisor himself. Ordinarily, however, the rule is that "promises bind the representatives of the promisors in case of the death of such promisors before performance".

41. *Effect of accepting performance from third person.*—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

If there is something in the contract to show that personal performance was intended, then the contract will have to be performed by the promisor himself. Sometimes the nature of the promise is an indication by itself that the promisor must perform personally. This usually happens in cases where the use of the personal skill of the promisor is involved, for instance, a contract to paint, sing or marry and contracts of technical nature.

Dixon v *Clark,* (1847) 16 & LJC-R 237: 136 ER 919. *Vidya Vati* v *Devi Das,* (1977) 1 SCC 293.

In such cases the death of the promisor puts an end to the contract. The promise cannot be enforced against his legal representatives, neither can they enforce the promise.

Ordinarily, however, the rule as laid down in Section 37 is that "promises bind the representatives of the promisors in case of the death of such promisors before performance". Thus, unless a contrary intention appears from the contract, a promise can be enforced against and also by the legal representatives of the seller or the buyer. There is nothing personal in the sale of goods or payment of price.[126]

"There is some English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor. In India, however, the words of Section 41 of the Contract Act leave no room for doubt that when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor."'[3]

PERFORMANCE OF JOINT PROMISES

According to English law, if one of the several joint promisors dies, the rights and liabilities under the contract devolve upon the surviving joint promisors. Section 42 of the Contract Act, lays down a different rule:

> **42. *Devolution of joint liabilities.*—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representatives jointly with the survivor or survivors and, after death of the last survivor, the representatives of all jointly, must fulfil the promise.**

According to this section joint promisors must, during their joint lives, fulfil the promise. And if any of them dies, his representative must, jointly with the surviving promisors, fulfil the promise and so on. On the death of the last survivor, the representatives of all of them must fulfil the promise. But this is subject to any private arrangement between the parties. They may expressly or impliedly prescribe a different rule.

Another important aspect of joint promises is codified in Section 43.

> **43. *Any one of joint promisors may be compelled to perform.*—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any (one or more) of such joint promisors to perform the whole of the promise.**

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[126] *Yaman* v *Changi*, (1925) 49 Bom 862: 27 Bom LR 1261. *A.R. Venkatasami Naicker* v *A.R.V. Jaganathan*, (1998) 1 Mad LJ 600, suit for specific performance of a contract of sale, the legal representatives of the defendant, (who died during pendency), could be brought on record unless there was contrary intention in the contract. *Cm Bank NA* v *Standard Chartered Bank*, (2004) 1 SCC 12: (2004) 2 Bom CR 540: AIR 2003 SC 4630: (2003) 117 Comp Cas 554 the performance must be of the original contract unless there is proof of its substitution.

***Each promisor may compel contribution.*—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.**

***Sharing of loss by default in contribution.*—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.**

***Explanation.*—Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.**

Illustrations

(a) *A, B* and C jointly promise to pay *D* 3,000 rupees. *D* may compel either *A* or *B* or C to pay him 3,000 rupees.

(b) *A, B* and C jointly promise to pay *D* the sum of 3,000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A*'s estate, and 1,250 rupees from *B.*

(c) *A. B* and *C* are under a joint promise to pay *D* 3,000 rupees. C is unable to pay anything and *A* is compelled to pay the whole. *A* is entitled to receive 1,500 rupees from *B.*

(d) *A, B* and *C* are under a joint promise to pay *D* 3,000 rupees. *A* and *B* being only sureties for *C. C* fails to pay. A and *B* are compelled to pay the whole sum. They are entitled to recover it from C.

This section lays down three rules:

Firstly, when a joint promise is made, and there is no express agreement to the contrary, the promisee may compel any one or more of the joint promisors to perform the whole of the promise. "*A, B* and C jointly promise to pay *D* 3000 rupees. *D* may compel either *A* or *B* or C to pay him 3000 rupees."[4]

Secondly, a joint promisor who has been compelled to perform the whole of the promise, may require the other joint promisors to make an equal contribution to the performance of the promise, unless a different intention appears from the agreement. A, *B* and C are under a joint promise to pay *D* 3000 rupees. *D* recovers the whole amount from A. *A* may require *B* and C to make equal contributions.

Thirdly, if any one of the promisors makes a default in such contribution, the remaining joint promisors must bear the deficiency in equal shares. A, *B* and C are under a joint promise to pay *D* 3000 rupees, C is unable to pay anything. The deficiency must be shared by A and *B* equally. If C's estate is able to pay one-half of his share, the balance must be made up by A and *B* in equal proportions.

Section 43 allows an action to be brought against any one of the joint promisors without impleading the others as defendants. Suppose now that the creditor sues only one joint promisor, can he subsequently sue the others? According to the English law he cannot, but according to Indian Law he can subsequently sue the others. The creditor is also given the right to release anyone of the joint promisors from his liability and this does not discharge the others from their liabilities.

> **44.** *Effect of release of one joint promisor.*—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

This also marks a departure from the English Common Law, according to which a discharge of one joint promisor amounts to a discharge of all, unless the creditor expressly preserves his rights against them.

Joint promisees [S. 45]

Devolution of joint rights is governed by almost the same kind of principles as the devolution of joint liabilities. When a promise is made to more than one person jointly, the right to claim performance rests with all of them jointly. If anyone of them dies, it rests with his legal representatives jointly, with the survivors and after the death of the last survivor, with the representatives of all jointly.

> **45.** *Devolution of joint rights.*—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.
>
> *Illustration*
>
> *A,* in consideration of 5000 rupees, lent to him by *B* and C, promises *B* and Ojointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B*'s representative jointly with C during C's life, and after the death of C. with the representatives of *B* and C jointly.

The joint promisee and not the legatee under a will was held entitled to the amount payable under a joint term deposit.[127]

Either or survivor savings bank account

Either or survivor mandate was withdrawn because of strained relations between husband and wife. After the husband's death the bank refused to allow the wife to operate the account without succession certificate. The court said that if the legal heirs consented on affidavit to let their mother have the proceeds of the account, the bank should allow

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[127] *Abha Sinha v Indian Explosives Ltd, (2003) 2 ICC 157 (Cal).*

it. Banks are supposed to have human face and also to adopt a consumer friendly approach.[16]

Time and place for performance [Ss. 46-50]

Where the place for performance is fixed in the promise, the performance must be offered at that place. Where, however, no place is fixed and the promisor has undertaken to perform without application by the promisee, "the promise should be performed at the place where it ought to be performed".[17] These principles are laid down in Sections 46-50, which are given below:

46. *Time for performance of promise, where no application is to be made and no time is specified.*—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

***Explanation.*—The question "what is a reasonable time" is in each particular case, a question of fact.**

47. *Time and place for performance of promise, where time is specified and no application to be made.*—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at *B's* warehouse on the first January. On that day *A* brings the goods to *B*'s warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

When a promise has to be performed within a certain time, it must be performed on any day before the lapse of that time.[18]

48. *Application for performance on certain day to be at proper time and place.*—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

***Explanation.*—The question "what is a proper time and place" is in each particular case, a question of fact.**

49. *Place for performance of promise, where no application to be made and no place fixed for performance.*—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

7 Shanti Devi v Bhojpur Rohtas Gramlfi Bank, AIR 2007 DOC 102 NCC.

17* *Vargliese Paul* v *Narayanan Naik,* (1999) 2 Ker LT 571, no separate consideration has to be shown in such cases as promises constitute consideration for each other.

Saraswat Trading Agency v Union of India, (2002) l ICC 1038.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Debtor to seek his creditor

The common law is that the debtor should seek his creditor and pay him. In keeping with that rule the section lays down duty of the promisor to apply to his promisee for fixing a reasonable place for performance. Under the Negotiable Instruments Act, 1881, it is the duty of the payee (promisee) to present the instrument for payment.[128]

50. *Performance in manner or at time prescribed or sanctioned by promisee.*—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) B owes *A* 2000 rupees. *A* desires *B* to pay the amount to A's account with C, a banker. *B,* who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by *C.* Afterwards, and before A knows of the transfer, C fails. There has been a good payment by *B.*

(.*b*) A and *B* are mutually indebted. A and *B* settle an account by setting off one item against another, and *B* pays A the balance found to be due from him upon such settlement. This amounts to payment by A and *B* respectively, of the sums which they owed to each other.

(c) A owes S 2000 rupees. *B* accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires *B,* who owes him Rs 100, to send him a note for Rs 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to A.

The first principle as laid down in Section 46 is that where the promisor is to perform without any application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. The Explanation to the section says that "what is a reasonable time" is, in each particular case, a question of fact.

The second general principle is stated in Section 47. Where the promisor has undertaken to perform without any application from the promisee, but the day of performance is fixed, the promisor may perform it during the usual business hours of the day and at the place where such promise ought to be performed. Since only the day of performance is stated but not the place, the promise should be performed at the place where its nature demands, that is, where it ought to be performed. In a promise, for example, to deliver goods at the buyer's warehouse, the tender of performance must be made at that place. The promisor should bring the goods at that place during the usual business hours. If he brings the goods after the business hours and they are not received, it cannot be said that the promise has been performed.

[128] *Jose Paul* v *Jose*, (2002) 2 Ker LT 540 (Ker).

The third general principle is to be found in Section 48. Where the day of performance is fixed, but the promisor has not to perform without application from the promisee, it is the duty of the promisee to apply for performance at proper place and within the usual business hours. The explanation to the section says that "what is a proper time and place" is a question of fact in each case.

The fourth general principle is in Section 49. When a promise is to be performed without any application by the promisee, and no place is fixed for performance, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. The illustration appended to the section supposes a case in which there is a contract to supply a quantity of jute on a fixed day. The seller must apply to the buyer to appoint a reasonable place for the performance of the promise and then to perform the promise at such place.

The next general principle is stated in Section 50. The section leaves the whole question as to the time and manner of performance upon the choice of the promisee. It says that the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. The illustrations appended to the section deserve to be noted. If a person owes another a sum of money and the creditor tells him to pay the amount into his account in a bank, which is done. Afterwards, before the creditor comes to know of the fact of payment, the bank fails, so that the creditor does not get the benefit of the payment. Even so the debtor is discharged from his liability. Where two persons are mutually indebted and they agree to set off their debts against each other, the balance being paid off by one to the other. Both stand discharged from their respective liability. Where the creditor accepts goods from the debtor in payment, the debtor stands discharged to the extent of the value of the goods. Where the creditor desires the debtor to send the money by post, the debtor will be discharged as soon as he posts a properly addressed and stamped letter containing the money.[20]

Performance of reciprocal promises [Ss. 51-54]

When a contract consists of an exchange of promises, they are called reciprocal promises. When such promises have to be simultaneously performed, the promisor is not bound to perform unless the promisee is ready and willing to perform his promise. This principle is laid down in Section 51.

51. ***Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.*—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.**

Illustrations

(a) A and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

[20] *Canara Bank* v *Vijay Kumar Arora*, AIR 2004 Del 304, encashment of draft by discounting it, discounting bank became owner, loss of the draft in transit could not be loss of the original owner.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(*b*) A and *B* contract that A shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

The order in which reciprocal promises are to be performed is provided in Section 52.

52. *Order of performance of reciprocal promises.*—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) *A* and *B* contract that A shall build a house for *B* for a fixed price. A'J promise to build the house must be performed before *B's* promise to pay for it.

(b) *A* and *B* contract that A shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

The defendant took a lease of land from the Municipality of a town on condition that he pays Rs 630 for levelling charges and possession was to be delivered after levelling. The question arose whether the sum was to be paid before or after the levelling. The agreement was silent on the point.[21] And, therefore, the court held that "in the ordinary course of business work is not usually paid for before it is done.

Section 53 lays down the principle that where one of the parties to reciprocal promises prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract. The section is as follows:

53. *Liability of party preventing event on which contract is to take effect.*—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

21 *Hashman v Lucknow Improvement Trust, (1927) 101 IC 847.*

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees. *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B*\ and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

The same result would follow where the obstruction to performance is caused by the inadequacy of the machinery or material supplied by one of the parties. In a case before the Supreme Court,[129] a bidder to whom a coal mine was knocked down was allowed to have refund of his deposit when the coal commissioner refused to permit him to take the coal to U.P., any such restriction being not present in the terms of the auction.

Effect of one Party's Default

Where the nature of the reciprocal promises is such that one cannot be performed or its performance cannot be claimed unless the other party performs his promise in the first place, then if the latter fails to perform, he cannot claim performance from the other, but must make compensation to him for loss. Section 54 incorporates this principle.

54. ***Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.*—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.**

Illustrations

(a) *A* hires B's ship to take in and convey, from Calcutta to Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B's* promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(b) *A* contracts with *B* to execute certain builders' work for a fixed price, *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by non-performance of the contract.

(c) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A's* promise to deliver need not be performed, and *B* must make compensation.

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[129] *Har Prasad Choubey* v *Union of India*, (1973) 2 SCC 746. *Uberoi Mohinder Singh* v *State of Haryana*, (1991) 2 SCC 362, in a contract for Yamuna quarrying, the contractor was prevented from performing his part because of the failure of the Flood Control Department to give no objection, held, the contractor was entitled to refund of his deposit money.

(id) A promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B's* promise to pay need not be performed and *A* must make compensation.

An illustration is the Supreme Court decision in *Natliulal* v *PhoolchandP*

The plaintiff was the owner of a ginning factory constructed on agricultural land nominally held in the name of his brother. He sold the factory to the defendant who paid half the price at once and was put in possession, the balance being payable on a fixed date. The buyer defaulted in paying up on that date and the seller rescinded the contract and brought an action for possession.

SHAH J held that the nature of the contract required that the seller should have his own name recorded as the owner and obtain permission of the State Government for transfer of the agricultural land before he could claim the final payment. So long as the seller did not carry out his part of the contract, the buyer could not be called upon to pay the balance of the price.

58. *Alternative promise, one branch being illegal.*—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

TIME FOR PERFORMANCE [S. 55]

Sometimes the parties to a contract specify the time for its performance. Ordinarily it is expected that either party will perform his obligation at the stipulated time. But if one of them fails to do so, the question arises what is the effect upon the contract. Section 55 provides the answer.

55. *Effect of failure to perform at fixed time, a contract in which time is essential.*—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

***Effect of such failure when time is not essential.*—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable,**

by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

***Effect of acceptance of performance at time other than that agreed upon.*—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the nonperformance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.**

Factors which make time of essence

According to the section "if the intention of the parties was that time should be of the essence of the contract", then a failure to perform at the agreed time renders the contract voidable at the option of the opposite party. Time is generally considered to be of the essence of the contract in the following three cases:

(1) Where the parties have expressly agreed to treat it as of the essence of the contract; (2) where delay operates as an injury; (3) where the nature and necessity of the contract require it to be so construed, for example, where a party asks for extension of time for performance.

The well-known illustration is *Budhra Chand* v *Betts:*[130]

> The plaintiff stipulated with the defendant to engage his elephant for the purpose of *Kheda* operations (to capture wild elephants). The contract provided that the elephant would be delivered on the 1st October, 1910; but the defendant obtained an extension of time till the 6th October and yet did not deliver the elephant till the 11th. The plaintiff refused to accept the elephant and sued for damages for the breach.

He was held entitled to recover as the parties intended that time should be of the essence of the contract. "This conclusion is confirmed by the circumstance that the defendant obtained an extension of the time; if the time were not of the essence of the contract, he need not have asked for extension of time."

Time is of essence in commercial transactions

The matter depends upon the intention of the parties. Even where "a specific date is mentioned for the completion of the contract, one has not to look at the letter but at the substance of the agreement in order to ascertain the real intention of the parties". "In commercial contracts time is ordinarily of the essence of the contract."[131] In *Mahabir Prasad Rungta* v *Durga Datta*[132] the Supreme Court held on the facts of the case that time of payment was of the essence of the contract. In this case the contract was for the transport of coal from a colliery to a railway station. The colliery owner was to keep the roads usable,

[24] (1915) 22 Cal LJ 566: 33 IC 347.

[25] *China Cotton Exporters v Beharilal Ramcliaran Cotton Mills Ltd, AIR 1961 SC 1295.*

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so as to enable him to pay, insurer could not deny liability under the policy. The result would have been dif ferent if due information had been sent to the proposer. That was the case in *National Insurance Co Ltd* v *Seema Malhotra*, (2001) 3 SCC 151: AIR 2001 SC 1197.

[132] AIR 1961 SC 990: (1961) 3 SCR 639, 645.

to arrange for petrol and to pay on the 10th of every month. These dates, including the time of payment, were considered to be crucial to performance giving the transporter the right to rescind on the colliery's failure in those respects.

Construction contracts

Time schedule in a construction contract is likely to be of the essence because construction is a commercial service. Where 24 months' time was given to the builder with a stipulation that if he failed to deliver within the stated time, he would pay 10% per annum of the purchase price measured by the period of delay, time was held to be of the essence entitling recovery of the stipulated amount.[133]

Sale transactions

In a contract of sale of goods, the time of shipment is of the essence. The leading Supreme Court authority is *China Cotton Exporters* v *Beharilal Ramcharan Cotton Mills Ltd.*[134]*

> The shipment time was 'October/November, 1950', and it was added: 'This contract is subject to import licence and therefore the shipment date is not guaranteed.'

Even so the court held that the shipment date must be regarded as that of the essence and the only effect of the above proviso was that to the extent the delay in obtaining import licence might stand in the way of keeping the shipment date, the shipment date was not guaranteed, but with this exception, shipment during October/November, 1950 was guaranteed.

Time for reporting

A singer agreed to perform at a theatre for a certain season and to be present at least six days before the commencement of the engagement. But he reported only two days before. The theatre owner sought to put an end to the contract. But he was not allowed to do so. It was only a breach of a warranty and not of a term or condition which touched the substance of the contract. Hence, the plaintiff could only recover compensation for loss, if any, suffered by him.[135]

Right to seek extension of time

An application for extension of time does not take effect unless accepted and the fact that an extension for a week was offered would not amount to a waiver within the meaning of Section 63 of the right to insist upon the stipulated time. A contract specifying the time-limit for supply also provided that there would be automatic termination of purchase order if the time-limit was not kept. The supplier lost the opportunity by not coming up

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[133] *Chye Fook v Teh Teng Seng Realty, (1989) 1 Mai LJ 308 IPOH HC.*

[134] AIR 1961 SC 1295.

[135] *Bettini* v *Gye*, [1874-80] All ER Rep 242.

Sale of shares

A transaction for sale of shares is of commercial nature. The time of completion of the transaction is likely to be an important factor. Thus where time would have been of the essence if specified, there one party can make time of the essence by serving a reasonable notice upon the other to complete.[35]

Non-commercial matters

"In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract."[36] Accordingly, "in a contract for the sale of immovable property, time would not be regarded as of the essence unless it is shown that the parties intended so".[37]

Consequences of failure

Section 55 further declares that "if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such things at or before the specified time". It means that the innocent party will have to accept performance even if it is delayed. He does not have the right to reject. But. he may sue the other party for any loss caused by the delay. Even where time is of the essence, the injured party may at his option accept the delayed performance. If he does so he cannot afterwards recover compensation for the delay "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".[38] Delay by itself does not put an end to the contract.[39]

IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION

Initial impossibility [S. 56]

Section 56 first lays down the simple principle that "an agreement to do an act impossible in itself is void". For example, an agreement to discover a treasure by magic, being impossible of performance, is void.

Subsequent impossibility [S. 56]

The second paragraph of Section 56 lays down the effect of subsequent impossibility of performance. Sometimes the performance of a contract is quite possible when it is made, but some event subsequently happens which renders its performance impossible or unlawful. In either case the contract becomes void.

[35] *British and Commonwealth Holding pic v Quadrex Holdings, (1989) 3 All ER 492 CA.*

[36] *Lucknow Automobiles v Replacement Parts Co, AIR 1940 Oudh 445.*

[37] *Mulla Badruddin v Tuf ail Ahmed, AIR 1963 MP 31.*

[38] *State of A.P. v Associated Engg Enterprises, AIR 1990 AP 294.*

[39] *Jain Mills and Electrical Stores v State of Orissa, AIR 1991 On 117.*

56. ***Agreement to do impossible act.*****—An agreement to do an act impossible in itself is void.**

Contract to do act afterwards becoming impossible or unlawful.**—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.**

Compensation for loss through non-performance of act known to be impossible or unlawful.**—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.**

Illustrations

(a) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(b) A and *B* contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A contracts to marry *B,* being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to *B* for the loss caused to her by the non-performance of the promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at the theatre for six months in consideration of a sum paid in advance by *B.* On several occasions A is too ill to act. The contract to act on those occasions becomes void.

In the first well-known English case of *Paradine* v *Jane*[40] it was pointed out that subsequent happenings should not affect a contract already made.

There the defendant had taken an estate on lease from the plaintiffs. The defendant was dispossessed of it by alien enemies for some time and, therefore, refused to pay the rent for the period of dispossession.

It was held that "when the party by his own contract creates a duty, he is bound to make it good."

In the subsequent case of *Taylor* v *Coldwell*[41] it was laid down that the above rule was only applicable when the contract was positive and absolute and not subject to any conditions express or implied.

The defendants had agreed to let the plaintiffs the use of their music hall between certain dates for the purpose of holding a concert there. But before the first day on

[40] King's Bench, (1647) Aleyn 26: 82 ER 897. (1863)

[41] 122 ER 309.

which a concert was to be given, the hall was destroyed by fire without the fault of either party.

The plaintiffs sued the defendants for their loss. It was, held that the contract was not absolute, as its performance depended upon the continued existence of the hall.

In this case the performance of the contract had become physically impossible because of the disappearance of the subject-matter. But the principle is not confined to physical impossibilities. It extends also to cases where the performance of the contract is physically possible, but the object the parties had in mind has failed to materialise. The well- known coronation cases of which *Krell* v *Henry*[136] is one, illustrates this.

The defendant agreed to hire from the plaintiff a flat for June 26 and 27, on which days it had been announced that the coronation procession would pass along that place. A part of the rent was paid in advance. But the procession having been cancelled owing to the King's illness, the defendant refused to pay the balance.

It was held that the real object of the contract, as recognised by both contracting parties, was to have a view of the coronation procession. The taking place of the procession was, therefore, the foundation of the contract. The object of the contract was frustrated by non-happening of the coronation and the plaintiff was not entitled to recover the balance of the rent.

This principle was applied in Parshotam Das v Batala Municipal Committee,[137]

A Municipal Committee leased out certain tonga stands to the plaintiff for Rs 5,000. But no tonga driver came forward to use the stand throughout the year and the plaintiff could not realize anything. He sued for the refund of his money.

It was held that "the plaintiff obtained the lease and the committee granted the same to him on the assumption that the tonga stands would be used by the drivers and the plaintiff would recover fees from them, but for reasons which both sides could not help, the drivers did not use the stands, the doctrine of frustration applied with full force".

Commercial hardship

The alteration of circumstances must be such as to upset altogether the purpose of the contract. Commercial hardship cannot be equated with impossibility. An illustration is *Sachindra Nath* v *Gopal Chandra.*[44]

The plaintiff let certain premises to the defendant for a restaurant at somewhat higher rent. The defendant agreed to pay high rent because the British troops were stationed in the town and a clause in the agreement specially provided that 'this agreement will remain in force so long as British troops will remain in this town'. After some months, the locality was declared out of bounds to the British troops.

[136] (1903) 2 KB 740: [1903] All ER Rep 20.

[137] AIR 1949 EP 301 at 304.

It was held that though it was possible that the defendant would not have paid such a high rent apart from the expectation of deriving high profits from the British troops, that was not sufficient to make out a case of frustration.

This is further shown by the Privy Council decision in *Harnandrai Fulchand* v *Prag- das.*[i5]

> By a contract in writing the plaintiffs bought of the defendants a number of *dhotis* to be manufactured by specified mills and to be delivered as and when the same may be received from the mills. The sellers delivered only part of the goods owing to the mills failing to perform their contract with the defendants as they were engaged in fulfilling certain Government contracts. The defendants pleaded frustration.

It was held that the bargain was not frustrated, as the stipulation as to delivery did not make delivery by the mills a condition precedent. It was a simple case of breach.

The Supreme Court applied this principle in *Ganga Saran* v *Ram Charan Ram Gopal*[138]

> A contract was made for supplying certain bales of cloth manufactured by the New Victoria Mills, Kanpur. The contract added: 'We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said mills.' The mill failed to supply the goods to the sellers and, therefore, the sellers pleaded frustration.

But they were held liable. Specific

grounds of frustration

"The principle of frustration of contract or of impossibility of performance is applicable to a great variety of contracts," but the following grounds of frustration have become well established.

1. Destruction of subject-matter

The doctrine of impossibility applies with full force "where the actual and specific subject-matter of the contract has ceased to exist". *"Taylor v Caldwell*[139] is the best example of this class." There, a promise to let out a music hall was held to have frustrated on the destruction of the hall. Similarly, where the defendant contracted to sell a specified quantity of potatoes to be grown on his farms, but failed to supply them as the crop was destroyed by a disease, it was held that performance had become impossible [48] Similarly, a contract to exhibit a film in a cinema hall was held to have become impossible of performance when on account of heavy rains the rear wall of the hall collapsed killing three persons,

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[138] AIR 1952 SC 9: 1952 SCR 36; *Travancore Dewasam Board* v *Thannath International,* (2004) 1 Ker LT 56, it is not a ground for non-performance that performance had become more onerous requiring enhancement of consideration.

[139] Queen's Bench, (1863) 3 B &S 826: 122 ER 309.

and its licence was cancelled until the building was reconstructed to the satisfaction of the chief engineer.[140]

Where the tenanted premises comprised land and building, the court said that once the structure was completely destroyed, the tenancy ceased. No right was available to the tenant to apply for possession if the landlord re-constructed the premises.[141]

2. Change of circumstances

A contract will frustrate "where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated". This happens when the change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult or hazardous.

The parties to an executory contract are often faced, in the course of carrying it out with a turn of events which they did not anticipate — a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. The Supreme Court laid down this principle in *Alopi Parshad & Sons* v *Union of India.*[142]

> The plaintiffs were acting as the agents to the Government of India for purchasing *ghee* for the use of army personnel. They were to be paid on cost basis for different items of work involved. The performance was in progress when the Second World War intervened and the rates fixed in peace time were entirely superseded by the totally altered conditions obtaining in war time. The agents demanded revision of rates but received no replies. They kept up the supplies. The Government terminated the contract in 1945 and the agents claimed payment on enhanced rates. They could not succeed.

Escalation.—Law has to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion than could have been reasonably anticipated by the parties and make performance so crushing to the contractor as to border virtually on impossibility, the law would have to offer relief to the contractor in terms of price revision. The Supreme Court recognised this in *Tarapore & Co* v *Cochin Shipyard Ltd.*[143]

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[140] *V.L. Narasu v P.S.V. Iyer, ILR 1953 Mad 831.*

[141] *West Bengal Kltadi and Village Industries Board* v *Sagore Banerjee,* (2003) 1 ICC 991 (Cal), S. 108(c) of the Transfer of Property Act applies only when the tenancy is not completely destroyed.

[142] AIR 1960 SC 588 at pp. 593-94: (1960) 2 SCR 793 at pp. 806-7; *Nagnath Kaulwar & Sons* v *Govindram Shyamsunder,* AIR 2004 Bom 271, non-availability of wagons was held to be no excuse to a supplier of rice to fulfil his contractual commitments. *State ofA.P.* v *V. Narender Reddy,* (2003) 4 ALD 345 (AP-DB): (2003) 5 ALT 51 a licensee for sale of *arrack* filed a suit against the State saying that the licence had become impossible of performance because of threats of naxalites. The ground was not established and at the same time the licensee was prepared to participate in the reauction. His suit was dismissed.

[143] (1984) 2 SCC 680.

<5] [S. 73]

In this case there is no room for doubt that the parties agreed that the investment of the contractor (for import of equipment and know-how, in foreign exchange) would

be two crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon an agreed fact situation, and that situation ceases to exist, the agreement, to that extent, becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs 2 crore by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to him to make a claim for compensation.

Where there was a 400% escalation of prices owing to a war as compared with the original price on which certain transformers were undertaken to be supplied on a firm basis, the contract was held to have ended.[144]

3. Non-occurrence of contemplated event

Sometimes the performance of a contract remains entirely possible, but owing to the non-occurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed. *Krell* v *Henry*[145] involved a situation of this kind. There, a contract to hire a room to view a proposed coronation procession was held to have frustrated when the procession was postponed. For this result to follow it is necessary that the happening of the event should be the foundation of the contract. This is shown by *Heme Bay Steam Boat Co* v *Hutton*[146] which also arose from the postponement of the coronation. The Royal Naval Review was proposed to be held on the occasion. The defendant chartered a steamboat for two days "to take out a party of paying passengers for the purpose of viewing the naval review and for a day's cruise round the fleet". But the review was cancelled and the defendant had no use of the ship. Yet he was held liable to pay the unpaid balance of the hire less the profit which the plaintiff had made by the use of the ship in the ordinary course.

4. Death or incapacity of party

"A party to a contract is excused from performance if it depends upon the existence of a given person, if that person perishes" or becomes too ill to perform. Where the nature or terms of a contract require personal performance by the promisor, his death or incapacity puts an end to the contract. *Robinson* v *Davison*[147] is the well-known illustration. Here the proposed musical concert had to be postponed due to the ill help of the performing artiste (eminent pianist) on the contracted day. The plaintiff action for breach of contract failed.

5. Government or legislative intervention

A contract will be dissolved when legislative or "administrative intervention has so directly operated upon the fulfilment of the contract for a specific work as to transform the

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[144] *Easun Engg Co Ltdv Fertilizers and Chemicals, Travancore Ltd, AIR 1991 Mad 158.*

[145] (1903) 2 KB 740: [1903] All ER Rep 20.

[146] [1903] 2 KB 683 (CA): [1900-3] All ER Rep 145.

[147] [1871] LR 6 Exch 269: 24 LT 755: [1861-73] All ER Rep 699.

contemplated conditions of performance". A well-known English authority is *Metropolitan Water Board* v *Dick Kerr & Co Ltd*[51].

> By a contract made in July 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six months. But by a notice issued under the Defence of the Realm Act, the contractors were required to cease work on their contract and they stopped the work accordingly. They claimed that the effect of the notice was to put an end to the contract.

The House of Lords held that the interruption created by the prohibition was of such a character and duration as to make the contract when resumed a different contract from the contract when broken off, and that the contract had ceased to be operative.

The State Trading Organisation, though a Government monopoly, was somewhat independent of the State. Its export contracts were held to have frustrated by Government intervention imposing a ban on exports.[58]

But an intervention of a temporary nature which does not uproot the foundation of the contract will not have the dissolving effect. This is shown by the decision of the Supreme Court in *Satyabrata Ghose* v *Mugneeran Bangur & Co.*[59]

> The defendant company started a scheme for the development of a tract of land into a housing colony. The plaintiff was granted a plot on payment of earnest money. The company undertook to construct the roads and drains necessary for making the lands suitable for building and residential purposes and as soon as they were completed, the purchaser was to be called upon to complete the conveyance by payment of the balance of the purchase money. But before anything could be done, a considerable portion of the land was requisitioned by the State during the Second World War for military purposes.

MUKHERJEA J held that the contract was not frustrated.

Where the intervention makes the performance unlawful, the courts will have no choice but to put an end to the contract.[60]

[57] 1918 AC 119: [1916-17] All ER Rep 122: *Managing Director, Army Welfare Housing Organisation* v *Suman- gal Services (P) Ltd,* (2004) 9 SCC 619: AIR 2004 SC 1344: (2004) 2 ICC 599, contractor not liable where further construction work was stopped under Municipal intervention. *T. Lakshmipatlii* v *P. Nithyananda,* (2003) 5 ALT 26 (SC), building alone demolished, it did not determine lease or tenancy, contract not frustrated.

[58] *STC* v *Union of India,* 1994 Supp (3) SCC 40, ban on export of silver, all pending contracts frustrated. *Rose Valley Real Estate & Construction Co* v *United Commercial Bank,* AIR 2008 Gau 38, a secured asset was sold by a bank, by an order of the court the bank was prevented from accepting the balance price, held, frustration, the bidder could not be penalised for not paying the balance money.

[59] AIR 1954 SC 44: 1954 SCR 310; *Nirmala Anand* v *Advent Corpn P Ltd,* (2002) 5 SCC 481: AIR 2002 SC 2290, agreement for purchase of a flat in a building constructed on a land leased out by the Municipality. The builder cancelled the deal saying that the Municipality had terminated the lease deed. The facts however showed that there was a possibility of renewal. The relief of specific performance was not refused to the buyer.

[60] *Boothalinga Agencies v. V.T.C. Poriaswami Nadar, AIR 1969 SC 110: (1969) 1 SCR 65.*

Intervention of war or warlike conditions in the performance of a contract has often created difficult questions. The closure of the Suez Canal following the Anglo-French war with Egypt, for instance, interrupted the performance of many contracts. One such case is *Tsakiroglou & Co. Ltd* v *Noblee Thorl GmbH.*[148]

> The appellants agreed to sell to the respondents three hundred tonnes of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be in November/December 1956, but on November 2, 1956, the canal was closed to traffic and it was not reopened until the following April. It is stated that the appellants could have transported the goods via the Cape of Good Hope. The appellants refused to ship goods via the Cape. The question now is whether by reason of the closing of the Suez route, the contract had been ended by frustration.

The appellants' argument was that it was an implied term of the contract that shipment should be via Suez. But it was held that such a term could not be implied.

If the intervention of war is due to the delay caused by the negligence of a party, the principle of frustration cannot be relied upon.[149] If there are more than one ways of performing a contract and the war cuts off only one of them, the party is still bound to perform by the other way, however inconvenient or expensive.

7. Application to Leases

In the leading case of Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd:[a]

> A building lease was executed for ninety-nine years, more rent being payable after erection of buildings. But, before any could be erected and while the lease had still 90 years to run, building activity was suspended by the Government because of the war.

It was said that the length of the interruption is presumably a small fraction of the whole term and the lease itself contemplates that rent may be payable although no building is going on, therefore, this interruption may not be regarded as destroyer of the identity of the arrangement. In *Matthey* v *Curling*

> There was the lease of a house for twenty-one years. The lessor had to keep the building in repair, to insure and in case of any destruction by fire, etc. to expend the insurance money in rebuilding. In 1918 the military authorities took possession of the premises and remained in possession until the expiry of the lease. In February 1919, the house was destroyed by fire and in March the term of the lease expired. It was held

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[148] 1962 AC 93: (1961) 2 All ER 179: [1961] 2 WLR 633.

[149] *Gambliirmal v Indian Bank Ltd, AIR 1963 Cal 163.*

by the House of Lords affirming the majority decision of the Court of Appeal (ATKIN LJ having dissented) that the lessee was liable both for repairs and for rent even during the period of dispossession.

In India the question was considered by the Supreme Court in *Raja Dhruv Dev Chand* v *Raja Harmohinder Singh*[150] where it was observed that the courts in India have generally taken the view that Section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. Lease of land was executed and completed by possession but parties had to migrate to India before any use of the land. Lease money was not allowed to be recovered.

On the other hand, where on account of an event beyond the parties' control, the lessor is not able to transfer possession to the lessee, the lessee would be entitled to take back his rent.[151] In the subsequent case of *Sushila Devi* v *Hari Singh*[61] the Supreme Court held that an agreement of lease ended by frustration where before completing it the parties had to run away and could not go to Pakistan to give or take possession. The Jammu and Kashmir High Court allowed in *Hari Singh* v *Dewani VidyawatF* the recovery of rent paid in advance under a lease which could not be completed on account of partition. The recovery was allowed under Section 65 as benefits received under a contract which became void.[152]

Theories of frustration

Many possible explanations have been put forward as a justification for the doctrine of frustration as a part of the law relating to discharge of contracts. Two theories are most well-known. These theories do not concern the courts in India because of clear statutory provision.

1. Theory of Implied Term

The theory of implied term was explained by Lord LOREBURN in FA *Tamplin Steamship Co Ltd* v *Anglo-Mexican Petroleum Products Co Ltd*His Lordship emphasized that the courts do not have the power to dissolve a contract. But they can examine the circumstances of the contract to see whether the parties contracted on the footing that a state of things would continue to exist. If so, a term to that effect would be implied. If that term fails the contract should be over.

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[150] AIR 1968 SC 1024: [1968] 3 SCR 339.

Gurdarshan Singh v *Bisliem Singh,* [1962] 2 Punj 5 FB; *Alluri Narayana Murtliy Raju* v *District Collector,* AIR 2008 AP 264, leave granted for mining of sand at river beds, villagers did not permit it inspite of prohibitory orders, frustration, refund of bid money.

[152] See *V. Kalapakam* v *Mutliurama,* AIR 1995 Ker 99, total destruction of the building held under lease did not terminate the lease but the lessee had no right to rebuild without the consent of the owner.

2. Just and Reasonable Solution

In a subsequent case,[7] DENNING LJ attempted to explain the doctrine of frustration on a different basis. He said: "The court really exercises a qualifying power — a power to qualify the absolute, literal or wide terms of the contract — in order to do what is just and reasonable in the new situation." But this statement was not approved when the case went before the House of Lords. The observation of Lord LOREBURN that "no court has an absolving power", was re-emphasised.

Effects of frustration

"It is well-settled that if and when there is frustration the dissolution of the contract occurs automatically."

1. *Frustration should not be self-induced*

Explaining the principle that frustration should not be self-induced, Lord WRIGHT said in *Maritime National Fish Ltd* v *Ocean Trawlers Ltd*,[12] that the essence of "frustration" is that it should not be due to the act or election of the parties. Frustration should arise without blame or fault on either side. Reliance cannot be placed on a self-induced frustration.

2. *Frustration Operates Automatically*

Frustration operates automatically to discharge the contract "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances". "The legal effect of frustration does not depend on their intention or their opinions, or even knowledge, as to the event." This is particularly true of Indian law as Section 56 of the Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. A subsequent case, however, shows that in certain circumstances frustration may be waived by one party and then the other will be bound by the contract. In *H R & S Sainsbury Ltd* v *Streetr*[153]

There was the sale of 275 tons (5% more or less) of feed barley to be grown on seller's land. The crop amounted to only 140 tons. The seller resold it to another and contended that he had the right to do so because the contract had ended by frustration. But he was held liable for breach of contract.

3. *Adjustment of Rights (Restitution)*

The rights of the parties are adjusted under Section 65.

65. *Obligation of person who has received advantage under void agreement, or contract that becomes void.*—***When an agreement is discovered to be void, or when a contract be***

" [1972] 1 WLR834.

comes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(ia) A pays *B* 1000 rupees in consideration of *B's* promising to marry *C,* A's daughter C is dead at the time of the promise. The agreement is void, but *B* must repay A the 1000 rupees.

(fo) A contracts with *B* to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and *B,* in consequence, rescinds the contract. *B* must pay A for the five nights on which she had sung.

(id) A contracts to sing for *B* at a concert for 1000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to *B* for the loss of the profits which *B* would have made if A had been able to sing, but must refund to *B* the 1000 rupees paid in advance.

The effect of the principle laid down in the section is that when the parties have entered into an apparently valid contract and some benefits have been passed under it, and subsequently the contract is either discovered to be void or becomes void, the party who has received the benefits must restore them to the other. The section does not apply to a contract which the parties knew at the time of making it to be void. The section also does not apply to a case where the benefits are being passed at a time when the contract had, though unknown to the parties, already ceased to be enforceable.[74]

Discovered to be void.—The first part of the section is concerned with an agreemen which never amounted to a contract, it being void *ab initio.* But the parties discoverec this at a later stage. "The word 'discovered' connotes the pre-existence of that which i discovered." This will cover cases of "initial mistake". Where, for example, money is paii for the sale of goods, which, unknown to the parties, have already perished at the time, th money is refundable. The principle will apply whether the agreement is void by reason c law or by reason of fact.[75]

Quantum meruit claims.—Claims under the well-known English law doctrine (*quantum meruit* have been allowed by the courts under this section. The Supreme Cou observed in *State of Madras* v *Gannon Dunkerley & Co (Madras) LtcP*[6] that claim f *quantum meruit* is a claim for damages for breach of contract. The value of the materi

[74] *Naihati Jute Mills Ltd* v *Khyaliram Jagannath*, AIR 1968 SC 522. Subsequent restrictions not rendering i contract void. *Ramkrishna Ganpatrao Jogdand* v *Kondiram Jaysingrao Naikwade,* AIR 2002 Bom 148, relief allowed to a party to such an agreement. *Rama Iyer* v *Jacob,* (2003) 3 Ker LT (SN), Case No. 3 p excavation work, 36% completed, further stopped by Government intervention, plaintiff entitled to reco only such amount for which working had been completed.

[75] *Uttamcliand v Mohan Das, AIR 1964 Raj 50.*

used or supplied is a factor which furnishes a basis for assessing the amount of compensation. The claim is not for price of goods sold and delivered but for damages. That is also the position under Section 65.

In a subsequent case, the Supreme Court explained the requirements of the claim. The original contract must be so discharged by the opposite party that the plaintiff is entitled to treat himself as free from the obligation of further performance and he must have elected to do so. The remedy is not available to the party who breaks the contract even though he might have partly performed it. The remedy is restitutory, it is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this respect it is different from a claim for damages which is a compensatory remedy. The court accordingly did not allow the claim of a contractor for extra payment on the ground that he had to procure the raw material from a longer distance than that represented in the tender documents.[154]The material was in fact available within the stated distance, but its removal required permission of Cantonment Authorities which the contractor could not manage to get.[155]

Becomes void.—The second type of situation covered by Section 65 is where a valid contract is made in the beginning, but it subsequently becomes either unlawful or impossible of performance. Any benefits which have passed under the contract from one party to the other must be restored. This is subject to the expenses which have already been incurred by the other party in the performance of the contract.

English law.—The principles of English law before the Law Reform (Frustrated Contracts) Act, 1943, Were those laid down in the two coronation cases, one of them is *Krell* v *Henry*[156] where the court held that the rent which had been paid before the contract to hire premises became void by reason of the postponement of the procession was not refundable and the outstanding rent was not recoverable. The courts left the parties where they were. They also did not like to disturb the rights which the parties had acquired before the contract became void. Of this the illustration is *Chandler* v *Webster.*™The plaintiff sued for refund of the rent which he had paid in advance and the landlord counter-claimed for the balance which was due, ROMER LJ stated the principle and said:

> Applying this to the facts here, as soon as it was ascertained that the procession, through no fault of either of the parties, could not take place, they were immediately free from any subsequent obligation under the contract, but the contract could not be considered as rescinded ab initio. That being so, many legal rights previously accrued to either of the parties remained, and could not be disturbed, and one of those rights was the right of the defendant to be paid £ 141.15 s.

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[154] *Puran Lai Sah v State ofU.P., (1971) 1 SCC 424.*
See further, *Srinivas &Co\ Inden Biselers,* (1971) 3 SCC 721: AIR 1971 SC 2224; *Allahabad Bank* v *Bengal Paper Mills Co Ltd*, (2004) 8 SCC 236, use of property in the in-between period, to be taken into account in the adjustment of rights.
[156] (1903) 2 KB 740: [1903] All ER Rep 20.

When a debtor owing several distinct debts to one person, makes a payment, which is not sufficient to discharge all the debts, the question arises to which particular debt the payment is to be applied. The Act, in Sections 59 to 61, lays down the underlying principles:

59. ***Application of payment where debt to be discharged is indicated.*****—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.**

Illustrations

(a) *A* owes *B,* among other debts, 1000 rupees upon a promissory note, which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) *A* owes to *IS.* among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

60. ***Application of payment where debt to be discharged is not indicated.*****—Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.**

61. ***Application of payment where neither party appropriates.*****—Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.**

1. Appropriation by debtor

The first principle is laid down by Section 59 which confers the right of appropriation upon the debtor. If the debtor owes several distinct debts to the same creditor and makes payment, he has the right to request the creditor to apply the payment to the discharge of some particular debt. If the creditor accepts the payment, he is bound by the appropriation. This principle was laid down as early as 1816, *In Re, Clayton,*[157] and has since been incorporated in the section and also followed in a number of cases.

[157] (1816) 1 Mer 572 : 15 RR 161.

This principle applies to several distinct debts and not to a single debt payable by instalments.[158] The debtor may exercise this right and may specify his appropriation expressly or his intention may be implied from surrounding circumstances indicating that his intention at the time of payment was to appropriate the amount deposited by him to

[158] *Munno Bibi v I.T. Commr, AIR 1952 All 514.*

a particular debt or to the account of that debt.[83] The payment of a money decree was directed to be in monthly instalments. The judgment-debtor remitted monthly instalments with a covering letter that the amount be appropriated towards principal. The bank did not refuse it and remained silent about it. The bank became bound by the appropriation. It could not appropriate the payments first towards interest and costs.[84]

These sections contain a general rule for appropriation of payments towards several distinct debts and not towards various heads of one debt.[85] It was not applied to a case in which the principal and interest amount were due on a single debt. The rule applicable in such cases is that payment is first applied to wipe out interest and the balance is appropriated towards principal.[86]

2. Appropriation by creditor

The second principle is laid down in Section 60, which enables the creditor to make appropriation. If the debtor makes payment without any appropriation, the creditor may use the payment at his discretion to wipe out any debt which is due. He may, for example, use it in payment of a time-barred debt[87], or in payment of a debt which carries simple or lesser interest.[88]

Where a mortgagor deposited some amount in the court without indicating whether it was for principal or interest, the court held that the ordinary principle that such money should first be applied to interest and costs and then to principal, would apply.[89] Where, on the other hand, an amount precisely equal to the principal amount was deposited, it was taken to be an implied appropriation towards the principal amount.[90]

83 *Prem Nath Kapur v National Fertilizer Corpn of India Ltd, (1996) 2 SCC 71.*

84 *Smithaben H. Patel v Industrial Credit and Development Syndicate, AIR 1997 Kant 188; Delhi State Cooperative Bank Ltd v DSCO Coop Industrial Society Ltd, (2001) 91 Del LT 555 (Del DB).*

85 *Industrial Credit & Development Syndicate* v *Smithaben H. Patel,* (1999) 3 SCC 80: AIR 1999 SC 1036: (1999) 96 Comp Cas 1. The rules apply before the stage of decree and not to the execution of court decree. *Haryana Urban Development Authority* v *Devinder Kaur,* AIR 2002 NOC 268 P&H: 2002 AIHC 2769, compensation amount for land acquisition deposited by the Collector at his discretion, the claimant not allowed to take the benefit of S. 60 and claim appropriation of that amount.

86 *Punjab National Bank v Surinder Singh Mandyal, AIR 1996 HP 1.*

87 *Kamaleshwari Pd v Gangadlmr, AIR 1940 Pat 52.*

88 *Rameshwar Koer* v *M. Mehidi,* (1898) 26 Cal 39. This principle was applied by the Supreme Court in *Prem Nath Kapur* v *National Fertilizer Corpn of India Ltd,* (1996) 2 SCC 71. Section 60 cannot be applied independently of S. 59. It gives discretion to the creditor and not to the judgment-debtor. *Industrial Credit & Development Syndicate* v *Smithaben H. Patel,* (1999) 3 SCC 80. *Waterbase Ltd* v *K. Ravindra,* 2003 Cri LJ 967 (AP), prosecution for dishonour of cheque, when the accused owed large sums to the complainant, any amount paid subsequently could be appropriated towards any other amount of a lawful debt at the choice of the complainant as envisaged in S. 60 and not merely against the amount of the dishonoured cheque.

89 *Meghraj* v *Bayabai,* (1969) 2 SCC 274 : AIR 1970 SC 161: (1970) 1 SCR 523.

90 *Syndicate Bank v W B Cements Ltd, AIR 1989 Del 107.*

3. Appropriation by law

The third principle is in Section 61. This section applies when neither party makes an appropriation. In such a situation the law gets the right to appropriate the payment and the law prefers to wipe out the debts in the order of time in which they were incurred. The principle enunciated in the *Clayton* case is that in the case of running accounts whether with a bank or otherwise there is "no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item in the debit side of the account that is discharged or reduced by the first item on the credit side ; the appropriation is made by the very act of setting the two items against each other".

DISCHARGE BY AGREEMENT

Contracts which need not be performed [S. 62]

62. *Effect of novation, rescission and alteration of contract.*—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

The section provides that "if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

Novation

Where the parties to a contract agree to substitute the existing contract for a new contract, that is called *novation*. In the well-known case of *Scarf* v *Jardine*[9], it was stated that novation is of two kinds, (1) involving change of parties; or (2) involving substitution of a new contract in place of the old,

(1882) 7 App Cas 345 at 351. Where the parties change only a part of the contract and the new contract is so inconsistent with the existing contract that they cannot stand together, there is no good novation. *Lata Construction \ Rameshchandra Ramniklal Shah*, (2000) 1 SCC 586: AIR 2000 SC 380. *United Bank of India* v *Ramdas Mahadeo Prashad*, (2004) 1 SCC 252: (2004) 1 CLJ 147, a memorandum of understanding does not amount to novation as envisaged under this section. The respondents had already committed a breach of contract, they could hardly seek to enforce the contract. *CITI Bank NA* v *Standard Chartered Bank*, (2004) 1 SCC 12: AIR 2003 SC 4630: (2003) 117 Comp Cas 554, novation cannot be brought about unilaterally. It requires consent of both parties. There was no evidence of any tripartite arrangement under which the third party was to take over liability. The case was rather governed by S. 63 under which a promisee can unilaterally accept an altered position and discharge the other party from liability. The party had accepted dishonoured bonds knowingly and voluntarily. *Vijay Kumar Khandre (Dr)* v *Prakash Khandre*, AIR 2002 Kant 145, a returned candidate was a licensed contractor and was holding several contracts with the Government. He tried to hand them over to others but a tripartite agreement could not be proved. Hence disqualification remained. *DDA* v *Joint Action Committee, Allottee ofSFS Flats*, (2008) 2 SCC 672, when the performance of a contract has been completed, a fresh liability cannot be thrust upon a party without assent. DDA not allowed to recover anything extra after full payment under the scheme.

1. *Change of Parties*

The first illustration to Section 62 is a case of novation by change of parties. If A is a debtor and the creditor agrees to accept *B* in his place as the debtor, the original contract between the creditor and A is at an end. A novation of this kind usually takes place when a new partner is admitted into an existing firm or when a partner retires from a firm and the new firm as constituted after admission or retirement accepts the liabilities of the old firm and this is approved by the persons dealing with the firm, or where one man's business is taken over by another under a pomise to pay off liabilites. Concurrence of all the parties is necessary.[159]

2. *Substitution of New Agreement*

When the parties to a contract agree to substitute a new contract for it, the original contract is discharged and need not be performed. It is necessary for the application of this principle that the original contract must be subsisting and unbroken. The substitution of a new contract is not possible after there has been a breach of the original contract. It is further necessary that the new agreement should be valid and enforceable. It has also been pointed out in a judgment of the Calcutta High Court that "Section 62 requires an agreement which necessarily implies consideration".[160] It is also obvious that there cannot be a unilateral alteration of a contract.

The petitioner was appointed in response to an advertisement but placed at a lower scale than that mentioned in the advertisement. He accepted his placement. He then claimed the promised pay scale. He was not allowed to do so. The principle of novation applied. The appointment and acceptance at the lower scale substituted the original proposed scale.[161]

FACILITIES FOR PERFORMANCE

67. ***Effect of neglect of promisee to afford promisor reasonable facilities for performance.*— If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise the promisor is excused by such neglect or refusal as to any non-performance caused thereby.**

Illustration A

contracts with *B* to repair *B*'s house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

159 *Slate Bank of India* v *T.R. Setha Varma,* AIR 1995 Ker 31, liability of original firm continued where the creditor did not accept the new debtor.

Union of India v Kishorilal Gupta & Bros, AIR 1953 Cal 642 at p. 644. Nagendra Kumar Brijraj

*Singh v*Hindustan Salts Ltd, (2001) 1 Guj CD 532 (Guj).*

Interdependent promises

Where promises are interdependent so that one party cannot perform without cooperation of the other, if the latter does not provide reasonable facilities for performance, the former is excused from his obligation to perform. The illustration appended to the section is based upon *Makin* v *Watkinson.*[162] Another illustration is *Ellon* v *Topp.*[163]

> An infant was placed by his father under a master to learn his three trades. Subsequently the master gave up one of his trades. The apprentice gave up his training for that reason.

The master sued for breach. The court came to the conclusion that the contract was on the basis of picking up three trades and the abandonment of one would not leave it to be the same contract.

Rescission and restoration

The section also permits the parties to rescind their contract. The Supreme Court allowed the parties to rescind under this section a contract for sale of forest coupes because of the substantial variance between the particulars of quantity and quality of timber held out at the time of the auction and the timber actually available. The contractor was allowed refund of his deposit. But no compensation was allowed to him for his loss because the contract contained a clause against compensation in such circumstances.[164] Where an old contract is rescinded and is replaced by a new one, the old one will not revive only for the fact.

Remission of performance [S. 63]

Section 63 allows a party to a contract to dispense with the performance of the contract by the other party, or to extend the time for performance or to accept any other satisfaction instead of performance.

> **63. *Promisee may dispense with or remit performance of promise.*—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.**
>
> *Illustrations*
>
> *(a) A* promises to paint a picture for *B. B* afterwards forbids him to do so. A is no longer bound to perform the promise.
>
> *(b) A* owes *B* 5000 rupees. A pays to *B* and *B* accepts, in satisfaction of the whole debt, 2000 rupees paid at the time and place at which the 5000 rupees were payable. The whole debt is discharged.

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[162] (1870) LR 6 Exch 25.

[163] (1851) 6 Exch 424.

[164] *Syed Israr Masood v State ofM.P., (1981)4 SCC 289.*

(c) *A* owes *B* 5000 rupees. C pays to *B* 1000 rupees, and *B* accepts them, in satisfaction of his claim on *A.* This payment is a discharge of the whole claim.

(d) *A* owes *B,* under a contract, a sum of money, the amount of which has not been ascertained. *A,* without ascertaining the amount gives to *B,* and *B,* in satisfaction thereof, accepts, the sum of 2000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) *A* owes *B* 2000 rupees, and is also indebted to other creditors: *A* makes an arrangement with his creditors, including *B,* to pay them a composition of eight annas in the rupee upon their respective demands. Payment to *B* of 1000 rupees is a discharge of *B's* demand.

The effect of the provision is that the party who has the right to demand the performance of a contract may—(1) remit or dispense with it, wholly or in part; or (2) extend the time for performance; or (3) accept any other satisfaction instead of performance.

Acceptance of less sum

The acceptance of a less sum of money where more is due is a good discharge of the whole of the liability. The Supreme Court decision in *Kapur Chand Godha* v *Mir Nawab Himayalikhan Azamjati'** illustrates this:

> The liability was above twenty-seven lakhs of rupees. Hyderabad having been taken over, a committee was appointed to clear matters. It offered twenty lakhs to the creditor in full satisfaction and he accepted it. Afterwards the creditor sued for the balance.

S.K. DAS, J held that the facts of the case were completely covered by Section 63 and illustration (c) thereof. The appellant having accepted payment in full satisfaction of his claim was not entitled to sue. The court also relied upon Section 41 under which when a promisee accepts performance from a third person, he cannot afterwards sue the promisor."

Waiver

To "dispense with" means that the party entitled to claim performance may waive it. The Supreme Court has already laid down[165] that waiver is the abandonment of a right which normally everybody is at liberty to waive. It signifies nothing more than an intention not to insist upon the right."[166] An extension of time for performance by mutual consent is not the same thing as a waiver. This distinction was emphasised by the Supreme Court in *M. Sham Singh* v *State of My sore}*[02]

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165 *Waman Shriniwas Kini* v *Ratilal Bhagwandas & Co,* 1959 Supp (2) SCR 217 : AIR 1959 SC 689: 61 Bom LR 1011.

[01] *Jagad Bandhu Chatterjee* v *Nilima Rani,* (1969) 3 SCC 445 at p. 446 : (1970) 2 SCR 925, 926.

<5] [S. 73]

Where grant of scholarship was on the term that *M* would serve the state after completing higher studies provided the state offered him a good job within 6 months and where *M* came for a domestic visit to India and again was sent back by the State for practical training, he was held liable to refund money when he joined service in the United States.

The party who has waived compliance with a particular condition of the contract may in circumstances and by giving reasonable notice withdraw his waiver.

Extension of time

Section 63 also permits a party to extend time for performance. The Supreme Court pointed out in *Keshavlal Lallubhai Patel* v *Lalbhai Trikumlal Mills Ltd*[103] that the promisee cannot by unilateral act extend the time of performance of his own accord and for his own benefit. Consent of the other party is necessary. The Privy Council held, in a case, that any of these things may be done without agreement and, therefore, also without consideration.[104]

An important difference between Sections 62 and 63 is that the former, which provides for *novation*, requires an agreement based on some consideration. But Section 63 requires neither. Under this section, the promisee may before breach gratuitously release the promisor from the obligation to perform the promise. The promisee may after breach gratuitously release the promisor from his liability arising on such breach. As against this, under Section 62 *novation* agreement must be made before the breach of the original promise.

Accord and satisfaction

The accord is an agreement made after breach where by some consideration other than his legal remedy is to be accepted by the party not in fault, followed by performance of the substituted consideration.[105] The liability arising out of breach of contract may be discharged by accord and satisfaction. The validity of accord and satisfaction must be judged by the general law of contract quite apart from the provisions of Sections 62 and 63. Accord is the agreement and satisfaction consists in the consideration offered. An illegal contract cannot support an accord and satisfaction.[106]

expired and owner wanted to withdraw without giving benefit of extension and contended that the other party had waived the right to seek extension. The court did not agree. There was no waiver in writing. The conduct of the party did not show any signs of waiver because it always kept on insisting that the benefit of extension must be made available for covering the period of breakdown. *CITI Bank NA* v *Standard Chartered Bank,* (2004) 1 SCC 12 acceptance of alternative scheme of investment, binding.

103 AIR 1958 SC 512: 1959 SCR 213: 60 Bom LR 948.

104 *Channa Mai Ram Nath v Mool Chand Ram Bhagat, AIR 1928 PC 99 at p. 102.*

105 Bachawat J in *Union of India* v *K.L. Gupta,* AIR 1953 Cal 642 at p. 644.

Union Carbide Corpn v *Union of India,* (1991) 4 SCC 584: AIR 1992 SC 317.

Where the creditor agreed that if a lesser sum than due was paid by the debtor before the specified date, it would be accepted in full satisfaction of all claims, but the debtor paid still lesser sum within the specified date, the court said that the debtor could not insist that his payment should be recorded as full satisfaction of all the claims.[167]

Estoppel: Acceptance of Final Bill

Where a contractor accepted the final bill without any objection and under the terms of the contract such act had binding efficacy against him, it was held that the claim of the contractor for additional payments and damages raised two years after acceptance of the final bill was barred by estoppel.[168] The Supreme Court has laid down that unless, while accepting the final bill the contractor unequivocally declares that he would not raise any further claim, he would not be stopped or precluded from doing so. The mere acceptance of the final bill did not have the effect of preventing the contractor from raising other claims.[169] Any settlement between the parties also does not have that effect unless the contract becomes a closed chapter under the settlement. If not, the arbitration clause in the contract remains and could be activated if the aggrieved party has anything more to claim.[170]

Abandonment

Where the parties have ignored the contract for a long time, it may give rise to an inference of abandonment. Under a contract to supply 50 dozen skins "delivery as required", the purchaser had from time to time demanded 20 dozen which were duly supplied. Thereafter, for a period of three years, neither anything was demanded nor delivered. This was taken to be an evidence of the intention to abandon the contract.[1"]

Material alteration

Where a contract is embodied in a deed and the party who has the custody of the deed alters it without the consent of the other in a material particular, the effect would exactly be the same as that of cancelling the deed. Both parties will be discharged from their re

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[167] *Saraswat Trading Agency* v *Union of India,* AIR 2002 Cal 51: (2002) 1 ICC 1038; *A.K. Construction* v *UP Power Corpn* , AIR 2008 All 117, the contractor accepted the proposed amount in final satisfaction which was acknowledged by receipt, he also received refund of the security amount, case of accord and satisfaction. No claim for damages for breach of contract survived. He could have made his acknowledgement conditional, but he did not do so.

[168] *Govt of Gujarat v R. R. Kalathia & Co, AIR 2003 Guj 185.*

[169] *Bharat Coking Coal Ltd v Annapurna Construction, (2003) 8 SCC 154.*

[170] *Chairman and MD, NTPC Ltd* v *Reslimi Constructions, Builders & Contractors,* (2004) 2 SCC 663. *Renuka Datla* v *Solvay Pharmaceutical B. V.,* (2004) 1 SCC 149, a very specific settlement drawn under court order, contract ended. *Food Corpn of India* v *Ratanlal N. Gwalani,* AIR 2004 MP 215, no pleading and nor issue before the trial court that final payment was accepted under accord and satisfaction, it could not be raised for the first time before the High Court.

spective obligations. The meaning of the expression 'material alteration' was considered by the Supreme Court in *Kalianna Gounder* v *Palani Gounder:"*[2]

> A memorandum of agreement for the sale of land under which Rs. 2,000 were paid in advance was with the plaintiff. The defendant refused to convey the land and pleaded that the plaintiff had altered the deed by adding the words that the seller shall 'clear the debts and execute the sale deed free from encumbrance'.

The plea was dismissed because the alleged alteration could not be proved.

Alteration of an agreement by the purchaser of land for accommodating two signatures of witnesses and to make it acceptable as a sacrosanct document was held to have discharged the agreement.[171] This judgment was reversed by the Supreme Court on appeal. The court said that the two independent persons were introduced as marginal witnesses. Such a change did not affect the validity or enforceability of the agreement. It was not a material alteration. It did not have the effect of avoiding the agreement.[172] Materiality of the unilateral amendment is the most important factor. In a contract containing an arbitration clause, the Government made the unilateral amendment to the effect that the arbitral award must be reasoned. The alteration was held to be not binding'upon the parties. The Government was not allowed to avoid the award on the ground that the award was without a statement of reasons.[173]

QUASI-CONTRACTS OR CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

There are many situations in which law as well as justice require that a certain person be required to conform to an obligation, although he has neither broken any contract nor committed any tort. For example, a person in whose home certain goods have been left by mistake is bound to restore them. Such obligations are generally described, for want of a better or more appropriate name, as *quasi*-contractual obligations.

Rationale

The theory on which quasi-contractual obligations are based is not yet finally settled. Lord MANSFIELD, who is considered to be the real founder of such obligations, explained them on the principle that law as well as justice should try to prevent "unjust enrichment", that is, enrichment of one person at the cost of another. His Lordship offered this explanation in *Moses* v *Macferlan.'*[16]

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[171] *Sardar* v *Ram Khilonna,* AIR 1998 All 268.

[172] *Ram Khilona* v *Sardar,* (2002) 6 SCC 375: AIR 2002 SC 2548.

[173] *Build India Construction System* v *Union of India.* (2002) 5 SCC 433: AIR 2002 SC 2437: (2002) 3 ICC 1032.

<5] [S. 73]

Jacob issued four promissory notes to Moses and the latter indorsed them to Macfer- lan, excluding, by a written agreement, his personal liability on the endorsement. Even so Macferlan sued Moses on the endorsement and he was held liable despite the agreement. Moses was thus compelled to discharge a liability which he had excluded and, therefore, sued to recover back his money from Macferlan.

He was allowed to do so.

But, beginning with the decision of the House of Lords in *Sinclair* v *Brougham*[174] it became fashionable to discard Lord MANSFIELD'S formulation and to rely upon an implied-in-fact contract. In this case an action was brought against a building society to recover *ultra vires* deposits under *quasi-contracts.* Their Lordships disallowed it because, if *quasi*-contract means an implied contract, it could not be enforced where an express contract would have been invalid. This approach dominated decisions for a long time and the decision was taken to have settled that the juridical basis of *quasi-contract* was the implied, notional or fictional contract. Where the circumstances of a case do not lead to an inference of this kind or where such an inference would be against the law, no liability would arise.

The identification of *quasi*-contracts with implied contracts restricted the scope of relief which would have been possible without any such hindrance under the principle of "natural justice and equity". The suffocation was felt by the House of Lords itself in *Fibrosa Spolka Akcyjna* v *Fairbaim Lawson Combe Barbour Ltd*[1 ls]. A sum of money was paid in advance under a contract for the supply of a machinery, and the performance was obstructed by the outbreak of war. Their Lordships allowed the advance to be recovered back as having been paid for a consideration which had wholly failed.

Chapter V of the Indian Contract Act deals with such situations under the heading "Of certain relations resembling those created by contract". The chapter avoids the word *"quasi*-contract", and in view of the clear statutory authorisation the courts in India are not hindered in allowing relief under the different sections of the Act by the theoretical considerations concerning <yMa.s/-contracts.

1. Supply oS necessaries IS. f>?>j

Where necessaries are supplied to a person who is incompetent to contract or to someone whom he is legally bound to support, the supplier is entitled to recover the price from the property of the incompetent person.[175]

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[174] 1914 AC 398: [1914-15] .All ER Rep 622.

[175]

2. Payment by interested person [S. 69]

69. ***Reimbursement of person paying money due by another, in payment of which he is interested.*****—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.**

Illustration

B holds land in Bengal, on a lease granted by *A,* the Zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B's* lease. *B,* to prevent the sale and consequent annulment of his own lease, pays to the Government the sum due from *A. A* is bound to make good to *B* the amount so paid.

Payer Must be Interested in Making Payment

The principle of the section is that when a person is bound to make a payment and another person, though not bound, is interested in the payment being made, and pays up to safeguard his interest, he is entitled to reimbursement from the person who was initially liable to pay. The conditions of liability under this section may be thus stated. *Firstly,* the plaintiff should be interested in making the payment. The interest which the plaintiff seeks to protect must, of course, be legally recognisable. His honest belief that he has an interest to protect is enough.[176]

But Should not be Bound to Pay

Secondly, it is necessary that the plaintiff himself should not be bound to pay. He should only be interested in making the payment in order to protect his own interest. Where a person is jointly liable with others to pay, a payment by him of the others' share would not give him a right of recovery under this section.[121]

Defendant Should be under Legal Obligation to Pay

Thirdly, the defendant should have been "bound by law" to pay the money. The words "bound by law" have been held to mean bound by law or by contract. It is not necessary that the liability should be only statutory. It is enough that "the defendant at the suit of any person might be compelled to pay".[122] Explaining the purport of the phrase in *Govin- dram Gordhandas Seksaria* v *State ofGondal,*[177] where a Maharaja, having sold certain mills without paying overdue municipal taxes, was sued by the buyer who had to pay the taxes to save the property from being sold, the Privy Council held that the Maharaja was bound by law to pay within the meaning of the section. Where a person is only morally

120 *Govindram Gordhandas Seksaria v State ofGondal, AIR 1950 PC 99: 77 IA 156.*

121 *Jagpatiraju v Sadnusannama Arad, AIR 1916 Mad 980; Gopinath v Ragliuvansh Kumar, AIR 1947 Pat 522.*

122 *Rasappa Pillai v Doraisami Reddiar, AIR 1925 Mad 1041.*

This provision has already been considered in the chapter "Capacity to Contract".

[177] AIR 1950 PC 99:77 IA 156.

bound and is not legally compellable to pay, he will not be bound to reimburse the party discharging his moral obligation.

Payment by One to Another

6][S. 70]

Lastly, the plaintiff should have made the payment to another person and not to himself. Thus, where a certain Government was the tenant of a land and paid to itself out of the rent due to the landlord the arrears of land revenue due to itself, the Government could not recover from the landlord. It was a transfer of money from one head to another within the Government and not "payment to another".[124]

3. Liability to pay for non-gratuitous acts [S. 70]

Section 70 creates liability to pay for the benefits of an act which the doer did not intend to do gratuitously. The section is as follows:

> **70. *Obligation of person enjoying benefit of non-gratuitous act.*—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.**
>
> *Illustrations*
>
> *(a) A*, a tradesman, leaves goods at B's house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.
>
> *ib) A* saves *B's* property from fire. *A* is not entitled to compensation from *B* if the circumstances show that he intended to act gratuitously.

GAJENDRAGADKAR J (afterwards CJ) stated in *State ofW.B.v B.K. Mondal and Sons*[125] the conditions on which the liability under the section arises.

> It is plain that three conditions must be satisfied before this section can be invoked: (1) a person should lawfully do something for another person or deliver something to him; (2) in doing the said thing or delivering the said thing he must not intend to act gratuitously; and (3) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

Not Intending to act Gratuitously

One of the conditions is that the person doing the act should not have intended to do it gratuitously. He should have contemplated being paid from the very beginning.[126] Secondly, the person for whom the act is done is not bound to pay unless he had the choice to reject the services. The person said to be liable under Section 70 always has the option not to accept the thing. It is only where he voluntarily accepts the thing or enjoys the

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_ *Secy of State for India* v *Fernandes*, (1907) 30 Mad 375. ;[3] AIR 1962 SC

779: 1962 Supp (1) SCR 876.

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Govt ofA.P. v *K. Brahmanandam*, (2008) 5 SCC 241, liability to pay for services rendered as a teacher, not intending to act gratuitously.

<5] [S. 73]

work done that the liability under Section 70 arises. In the application of this principle the courts have had to strike a balance between two factors. *Firstly,* the rule cannot be used by anybody to make officious interference in the affairs of another.[127] The court will not compel a person to pay for services which have been thrust upon him against his will.[128]

Where a tenant bank overstayed and also did not pay the increased rent which it had acknowledged, the court said:[129] "Having regard to the law laid down in various decisions of the Supreme Court and High Courts on the principle of "tenant-holding over" and its consequential effect making the tenant liable to pay damages or *mesne* profits to the landlord for continuing in possession without any authority of law and similarly in view of the legal position as regards the principle of unjust enrichment under the provisions of Section 70 of the Act, the court came to the inevitable conclusion that the defendant bank was liable to pay the plaintiff the entire amount of the suit claim."

Service Should have been Rendered Without Request

Yet, *secondly,* it is necessary that services should have been rendered without any request.[130] Reasonable compensation may, however, be recovered for services rendered at request.[131] This has been laid down by the Supreme Court in *State ofW.B.* v *B.K. Mondal and Sons?*[32]

> The plaintiff, on the request of an officer of the State of West Bengal, constructed a kutcha road, guardroom, office, kitchen, room for clerks and storage sheds for the use of the Civil Supplies Department of the Government. The State accepted the works but tried to escape liability under the pretence that no contract had been concluded in accordance with the requirements of Section 175(3) of the Government of India Act, 1935 (now Article 299 of the Constitution of India). The contractor was thus forced to try his luck with the State under Section 70, and it proved to be better than that of the State but at the cost of fighting up to the Supreme Court for a sum of Rs 19,325.

127 *Muthu Raman v Chinna Vellayan, (1916) 39 Mad 965.*

128 *Suchand Ghosal v Balram Mardana, (1911) 38 Cal 1.*

129 *Bank of India* v V! *Swaroop Reddy,* AIR 2001 AP 260: (2001) 2 Andh LT 388; *Syndicate Bank* v *Seema Traders,* 1999 A1HC 1876 (Kant), borrower liable to pay interest irrespective of anything else because otherwise he would be enriching himself at the cost of the lender; *B.N. Venketaswamy* v *P.S. Rukmiamma,* 1999 AIHC 1979 (Kant), interest is recoverable even if there is no provision to that effect in the loan agreement. *Nan- napaneni Venkata Rao, Coop Sugars Ltd* v *State Bank of India,* (2003) 6 ALT 199 (AP-DB), amount of loan was required to be kept in SB A/c till utilisation, SB interest allowed on the amount, nothing against it in RBI directions. *Niranjan Das* v *Orissa State Electricity Board,* (2003) 96 CLT 528 (Ori), liability to pay for electricity used after expiry of licence. *Narayan Venkatesh Pandit* v *Syed N Kliadri,* (1999) 2 Kar LJ 449, interest on oral loan allowed to be recovered. *Nanapaneni Venkata Rao Cooperative Sugar Ltd* v *SBI,* (2003) 6 ALD 307 AP interest on SB A/c.

130 Thus, goods supplied on order could not be made the subject-matter of a suit under this section. *Jain Mills and Electrical Stores* v *State of Orissa,* AIR 1991 Ori 117.

131 *Sibkisore Ghose* v *Manik Chandra,* (1915) 29 IC 453, lawyers entitled to reasonable fee where none was agreed to.

132 AIR 1962 SC 779: 1962 Supp (1) SCR 876.

The State was held liable because instead of rejecting the services it had enjoyed the benefit of them.

The principle of this case has been reaffirmed by the Supreme Court in *Piloo Dhun- jishaw Sidhwa* v *Municipal Corpn of the City ofPoona.*[m] Here too the Corporation tried to escape liability for spare motor parts supplied to it on the ground that the contract was not made in accordance with the Bombay Municipal Corporation Act (59 of 1949). But the Corporation was held liable to pay under Section 70. The only question was what should be the measure of compensation. In the present case the rates quoted by the supplier in his invoice were considered to be the fair measure of compensation giving the State the right to show that the market price was less than that, but the Corporation did nothing in this respect. Thus, though the claim under Section 70 is not based upon any contract, yet the contract between the parties is relevant at least for indicating the fair measure of compensation.[134]

The Supreme Court has further held that where a contractor whose work has been accepted by the other party claims compensation under an oral agreement, which he is not able to prove, he would still be entitled to compensation under Section 70.[135]

"Lawfully Does"

Secondly, services should have been rendered lawfully. Commenting upon this in *State of W.B.* v *B.K. Mondal and Sons*[136], the Supreme Court said that the word "lawfully" refers to an object or consideration which is not forbidden by Section 23 of the Contract Act, but requiring the Government to pay for benefits enjoyed without fulfilling the requirements of the Constitution is not unlawful. It has been a point of emphasis that between the person claiming compensation and the person against whom it is claimed, some lawful relationship must exist and it should arise by reason of the fact that what has been done by the former has been accepted and enjoyed by the latter.

Contract void under Article 299 or otherwise.—Recovery under the section is possible even if there was no contract or the contract was void under Article 299 of the Constitution. Thus, the Government was allowed to recover the cost of training from a candidate who refused to join the Government service. The Government could have waived but there was no evidence of waiver. The candidate was sent to training on his agreeing to serve the Government. He could not say that no advantage came to him from the training.[137]

Kisan Vikas Patras were issued by a post office to a Cooperative Bank unmindful of the prohibition contained in the Government Savings Certificates Act, 1952. The Post Of-

[33] (1970) 1 SCC 213: AIR 1970 SC 1201: (1970) 3 SCR 415, followed in *Dinshaw & Dinshaw* v *Indoswe Engineers (P) Ltd,* AIR 1995 Bom 180, a contractor was allowed recovery for extra work done by him under a contract, though not covered by the contract. *Followed* in *Pannalal* v *Dy. Commr., Bhandara,* (1973) 1 SCC 639.

135 *V.R. Subramanyam* v *B. Thayappa,* (1961) 3 SCR 663: AIR 1966 SC 1034. [36] AIR 1962 SC 779: 1962 Supp (1) SCR 876.

137 *D.C. Wadliwa v State of Punjab: AIR 1987 P&H 117.*

fice had to pay interest up to the date of maturity. The Government cannot enrich itself at the cost of an individual under its own errors.[138]

Non-gratuitous acts.—*Thirdly*, the person rendering services should not have intended to act gratuitously. The decision of the Madras High Court in *Damodara Mudaliar* v *Secretary of State for India*[m] is an instructive illustration.

A number of villages were drawing irrigation waters from a tank. Some of the villages were under direct State tenancy, others under *Zamindars.* The Government carried out repairs to the tank for its preservation. The *Zamindars* also enjoyed the benefits of the repairs.

They were accordingly held liable to make proportional contribution towards the expenses of repair. In an unusual case, the bridegroom and his father went back along with the marriage party, refusing to carry the bride with them just on the ground that the bride's father refused to pay the charges of the dancing-girl which the marriage party brought with itself. The bride's father was allowed to recover the expenses incurred on feeding, and other services rendered to the marriage party.[140]

Payment for work already done.—A highway work was allotted on emergency basis. The cost was sanctioned by the superintending engineer but no allocation of funds was made. The work was completed. The State was not allowed to leave the contractor high and dry. The State must compensate him. The work was not supposed to have been done on gratuitous basis. The sanctioned amount must be paid.[141]

"Enjoys the benefit".—*Lastly,* the defendant must have derived a direct benefit from the payment or services. Where the works done by a railway company developed the adjoining lands and consequently the municipality received more taxes, this was held to be not a sufficient benefit to enable the railway company to recover compensation from the municipality.[142]

4. Finder of goods [S. 71]

Section 71 lays down the responsibility of a finder of goods.

71. *Responsibility of finder of goods.*—A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.

In respect of duties and liabilities, a finder is treated at par with bailee.

5. Mistake or coercion [S. 72]

Section 72 deals with payments made or things delivered under mistake or coercion.

138 *Mahila Sewa Sahakari Bank Ltd v Chief Post Master, AIR 2007 Guj 72.*

139 (1894) 18 Mad 88,91.

140 *Noor Mohd v Mohd Jiaddin, AIR 1992 MP 244.*

141 *Ram Pravesh Prasad v State ofBikaner, AIR 2007 Pat 26.*

142 *Governor-General-in-Council v Madura Municipality, (1948) 75 IA 213: AIR 1949 PC 39.*

<5] [S. 73]

72. ***Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.*****—A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.**

Illustrations

0*a) A* and *B* jointly owe 100 rupees to *C. A* alone pays the amount to *C* and *B,* not knowing this fact, pays 100 rupees over again to *C. C* is bound to repay the amount to *B.*

(,b) A railway company refused to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Mistake of Fact or of Law

Money paid under mistake is recoverable whether the mistake be of fact[143] or of law. The controversy between the High Court decisions as to whether money paid under mistake of law could be recovered was set at rest by the Privy Council in *Shiba Prasad Singh (Sri)* v *Maharaja Srish Chandra Nandi*[144]. The Supreme Court in its decision in *STO* v *Kanhaiya Lai Makund Lai Saraf*[45] has accepted this interpretation of Section 72. A certain amount of sales tax was paid by a firm under the Uttar Pradesh Sales Tax law on its forward transactions and subsequent to the payment the Allahabad High Court ruled the levy of sales tax on such transactions to be *ultra vires.* The firm was allowed to recover back the tax.

Mistaken Payment of Taxes

The scope of the word "mistake" has been further exemplified by the Supreme Court in *Tilokchand Motichand* v *H.B. Munshi,*[146]

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Payment for consideration which failed is a mistake of fact, e.g., payment for purchase of oil which had to be rejected because of adulteration. Price paid was allowed to be recovered back with interest, *Ashok Vandhan Bhagat* v *West Bengal Essential Commodities' Supply Corpn Ltd,* AIR 1992 Cal 135. Extra payment under a contract is covered by the section and, therefore, refundable, *Board of Trustees of Cochin Port* v *Ashok Leyland Ltd,* AIR 1992 Ker 1; *Nurdin & Peacock Pic* v *D.B. Ramsden & Co Ltd,* (1999) 1 All ER 941 (Ch D) refund of overpaid rent; *Gujarat Steel Tubes Ltd* v *Board of Trustees of the Port of Kandla,* AIR 2002 Guj 173, plea of refund at the stage of arguments not allowed. *K.T. Venkatagiri* v *State of Karnataka,* (2003) 9 SCC 1: AIR 2003 SC 1819: 2003 AIR-Kant HCR 787 sole distributor, disputes arose, during pendency of litigation marketing done through others, this deprived the sole distributor of his sales commission, he was allowed to claim reimbursement to that extent. *K.S. Satyanarayana* v *V.R. Narayana Rao,* (1999) 6 SCC 104: AIR 1999 SC 2544. *State Bank of India* v *National Open School Society,* AIR 2004 Del 306, saving bank account credited by bank by mistake. On realising the mistake on information by customer the entry was reversed and interest sought to be recovered from the customer for using the money, held not allowable. While attempting to recover the principal money, the bank appropriated an equal amount of money from the customer's another account. This was held to be misappropriation and breach of trust. *ONGC* v *Assn of Natural Gas Consuming Industries,* (2001) 6 SCC 627: AIR 2001 SC 2796, recovery of escalated costs for supply of gas. *Gautam Constructions and Fisheries Ltd* v *National Bank for Agriculture & Rural Development,* (2000) 6 SCC 519, prices already fixed found to be reasonable, no escalation allowed.

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76 IA 244: AIR 1949 PC 297. [45] 1959 SCR 1350: AIR 1959 SC 135: (1958) 9 STC 747:

(1959) 1 Mad LJ 35.

146

(1969) 1 SCC 110: (1969) 2 SCR 824: AIR 1970 SC 898: (1970) 25 STC 289.

A cheque was given by the State to a firm to refund the tax of about Rs 26000 which was collected from persons not liable to pay tax. When refund was not done, the State asked for refund of the money but firm could pay it back only on order of attachment. In the meantime, the Act under which the recovery was made from the firm was declared by the Supreme Court to be ultra vires. The firm sought to recover back the money as having been paid under mistake of law or coercion. The recovery was not allowed because the period of limitation for filing a recovery suit had expired.

In a subsequent case, the Bombay High Court laid down that a tax collected without authority is recoverable by the person from whom it was collected even though he might have shifted the burden of it to others. The relief was allowed under writ jurisdiction. The court, however, added that while the State cannot be allowed to enrich itself at the cost of the taxpayer, the unjust enrichment of the taxpayer is not an irrelevant consideration, particularly when refund is being given to him of a tax amount the burden of which he has already shifted to his customers and absorbed into his costs.[147] The Supreme Court did not permit the recovery to a dealer who paid octroi duty and passed on the burden to customers,[148] and also to a dealer who was seeking refund of excise duty because he was not able to show that he had not passed on the burden to his customers.[149] The Supreme Court upheld a decision permitting refund of terminal tax amount paid under a mistake of law.[150]

Change of position by payee in reliance on payment.—Every payment made under mistake is, not recoverable. "There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise."[151] The Calcutta High Court followed this principle in a case in which the facts were as follows:[152]

147 *New India Industries Ltd v Union of India, AIR 1990 Bom 239.*

148 *State of Rajasthan* v *Novelty Store,* (1998) 9 SCC 570: AIR 1995 SC 1132. Refund was allowed where the burden of unleviable octroi was not passed, *Birla Cement Works* v *State of Punjab,* AIR 1993 P&H 224. No refund was allowed where the burden was passed to buyers and the trader had not chance of returning the amount to them, *Mafatlal Industries Ltd* v *Union of India,* (1997) 5 SCC 536.

149 *Union of India* v *ITC Ltd,* 1993 Supp (4) SCC 326: AIR 1993 SC 2135.

150 *Nagar Mahapalika, Kanpur* v *Sri Ram Mahadeo Prasad,* 1991 Supp (2) SCC 279: AIR 1991 SC 274: (1977) Tax LR 1998 All. This is no question for estoppel. *K. Ketrabarsappa* v *Indian Bank,* AIR 1987 Kant 236; *Maruthy Enterprises* v *Corpn of City of Bangalore,* AIR 1999 Kant 41, where overpaid property tax was held to be refundable to the extent of the amount paid within the preceding three years, the rest having become time-barred. The Supreme Court has again reiterated in *Deputy Commr, Andaman* v *Consumer Co-op Stores Ltd,* (1999) 1 SCC 507: AIR 1999 SC 696 that the State should not resist the demand for refund of tax money (excise in this case) on the ground of unjust enrichment, where the money has been illegally collected from the taxpayer. The Bombay decision to the same effect is in *Garware Plastics <£ Polyester Ltd* v *Municipal Corpn of Aurangabad,* AIR 1999 Bom 431, octroi duty was paid and theie was a claim for refund. The claimant did not plead that the amount paid was not added to the cost of the product and, therefore, was not passed on to buyers. He was not allowed to claim refund. *Shree Digvijay Cement Co Ltd* v *Union of India,* (2003) 2 SCC 614: AIR 2003 SC 767, no refund allowed where the burden of the tax had already been passed on to customers. *Alco Chem Ltd* v *Hyderabad Chemical Pharmaceutical Works Ltd,* (2003) 3 Banking Cases 508 (AP), no refund of tax amount which was paid after collecting from others.

151 *Shiba Prasad Singh (Sri) v Maharaja Srisli Chandra Nandi, 76 Ind App 244: AIR 1949 PC 297.*

152 *Union of India v A TAli Hussain & Co, AIR i£78 Cal 169.*

The plaintiff bank made payment of certain crossed cheques to the defendant bank. The latter informed their customer-payee of the cheques that the payment had been received. The customer then delivered the goods to a person from whom he had received the cheques. It then turned out that the cheques were forged. The plaintiff sued the defendant bank and its customer to recover back the amount, contending that the payment had been made under the mistaken belief that the cheques were genuine.

The Court came to the conclusion that if the defendant bank had not paid away the proceeds to its customer or if the customer had not yet delivered the goods, the money could have been recovered back under Section 72.

An obvious case is a mistaken credit entry in a customer's account in a bank and'the customer withdrawing the amount. He would be bound to pay back the amount along with interest under the Interest Act, 1978.[178] Where a mortgaged land was sold and/a sum of money was left in the hands of the buyer to enable him to pay off the mortgage debt but he redeemed the mortgage without paying because of an intervening Debt Relief Act, the money in his hands became an unjust enrichment to him and he had to return it to the seller.[179]

Coercion.—The word "coercion" is used in this section in its general sense and not as defined in Section 15. Thus, money paid under pressure of circumstances, such as prevention of the execution of a decree on a property in which the party paying is interested, may be recovered even though "coercion" as defined in Section 15 is not established.[180]

Though the remedy is independent of contract, the contract, if any, shall not be wholly irrelevant.

DISCHARGE BY BREACH

A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible that he should perform his obligations under it or totally or partially fails to perform such obligations.[181] The failure to perform may take place when the time for performance has arrived or even before that. Thus, breach is of two kinds, namely: (1) anticipatory breach, and (2) present breach.

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[178] *S. Ketrabarsappa v Indian Bank, AIR 1987 Kant 236.*

[179] *Saraswathi Ammal* v *Shanmughavadi V. Ammal,* AIR 1994 Mad 234; *Rajendra Singh Wadhwa* v *State of M.P.,* AIR 2008 NOC 682 MP, liquor licencee not paying full licence money, deprivation from supplies, alright, but forfeiture of deposit money by encashing bank guarantee, held illegal.

Seth Kanhaya Lai v *National Bank of India,* (1913) 40 IA 56. *Mathew* v *Kuruvilla,* (1983) Ker LT 104, a transaction signed by a person while under detention at a police station was held to be the result of coercion.

[181] *Food Corpn of India* v *J. R Kesharwani,* 1994 Supp (1) SCC 531, one party making unilateral alterations without any intimation to the other and then cancelling the contract, this amounted to breach. *U.P. State Sugar Corpn* v *Mahalchand M. Kothari,* (2005) 1 SCC 348, breach of contract on the part of receiver of property.

Anticipatory breach

It is an announcement by the contracting party of his intention not to fulfil the contract and that he will no longer be bound by it. This kind of anticipatory renunciation has certain effects upon the rights of the parties.

Acceptance of Repudiation by Aggrieved Party

In the first place, the other party is excused from performance or from further performance. *Secondly,* it entitles the injured party to an option to sue immediately or to wait till the time the act was to be done. That an anticipatory breach gives an immediate right of action was recognised as early as (1853) in *Hochester* v *De La Tour}*[51]

> The plaintiff was a courier. He was engaged by the defendant to accompany him on a tour to commence on June 1, 1852. Nearly a month before this date the defendant wrote to the plaintiff that he had changed his mind, and declined his services. The plaintiff sued him for damages for breach. The defendant's counsel very powerfully contended that there could be no breach of agreement before the day when the performance was due.

But Lord CAMPBELL CJ ruled out the objection, and allowing the claim pointed out that a contract is a contract from the date it is made and not from the date that its performance is due.

The principle applies even to contingent contracts. *Frost* v *Knight'™* is the well-known illustration.

> The defendant promised to marry the plaintiff on the death of his father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. The plaintiff, without waiting for the father's death, at once brought an action for the breach.

The defendant contended that a breach could only arise on the happening of the contingency. But COCKBURN CJ held that "the case falls within the principle of *Hochester* v *De La Tour,* and that consequently, the present action is well brought".

The option is with the aggrieved party to sue at once or wait for performance.

Consequences of not Accepting Repudiation

If the aggrieved party does not accept the repudiation and leaves the contract alive, the consequences will be as follows: *Firstly,* the party repudiating the contract may nevertheless choose to perform when the time comes and the promisee will be bound to accept the same. *Secondly,* if while the contract is lying open, some event happens which discharges the contract otherwise than by repudiation, for example, by supervening impossibility

<5] [S. 73]

or frustration, the promisor would also be entitled to take the advantage of the changed circumstances. The most appropriate illustration is *Avery* v *Bowden,*[182]

> The defendant chartered the plaintiff's ship and agreed to load it with a cargo at Odessa within forty-five days. On arrival of the ship there, the defendant told the captain that he had no cargo for him and requested him to go away. The captain, however, stayed there in the hope that the defendant would fulfil his contract. But, before the expiry of forty-five days, a war broke out which rendered the performance illegal. The plaintiff then brought an action for breach.

It was held that the contract had ended by frustration and not by breach.

Thirdly, in case the anticipatory repudiation is accepted, damages for breach would be assessed at the time when repudiation takes place.

Where, the promisee does not accept the repudiation, damages will be assessed at the time fixed for performance and the promisee takes the risk of market rate falling and, in the meantime, he will have to take all reasonable steps to keep his loss to the minimum. The law is as stated in plain and simple terms in the speech of Viscount SIMON LC in *Hey- man* v *Darwins Ltd*:[183] that... repudiation by one party standing alone does not terminate the contract. It takes two to end it, repudiation, on the one side, and acceptance of the repudiation, on the other. This was emphasised by the House of Lords in *White and Carter (Councils) Ltd* v *McGregor.*'[61]

> A contract for display advertisement for 3 years of a motor garage business was struck between advertisement contractors and the agent of the garage owner, but the latter repudiated the contract by writing a letter of cancellation. The contractors refused his request and displayed the advertisement. The contract provided for annual payments and in default the payment for all the three years was to become due. Accordingly the contractors claimed full payment.

Their Lordships held that the contractors were only claiming what was due to them under the contract and, therefore, were entitled to it. Laying emphasis upon another aspect of repudiation the Supreme Court has observed that whatever implications the acceptance by the other party may have for remedial purposes, so far as the repudiating party is concerned he becomes free from the contract to the same extent as if the contract has ended. The disqualification, if any, for election purposes by virtue of a contract would end as soon as the contract is repudiated.'[62]

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[182] (1855) 5 E & B 714; 25 LJ QB 49; 103 RR 695; *George Avery* v. *Samuel Wilson Bowden,* 119 ER 647; 27 LJ 119.

[183] 1942 AC 356 at p. 361: [1942] 1 All ER 337 at p. 341. It has been held by the Supreme Court in *State of Kerala* v *Cochin Chemical Refineries ltd,* (1968) 3 SCR 556: AIR 1968 SC 1361 that by refusing to advance the loan which the State had undertaken to advance, its obligation to purchase groundnut cake from the company did not come to an end. The contract does not terminate unless the repudiation is accepted by the other party.

Failure to Perform Promise Wholly

Section 39 of the Indian Contract Act gives expression of the doctrine of anticipatory breach.

39. *Effect of refusal ofparty to perform promise wholly.*—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

(a) A, a singer enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engaged to pay her at the rate of hundred rupees for each night. On the sixth night, A wilfully absents herself. With the assent of *B, A* sings on the seventh night. *B* has signified an acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for damage sustained by him through A's failure to sing on the sixth night.

The party in default must have refused altogether to perform the contract and the refusal must go to the whole of the contract, otherwise the other party would not be justified in putting an end to the contract. Whether a partial failure goes to the root of the contract or not is a question of fact in each case. In a case before the Supreme Court a part of the goods were delivered by the seller himself under agreed instalments, but for the rest, delivery orders were sent asking the buyers to take deliveries from the mills directly. Since these delivery orders contained conditions which were not there in the contract, it was held that the seller was in breach of his contract.'[63]

The aggrieved party may, after putting an end to the contract, bring an action for damages for breach, but he will be bound under Section 64 to restore to the other party the benefits he might have received under the contract.

Termination by Notice

Certain engagements are inherently of such a nature that they imply a power of termination by appropriate notice. Leases, agencies and tenancies are common instances. Even where no time-limit is fixed it cannot be supposed that the parties intended to bind themselves in perpetuity, particularly in view of the changing economic conditions. A long-term contract for supply of gas was allowed to be terminated by a twelve months' notice. [184]

Tower Hamlets London Borough Council v British Gas Corpn, The Times, March 23, 1982.

DAMAGES FOR BREACH

The party who is injured by the breach of a contract may bring an action for damages. Damages means monetary compensation for the loss caused to the injured party. Every action for damages raises two problems. The first is the problem of "remoteness of damage" and the second that of "measure of damages".[165]

Remoteness of damage

Every breach of contract upsets many a settled expectation of the injured party. He may feel the consequences for a long time and in a variety of ways. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the consequences are too remote. The problem is where to draw the line.

Rules in Hadley v Baxendale

A very noble attempt was made as early as 1854 in the well-known case of *Hadley* v *Baxendale*[166] to solve the problem by laying down certain rules.

> The plaintiffs carried on an extensive business as millers. Their mill was stopped by a breakage of the crankshaft by which the mill was worked. The defendants, a firm of carriers, were engaged to carry the shaft to the manufacturers as a pattern for a new one. The defendants delayed the delivery by some neglect, and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done. The action was brought for the loss of profits which would have been made during the period of the delay.

ALDERSON B laid down the following rule:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

On the basis of this principle the defendants were held not liable for the loss of profits.

This decision has always been taken as laying two rules ***(1) General damages.***—General damages are for loss which arises naturally in the usual course of things from the breach itself. Another mode of putting this is that the defendant is liable for all the reasonably foreseeable consequences of his breach. ***(2) Special damages.***—Special damages are for loss which arises on account of the unusual circumstances affecting the plaintiff. They are not recoverable unless the special circumstances were brought to the knowledge

of the defendant so that the possibility of the special loss was in the contemplation of the parties.

<5] [S. 73]

Recovery of Special Damages only when Party had Knowledge of Special Circumstances

Lack of knowledge of special circumstances once again prevented recovery of special damages in *Home* v *Midland Railway Co}*[61]

> The plaintiffs, a firm of shoe manufacturers, contracted to supply a quantity of shoes to a firm in London for the use of the French Army at an unusually high price. The shoes were to be delivered by the 3rd of February. They consigned the shoes with the defendant railway company telling them that the consignment must reach by the 3rd, but not that there was anything exceptional in the contract. The consignment was delayed and the consignee refused to accept. The plaintiffs had to sell them in the market at about half their contract price.

In the action against the defendants for the delay in delivering the shoes, they paid into the court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched. It was held that this was a damage of an exceptional nature and it could not be supposed to have been in the contemplation of the railway company when it contracted to convey the goods by the 3rd.

For the same reason loss of profits was not allowed to be recovered in *British Columbia Saw Mill Co* v *Nettleship.*[m]

> The parts of a sawmill machinery, packed in cases, were given to the defendant, a carrier, for carriage to Vancouver. One of the cases was lost and consequently a complete mill could not be erected and operated. The plaintiff claimed the cost of lost machinery and the profits which could have been earned if the mill had been installed in time.

The court allowed only the cost in Vancouver of the articles lost.

Special Circumstances already Known

In the subsequent case of *Simpson* v *London & North-Western Railway Co,*[m] it was pointed out that if the special circumstances are already within the knowledge of the party breaking the contract, the formality of communicating them to him may not be necessary. The company was already aware of the object of carrying the goods there to a show ground. The plaintiff was allowed to recover not only the loss of freight but also the profits he would have made by placing the goods at the show.

167 (1873) LR8CP 131.
168 (1868) LR 3 CP 499: 18 LT 604.

Re-examination of the Two Rules.
6][S. 39]

The relationship between the rules was re-examined in *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*™. The substance of the rules is that only such loss is recoverable as was at the time of the contract reasonably foreseeable as liable to result from the breach. Foreseeability depends upon knowledge. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently to know what loss is liable to result from a breach of the contract naturally in the usual course of things. This is the subject-matter of the "first rule" in *Hadley* v *Baxendale.* But to this knowledge must be added the actual knowledge of the special circumstances of the case showing the possibility of more loss arising from the breach. Such a case attracts the operation of the "second rule" so as to make the additional loss recoverable. The judgment emphasises that both the rules are based upon the principle of "foreseeability". The facts of *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[171] were as follows:

> A firm of launderers and dyers wanted to expand their business and, therefore, ordered with the defendants for the supply of a boiler of much greater capacity. The defendants agreed to deliver on June 5, 1946, but delayed delivery until November 8. The plaintiffs claimed as damages the loss of profits which would have been earned if their business was expanded in time as there were at the time unique business opportunities.

The court allowed £ 110 as general damages but disallowed loss of profits.

House of Lords restored original vitality of the two rules.—The House of Lords in their decision in the *Heron II, The Koufos* v *C Czarnikow Ltd*[185] have restored the distinction between the two rules by again laying emphasis upon the "contemplation of the parties" rather than reasonable man's foresight.

> A vessel was chartered to proceed to Constanza, there to load a cargo of three thousand tons of sugar; and to carry it to Basrah, or, at the charterers' option, to Jeddah. The vessel left in time. A reasonably accurate prediction of the length of the voyage was twenty days. But the vessel in breach of contract made deviation which caused a delay of nine days. If the vessel had arrived in time, the charterer would have obtained roughly £ 1 more per ton than what he actually obtained. The shipowner knew that there was a market for sugar at Basrah, but did not know that the charterer wanted to sell the sugar promptly on arrival. The shipowner also knew that sugar prices were apt to fluctuate from day to day, but had no reason to suppose that fluctuation would be downwards rather than upwards. He was sued for the loss due to fall in market price.

The umpire allowed this loss. But the trial judge allowed as damages only the interest on the value of the cargo during the period of delay. The Court of Appeal reversed this order

170 [1949] 2 KB 528 CA: [1949] 1 All ER 997.
171 *Ibid.*

185 [1967] 3 All ER 686: [1969] 1 AC 350: [1967]3WLR 1491.

and restored the award of the umpire and the House of Lords unanimously affirmed the decision of the Court of Appeal.

Section 73, Contract Act

The same principles are applicable in India.

73. *Compensation for loss or damage caused by breach of contract.*—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

***Compensation for failure to discharge obligation resembling those created by contract.*— When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.**

***Explanation.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.**

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to *B.* at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A,* by way of compensation, the sum if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires *B's* ships to go to Bombay, and there takes on board, on the first January a cargo which *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B's* ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

(c) A contracts to buy of *B,* at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from A, by way of compensation the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when A informs *B* that he will not accept it.

(d) A contracts to buy *B's* ship for 60,000 rupees, but breaks his promise. A must pay to *B,* by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before

<5] [S. 73]

the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in certain manner, and receives payment in advance. *A* repairs the house, but not according to the contract. *B* is entitled to recover from *A* the cost of making the repairs that conform to the contract.

(g) A contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B,* by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply *B* with a certain quality of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A,* by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

(i) A delivers to *B*, a common carrier, a machine, to be conveyed without delay, to A's mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and A in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B,* by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with *B* to supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with *B. C* fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B.*

(k) A contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A,* and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A),* and is compelled to make compensation for breach of that contract. *A* must pay to *B,* by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to C, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C. A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B,* who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and *B,* in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay C a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A.*

(,*n*) A contracts to pay a sum of money to *B* on a day specified. A does not pay the money on that day; *B,* in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January, A breaks his promise. In estimating the compensation payable by A to *B,* the market price of the first of January, and not the profit which would have arisen to *B* from the sale to C, is to be taken into account.

(*p*) A contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. A knows nothing of *B's* mode of conducting his business. A breaks his promise, and *B,* having no cotton, is obliged to close his mill. A is not responsible to *B* for the loss caused to *B* by the closing of the mill.

{q) A contracts to sell and deliver to *B* , on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from A, by way of compensation the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a shipowner, contacts with *B* to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and *B* pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B,* after being in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

Section 73 declaratory ofHadley v Baxendale Rules

The section declares that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The section also provides that the same principles will apply where there has been a breach of a <?Ma.n'-contractual obligation. The section thus clearly lays down two rules. Compensation is recoverable for any loss or damage: *(i) arising naturally in the usual course of things from the breach,* or *(ii) which the parties knew at the time of the contract as likely to result from the breach.* The first rule is "objective" as it makes the liability to depend upon a reasonable man's foresight of the loss that will naturally result from the breach of the contract. The second rule is "subjective" as, according to it, the extent of liability depends upon the knowledge of the

parties at the time of the contract about the probable result of the breach. One illustration is

<5] [S. 73] *Madras Railway Co v Govinda Rau.*[m]

> The plaintiff, who was a tailor, delivered a sewing machine and some cloth to the defendant railway company to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the company of his special purpose.

He claimed as damages the expenses of travelling up to the place of festival and of staying there and the loss of profits which he would have earned. The court held that the damages claimed were too remote.

Even where the goods are altogether lost in transit, the carrier is not liable for the loss of profits which would have been made by selling the goods at their destination.

Thus, loss of profits which are to accrue upon resale can never be recovered unless it is communicated to the other party that the goods are for resale upon a special contract.

The burden of proof lies on the plaintiff to show that damage has been sustained and what shall be the measure of converting the loss into money. A claim for damages becomes liable to be rejected where this burden is not discharged.[186]

Meaning of Market Price

In almost all sales transactions which fail to go through, the normal yardstick for working out the sum of money to which the aggrieved party is entitled is the difference between the contract and market price. The rule presupposes the existence of a market and the possibility of ascertaining the price of the goods in that market. These concepts were the subject-matter of some explanation in a case where the buyer refused to accept the goods.[187] The court dealt with the question in the following way:

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186 *Draupadi Devi v Union of India, (2004) 11 SCC 425; HPA International v Bhagwandas Fateh Chand Das- wani, (2004) 6 SCC 537: AIR-2004 SC 3858.*

Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd, (1990) 3 All ER 723 QBD (Commercial Court).

190 In assessing damages for failure to perform a contract for the purchase of goods the measure of damages payable by the defaulting buyer is the difference between the contract price and the current market price at the date of breach based on a hypothetical sale of the particular amount of the goods in question in the available market but disregarding any characteristic of the seller which might have led to a lower price being obtained. In determining whether there is an 'available market' for the goods in question, if the seller actually offered the goods for sale there is no available market unless there is one actual buyer on that day at a fair price. If, on the other hand, there is only a notional or hypothetical sale there is no available market unless on the relevant

<5] [S. 73]

day there were in the market sufficient traders potentially in touch with each other to evidence a market in which the seller could if he had wished have sold the goods.

In a case before the Supreme Court'[76] a consignment of goods with the railways reached its destination after inordinate delay, caused by gross negligence of seven months. The plaintiff's money remained blocked for the period. He was allowed to recover interest on the money by way of damages for the loss.[188]

Where there was a failure to supply about half the material contracted for, the Supreme Court held that damages would be calculated on the basis of the price prevailing on the date fixed for delivery.[189] Where the Government committed the breach of a contract allotted to a contractor by means of a tender, the contractor was allowed by the Supreme Court to recover compensation for the loss of expected profits.[190]

Where in a scheme for allotment of houses the limit of escalation cost was fixed in the scheme itself, the Authority was not allowed to charge anything in excess of the limit by way of escalation.[191]

Agreement to Provide Finance

An arrangement to provide funds for an approved project is not a typical contract; it is only a facility. Where, after releasing some instalments, the lending institution refuses to go further, the borrower cannot compel it, nor hold it liable in damages for the loss of his expectations, nor claim a set off against its demand for interest on the money already provided, his right, if any, to damages.[192] Writ remedy has been held to be not available

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[188] *Ibid* and see *Modi Sugar Mills* v *Union of India,* 1984 Supp SCC 338: AIR 1984, SC 1248.

[189] *Union of India v Jolly Steel Industries (P) Ltd, 1980 Supp SCC 436: AIR 1980 SC 1346.*

[190] *A T. Brij Paul Singh* v *State of Gujarat,* (1984) 4 SCC 59: AIR 1984 SC 1703; *Pravara Sahakari Sakhar Karkhana Ltd* v *Express Industrial Corpn,* AIR 2002 Bom 185, seller failed to deliver balance of the goods, the buyer proved no loss, Rs 25,000 allowed in recognition of breach of contract. *Thyssen Stahl Union GMBH* v *SAIL,* AIR 2002 Del 255, the party to the arbitration proved no loss, the arbitrator could not have allowed damages. *A. Molid Basheer* v *State of Kerala,* (2003) 6 SCC 159, bid for collection of forest output, which was destroyed by fire, the bidder asked for reduction in price which was rejected and auctioned at a lesser price, difference not allowed to be recovered from the original bidder. *Gujarat State Road Transport Corpn* v *Ray Orr Bros,* AIR 2000 Guj 313, the Government purchased the requisite machinery almost one year after failure on the part of the tenderer. The Government was allowed the difference between the rates of the tenderer whose quotation was accepted and that of the next higher tenderer.

191

Kanpur Development Authority v *Sheela Devi,* (2003) 12 SCC 497: AIR 2004 SC 400; *Bareilly Development Authority* v *Vrinda Gujarati,* (2004) 4 SCC 606: AIR 2004 SC 1749, escalation of costs of flats in accordance with Rules duly intimated to and accepted by allottees. *Gujarat Housing Board* v *Harilal Jethalal,* AIR 2001 Guj 259, delay in completion in work due to contractor's fault, he was delaying to take advantage of escalation, not allowed. *Food Corpn of India* v *Ratanlal N. Gwalani,* AIR 2004 MP 215, delays in working because of obstructions caused by the Department, contract provided for escalation. If delay was not due to contractor's fault, escalation allowed.

Industrial Finance Corpn of India v Sehgal Papers Ltd, AIR 1966 P&H 21.

for examining the validity of the conduct of a nationalised bank in unilaterally refusing to disburse the loan in terms of its agreement.[193]

Building Contracts

Since works and building contracts are undertaken only with a view to earning profits, the party committing the breach would be liable for the contractor's loss in terms of expected profits. The Supreme Court came to this conclusion in *A.T. Brij Paul Singh* v *State of Gujarat,*[194]

> A Government building contract was allotted through tenders. It fell to the share of a Poona-based contractor who transported his mobile workshop from there to the work site at Rajkot in Gujarat. He had done only a part of the work when the Government unjustifiably repudiated the contract. The contractor sued for loss of profits.

It was not disputed before the Supreme Court that where in a works contract the party entrusting the work commits breach, the contractor would be entitled to claim damages for loss of profit which he expected from the project.[195]

MEASURE OF DAMAGES

Once the extent of recoverable loss is determined, it has to be evaluated in terms of money. This is the problem of measure or calculation of damages and is governed by some fundamental principles.

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193 *Gwalior Ispat (P) Ltd* v *SBI,* AIR 1995 Del 199. The reason is that a contract of loan is not specifically enforceable. Remedy under Art 226 was refused by the Supreme Court in *Food Corpn of India* v *Jagannath Dutta,* 1993 Supp (3) SCC 635: AIR 1993 SC 1494.

194 (1984) 4 SCC 59: AIR 1984 SC 1703.

195 *Ghaziabad Development Authority* v *Union of India,* (2000) 6 SCC 113: AIR 2000 SC 2003, damages for mental pain and anguish cannot be awarded in a case in which there is a breach on the part of a development authority in delaying the completion of the scheme. It is not a head of damages in ordinary commercial contracts. The court, however, allowed interest at the rate of 12% on the refundable amount though there was no provision in the contract to that effect. It was justifiable on the equitable ground. The court noted its own decision in *Sovintorg (India) Ltd* v *State Bank of India,* (1999) 6 SCC 406: AIR 1999 SCW 2878: AIR 1999 SC 2963, where in similar circumstances the National Consumer Disputes Redressal Commission directed the amount deposited by the claimant to be returned with interest @ 12% and the Supreme Court enhanced it to 15%. *Dwarka Das* v *State ofM.P.,* (1999) 3 SCC 500: AIR 1999 SC 1031. A works contract was rescinded on the ground that the contractor had not completed within the stipulated time even 10% of the works. But evidence showed that the contract was improperly rescinded and, therefore, it amounted to a breach of contract. The contractor claimed Rs 20,000 as compensation, being 10% of the value of the contract. The court said that the contractor was entitled to claim damages for loss of profit which he expected from the project. His claim was held to be fully justified. *Usha Deltron Ltd* v *Nand Kishore Parasramka,* AIR 2001 Cal 429, at least some evidence at price difference must be shown to enable the court to make a proper quantification. *Cotton Corpn of India Ltd* v *Algappa Cotton Mills,* AIR 2001 Bom 420 interest on price difference allowed. *Managing Director, Army Welfare Housing Organisation* v *Sumangal Services (P) Ltd,* (2004) 9 SCC 619: AIR 2004 SC 1344, statement of factors relevant for determining damages in a building contract.

<5] [S. 73]

Damages are compensatory, not penal

"The primary aim or principle of the law of damages for a breach of contract is to place the plaintiff in the same position he would be in if the contract had been fulfilled, or to place the plaintiff in the position he would have occupied had the breach of the contract not occurred. When this is accomplished, the primary aim or principle of the law of damages has been fulfilled."'[85]

Robinson v *Harman*[m] is an apt illustration. The defendant, having agreed to grant a lease of a certain property to the plaintiff, refused to do so. The court allowed the plaintiff by way of damages the expenses incurred by him on the preliminary legal work and also for the profits which he would have earned if the lease had been granted to him. Thus, damages are given by way of compensation for the loss suffered by the plaintiff and not for the purpose of punishing the defendant for the breach. Motive for and the manner of breach are not taken into account because generally "punitive damages are not recoverable for breach of contract".

Inconvenience caused by breach.—The inconvenience'caused by the breach may be taken into account. In *Hobbs* v *London and South-Western Rly.* Co'[87], where a train pulled its passengers to a wrong direction and consequently the plaintiff and his wife, finding no other conveyance, nor a place to stay, had to walk home at midnight, the jury allowed £ 8 as the damages for the inconvenience suffered by the plaintiffs in being obliged to walk home and £ 20 in respect of the wife's illness caused by catching cold. On appeal the Court of Queen's Bench held that the £ 8 was properly awarded but not £ 20.

In the subsequent case of *McMohan* v *Fields*[m] the above decision was criticised and damages were allowed when the plaintiff's horses were turned out of the defendant's stable in breach of contract and they caught cold before an alternative accommodation could be found for them.

Loss caused by misrepresentation.-—The price at which a thing is purchased and its difference with the real value when misrepresentation about it is discovered, is the yardstick for compensation. A horse was purchased described as fit for races. But it turned out to be of a different breed. That was discovered after a long process of trial and error and after the discovery its market value was much less. It was held that where an article purchased as a result of a misrepresentation could have been resold immediately after the sale for the price paid but by the time the misrepresentation was discovered its value had fallen by reason of a defect in it which had then become apparent, the appropriate measure of damages would be the difference between the purchase price and its value at the

time when misrepresentation is discovered and not the difference between the purchase price and its actual value at the time of purchase.[189]

Nominal Damages, No loss situation

Where the plaintiff suffers no loss, the court may still award him nominal damages in recognition of his right. But this is in the discretion of the court, that Section 73 does not give any cause of action unless and until the damage is actually suffered. The case before the court was *Union of India* v *Tribhuwan Das Lalji Patel*[190].

> A contract for the supply of sleepers to the railway administration contained a number of clauses including this that irrespective of whether the Government suffered any loss or not on account of the contractor's failure to supply the Government was entitled to damages. The contractor failed to supply, but the railways did not suffer any loss. Even so an action for damages was instituted against the contractor. The action was disallowed.

In some cases, however, the court may award nominal damages, as was done by the Court of Appeal in *Charter* v *Sullivan*[191].

> The defendant, having contracted to buy a Hillman car from a car dealer, ultimately refused to buy. Within a week the car was sold to another customer. Indeed the dealer was able to sell as many cars as he wanted and lost nothing on account of the defendant's breach. Even so he wanted to recover the loss of his profit.

The court held that he was entitled only to nominal damages. As against it in another case,[196] on account of the customer's breach in lifting the car in terms of his agreement, the dealer had to return the car to the manufacturer. He was allowed to recover the profits which he would have made on sale of the car to the defaulting customer.

An action was brought for breach of contract arising out of overuse of musical recordings. The court generally orders in such cases an account of profits made in overuse but in this case the breach had caused no economic loss.[197] The court said:

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[196] *VL Thompson Ltd v Robinson (Gunmakers) Ltd, [1955] 1 All ER 809: 1955 Ch 177.*

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Although the court could order an account of profits for breach of contract where the claimant could not prove that it had suffered any financial loss, this would only be done in exceptional circumstances such as national security, exceptional profits and fiduciary breaches. Damages could be awarded for a breach of a restriction which had been imposed to protect the claimant's property where an injunction was refused because the court was only concerned with past profits. This was not an exceptional case which justified an account of profits. Even so, the defendant should make a reasonable and substantial payment for the unauthorised use of the master records.

Where the highest bidder committed default in payment but the forest authorities suf fered no serious prejudice due to the default, the court said that forfeiture of the wholi of the deposit money was not justified. The court ordered refund of the actual amour without interest or costs.[198]

Mental pain and suffering

In ordinary cases, damages for mental pain and suffering caused by the breach are n allowed.[193] But they may be allowed in special cases. An illustration is found in a ca; before the Supreme Court of Colorado, US[199]:

The defendant, a banking corporation, agreed to loan to the plaintiff money foi trip to California by crediting his account with such sums as he might need after reac ing his destination. The plaintiff reached California, but the defendant refused to gi him the promised credit.

The court allowed damages for humiliation and mental suffering.

The House of Lords in *Addis* v *Gramophone Co Ltd*[200] listed three situations in wh mental pain and suffering can be taken into account, namely "unjustified dishonour < cheque; breach of promise of marriage[201] and where the vendor of real estate fails to m title". The facts of the case were:

The plaintiff was employed by the defendant company at a certain salary and c mission on trade done. He could be dismissed by six months' notice. He was givei months' notice and at the same time another person was appointed to his place preventing him from acting as manager even for the notice period and earnin; commission.

194 *State of A. P. v Singam Setty Yellananda. AIR 2003 AP 182.*

195 *Bangalore Development Authority* v *Syndicate Bank,* (2007) 6 SCC 711, for negligent, arbitrary or cious conduct on the part of a Development Authority, the Supreme Court said that the victim shouk compensation for mental agony and suffering under administrative law.

196 *Westesen v Olathe State Bank, (1925) 78 Colo 217.*

Experience Hendrix LLC v PPX Enterprises Inc, 2003 EWCA Civ 323. The Court considered Attorney- General v Blake, (2001) 1 AC 268; Wotam Park Estate Co Ltd v Parkside Homes Ltd, (1974) 1 WLR 798;

the efforts to prevent, overspill continued but, no loss of revenue was caused.

200 1909 AC 488; 78 LJKB 1122.

201 Damages of Rs 30,000 were allowed to a girl who was lured away under promise of marriage a abandoned after pregnancy, the court taking into account physical pain, indignity, dim chance of rem social stigma, etc, *Laxminarain* v *Sumitra Bai,* AIR 1995 MP 86.

<5] [S. 73]

The House of Lords rejected the claim for damages for the humiliating manner of dismissal, but allowed damages for the commission and salary which he had lost. [197]

Photographer's failure to **appear** at **wedding.**—Now the principle is revolving round to this that in every proper case damages for mental distress can be recovered. In a Scottish case, a photographer who had agreed to take photographs at a wedding, failed in breach of his contract to appear there. As a result the bride had no photographs of her wedding. She was allowed damages for resulting injury to her feelings.[202]

Holiday cases.—In the more recent case of *Jarvis* v *Swam Tours Ltd*[203], Lord DENNING MR has described the principle that damages cannot be recovered for mental pain and suffering caused by the breach to be out of date.

> The plaintiff wanted to spend his holidays. He was attracted by the representations held out by a tourist agency that certain kind of facilities, recreation, company, etc., would be provided by them on tours conducted by them. The promises turned out to be unreal and the plaintiff was much disappointed. He was allowed damages for disappointed expectations, the court saying that in a proper case damages for mental distress can be recovered and one such case in a contract for holiday.

Solicitor's failure to take appropriate steps to protect client's interest.—The principle is now no more confined to holiday cases. The decision of the English Court of Appeal in *Heywood* v *Wellers*[204] has rendered it to be a principle of general import.

> The plaintiff engaged a firm of solicitors to obtain an injunction against a man who was harassing her. The solicitors obtained an injunction but failed to bring the man before the court when he molested her again with the result that the harassment remained unabated.

She was allowed to recover damages from the solicitors for the consequential mental anguish. The court expressed the opinion that this kind of loss is no different from any other loss, for any reasonable man could have foreseen that continued molestation would cause further mental distress.

Loss of pets due to carrier's negligence.—This principle was applied by a Canadian Court to the distress caused by the loss of a pet due to carrier's negligence.[205]

> The plaintiffs wanted to carry their two pet dogs with them in the flight. The plaintiffs were willing to pay for the entire first class section of the aircraft for the purpose of keeping their pets with them. But the defendants did not agree to that. They told the plaintiffs that the pets would be carried in the cargo compartment and assured that they would arrive in the first class condition. But, as luck would have it, the pets happened

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[202] *Diesen* v *Samson*, 1971 SLT 49; noted in CURRENT LAW, November 1971.

[203] [1973] 1 All ER 71 CA.

[204] [1976] 1 All ER 300.

[205] *Newell* v *Canadian Pacific Airlines*, (1976) 74 DLR (3d) 574 (Ont Cty Ct).

to be placed next to a container of dry ice which threw out fumes. One pet perished and the other was taken ill.

The plaintiff successfully claimed damages, apart from, for the loss of the dog, for "the anguish, and sadness".

Demotion of employee without reasonable cause.—Where, on the other hand, it is in the contemplation of the party committing the breach, that mental depression may result, liability to compensate the same may arise. It has been held[203] that "in relegating the plaintiff to a position of lesser responsibility, the defendants were in breach of contract. Since that breach had caused the plaintiff depression, vexation and frustration leading to ill health, he was entitled to receive damages for that breach since, at the time when the contract was made, it was in the contemplation of the parties that if it were broken the plaintiff would be exposed to the kind of mental distress which he had, in fact, suffered. The plaintiff was, therefore, held entitled to £500 damages for the defendant's breach of contract."

The courts, however, keep repeating that it is not appropriate to award damages for anguish and vexation when the contract broken is an ordinary commercial one.[204]

Mental distress caused by negligent professional advice.—The same principle was followed where mental distress was caused by a negligent survey report as a result of which a house was purchased at a price higher than it was worth and considerable time and money had to be spent on making it habitable. A sum of £ 8000 (being £ 4000 to each plaintiff) was awarded at the trial, but the Court of Appeal held that damages for breach of a normal contract of survey are only recoverable for distress caused by physical consequences of the breach and that they would each be awarded damages of £ 750 for physical discomfort.[205]

Contracts for providing peace of mind or preventing mental distress.—The principle is revolving round to this that in every proper case damages for mental distress can be recovered, that is to say, "where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress".[206] This would not include cases where the object of the contract was not comfort or pleasure, or the relief of discomfort, but simply carrying on a commercial activity with a view to profit.

Failure by band to attend wedding reception.— A businessman of some standing engaged a top 12-man band for daughter's wedding reception to entertain about 1200 guests. When half an hour before the agreed time on the wedding day the bandmaster rang to tell his unability to reach there, the host had to suffer a considerable humiliation because it was a matter of personal prestige for him. Substituted group was not that good

[203] *Cox* v *Philips Industries Ltd*, [1976] 3 All ER 161: [1976] 1 WLR 638 QB.

[204] *Hayes* v *Dodd*, (1988) CLY 422, 1044 CA.

[205] *Watts* v *Morrow*, (1991) 4 All ER 937 Ch.

Bliss v South-East Thames Regional Health Authority, (1987) 1 ICR 700, 718.

therefore, court ordered refund of advance money & $800 for disappointment and humiliation as general damages.

Refusal to provide motel booked for wedding reception.[208]— Where a motel cancelled the wedding reception on booking 48 hours before the marriage, the plaintiffs had to suffer because the alternative agreement was very bad, the court held that marriage of an only daughter's wedding is a unique event for a parent and general damages of £ 750 were awarded for inconvenience and disappointment plus £ 265 special damages for the cancellation fee of the band and telephone calls to notify guests of the changed venue.[206]

Damages for breach of confidence.—Damages are also allowed for breach of confidence.

Three actresses formed a rock group. They conceived an idea of producing a television serial, based on their experiences, to focus attention on their individual and group life so as to contrast their collective character with their individual character. The idea was conveyed in the course of oral negotiations to a television company. This resulted in a written agreement which provided some payment to the ladies but forbade the company from using the idea unless the ladies were given the opportunity to act and they declined it. Without giving the opportunity, the company produced the programme with great commercial success.

The company was held liable in damages to the ladies.

Where damages would not be an appropriate remedy, an injunction may be issued against improper use of confidence.[207]

Every information or general knowledge of facts which comes to be picked up by an employee cannot be labelled as trade secret or confidential information. A TV personality who left employment of one company and joined another which proposed to establish a competitive business could not be restrained from doing so only for the fear that he might use his experience gained in the first employment in promoting the business of the next employer.[209]

Injunction for restraining breach of contract

A supply system to the Army which had been going on since 1960 was not allowed to be scrapped all of a sudden by blacklisting the supplier. A person dealing with the Government in matters of sale and purchase develops legitimate interest and expectations. The order of blacklisting amounted to denial of equality of opportunity. Before issuing such

[206] *Hotson & Hotson v Payne, 1988 CLY 1047.*

[207] *Attorney-General* v *Barker,* [1990] 3 All ER 257 CA, restraint on a publication in which information obtained as an employee was going to be used.

[209] *Star India P Ltd* v *Laxmiraj Seetharam Nayak,* (2003) 3 Mh LJ 726. For a study of the object showing the need for and techniques of protection *see* Ter Kah Leng and Susanna HS Leong, *Contractual Protection of Business Confidence,* 2002 JBL 513.

an order some explanation should have been called for. The court would not interfere in the matter if it is decided again by giving opportunity to the supplier.[210]

Writ remedy against termination of dealership

A dealership agreement was terminated by reason of breaches on the part of the dealer. He applied for a writ against the order expecting that contractual obligations should be decided on the basis of affidavit evidence. The court refused to entertain the petition. The matter related to contract, trade and business. It should be adjudicated through an appropriate civil action.[211]

Withdrawal of letter of intent and writ remedy

A letter of intent was issued in favour of the petitioner for granting him a retail outlet for sale of petroleum products. The letter was subsequently withdrawn without assigning any reasons. This was held to fall foul of Article 14 of the Constitution. The court said that in appropriate cases it could interfere in contract matters in the exercise of writ jurisdiction. The respondent was directed to restore the letter of intent and take further steps in accordance with the law and prescribed procedure.[212]

Duty to mitigate

The *Explanation* attached to Section 73 provides for the duty to mitigate damages. It says:

> ***Explanation.*—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.**

Thus, the injured party has to take reasonable steps to see that his loss is kept to the minimum. The most frequent application of this rule takes place in contracts for sale or purchase of goods. On the buyer's refusal to take delivery, the seller should resell the goods at the prevailing market price and he may then recover from the defaulting buyer as damages the difference between the price he realised and the price he would have received under the contract.[213] If the seller does not resell the goods and his loss is aggravated by the falling market, he cannot recover the enhanced loss. The well-known authority for this proposition is the decision of the Privy Council in *Jamal* v *Moola Dawood Sons* & Co:[214]

[210] *Bombay Motor Stores v Union of India, (2000) 1 BLIR 23 (Pat).*

[211] *Howrah Motor Co Ltd* v *Bharat Petroleum Corpn.* (2000) 3 BLJR 1854 (Pat); *Bhushan Krishna* v *Union of India,* (1999) 2 BLJR 1100 (Pat) another writ petition relegated to civil suit because the appointment as dealer was itself in dispute.

[212] *Alok Prasad Verma v Union of India, (2000) 3 BLJR 1913 (Pat).*

[213] *P.S.N.S. Ambalavana Chettiar v Express Newspapers Ltd, AIR 1968 SC 741: (1968) 2 SCR 239.*

[1916] 1 AC 175: 43 IA 6: ILR (1916) 43 Cal 493.

> The plaintiff contracted to sell to the defendants 23,500 shares to be delivered and paid for on December 30, 1911. The shares were tendered on this date, but the defendants declined to take delivery or to pay for them. At the market price for sales upon that day, the shares would have realised Rs 1,09,218 less than their price under the contract. But the plaintiff sold the shares only after February when the market was again rising and he realised only Rs 79,862 less than the price under the contract.

The defendants contended that they should be held liable to pay the loss of only Rs 79,862. But they were held liable for Rs 1,09,218.

Similarly, where a seller refuses to perform the contract, the buyer should buy the goods if they are available from any alternative source and cannot recover any further loss that may be due to his own neglect.[2,5]

Aggrieved party increasing loss by unreasonable conduct.—Where the aggrieved party increases his loss by unreasonable conduct, he cannot hold the defendant liable for the same. For example, in *Darbishire* v *Warran,*[208] the plaintiff's car was damaged due to the defendant's negligence. The plaintiff got the car repaired at a cost which was double the value of a new equally good substitute car. The Court of Appeal did not allow him to recover the difference between the insurance money and the cost of repair, but allowed the difference between the insurance money and the market value of the car. HARMAN LJ distinguished the case from *O'Grady* v *Westminster Scaffolding Ltd*[211], where the plaintiff was held entitled to the cost of repairing his car at a cost considerably exceeding its market value, because the car was unique and could not be replaced.

Duty **of mitigation in auction sales.**—The nature of the duty of mitigation has also been explained by the Supreme Court.[209] A dealer whose bid at an auction of coffee had been accepted, refused to carry out the contract. The coffee was accordingly reauctioned. It was knocked down, not to the highest bidder, but to the next bidder. The difference between the price thus realised and the original auction price was sought to be recovered from the defaulting bidder as damages for breach of contract. He contended that by not accepting the highest bid, the Board had increased the loss in violation of its duty of mitigation. But he was held liable for the difference between the accepted bid and his bid.

Contract of employment.—The duty of mitigation also finds application in reference to premature termination of a contract of employment. Thus, where on account of the

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[208] [1963] 3 All ER 310: [1963] 1 WLR 1067 CA.

[209] *M. Lachia Setty and Sons Ltd v Coffee Board, (1980) 4 SCC 636.*

retirement of two out of four partners, a partnership firm was ended and with it the services of the manager but the remaining two partners reconstituted the firm and offered him employment on identical terms which he refused to accept and instead brought an action for damages, it was held that he should have accepted the employment in mitigation of his loss and that he was entitled to nominal damages only.[219] But, where no alternative employment of equal standing is available to him, the ex-employer cannot ask that he should have mitigated his loss by accepting a lesser job. The Bombay High Court in *K.G. Hiranandani* v *Bharat Barrel & Drum Mfg Co (P) Ltd*[220] held that what the explanation to the section means is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73.

Stigma Compensation

An employee of a bank, which failed, was not allowed to maintain an action against the bank for damages for loss of reputation in the financial services industry by reason of belonging to a bank of that kind, though the damage to his reputation was such that he was not able to get employment in that industry.[221]

It became clear from this case that an action could lie at common law under the heading "stigma damages" representing the damage done to reputation. A claim of this kind was raised in *BCCI* v *Ali*[222]. The bank had rendered a number of employees redundant. They were required to sign a form of release under which they made the bank free of all their claims against it connected with the termination of their employment. They subsequently claimed "stigma damages" arguing that their image had been tarnished because of their association with the bank and its fraudulent activities. The trial court was of the view that it could not be said that the bank was under a duty of disclosure regarding the manner in which it had conducted its business. The Court of Appeal allowed the claim. The release deed could not apply to a state of facts of which the releaser was unaware at the time. It would be unconscionable to hold him bound to such a state of things. A commentator on this decision has expressed the following lurking fear: "If the Court of Appeal's decision is correct, then very many of these settlements could be set aside with huge repercussions throughout the industry for the finality of these settlements. Finality in the face of potential litigation is of course a cornerstone of English law in this area."[223]

219 *Brace* v *Colder*, [1895] 2 QB 253: [1895-9] All ER Rep 1196.

220 AIR 1969 Bom 373. *S.M. Murray* v *Fenner (India) Ltd*, AIR 1986 De! 427, where the court pointed out that an employee was not compellable to take up a lesser job and, therefore, the amount of compensation is the remuneration which he would have earned, including any extra remuneration.

221 *Malik v Bank of Credit and Commerce International, (1995) 3 All ER 545: 1997 AC 20.*

222 (2000) 3 All ER 51 CA.

Duncan Sheehan, Vnconscionability and Mistake in the Court of Appeal, 2001 JBL 107.

Where a five star hotel accommodation was booked six months in advance to suit personal and family needs and though, on account of heavy booking and rush, the hotel was not able to provide accommodation, they did arrange an alternative accommodation which the guest rejected, she was given refund of the whole money she had paid and was not allowed to recover anything more.[210]

Thus, what matters is the reasonableness of the conduct :r the injured party. A characteristic illustration is *Payzu Ltd* v *Saundars*[211].

> In a contract of sale of goods, delivery was to be in instalments over a period of nine months and payment was to be made within one month of delivery. The buyer failed to pay for the first instalment within the stated time. The seller refused to deliver any further instalments but offered to do so if cash was paid against each delivery.

The buyer sued him for breach of contract claiming as damages the difference between the contract and market prices. The seller contended that if the buyer had accepted their proposal of deliveries against cash, their loss would have been less. The question, therefore, was what a prudent person ought to have done in the circumstances. The court laid down that the buyer should have considered the proposal.

Transactions Concerning Property

This result would not follow everywhere. Suppose that a buyer agrees to buy property having a certain quality and the seller delivers property without that quality. There is a difference between the market value of the property with that quality and without it. The buyer is clearly entitled to recover the difference between the two values. Suppose further that the seller in response to the buyer's notice proposes to buy back the property and refund the price, but the buyer refuses. Does he lose the right to recover the difference between the two values? The Court of Appeal answered this question in *Strutt* v *Whit- enelt*[212] where facts of this kind were involved, that the buyer would be entitled to retain the property and to recover the difference between the values. The seller cannot compel him to forgo his right to substantial damages as the price of retaining what has become his own property. The seller cannot say that the buyer had no good reason for refusing to accept his offer to buy back the property.

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[210] *Toubi* v *Intasun Holidays*, 1988 CLY 423, 1060.

[211] (1919) 2 KB 581; *Santosh Kumar Chopda* v *State ofM.P.*, (2003) 1 MPHT 343 (MP), auction of right to collect tendu leaves, the bidder could not pay after depositing earnest money, long delay in reauctioning, leaves allowed to whither away, the bidder held not liable for shortfall on reauction because of unreasonableness of conduct, forfeiture of earnest money held to be fully justified.

[212] [1975] 1 WLR 870: [1975] 2 All ER 510; *Food Corpn of India* v *Babulal Agarwal*, (2004) 2 ALD 66 (SC), The contract was for the provisi.on of premises of certain nature which were prepared for a special purpose on lease for a minimum period of three years. The lessee returned the premises earlier. The court allowed lease money to be recovered for the full period of 3 years irrespective of the fact that no lease deed was executed.

Aggrieved Party not to be Inflicted with Unusual Burdens in the name of "Mitigation"

The duty of mitigation cannot impose upon the plaintiff burdens of unusual nature. In a case,[227] there was a transfer of a part of a plot of land, the transferee undertaking to erect a boundary wall, which wall would have increased the value of the seller's remaining land. The buyer failed to erect the wall. In an action against him, the measure of damages would have been the cost of constructing the wall. He contended that if the wall had been constructed as soon as there was the breach, the cost would have been much less; the plaintiff waited till the decision in the case and, in the meantime, inflation had escalated the cost and that he should not be held liable for the increased cost. The Court felt that it was reasonable for the plaintiff to wait as long as his right to damages was disputed and there was no injustice to the defendant if the result of inflation was to increase the pecuniary amount of his ultimate liability.

Contributory negligence

In contract claims the duty to keep one's loss to the minimum is capable of taking care of the matter where the loss is either caused or increased by the claimant's contributory negligence. But where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract, the court has power to apportion blame and to reduce the damages recoverable by the plaintiff even though the claim is made in contract. This approach was adopted in a principal's action against his agent for breach of the agent's duty in circumstances in which the principal failed to rectify the matters during the subsequent opportunities available to him.[228]

Exclusion of'S. 73: Arbitration Clause

Whether in the context of terms and conditions of a contract it is permissible to provide that S. 73 would not apply and the special terms of the contract should be applied for making out recoverable loss, the court said that it depends upon the appreciation of the facts of the case and if the arbitrator had followed the special provision, no fault in his award could be found for that reason alone.[229]

Liquidated damages and penalty [S. 74]

English law

The parties to a contract may determine beforehand the amount of compensation payable in the event of breach. According to English law a sum so fixed may fall in any of the following two categories: *(i)* liquidated damages, or (*ii*) penalty. If the sum fixed represents a genuine pre-estimate of the probable damage that is likely to result from the breach it is

[227] *Radford v De Froberville, [1978] 1 All ER 33.*

[228] *Forsikringsaktieselskapet Vesta v Butcher, (1988) 2 All ER 43 CA.*

Maharashtra State Electricity Board v Sterlite Industries (India} Ltd, (2002) 1 ICC 178 (SC).

liquidated damages. A sum less than the amount of probable damage is also regarded as liquidated damages. The whole of such sum is recoverable. A well-known illustration is *Dunlop Pneumatic Tyre Co Ltd* v *New Garage and Motor Co Ltd.*™

> A manufacturer of tyres supplied a quantity of tyres to a dealer on the condition that they would not be sold below the listed price and that liquidated damages and not penalty of £5 would be payable for every tyre sold in breach of the agreement. The dealer committed breach. The question was whether the above sum was intended as a genuine compensation for loss suffered.

The House of Lords held it to be liquidated damages.

Court's power to reduce specified amount.—If the sum fixed by the parties is found to be liquidated damages, the whole of it is recoverable. But if it is viewed as "penalty", it is rejected. Damages will then be calculated according to the ordinary principles. An illustration of "penalty" is *Ford Motor Co* v *Armstrong*[213].

> The defendant, a retailer, received from the plaintiffs supplies of cars and parts and agreed not to sell any item below the listed price. A sum of £250 was payable for every breach as "agreed damages".

A breach, having taken place, a majority of the Court of Appeal held that the sum fixed was a penalty as it might happen that a part sold in breach was of lesser value than the damages payable.

Application to hire-purchase transactions.—Another illustration of penalty is Lamdon Trust Co Ltd v HurreJP[214].

> A car was purchased on hire-purchase terms, the total price payable by instalments being £558. The agreement provided that if the purchaser returned the car or if, on account of his default, the seller retook it, the total sum, including the instalments already paid, of £425 must be paid. The purchaser paid up to £302 and then defaulted. The seller retook the car and resold it for £270, thus receiving a total sum of £572, which was more than the contract price. Even so he brought an action to recover £122, being the difference between £425 and the instalments paid.
>
> His claim failed. The court rejected the sum as being a penalty and not a genuine pre- estimate of the probable damage.

Heavy Amount as Evidence *of Penalty*

The House of Lords in their decision in *Bridge* v *Campbell Discount Co Ltd*[215] carried this principle still further by holding that where two-thirds of the price is made payable in the event of a default, that should be viewed as a 'penalty'. The Court of Appeal pointed out

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[213] (1915) 31 TLR 267 (CA).

[214] [1955] 1 All ER 839; *Sub nom Lamdon Trust Co Ltd* v *Hurrel*, [1951] 1 WLR 391.

[215] 1962 AC 600: [1962] 2 WLR 439: [1962] 1 All ER 385 HL.

in a subsequent case,[216] that where a hire-purchase agreement provides for the payment of the full amount or a fixed amount, whether the default takes place in the beginning or towards the end of the period of agreement, it is found to be regarded as a penalty.

Fixed Figure Constitutes Ceiling

Where the figure of compensation assessed by the parties is reasonable it will constitute the ceiling, and nothing more than that would be recoverable. In a case before the House of Lords:[217]

> A contract for the delivery and erection of a certain machinery provided that the contractor would have to pay £20 as penalty for each day of default. The contractor delayed the completion of the work by thirty weeks. According to the contract his liability was £600, but the purchasers claimed £5,850 being the actual loss suffered by them by reason of the delay. They were held entitled to claim only £600.

Section 74, Contract Act.—Section 74 of the Indian Contract Act deals with this matter.

> **74. *Compensation for breach of contract where penalty stipulated for.*—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.**
>
> ***Explanation.*—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.**
>
> ***Exception.*—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or, under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.**
>
> ***Explanation.*—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.**
>
> *Illustrations*
>
> *(a) A* contracts with *B* to pay *B* Rs 1000. if he fails to pay *B* Rs 500 on a given day. *A* fails to pay *B* Rs 500 on that day. *B* is entitled to recover from *A* such compensation, not exceeding Rs 1000, as the Court considers reasonable.
>
> *(b)* A contracts with *B* that, if *A* practices as a surgeon within Calcutta, he will pay *B* Rs 5000. *A* practices as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs 5000, as the Court considers reasonable.

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[216] *Anglo-Auto Finance Co Ltd* v *James.* [1963] 3 All ER 566: [1963] 1 WLR 1942 (CA).
[217] *Cellulose Acetate Silk Co Ltd v Widness Foundry (1925) Ltd, 1933 AC 20: [1932] All ER Rep 567.*

(c) A gives a recognizance binding him in a penalty of Rs 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives *B* a bond for the repayment of Rs 1000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) A, who owes money to *B,* a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty and *B* is only entitled to reasonable compensation in case of breach.

(*f*) A undertakes to repay *B* a loan of Rs 1000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Rs 100 from *B* and gives him a bond for Rs 200 payable by five yearly instalments of Rs 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

A contract providing for payment of money by one party on the occurrence of a specified event, rather than on the breach of a contractual duty owed by that party, cannot be penalty. A person who guaranteed the payment of promissory notes issued by a contractor against which loans were provided, could not avoid his liability by showing that the amount covered by the promissory notes would have amounted to a penalty.[218]

The rule is that where a sum is named in a contract as the amount to be paid in case of breach, regardless of whether it is a penalty or not, the party suffering from breach is entitled to receive reasonable compensation not exceeding the amount so named. The named sum determines the maximum limit of liability. The court cannot order damages beyond that. But the court has the latitude to reduce the amount to what appears to be reasonable in the circumstances.[219]

Common Features between English and Indian laws

Yet the distinction between liquidated damages and penalty is not altogether irrelevant to the section. Its relevance, in the first place, arises from the fact that the amount contemplated by the parties will be reduced only if it appears to be by way of penalty. Otherwise

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218 *ECGD* v *Universal Oil Products,* [1983] 2 All ER 205, QBD. This section is not attracted by a penal provision in a consent decree. *Punjab Woollen Textiles Finn* v *Bank of India,* AIR 1992 P&H 158. For a contrary view, see *Paiyati Bai* v *A.P. Jain,* 1985 MP LJ 703. But the provision is applicable to compromises, e.g., a truck driver's compromise agreement either to set right the damage done by negligent driving or to pay Rs 10,000, *C.K. Kesaram* v *Kudaythoor,* (1990) 2 Ker LJ 424.

219 Hence, the right is the right to sue for the breach and not for the amount reserved because the court has to ascertain its reasonableness. *State of Gujarat* v *M.K. Patel & Co,* AIR 1985 Guj 179. Where under a term of the contract, the Government side was authorised to assess compensation for breach, it was held that the clause would apply only wheij there was an admitted breach. Such a clause would not enable the party so empowered to ignore the requirements of S. 74 one of which is that only a reasonable amount would be allowed. *State of Karnataka* v *Sliree Rameshwara Rice Mills,* (1987) 2 SCC 160: AIR 1987 SC 1359.

the whole of it is recoverable as liquidated damages.[238] *Secondly,* the first explanation t< the section uses the word "penalty". It provides that "a stipulation for increased interes from the date of default may be a stipulation by way of penalty". Where, for instance money is borrowed at 12% interest payable six-monthly, and the agreement provides th; in case of default an interest of 75% shall be payable. This is a stipulation by way of pei alty. Another illustration is *Gurubax Singh* v *Begum Rafiya*[m]. The contract involved sa of standing trees for a sum of Rs 60,000. The contract provided that in the event of defai by either party a compensation of Rs 50,000 would be payable. The court regarded th to be a penalty and required the party to prove his actual loss. Where the whole of t money is presently due and it is only for the benefit of the debtor and for his convenien that the creditor agrees to accept payment in instalments, a provision that default in o instalment would make the whole amount due at once is not a penalty.[240]

Still another common feature between English common law and Indian law is sho by the decision of the Supreme Court in *Chunilal V. Mehta & Sons Ltd* v *Century i & Mfg Co Ltd,*[24]] where it has been held that "by providing for compensation in expr terms the right to claim damages under the general law is necessarily excluded".

> An agreement for the appointment of managing agents provided that their remui ation would be Rs 6000 per month or 10% of the gross profits of a year, whichever more, and also that in the event of premature termination their compensation wc be not less than Rs 6000 per month for the whole of the unexpired period. They \ removed before the expiry of the term and claimed compensation at the rate of of the gross profits.

But the Supreme Court held that they must be content with the rate of Rs 6000 per m< They were bound by the clause.

Forfeiture of Earnest Money or Deposit

In the application of Section 74 to forfeiture clauses, the Supreme Court has drawn tinction between "earnest money" and "security deposit". The distinction was set to in *Fateh Chand* v *Balkishan Das*[242].

238 *Sardar Mohar Singh* v *Mangilal,* (1997) I SCC 217, money deposited for purchasing land, retained t not given, ordered refund with interest, Rs 2000 per year for the withheld sum of Rs 15,000.

239 AIR 1979 MP 66.

240 *K.P. Subbarama Sastri* v *K.S. Raghavan,* (1987) 2 SCC 424: AIR 1987 SC 1257. A surcharge o< imposed by a State Electricity Board (SEB) in the exercise of its powers under the Electricity (Supf 1948 on unpaid bills by bulk buyers has been held to be not a penalty; it is in the nature of a claim of on overdue payments. *Modi Industries Ltd\ EE Electricity Distribution Divn,* AIR 1993 AH 351.

241 AIR 1962 SC 1314: 1962 Supp (3) SCR 549: (1962) 1 Lab LJ 656.

242 AIR 1963 SC 1405: (1964) 1 SCR 515. Where the amount was paid before the acceptance of the way of earnest money but thereafter acceptance could not take place because the acceptor introducet conditions, no contract arose and, therefore, forfeiture of the earnest money was not allowed. *Arvin, Construction Co* v *Damodar Valley Corpn,* AIR 1991 Pat 14. Similarly, an amount paid pending ne; for letting out premises which did not fructify was ordered to be refunded with 12% interest. *J K1 Ltd* v *Mohan Investments and Properties (P) Ltd,* AIR 1992 Del 305.

<5] [S. 73]

> An agreement for the sale of certain land and bungalow for Rs 1,12,500 provided that the buyer was to pay Rs 1000 as earnest money and Rs 24,000 on delivery of possession. The buyer made these payments and was put in possession. The agreement further provided that if the buyer failed to pay the balance price and get the sale deed registered by a certain date, the sum of Rs 25,000 would stand forfeited, the agreement cancelled and the buyer shall return possession to the seller. The buyer defaulted and the seller forfeited the above sum and brought an action to recover possession and compensation for occupation and use.

He was allowed to forfeit Rs 1000 being earnest money and to retain the sum of Rs 24,000 also, not by virtue of his right to forfeit but as representing use value. SHAH J refuted the fallacy as shown by some High Court decisions that Section 74 applied only to cases where the aggrieved party is seeking to recover a fixed amount on breach of contract and not to cases where an amount received under the contract is sought to be forfeited.[243]

Another question which the court considered was whether actual proof of loss is necessary to recover anything under Section 74. The section does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted. This is so because compensation can only be awarded for loss which naturally arose or was in the contemplation of the parties. Thus, proof of some loss is necessary, though it will not be necessary to prove the extent of it. This view was reaffirmed by SHAH J (acting CJ) in *Maula Bux* v *Union of India*.[244]

> The plaintiff contracted to supply to Military Headquarters, U.R area, potatoes, poultry, eggs and fish for one year and deposited Rs 18,500 for due performance of the contract. The plaintiff having made persistent defaults in making regular and full supplies, the Government of India, in pursuance of the terms of the contract, rescinded the contract and forfeited the amount deposited by the plaintiff.

The court cited the observation of the Privy Council in *Chiranjit Singh* v *Har Swarup*[245], that "earnest money is part of the purchase price when the transaction goes forward: it is

243 See also *State of Maharashtra* v *Digambar Balwant Kulkarni*, (1979) 2 SCC 217, where forfeiture of the security deposit against loss caused by delay was held to be justified. *State of Orissa* v *Ganeshwar Jena*, AIR 1994 Ori 94, an order of forfeiture should be passed by the same authority which executed the contract, otherwise forfeiture would be invalid. *Delhi Development Authority* v *Grihsthapana Coop Group Housing Society Ltd*, 1995 Supp (1) SCC 751: AIR 1995 SC 1312, forfeiture of earnest money against non-payment of escalated costs for allotment of land was held to be justified, the claim to escalation being found to be valid. *Lai Chand* v *Chandigarh Admn*, AIR 1992 P&H 194, forfeiture of earnest money on default was held valid even though there was no forfeiture clause in the contract.

244 (1969) 2 SCC 554: AIR 1970 SC 1955: (1970) 1 SCR 928. An advance payment made by a bidder at an auction was not allowed to be forfeited because the auctioning authority showed no loss and the amount was not in the nature of an earnest money, *Bhanwarlal* v *Babulal*, AIR 1992 MP 6.

245 AIR 1926 PC 1; *Roshan Lai* v *Manohar Lai*, AIR 2000 Del 31 where a contract for purchase of property worth 30 lakh rupees carried earnest money of three lakh rupees and a damage clause of 12 lakh rupees, the clause was held to be unreasonable, *H. Sowbhagya* v *NGEF Ltd*, AIR 2004 Kant 155, purchaser of property at auction defaulted, reauction brought higher price, earnest money not allowed to be forfeited though reasonable compensation was allowed. *Amarjeet Singh* v *Zonal Manager, FCI*, (2002) 4 ICC 47 (P&H), a public authority has to exercise its powers even under the contract fairly and reasonably. Even otherwise.

forfeited when the transaction falls through by reason of the fault or failure of the vendee" and said that if this is the view of an earnest deposit, then quite obviously the deposit in the present case was not by way of earnest money because it was not to be appropriated towards the payment of price, but was to be held as a security. The court pointed out that Section 74 does not apply to forfeiture of earnest money, but forfeiture of a deposit may amount to a penalty.

Neither the earnest money nor any kind of deposit can be subjected to forfeiture if the underlying contract is void. A deposit of money was made for purchasing a piece of land. The transaction turned out to be void because the seller thought that the price offered was per *kanal* whereas the buyer thought it was per *bigha*. The contract being void by reason of mistake, the deposit could not be forfeited.[246]

Where no Loss Caused

An amount was paid by a purchaser in advance towards the purchase price of goods. The contract provided that on default by the purchaser the amount would be forfeited. He defaulted. He was allowed refund. The seller proved no loss. The court said that retention of money for a long period was sufficient to compensate him.[247]

Where Profit Follows

Where not only no loss was caused to the seller of land by the buyer's refusal to perform, but, on the contrary, he resold it at a profit, the seller was not permitted to forfeit the advance paid by the buyer.[248]

Forfeiture of Earnest Money only when Reasonable to do so

In the subsequent case of Shree Hanuman Cotton Mills v Tata Air Craft Ltd:[249]

namely where Government is not a party, the terms relating to forfeiture must be strictly followed and the courts should also strictly construe them. *State ofHaryana* v *Yusuf*, (2004) 3 ICC 619 (P&H), terms providing for forfeiture, etc, allowed to be enforced where contract was formed and breach took place by failure of the contractor. *Hind Construction Contractors* v *State of Maharashtra*, (1979) 2 SCC 70: AIR 1979 SC 720, where the State illegally rescinded the contract, it was not allowed to forefeit the contractor's deposit. *Sukhdev Kaur* v *Hoshiar Singh*, (2004) 2 ICC 55 (P&H), even where there is a liquidated damages clause the party claiming damages may have to show his loss this being necessary to ascertain the element of reasonableness, though actual proof of loss may not be necessary where the party committing breach knew that loss was a likely result of the breach. The agreement in this case was that the contractor would pay, for his failure to perform, double the amount of earnest money and it would be payable alongwith 12% interest. The civil judge had rightly allowed the amount.

246 *Tarsam Singh* v *Sukhminder Singh*, (2001) 4 SCC 350: 2001 SCC (Cri) 710.

247 *SabinaD' Costa v Joseph Antony, AIR 1988 Kant 122.*

248 *Mohanlal v Dayaldas & Co, AIR 1976 Raj 68.*

249 (1969) 3 SCC 522: AIR 1970 SC 1986: (1970) 3 SCR 127; *P.K. Abdulla* v *State of Kerala*, AIR 2002 Ker 108, the claiming party did not prove that they sustained any legal injury due to breach, in the absence of proof of actual loss, damages could not be awarded and, therefore there was no question of forfeiture of earnest money or retention of other money.

The plaintiffs contracted with the defendants to purchase from them aeroscrap for rupees ten lakhs and paid Rs 2,50,000, being 25% of the purchase price. One of the conditions, among others being, that if he failed to pay the balance of purchase price in accordance with the contract, the deposit would be forfeited and the contract cancelled. The buyer defaulted and the seller forfeited the deposit. The buyer sued to recover it.

The court held that the deposit in question was intended as earnest money. The agreement clearly provided that the deposit would carry no interest and would be adjusted in the final bills. It was a part of the price and seller was entitled to forfeit it.

No Forfeiture Where extra costs otherwise Recovered

Where, upon the failure of the contractor to complete the work the State got the work executed at his risk and also recovered the extra expenses from him, the State was not allowed to forfeit his security deposit. This would have amounted to penalty and the State had suffered no loss.[220]

Security Money under other Contracts

Security money paid in respect of other contracts cannot be forfeited in respect of the contract under dispute, but bill-money due to the contractor under other contracts may be. so used.

A clause in a contract provided that all moneys or compensation payable to the Government under the terms of the contract may be realised out of the security deposit or money due under any other amount.

The Supreme Court came to the conclusion that this clause enabled the Government to realise its claim from money due to the contractor in respect of other contracts and the security deposited under the present contract but not the security deposit belonging to other contracts.[221]

Effect of Partial Breach

Where a contract for the supply of gas in cylinders was being performed in instalments and there was such a breach in respect of one instalment which entitled the purchaser to terminate the contract, he was allowed compensation at the rate fixed in the contract for

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[220] *State of U.P. v Chandra Gupta & Co, AIR 1977 All 28.*

[221] *Union of India* v *K.H. Rao,* (1977) 1 SCC 583. In the subsequent case of *H.M. Kamaluddin Ansari & Co* v *Union of India,* (1983) 4 SCC 417: AIR 1984 SC 29, where the court expressed the opinion that money due in respect of other contracts may be forfeited if there is a clear and express provision to that effect in the contract. Where the Government wants to debar and blacklist a contractor, that being also a penalty, the contractor should be given an opportunity to explain his position. *Joseph Vilangandan* v *Executive Engineer (PWD),* (1978) 3 SCC 36; *Pran Nath Gupta* v *Union of India,* AIR 2004 J&K 135, provision for recovery of money due under earlier bills from subsequent bills, the validity not allowed to be tested under writ jurisdiction.

the failure to supply the remainder. To attract Section 74 it is not necessary that a contract should be broken in its entirety.[222]

Minimum Charges

Minimum charges for supply of electricity have been held to be not by way of penalty. The maintenance of a supply line does cost something and if a consumer does not consume to a certain figure the supplier may recover from him the specified minimum in order to meet his costs. This requires that the minimum should be reasonable in the circumstances and not arbitrary.[223]

Remedy by way of writ

Remedy by way of writ under the Constitution of India was not allowed to stay the enforcement of a bank guarantee.[224] A contract between the State and a citizen is not a statutory affair. No writ can be issued to compel the authority in question to remedy the breach of such a contract.[225] Writ remedy was not allowed for examining the propriety of the conduct of a nationalised bank in unilaterally refusing to disburse the loan in terms of its agreement.[226] Writ remedy is available for seeking refund of overpaid or mistakenly paid taxes.[227]

Reinstatement

An employment is also the subject-matter of a contract. Unless it is governed otherwise by a statute or rules framed under it, the provisions of the Contract Act would be applicable to the formulation and termination of a contract of employment. Subject to certain exceptions, even specific performance of such a contract by way of a direction for reinstatement of a dismissed employee is also permissible in law.[228]

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[222] *Indian Drugs & Pharmaceuticals Ltd v Indus Oxygen Co, 1984 Mah LJ 690.*

[223] *Mahavir Khandsari Sugar Mill* v *Maharashtra SEB,* AIR 1993 Bom 279. The court followed *Gujarat Electricity Board* v *Shri Rajratna Naranbhai Mills Co Ltd,* (1975) 16 Guj LR 90; *Watkins Mayor & Co* v *Jul- lundur Electricity Supply Co,* AIR 1955 Punj 133. Here the concept of minimum charge was thus explained: "A minimum charge is not really a charge which has for its basis the consumption of electrical energy. It is based on the principle that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains on which he has to have a reasonable return. He gets a return when energy is actually consumed ... but the minimum charges are really a return on his capital outlay incurred for the particular consumer."

[224] AC. *Roy Co* v *Union of India,* AIR 1995 Cal 246.

[225] *Amar Singh* v *UT Chandigarh,* AIR 1993 P&H 100, the contract was for supply of sullage water for irrigation purposes. *Krishna* <6 Co v *Govt ofA.P.,* AIR 1993 AP 1, writ remedy was allowed for seeking refund of security deposit.

Gwalior Ispat (P) Ltd v *SBI,* AIR 1995 Del 199. The reason is that a contract of loan is not specifically enforceable. Relief under Article 226 was refused by the Supreme Court in *Food Corpn of India* v *Jagannath Dutta,* 1993 Supp (3) SCC 635: AIR 1993 SC 1494.

[227] *Chandrika v DRM, Southern Rly, (1985) I Mad LJ 369.*

[228] *Bank of India* v *O.P. Swarnakar,* (2003) 2 SCC 721: AIR 2003 SC 858.

Where compensation is payable in terms of a statutory provision, the Supreme Court has held that the provision applicable would be one that is in force at the time of cause of action and not one that was in force at the time of the contract. The plaintiff's husband was killed by a goods lorry which was insured with the defendant insurance company. At the time of the policy, the statutory compensation for loss of life under the Motor Vehicles Act, 1939, was Rs 20,000. By the time of the accident the Act had been amended by raising the compensation money to Rs 50,000. The court allowed the revised figure. This did not amount to retrospective operation, because the accident had taken place after the amendment. The result would have been different if the accident had happened before the amendment or if the parties had contracted only on the basis of law as it then stood.[259]

Where no ceiling was fixed on energy to be consumed by consumers and there was no breach of contract, nor any loss to the supplier, levy of penalty on energy consumed in excess of the contracted demand was held to be illegal.[260]

A *Statutory contract* means that it is a contract with some statutory content which generally contain provisions regarding determination of tariff as per, for example, S. 43- A(2) of the Electricity Supply Act, 1948 regarding determination of tariff. The court was dealing with a power purchase agreement.[261]

ASSIGNMENT OF CONTRACTS

Section 37 which enables parties to dispense with performance should also enable them to assign their contractual obligations. "Assignment" means transfer of contractual rights or liability by a party to the contract to some other person who is not a party. For example, if A owes *B* Rs 500 and *B* owes *C* a like amount, *B* has the right to receive from A and is under liability to pay C. *B* can ask A to pay directly to C and if A accepts, that will be an assignment of *B's* right to C.

Assignment of liabilities

An important principle affecting assignment is that the burden of or liability under a contract cannot be assigned. The promisor has the right to insist that perfonnance shall be the responsibility of the promisee. The promisor may have contracted with him by reason of the personal confidence which he reposed in him and, therefore, the promisor can object to the contract being performed by any other person. This is more particularly true of cases in which the engagement is of personal nature, such as the engagement to sing or to paint. In such cases there is no question of vicarious performance. In other cases, it should

259 *Padma Srinivasan* v *Premier Insurance Co Ltd,* (1982) 1 SCC 613: 1982 SCC (Cri) 330: AIR 1982 SC 836 : (1982) 44 FLR 271.

250 *Sri Visnu Cements Ltd v A.P. State Electricity Board, AIR 1999 AP 103. Indian Thermal Power Ltd* v *State ofM.P.,* (2000) 3 SCC 379: AIR 2000 SC 1005.

261

not matter to the promisor whether the performance is offered by the promisee himself or by someone else acting for *him, provided,* of course, that the promisee is responsible for the performance by his agent. A vicarious performance is not an assignment *in the* real sense *of the word.* "It is quite a mistake to regard that as an assignment of the contract, it is not."[229]

Assignment of rights

"On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties." The intention of the parties is to be gathered from the nature of the agreement and the surrounding circumstances. The leading authority is the decision of the Supreme Court in *Khardah Co Ltd* v *Raymon & Co (India) (P) Ltd:*[2a]

> The dispute arose out of a contract for the purchase by a mill of Pakistani raw jute from a dealer, who failed to supply the goods as agreed.

The court held that the contract for the purchase of foreign jute was not assignable because the goods had to be imported under a licence which was not transferable and which also required the utilisation of the important raw material only by the mill in question. The only other question was whether the dealer could assign his right to the price on delivery of the goods. The court conceded that ordinarily there is nothing personal about a contract for the sale of goods. The court further pointed out that "it is settled law that an arbitration clause does not take away the right of a party to assign if it is otherwise assignable".

The rights under a lottery ticket are assignable.

The matter arose out of the attempt of the Tamil Nadu Government to subject the sale of lottery tickets to sales tax. Such tickets being goods within the meaning of the Sale of Goods Act, 1930, the State was held to be competent to do so. Dealing with agreements which are in the nature of grants, the court said:

> It is well-settled that rights and benefits arising thereunder, unless of a personal j nature, partake of the character of personality as opposed to reality and, therefore, movable property capable of being assigned or transferred.

Where no element of personal skill is involved, an assignment becomes effective. A quarry land was sold to a company for establishing cement works. The seller was to supply chalk to the company according to its needs for a period of fifty years. The company went into liquidation. Its rights under the agreement were assigned to the Associated Ce

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229 This principle has been accepted by the Supreme Court in *Khardah Co Ltd* v *Raymon* A *Co (India) (P)* ***Ltd,*** AIR 1962 SC 1810: (1963) 3 SCR 183, VENKATARAMA AIYYAR J said: "The contract in question is one forthJ sale of goods. It is of no consequence to the buyer as to who delivers the goods. What matters to him is thx the goods delivered should be in accordance with the specifications."

ment Manufacturers Ltd. Since the supply of chalk did not involve any personal element, the assignee was allowed to enforce the rights assigned to it.[264]

An assignment by operation of law takes place when the contracting party dies or becomes insolvent. The rights devolve upon the legal heirs in one case and upon the receiver in the other.

The Central Government assigned a piece of land to its own corporate undertaking with rights, liberties and privileges one of which was exemption from land revenue. It was held that the assignee became entitled to the exemption as a successor-in-interest of the Central Government.[265]

Effect and Formalities of Assignment

Consideration

In the first place, an assignment requires some consideration between the assignor and assignee. In the absence of any consideration between them, the assignment will be revocable by the assignor. But when an assignment made as a gift has been completed by fulfilling the essential formalities, it cannot be revoked. This is true of all gifts.[266]

Subject to equities

Secondly, the title of the assignee shall be subject to all equities that exist at the time between the assignor and the debtor, or that which arise up to the time that the notice of assignment is given to the debtor. Where, for example, the assignor had induced by fraud the other party to contract with him, the other party will have the same right of rescission against the assignee as he would have had against the assignor. But the assignee will not be affected by any equity of personal nature between the assignor and the debtor.

Notice of assignment

Thirdly, notice of assignment should be given to the debtor. Such a notice is useful from several points of view. It binds the debtor. In the absence of a notice, the debtor can make payment to the assignor himself and that will be a good discharge. Another advantage of giving notice is that the assignee will not be affected by any equity that may arise between die assignor and the debtor after notice. Notice is also important from the point of view of priorities.

[254] *Tolhurst v Associated Cement Manufacturers Ltd, [1902] 2 KB 660: [1900-3] All ER Rep 386.*
[23] *Steel Authority of India Ltd v State ofM.P., (1999) 4 SCC 76: AIR 1999 SC 1630.*
266
Transfer of Property Act, 1882, S. 130 requires that assignment of an actionable claim, for example, a debt, whether with or without consideration (gift) must be effected by an instrument and on the execution of the instrument the transfer becomes effective as between the transferor and transferee, whether notice to the debtor has been given or not. Notice of transfer in writing is, however, necessary to make the transfer binding on the debtor. In the absence of these formalities, the transfer is merely an equitable assignment and not a legal assignment. An equitably assignment also becomes binding on the debtor on notice being given to him. *Brandt* v *Dunlop Rubber Co,* 1905 AC 454.

Contract of Indemnity

Definition and nature [S. 124]

Definition in English law.—An illustration in English law of the meaning and effect of a contract of indemnity is to be found in the facts of *Adamson* v *Jarvis:'*

> The plaintiff, an auctioneer, sold certain cattle on the instruction of the defendant. It subsequently turned out that the livestock did not belong to the defendant, but to another person, who made the auctioneer liable and the auctioneer in his turn sued the defendant for indemnity for the loss he had thus suffered by acting on the defendant's directions.

The court laid down that the plaintiff having acted on the request of the defendant wai entitled to assume that, if, what he did, turned out to be wrongful, he would be indemni fied by the defendant.

Thus 'indemnity' in English law means0020a promise to save a person harmless from tf consequences of an act. The promise may be express or it may be implied from the ci cumstances of the case.

Definition in S. 24 narrower.—The English definition of indemnity is wide enough include a promise of indemnity against loss arising from any cause whatsoever, e.g., 1< caused by fire or by some other accident. Indeed, every contract of insurance, other tl life assurance, is a contract of indemnity. But the definition of "indemnity" in Section of the Indian Contract Act is somewhat narrower. It is like this:

> **124. *"Contract of indemnity" defined.*—A contract by which one party promises to the other from loss caused to him by the conduct of the promisor himself, or by the con of any other person, is called a "contract of indemnity".**
>
> ***A* contracts to indemnify *B* against the consequences of any proceedings which C take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemn**

The only illustration appended to the section says that if a person promises to another from the consequences of a proceeding which may be commenced against I is a contract of indemnity.

(1827) 4 Bing 66: 5 LJ (OS) (CP) 68: 29 RR 503.

The person who gives the indemnity is called the 'indemnifier' and the person for whose protection it is given is called the 'indemnity-holder' or 'indemnified'.

Thus the scope of 'indemnity' is by the very process of definition restricted to cases where there is a promise to indemnify against loss, caused *(a)* by the promisor himself, or *(b)* by another person. The promise of indemnity, as envisaged by the section, may be express or implied. An illustration of implied indemnity is the decision of the Privy Council in *Secretary of State* v *Bank of India Ltd.*[2]

A note with forged indorsement was given to a bank which received it for value and in good faith. The bank sent it to the Public Debt Office for renewal in their name. The true owner of the note recovered compensation from the State and the State was allowed to recover from the bank on an implied promise of indemnity.

Extent of liability [S. 125]

Section 125 lays down the extent of liability. The scope of his authority, is entitled to recover—

1. all damages which he may be compelled to ter to which the promise of indemnity applies;
2. all costs which he may be compelled to pay in such suits if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or, if the promisor authorised him to bring or defend the suit;
3. all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

indemnity holder, acting within the

pay in any suit in respect of any mat-

(1938) 175 IC 327 (PC). In similar circumstances in *Starkey* v *Bank of England,* (1903) AC 114, a bank was allowed to recover indemnity from an agent who presented a transfer document on which one out of three signatures were forged, though he did not know this fact. See *Regional Manager, Oriental Fire and General Insurance Co* v *Saving Solvent Oil Extractions Ltd,* (1997) 6 Andh LD 1 DB, AP, the following propositions are noticeable from the judgment: in a claim under an insurance policy, if the insurer is refusing payment, the burden lies upon him to show that the assured violated the conditions of the policy; if the assured presents a bogus claim (in this case that the whole stock was burnt, which was not found to be true) he would forfeit all benefits under the policy, he has to observe good faith throughout; a provision in the policy that the insurer may enter upon the affected premises and may remain there for the purposes of assessment, does not make it his duty to do so. *State of Orissa* v *United India Insurance Co Ltd,* (1997) 5 SCC 512: AIR 1997 SC 2671, insurance from port to port, cancellation by the insurer at a subsequent stage, valid. *United India Insurance Co Ltd* v *T. Venkata Narsaiah,* AIR 2002 NOC 119 (AP), the insurer held liable for stock of *bidis* destroyed in fire, figures of the stock were known to the insurer. Shifting of the insured stock from one specified ground to another to protect it from rain could not be regarded as contrary to the insurance policy. *Vishan Narain* v *Oriental Insurance Co Ltd,* AIR 2002 Del 336 vehicle insured for Rs 1,00,000, it was stolen and became a total loss, the insurer not permitted to say that his liability was only up to market value of the vehicle. *Eastern Counties Leather pic* v *Eastern Counties Leather Group Ltd,* (2002) EWHC 494: (2002) Env LR 34, right to indemnity which became exercisable on account of the repair works for protection of water pollution caused by tannery.

A person who encashes an indemnity bond which is in the nature of a bank guarantee can retain only that part of the amount of the bond which represents the damage or loss suffered by the bond-holder as a result of the contracting party's breach. Anything more would be undeserved windfall for one party and penalty of the other.[230]

Where a motor vehicle (truck) was under indemnity insurance for Rs 2,00,000 and it was stolen with no chances of recovery, it was held that the proper amount of indemnity was as fixed by the surveyor at Rs 1,87,492 and that it was payable with 18% interest for the delay period. The settlement of claim at a lesser amount by insurance authorities was arbitrary and unfair under Article 14 of the Constitution.[4]

Commencement of liability

An important question in this connection is when does the indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover his indemnity. The original English rule was that indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim. The maxim of law was "you must be damnified before you can claim to be indemnified". But the law is now different. The process of transformation is well explained by CHAGLA, J of the Bombay High Court in *Gajanan Moreshwar* v *Moreshwar Madan:*[231]

> It is true that under the English common law no action could be maintained until the actual loss had been incurred. It was very soon realised that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him he had actually to wait till a judgment was pronounced and it was only after he had satisfied that judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. Therefore, the courts of equity stepped in and mitigated the rigour of the common law. The courts of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into court sufficient money which would constitute a fund for paying off the claim whenever it was made.

This principle was expounded in *Richardson Re, Ex parte The Governors of St. Thomas's Hospital,*[232] where BUCKLEY, LJ observed: "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never

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[230] *Cargill International SA v Bangladesh Sugar & Food Industries Corpn, (1996) 4 All ER 563.*
[231] AIR 1942 Bom 302 at p. 304.
[232] (1911)2 KB 705 at p. 715.

be called upon to pay...."[7] The High Court of Calcutta in its well-known decision in *Os- man Jamal & Sons Ltd* v *Gopal Purshottam*[8] followed this principle.

A company was acting as the commission agents of the defendant firm and in that capacity bought certain goods for the defendants which they failed to take. The supplier became entitled to recover from the company certain sum of money as damages for breach. The company went into liquidation before paying the claim.

It was held that the Official Liquidator could recover the amount even though the company had not actually paid the vendor. The court, however, directed that the amount should be set apart so that it is used in full payment of the vendor in respect of whose contract the company had incurred liability.

Specified Time for Notice

An insured motor vehicle was lost by theft. The insurance policy required the assured to send notice to the insurer immediately after theft or any other criminal act. The assured made police report of the theft immediately after the incident, but informed the insurer after one month. The question was whether this could be regarded as a notice given immediately. The court said that the expression 'immediately' implies notice to be given with promptitude avoiding unnecessary delay. Immediate police report showed *bona fides* of the assured in the matter. Report to the insurer after one month could not be regarded as unreasonable. Indemnification could not be denied.[9]

7] [S. 124]

Earlier to this KENNEDY, LJ observed in *Liverpool Mortgage Insurance Co* case, (1914) 2 Ch 617 at p. 638: that indemnity does not merely mean to reimburse in respect of moneys paid, but to save from loss in respect of the liability against which the indemnity has been given because otherwise indemnity may be worth very little if the indemnity-holder is not able to pay in the first instance. ' 1928 ILR 56 Cal 262.

Praful Kumar Mohanty v *Regional Manager of Oriental Insurance Co Ltd,* (1997) AIHC 2832 Ori; *R.* v *Berkshire Justices, 4* QBD 469, 'immediately' implies that the act to be done should be done with all convenient speed, i.e. as quickly as is reasonably possible.

Guarantee

Definition

"CONTRACT of guarantee" is defined in Section 126 of the Contract Act.

> **126. *"Contract of guarantee", "surety", "principal debtor" and "creditor".*—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.**

Economic Functions of Guarantee

The function of a contract of guarantee is to enable a person to get a loan, or goods on credit or an employment. Some person comes forward and tells the lender, or the supplier or the employer that he (the person in need) may be trusted and in case of any default, "I undertake to be responsible". For example, in the old case of *Birkmyr* v *Darnell*the Court said: "If two come to a shop and one buys, and the other to give him credit, promises the seller, If he does not pay you, I will'." This type of collateral undertaking to be liable for the default of another is called a "contract of guarantee'"

Parties

The person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor".

Collateral *Liability*

There must be a conditional promise to be liable on the default of the principal debto A liability which is incurred independently of a "default" is not within the definition < guarantee. To refer again to *Birkmyr* v *Darnell,*[233] where referring to the buyer's compa ion the court further said that if the companion had said: "Let him have the goods, I w

[233] *Ibid.*

be your pay master', or I will see you paid'. This would have been an undertaking as for himself and is not a guarantee."

Essential features of guarantee

Following are the requisites of a valid guarantee:

1. Principal Debt

The purpose of a guarantee being to secure a debt, the existence of a recoverable debt is necessary. It is of the essence of a guarantee that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. If there is no principal debt, there can be no valid guarantee. "A contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety."[234] This was laid down by the House of Lords in the Scottish case of *Swan* v *Bank of Scotland*,[235] decided as early as 1836.

> The payment of the overdraft of a banker's customer was guaranteed by the defendant. The overdrafts were contrary to a statute, which not only imposed penalty upon the parties to such drafts but also made them void. The customer having defaulted, the surety was sued for the loss. But he was held not liable.

Guarantee for Void Debt

But sometimes a guarantee even for a void debt may be held enforceable. Where, for example, the directors of a company guaranteed their company's loan which was void as being *ultra vires*, they were nevertheless held liable.[236] The reason "may be that the void- ness of a contract to guarantee the debt of a company acting *ultra vires* is different in its consequence from the voidness brought about by the express and emphatic language of a statute".

Guarantee of Minor's Debt

A similar problem arises when the debt of a minor has been guaranteed. The debt being void, is the surety liable? The Court of King's Bench considered the question in *Coutts & Co* v *Brown Lecky*[237] and held that no liability should be incurred by the surety. The head note to the report says:

> A loan by way of overdraft made by a bank to an infant being void under Section 1, of the Infants' Relief Act, 1874, the guarantors of the loan, where the fact of infancy is known to all parties, cannot be made liable in an action on the guarantee.

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[234] *Mahabir Shumsher v Lloyds Bank, AIR 1968 Cal 371 at p. 377 per* RAY, *J.*

(1836) 10BlighNS627.

Yorkshire Railway WagOn Co v Maclure, 19 Ch D 478; Garrard v James, [1925] Ch 616.

[237] [1947] 1 KB 106: [1946] 2 All ER 207.

In India it has been held, following earlier English authorities, that where a minor's debt has been knowingly guaranteed the surety should be held liable as a principal debtor himself. In *Kashiba* v *Shripaf* the Bombay High Court observed that we see no reason why a person cannot contract to guarantee the performance by a third person of a duty of imperfect obligation. If the debt is void, the contract of the so-called surety is not collateral, but a principal contract.

2. Consideration [S. 127]

Like every other contract, a coiVict of guarantee should also be supported by some consideration. But there need be no direct consideration between the surety and the creditor. Section 127 clearly says that:

> **127. *Consideration for guarantee.*—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.**
>
> *Illustrations*
>
> *(a) B* requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
>
> *{b) A* sells and delivers goods to *B. C* afterwards requests A to forbear to sue *B* for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by *B. A* agrees to forbear as requested. This is a sufficient consideration for C's promise.
>
> (c) A sells and delivers goods to *B. C* afterwards, without consideration, agrees to pay for them in default of *B.* The agreement is void.

Where a loan is given or goods sold on credit on the basis of a guarantee, is a sufficient consideration. A guarantee for a past debt should be invalid. The section says that "anything done...for the benefit of the principal debtor" is good consideration. Will the words "anything done" include things done before the guarantee was given? The Oudh High Court in *Gulam Husain* v *FaiyazAlP* answered this question in the affirmative.

> A lessee agreed to pay the sum due under a lease by certain instalments and after a few days a person executed a surety bond binding himself to pay a certain amount in default of the payment of instalments.

The court held that the bond was not without consideration. The decision has been criticised. The words of the section should have been taken to refer to executed considerations and not to past consideration. The decision also seems to be contrary to the third illustration to the section.[238]

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238 The Andhra Pradesh High Court has supported the view that past consideration is no good. *M.N.A. Khan* ■ *Commercial and Industrial Bank,* AIR 1969 AP 294. But the judicial opinion is still in conflict. See *Kaliclia*

A guarantee for a past as well as a future debt is enforceable provided some further debt is incurred after the guarantee.

Benefit of Principal Debtor, enough Consideration

If the principal debtor gets a benefit, that suffices to sustain the guarantee. It will be of no consequence to say that the principal debtor had never requested for a guarantee or that it was given without his knowledge or consent. A contention of this kind was refuted by the Patna High Court in a case"[1] where the directors of a company who guaranteed the company's loans argued that the company had never asked for the guarantee.

3. There should be no Misrepresentation or Concealment [Ss. 142-143]

A contract of guarantee is not a contract *uberrimae fides* or one of absolute good faith." Thus where a banker received a guarantee with knowledge of circumstances seriously affecting the credit of the customer, it was held that there was no duty to disclose this fact to the surety.[12]Yet "it is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglects to do so, it is his peril. A surety ought to be acquainted with the whole contract entered into with his principal." Sections 142 and 143 implement these principles.

142.*Guarantee obtained by misrepresentation, invalid.*—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

143. *Guarantee obtained by concealment, invalid.*—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid.

Illustrations

(a) *A* engages *B* as clerk to collect money for him. *B* fails to account for some of his receipts, and *A,* in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. *A* does not acquaint *C* with *B's* previous conduct. *B* afterwards makes default. The guarantee is invalid.

(b) *A* guarantees to Cpayment for iron to be supplied by him to 5 to the amount of 2000 tons. *B* and C have privately agreed that *B* should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from *A. A* is not liable as a surety.

ran v *Abdul Rehman,* AIR 1918 PC 226. See also *Prasanjit Mahtha* v *United Commercial Bank,* AIR 1979 Pat 151, where a guarantee given after the execution of the loan document was held to be valid. In *Allahabad Bank* v *S.M. Engineering Industries,* (1992) 1 Cal LJ 448, the bank was not allowed to sue the surety without any advance of money made after the date of the guarantee. In *Union Bank of India* v *A. P. Bhonsle,* 1991 Mah LJ 1004, past debts were also held to be covered under the wide language of the section.

10 *Prasanjit Mahtha v United Commercial Bank, AIR 1979 Pat 151.*

See Davies v London and Provincial Marine Insurance Co, (1878) 8 Ch D 469. National

Provincial Bank of England v Glanusk, [1913] 3 KB 335.

Guarantees for the good conduct of a servant have invited more frequent applications of this principle. A very illustrative case is *London General Omnibus Co* v *Holio way.*[n]

The defendant was invited to give a guarantee for the fidelity of a servant. The employer had earlier dismissed him for dishonesty, but did not disclose this fact to the surety. The servant committed another embezzlement. The surety was held not liable.

4. Writing not Necessary [S. 126]

Section 126 expressly declares that a guarantee may be either oral or written.

EXTENT OF SURETY'S LIABILITY [S. 128]

The fundamental principle about the surety's liability, as laid down in Section 128, is that the liability of the surety is co-extensive with that of the principal debtor. The surety may, however, by an agreement place a limit upon his liability.

128. *Surety's liability.*—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to *B* the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by *C. A* is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Co-extensive

The first principle governing surety's liability is that it is co-extensive with that of the principal debtor. The expression "co-extensive with that of the principal debtor" shows the maximum extent of the surety's liability. He is liable for the whole of the amount foi which the principal debtor is liable and he is liable for no more. The only illustratior appended to the section says that if the payment of a loan bond is guaranteed, the suret; is liable not only for the amount of the loan, but also for any interest and charges whicl may have become due on it. Where the overdrafts of a company were guaranteed by th> company's directors and the banker had recovered a part of the loan by disposing of cei tain goods belonging to the company, the Madras High Court held that the liability of th surety had gone down accordingly.[239]

Where the principal debtor acknowledged liability and this had the effect of extendin the period of limitation against him, the surety also became affected by it.[240]

[239] *Harigopal Agarwal v State Bank of India, AIR 1956 Mad 211.*

[240] *Bank of India* v *Surendra Kumar Mishra,* (2003) 1 BC 45 (Jhar): (2003) 1 Bankmann 551. *Vyasya Bank L* v *Deputy Director, DCFT.* (2003) 6 ALD 241 (AP), liability wholly depends upon the terms of the contra Writ petition not allowed for knowing whether interest was payable. Civil suit advised. *Kailasli Nath Agi wal* v *Pradeshiya Industrial & Investment Corpn of U.P. Ltd,* (2003) 4 SCC 305: AIR 2003 SC 1886: (20(

Condition precedent to liability

8][S. 144]Where there is a condition *Guarantee* precedent to the surety's liability, he[221] will not be liable unless that condition is first fulfilled. A partial recognition of this principle is to be found in Section 144.

144. *Guarantee on contract that creditor shall not act on it until co-surety joins.*—Where a person gives a guarantee upon a contract that creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

An illustration in point is National Provincial Bank of England v Brackenbury ,[6]

The defendant signed a guarantee which on the face of it was intended to be a joint and several guarantee of three other persons with him. One of them did not sign. There being no agreement between the bank and the co-guarantors to dispense with his signature, the defendant was held not liable.

A surety can attach any other condition to his liability, e.g., that on default by the principal debtor, an independent demand for payment should be made upon the guarantor. In such a case it would not be enough to serve upon him a carbon copy of the demand against the borrower. A separate demand should be created upon him.[17]

Where the liability is otherwise unconditional, the court cannot of its own introduce a condition into it. This was pointed out by the Supreme Court in *Bank of Bihar* v *Damodar Prasad.*[1]*

The defendant guaranteed a bank's loan. A default having taken place, the defendant was sued. The trial court decreed that the bank shall enforce the guarantee in question only after having exhausted its remedies against the principal debtor. The Patna High Court confirmed the decree. But the Supreme Court overruled it.

The Court held that a condition of this kind would defeat the parties' intentions.

In a subsequent case, the Supreme Court held that the creditor must proceed against the mortgaged property first and then only against the surety for the balance,[19] even if the decree is a composite one against the principal debtor, mortgaged property and the guarantor. In that case only a portion of the decree was covered by the mortgage and the court did not consider it relevant whether the two portions of the decree were severable or not.

This decision was overruled by the Supreme Court in *State Bank of India* v *Indexport Registered*,[20] A composite decree was passed against the surety, the borrower and the

114 Comp Cas 4, joint and several liability created under a guarantee bond. *Syndicate Bank* v *K. Manohara,* AIR 2003 Ker 284. the surety and the borrower were held liable jointly and severally. [16] (1906) 22 TLR 797.

Orang v *Kwong*, (1989) 3 Mai LJ 155 Malaysia.

18 AIR 1969 SC 297: (1969) 1 SCR 620: (1969) 39 Comp Cas 133.

19 *Union Bank of India* v *Manku Narayana*, (1987) 2 SCC 335: AIR 1987 SC 1078.

(1992) 3 SCC 159: AIR 1992 SC 1740.

mortgaged property of the borrower. The High Court of Delhi ordered that the decree should first be enforced against the mortgaged property and only for the balance if any, against the surety. The Supreme Court did not agree with this order and allowed the decree-holder to proceed as he liked. The decree had made the judgment-debtor jointly and severally liable and not as principal debtor and guarantor.

The liability of the surety does not depend upon possibility of the surety being able to realise the amount from the principal debtor.[241] The law on this point was settled by the decision of the Supreme Court in a case where it was observed that the right of the creditor to recover from the guarantor arises out of the terms of the deed of guarantee which are not in any way superseded or brought to nullity merely because the creditor (or guarantor) may not be able to recover anything from the principal debtor.[242]

Novation of Main Contract

Where a father guaranteed his son's business debts and the business was subsequently converted into a company and with the consent of the bank the loan was to be treated as that of the company and the son and his companions were accepted as guarantors, it was held that under the new arrangement, the father had been dropped from the guarantee and hence he was not liable. His property could not be attached for enforcement of the guarantee.[243]

The Supreme Court[244] has also held that where the management of a company ha been taken over under an Act,[245] that does not discharge the guarantors of the company' loans.

Surety's Right to Limit His Liability

The above principle applies only where the surety undertakes to be liable for the who debt. But it is open to him to place a limit upon his liability. He may expressly decla his guarantee to be limited to a fixed amount, for example, that "my liability under th guarantee shall not at any time exceed the sum of £250".[246] In such a case, whatever m be owing from the principal debtor, the liability of the surety cannot go beyond the su so specified.

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[241] *Syndicate Bank v Narayana Iyer, (2003) 3 Ker LT 726.*

[242] *Industrial Finance Corpn of India Ltd v Cannanore Spg and Wvg Mills Ltd, (2002) 5 SCC 54: (2002) Ke 86 (SC) (SN). To the same effect is Punjab National Bank v State ofU.P., (2002) 5 SCC 80.*

[243] *Satish Chandra Jain v National Small Industries Corpn Ltd, (2003) All LJ 238 (SC).*

[244] *State Bank of India v Saksaria Sugar Mills Ltd, (1986) 2 SCC 145: AIR 1986 SC 868.*

[245] Sugar Undertaking (Taking over of Management) Act, 1978.

See *Hobson* v *Bass,* (1871) 6 Ch A 792. The surety may impose any other limit upon his liability, e.g. he would be liable if the performance was defective in certain respects, *Nanyang Ins Co* v *A. Chin Kim* (1992) 1 Current LJ 454.

Liability under continuing guarantee

129. *"Continuing guarantee".*—A guarantee which extends to a series of transactions is called a "continuing guarantee".

Illustrations

(a) A, in consideration that *B* will employ C in collecting the rent of *B's* zamindari, promises *B* to be responsible, to the amount of 5000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.

(b) *A* guarantees payment to *B*, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to *C*. *B* supplies C with tea to the above value of £100, and C pays *B* for it. Afterwards *B* supplies C with tea to the value of £200. *C* fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to *B* to the extent of £100.

(c) A guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to C, which *C* does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the four sacks.

A guarantee of this kind is intended to cover a number of transactions over a period of time. The surety undertakes to be answerable to the creditor for his dealings with the debtor for a certain time. A guarantee for a single specific transaction comes to an end as soon as the liability under that transaction ends. For instance, in the old case of *Kay* v *Groves*,[21] on which the third illustration given in the section is based, the guarantee was in these terms:

"I hereby agree to be answerable to *K* for the amount of five sacks of flour to be delivered to *T*, payable in one month." Five sacks were actually supplied and *T* paid for them. Further supplies were made during the same month, for which *T* failed to pay. The surety was then sued. The court held that it was not a continuing guarantee.

The essence of a continuing guarantee is that it applies not to a specific number of transactions, but to any number of them and makes the surety liable for the unpaid balance at the end of the guarantee.[28] In *Chorley and Tucker* the distinction is thus explained:[29]

A specific guarantee provides for securing of a specific advance or for advances up to a fixed sum, and ceases to be effective on the repayment thereof, while a continuing guarantee covers a fluctuating account such as an ordinary current account at a bank, and secures the balance owing at any time within the limits of the guarantee...

21 (1829) 80 ER 1274.

28 The liability of the guarantors to pay the same remains alive as long as the principal debtor does not clear the account. *Union Bank of India* v *T.J. Stephen*, AIR 1990 Ker 180. Following the Supreme Court decision in *Margaret Lalita Samuel* v *Indo Commercial Bank Ltd*, (1979) 2 SCC 396: AIR 1979 SC 102, the court held that the period of limitation commences from the time when the payment is demanded and refused or otherwise denied by the surety. *State Bank of India* v *Gemini Industries*, (2001) 3 Guj CD 1885 (Guj). *SICOM Ltd* v *Harjinder Singh*, AIR 2004 Bom 337, in the case of continuing guarantee, the bar of limitation docs not arise as long as guarantee is running.

29 LEADING CASES ON MERCANTILE LAW, (4TH EDN BY LORD CHORLEY AND GILES, 1962), P. 322.

A guarantee for the conduct of a servant appointed to collect rents has been held by the Calcutta High Court to be a continuing guarantee.[30] A guarantee for the appointment of an agent has been held to be not a continuing guarantee. The use of the word "continued" in the guarantee bond did not make it a continuing guarantee. It only meant that the bond was to remain in force during the subsistence of the agency.[31]

A personal guarantee provided that the guarantee was to remain in force till the borrower paid the loan amount on demand. This was regarded as a continuing guarantee. The period of limitation started running on refusal by the borrower to pay the amount on demand.[32]

Liability under bank guarantee

A bank guarantee is a sort of an absolute undertaking on the part of the bank under an arrangement with its customer to pay to the creditor whenever the latter invokes the guarantee. In a matter of this kind before the Calcutta High Court:[247]

> The contract was to ship goods. Performance was assured by means of a bank guarantee. The vendee could invoke the guarantee if the vendor failed to perform his obligation. The guarantee was irrevocable and the vendee's declaration that performance was not satisfactory was to be conclusive and binding. The vendor did not ship the goods within the stipulated time. The guarantee was invoked by the vendee by means of a letter which, without giving any details, only stated that the vendor had defaulted in satisfactory execution. The vendor tried to stay the invocation of the guarantee.

The court refused to oblige. The details of the relation between the vendor and vendee were irrelevant to the obligation of the bank to pay the amount on demand.[248]

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[30] *Durga Priya Cliowdhery v Durga Pada Rov, AIR 1928 Cal 1204.*

[31] *Md NazeerAd v Economic Transport Organisation, (2005) 3 ALD 527 (AP).*

[32] *CP Sree Lai v District Collector, Thiruvananthapuram, AIR 2007 Ker 131.*

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[247] *Road Machines (India) (P) Ltd v P&E Corpn of India, AIR 1983 Cal 91.*

[248] *Bird & Co* v *Tribunal Jute Mills,* (1979) 83 Cal WN 802, where also an interim injunction was refused: *Texmaco Ltd* v *SBI,* (1979) 83 Cal WN 807. A similar stay was refused where the ground alleged by the contractor was that the work allotted to him was impossible and vital facts were suppressed from him. *DTh Construction (P) Ltd* v *SAIL,* AIR 1986 Cal 31; *Basant Rlymers* v *State Chemical and Pharmaceutica Corpn,* AIR 1986 Raj 1. bank guarantee regarded as equivalent to cash; *Allied Resins of India Ltd* v *M. & M Trading Corpn of India Ltd,* AIR 1986 Cal 346, no slay; *Jute Corpn of India Ltd* v *Konark Jute Ltd,* AIR 1981 Ori 238, matter under arbitration, no stay; *STC* v *Jainsons Clothing Corpn,* (1994) 6 SCC 597: AIR 1994 S(2778. suppliers bank guarantee against his failure to supply allowed to be encashed without stay when th contract had to be cancelled because of the failure to supply. *Bank of India* v *Nangia Construction,* AIR 200 SC 2906, refusal to honour unconditional guarantee would bring the entire commercial world and busines transactions to a grinding halt. *SCIL India Ltd* v *Indian Bank,* AIR 1992 Bom 131, suspension of the coi tract because of the contractor's default, encashment not stayed. *National Building Construction Ltd* v *Sta Bank ofPatiala,* AIR 1993 Del 89. enacashment not stayed, *Nangia Construction India Ltd* v *Internation Airports Authority of India Ltd,* AIR 1992 Delhi 243 encashment not stayed.

[248] (1986) 4 SCC 136: AIR 1986 SC 1924.

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The court refused to follow a decision of the Delhi High Court[35] to the effect that for invoking a bank guarantee the bank should be informed of all the facts which go to show that the payment had really become due under the guarantee. The court said that a bank guarantee is a commercial document. It can be invoked in a commercial manner. The invocation would be sufficient and proper if the bank concerned understands that the guarantee is being invoked.[36] The Supreme Court allowed guarantee money to be collected notwithstanding the insolvency of the customer or the state of the bank's relations with the customer.[37] The money is payable on demand and not on breach.[38] In a performance guarantee issued through a bank, the commitment is that if the buyer demands payment alleging that the seller has not performed his part of the bargain, the bank would pay the amount. The seller is not ordinarily allowed to prevent such payment even if the payment is demanded without justification. If the buyer withdraws the amount without having the right to do so, the seller can recover it from him, but the damage to the bank's reputation in not keeping its international commitment will be irreparable.[39]

Affirming this in a subsequent case, the court added that performance guarantees are virtually promissory notes payable on demand. Performance bonds stand on a similar footing to letters of credit and must be honoured in the absence of notice of clear fraud.[40] In this case the buyer had to establish letters of credit against the seller's performance bond, which he did not do and, therefore, the sellers did not supply the goods. The buyers demanded encashment of the performance guarantee and in spite of its being an unjust demand the court did not stay it.

Even the winding up of the company on whose behalf the guarantee was submitted would not enable the bank to refuse payment[41] Where the bank guarantee was invoked

35 *Harprasad & Co v Sundaran Steel Mills, AIR 1980 Del 174.*

36 *Shreeram Cloth Stores v Trading Corpn of Bangladesh, (1980) 1 Cal HC Notes 132; United Commercial Bank v Bank of India, (1981) 2 SCC 766: AIR 1981 SC 1426.*

Maharashtra SEB v *Official Liquidator,* (1982) 3 SCC 358: AIR 1982 SC 1497. *Rampur Engineering Co Ltd* v *United Construction Co,* AIR 2002 Del 170, revocation of bank guarantee, negligence of bank in taking necessary steps against debtor and his guarantor for realisation of debt within validity period of guarantee, bank liable to reimburse beneficiary, the court would not intervene only because of a dispute between the beneficiary and the debtor. *Development Consultant (P) Ltd* v *Industrial Development Bank of India Ltd,* (2003) 3 Cal LT 632 (HC), invocation of bank guarantee not to be restrained, court to exercise power with circumspection.

38 *Dena Bank v Fertilizer Corpn of India Ltd, AIR 1990 Pat 221.*

R. D. Harbottle (Mercantile) Ltd v *National Westminster Bank Ltd,* [1978] 1 QB 46: [1977] 3 WLR 752. The Supreme Court has observed that trend of law is the same in India also. *Tarapore & Co* v *V.O. Tractors Export,* (1969) 1 SCC 233: AIR 1970 SC 891: (1969) 2 SCR 920; *Centax (India) Ltd* v *Vinmar Impex Inc,* (1986) 4 SCC 136: AIR 1986 SC 1924. Wrongful encashment can be set right by forcing recovery of the amount, *Bridge and Building Construction Co P Ltd* v *Ceminda Co Ltd,* AIR 1994 Cal 219. Where the contractor's security deposit had already been forfeited, encashment of bank guarantee would be allowed only for the balance, *Madan Gopal* v *Union of India,* AIR 1992 Del 253.

40z *Edward Owen Engg Ltd* v *Barclays Bank International Ltd,* [1978] 1 QB 159. See further, *United Trading Corpn SA and Murray Clayton Ltd* v *Allied Arab Bank Ltd,* [1985] 2 Lloyd's Rep 554, supplies not made because of Iraq-Iran war, enforcement of guarantee allowed.

. ^ *Gas Authority of India Ltd v Official Liquidator, Mumbai, AIR 2004 Bom 220.*

within its validity period but its payment could not be released because of a court stay order and before the stay could be lifted, its period expired and there being no renewal, the bank refused to pay, the Supreme Court held the refusal to be wrongful. It was the same guarantee which had been invoked and of which payment remained suspended because of the stay order.[42]

The court gave no guidance as to what constitutes "fraud" except this that it must be "very clearly established."[43] Even where two demands were stayed on proof that the signatures on them were forged, the court refused to stay further demands on the basis that they were also likely to be forged.[44] Thus a bank guarantee is not and should not be concerned in any way with the rights and wrongs of the underlying transaction between the parties.[45]

Where the terms of a bank guarantee required that the letter of invocation must mention the amount of loss caused, the encashment was stayed because the letter only mentioned the failure of the contractor and not the amount of loss caused.[46]

Letters of Credit and Bank Guarantees

SEN J of the Supreme Court observed in *Centax (India) Ltd* v *Vinmar Impex Inc.*[41] "Commitments of banks must be allowed to be honoured free from interference from the courts. Otherwise, trust in international commerce would be irreparably damaged."[249] The court did not grant an injunction to stay the enforcement of letters of guarantee on the grounds that the goods were of inferior quality and the sellers had not sent the original shipping documents. The court emphasised that a bank guarantee attracts the same consideration as a letter of credit and added: "A letter of credit sometimes resembles and is analogous

42 *Bank of India* v *Nangia Constructions (P) Ltd,* (2008) 7 SCC 290, the court said that international business wholly depends upon bank guarantees. Bank should not try to avoid payment by resorting to subterfuges.

43 *Himadri Chemicals Industries (P) Ltd* v *Coal Tar Refining Co,* (2007) 8 SCC 110, an injunction can be granted only in case of eggregious fraud and irretrievable loss, a dispute between the parties is not sufficient for the purpose. *Mauriya Udyog Ltd* v *Corporation Bank,* AIR 2007 Del 259 (DB), eggregious fraud is established when there is a clear fraud of which the beneficiary is trying to take benefit.

44 *Tukan Timber Ltd v Barclays Bank pic. Financial Times, Dec 17, 1986.*

45 *Esal Commodities Ltd and Reltor Ltd* v *Oriental Credit Ltd,* [1985] 2 Lloyd's Rep 546; *Howe-Ricluirdson Seal Co Ltd* v *Polinex Cekop and National Westminster Bank Ltd,* [1978] 1 Lloyd's Rep 161; *U.P. Coop Federation Ltd* v *Singh Consultants and Engineers (P) Ltd,* (1988) 1 SCC 174, relying upon *U.C.M. (Investments)* v *Royal Bank of Canada,* [1982] 2 All ER 720 HL. Where the power plant was supplied to the buyer and it was also in his actual use so that the defect, if any, was reduced from condition to warranty and which also showed that no fraud was involved, encashment was not stayed. Even otherwise there was likely to be no irretrieable injustice because the supplier and the banker both were in friendly country, *Svenska Han- delsbanken* v *Indian Charge Chrome Ltd,* (1994) 2 SCC 155: AIR 1994 SC 626. Suspension of the contract by the Department on account of the contractor's defaults, encashment of bank guarantee given by a third person not affected, *SCIL* v *Indian Bank,* AIR 1992 Bom 131. Enforcement was stayed where the contractor was compelled to drop protective terms from the guarantee, *Dal-ichi Karkaria P Ltd* v *ONGC,* AIR 1992 Bom 309.

46 *Ansal Properties and Industries (P) Ltd v Engg Projects India Ltd, AIR 1998 Del 176.*

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249 Citing DENNING, MR in *Elan* v *Matpas,* (1966) Li LR 595.

to a contract of guarantee."[49] A bank guarantee is very much like a letter of credit. The courts will do their utmost to enforce it according to its terms. They will not, in the ordinary course of things, interfere by way of injunction to prevent its implementation. The court also cited an observation of KERR, J in *R. D. Harbottle (Mercantile) Ltd* v *National Westminster Bank Ltd*[s()]

> It is only in exceptional cases that the court will interfere with the machinery of irrevocable obligations assumed by banks. They are the life blood of international commerce.

The type of rare case in which a court may intervene was before the Calcutta High Court in *Banerjee & Banerjee v H. S. W. Construction Ltd*[31] Here the party claiming under the guarantee failed to point out the precise amount of his claim although he had the means to quantify it, his intention being to suppress vital information, the court held that his conduct being fraudulent, enforcement of the guarantee ought to be stayed.

In a letter of credit two banks are involved. The buyer opens an account in a bank in his country which guarantees payment and is known as the issuing bank. This bank opens a credit with a bank in the seller's country in favour of the seller. This bank, known as the advising bank, advises the seller as to the documents which the seller has to deliver to the bank and the time within which he must do so. On presentment of such documents, the payment under the letters of credit is released. That is why this system of credit is also known as documentary credit. The documents must be in accordance with the contract and should also be presented within the time specified because otherwise the bank can refuse to release promised finance.

A confirmed letter of credit goes beyond the power of the buyer to countermand payment. The bank is liable in damages if it refuses to pay an irrevocable confirmed letter of credit.[52] "The bank can refuse to honour the documents tendered by the seller if they do not correspond strictly with the instructions. The documents should be absolutely the same as demanded by the party and not merely just or almost the same. Thus where a certificate of experts about the quality of the goods was demanded and the certificate was signed by only one expert, it was held that the seller was not entitled to payment.[53]

CITING DENNING, MR IN *ELAN* V *MAMAS*, (1966) LI LR 595.

50 [1978] 1 QB 46: [1977] 3 WLR 752; *Svenska Handelsbanken* v *Indian Charge Chrome Ltd*, (1994) 1 SCC 502; *STC* v *Jainsons Clothing Corpn*, (1994) 6 SCC 597, bank guarantee not stayed in these cases. AIR 1986 Cal 374. *Urquhart Lindsay &Co\ Eastern Bank, (1992) 1 KB 318.*

53 *Equitable Trust Co of New York* v *Dawson Partners Ltd*, (1926) 27 Lloyd's LR 49, the seller had shipped rubbish which the single expert could not notice. Where the documents when originally tendered were wrong because the goods (fish) did not carry the prescribed standard of protein and when the documents were re- tendered after rectification ofthe error, the period of credit expired, rejection of the tender by the bank was held to be justified, *Soproma SPA* v *Marine & Animal By-products Corpn*, (1966) 1 Lloyd's Rep 367.

No Arbitration about Bank Guarantee

The enforcement of a bank guarantee cannot be made the subject-matter of arbitration proceeding.[54] But where a bank found that there was a pending arbitration under which the liability of all the parties had to be ascertained, the Karnataka High Court upheld the decision of the bank to withhold payment.[55]

Joint-debtors and suretyship [S. 132]

132. ***Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety in other's default.*—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract although such third person may have been aware of its existence.**

Illustration

A and *B* make a joint and several promissory note to *C. A* makes it, in fact, as surety for *B,* and C, knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for *B,* is no answer to a suit by C against *A* upon the note.

The section is based upon the principle that the liability of persons who are primarily liable as joint-debtors is not affected by any arrangement between them as to the order of their liability. A creditor is not affected by any private arrangement entered into as between his two debtors that one will be the surety of the other even if the creditor knows of this arrangement. The creditor may not be a consenting party to the arrangement.[56] The principle of the section is that whatever be the arrangement between joint debtor as to their liability to the creditor, they remain joint debtors. The creditor is not concerned with their mutual agreement that one would be a principal and the other a surety. Where, however, the creditor knows of any such arrangement, he must refrain from doing anything which would have the effect of discharging the surety under Sections 133, 134 or 135.[57]

Where the sub-letting of a Government contract was allowed only in respect of three items and the principal contractor in fraud of his sub-lettee handed over the entire contract to him and obtained from him a bank guarantee for due performance, the enforcement of the guarantee was stayed by reason of the fraud, for otherwise the sub-lettee would have suffered an irreparable loss.[58]

54 *National Project Construction Corpn v G. Ranjan, AIR 1985 Cal 23.*

55 *Kudremukh Iron Ore Co v Karola Rubber Co Ltd, AIR 1987 Kant 139.*

56 *Duncan Fox & Com North and South Wales Bank, (1880) 6 AC 1; Medisetti Ravi Babu v Promida Chit Fund (P) Ltd, (2003) 2 Banking Cases 527 (AP). " Oakerley v Pasheller, (1836) 4 CI & F 207: 42 RR 1.*

57 *Nagina Construction (India) (P) Ltd v National Buildings Constructions Corpn Ltd, AIR 1990 (NOC) Delhi 177.*

DISCHARGE OF SURETY FROM LIABILITY

A surety is said to be discharged from liability when his liability comes to an end. The Act recognises the following modes of discharge.

1. By Revocation [S. 130]

Ordinarily a guarantee is not revocable when once it is acted upon. But Section 130 provides for the right of revocation of a continuing guarantee.

130. *Revocation of continuing guarantee.*—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) A, in consideration of *B's* discounting, at A's request, bills of exchange for C, guarantee to *B,* for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to *B* for any subsequent discount. But A is liable to *B* for the 2,000 rupees, on default of C.

(b) A guarantees to *B,* to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C. C* accepts the bill. A gives notice of revocation. *C* dishonours the bill at maturity. A is liable upon his guarantee.

Revocation becomes effective for the future transactions while the surety remains liable for transactions already entered into. *Ojford* v *Davies*[59] is a suitable illustration.

The defendants guaranteed the repayment of bills to be discounted by the plaintiffs for *Davies & Co* for twelve months not exceeding £600. The defendants revoked the guarantee before any bill was discounted. But the plaintiffs discounted the bills which remained unpaid.

The question was whether the surety had a right to revoke. The court said: "We are of opinion that they had" and consequently they were not liable. A separate transaction which makes the surety irrevocably liable, but he may free himself from further liability.

The employment of a servant is one transaction. A guarantee for his good behaviour is not a continuing one and is not revocable as long as he continues in the job.[60] When a person guaranteed the payment of rent by his servant and revoked the guarantee as soon as the servant left his employment, he was held not liable for rents which became due after the revocation.[250] Where the directors of a company guaranteed the payment of the company's overdraft and subsequently resigned their office and the bank was informed, it was held that the liability of the directors would be confined to the amount due up to

(1862) 6 LT 579: 133 RR491: 142 ER 1336.

Lloyd's v *Harper,* (1880) 16 Ch D 290.

[250] *Wingfleld v De St Croin, (1919) 35 TLR 432.*

the date of their resignation.[62] Where a guarantor to a bank under a continuing guarantee agreed not to claim the benefit of Section 130, the Supreme Court[63] did not allow him to do so even before any sum was advanced by the bank/'[3]

8] [S. 129]

Guarantee

2. By death of surety [S. 131]

131. ***Revocation of continuing guarantee by surety's death.*****—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.**

A continuing guarantee is also determined by the death of the surety unless there is a contract to the contrary. Once again, the termination becomes effective only for the future transactions, the surety's heirs can be sued for liability already incurred. The liability of the deceased surety can be enforced against his legal heirs but only to the extent of the property inherited by them.[251]

3. By variance [S. 133]

Courts of law and equity have always taken zealous care of a surety's interest. "A surety is considered a favoured debtor and his liability is in *strict-is-simi juris*",[252] Initially a contract of guarantee may not be one of utmost good faith, but once formed the duty of utmost good faith is imposed upon the creditor. The result of this concern of the courts for the surety's interest is that a surety is held discharged when, without his consent, the creditor makes any change in the nature or terms of his contract with the principal debtor. Section 133 incorporates this principle.

133. ***Discharge of surety by variance in terms of contract.*****—Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.**

Illustrations

(a) A becomes surety to C for B's conduct as a manager in *C's* bank. Afterwards, B and *C* contract, without A*'s* consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

[62] *Harigopal Agarwal v State Bank of India, AIR 1956 Mad 211.*

[63] *Sita Ram Gupta v Punjab National Bank, (2008) 5 SCC 711.*

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[251] *R.K. Dewan v State ofU.P., (2005) All LJ 2067.*

[252] The protective provisions are spread over in Ss. 133, 134, 135, 139 and 141. The Karnataka High Court has been of the view that a surety may agree not to claim the benefit of these protective provisions. The rights conferred by these sections being not inalienable, and being also variable, there is no statutory violation if a surety agrees not to claim the benefit. *T. RajuShettyv Bank of Baroda,* AIR 1992 Kant 108, not agreeing with *Union of India* v *Pearl Hosiery Mills,* AIR 1961 Punj 281, where it was held that S. 133 could not be ousted. Applying this doctrine in *United Commercial Bank* v *B. M. Mahadeva Babu,* AIR 1992 Kant 294, the same High Court held that where the guarantee contained a term that any rearrangement between the creditor and the principal debtor would not discharge the surety, an acknowledgement of liability by the principal debtor extending the period of limitation against him had the effect of extending it against the surety also.

(.b) A guarantees C against the misconduct of *B* in an office to which *B* is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, *B* misconducts himself. *A* is discharged by the change from future liability under his guarantee, though the misconduct of *B* is in respect of a duty not affected by the latter Act.

(c) C agrees to appoint *B* as his clerk to sell goods at a yearly salary, upon A's becoming surety to *C* for *B's* duly accounting for moneys received by him as such clerk. Afterwards, without *A's* knowledge or consent, C and *B* agree that *B* should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of *B.*

(cl) A gives to C a continuing guarantee to the extent of 3000 rupees for any oil supplied by *C* to *B* on credit. Afterwards *B* becomes embarrassed, and, without the knowledge of *A, B* and C contract that *C* shall continue to supply *B* with oil for ready money, and that the payment shall be applied to the then existing debts between *B* and *C. A* is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend *B* 5,000 rupees on the first March. A guarantees repayment, C pays the 5000 rupees to *B* on the first January. *A* is discharged from his liability, as the contract has been varied inasmuch as *C* might sue *B* for the money before the first of March.

Bonar v *Macdonald*[66] is one of the early illustrations.

The defendant guaranteed the conduct of a manager of a bank. The bank afterwards raised his salary on the condition that he would be liable for one-fourth of the losses on discounts allowed by him. No communication of this new arrangement was made to the surety. The manager allowed a customer to overdraw his account and the bank lost a sum of money. It was held that the surety could not be called on to make good the loss as the fresh agreement was a substitution of a new agreement for the former which discharged the surety.

One of the questions that concerns the courts is that where a variation is not substantial or material, or is beneficial to the surety, will he be discharged? A problem of this kind was before the Supreme Court in *M. S. Anirudhan* v *Thomco's Bank Ltd*[61]

The defendant guaranteed the repayment of a loan given by the plaintiff bank to the principal debtor. The guarantee paper showed the loan to be Rs 25,000. The bank refused to accept. The principal debtor then reduced the amount to Rs 20,000 and without intimation to the surety gave it to the bank which was then accepted. The principal debtor failed to pay and the bank sued the surety. The question was whether the alteration had discharged him.

It was held by a majority that the surety was not discharged.

[6r](1850) 3 HLC 226: 88 RR 60: 10 ER 87. AIR 1963 SC 746:1963 Supp (1) SCR 63: (1963) 33 Comp Cas 185.

Extension of cash-credit limit of the borrower beyond the amount which was guaranteed did not have the effect of discharging the surety because his limit of liability was to remain the same as under the guarantee.[253]

An alteration not only discharges the surety from his personal liability but also release; the property, if any, which the surety had included in the contract. This was the situatioi in *Bolton* v *Salmon.*™ The defendant was a surety for a loan and also brought in some o her own property as a security. The principal debtor, without her knowledge, borrowei from the creditor further still and executed a new deed consolidating all the loans. Th defendant was held to have been discharged and her properties released from the bond.

Effect of Decree Against Surety

It has been held by the High Court of Delhi that when a decree for the amount due obtained against the principal debtor and the surety making them jointly and several liable, any adjustment given to the principal debtor in the matter of the execution of t! tion decree would not discharge the surety from his liability under the decree.[254] Two decisio of the Madras High Court are also to the same effect.[7']

4. Release or discharge of principal debtor [S. 134]

134. ***Discharge of surety by release of discharge of principal debtor.*—The surety is (charged by any contract between the creditor and the principal debtor, by which the pi cipal debtor is released, or by any act or omission of the creditor, the legal consequent which is the discharge of the principal debtor.**

Illustrations

(a) *A* gives a guarantee to *C* for goods to be supplied by *C* to *B. C* supplies goods to *B,* afterwards *B* becomes embarrassed and contracts with his creditors (including C's to assif them his property in consideration of their releasing him from their demands). Here *B* is rele from his debt by the contract with C, and *A* is discharged from his suretyship.

(b) *A* contracts with *B* to grow a crop of indigo on A's land and to deliver it to *B* at a rate, and *C* guarantees A's performance of this contract. *B* diverts a stream of water whi necessary for irrigation of A's land and thereby prevents him from raising the indigo. C longer liable on his guarantee.

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[253] *M.V. Shantanarasimhaiah* v *Dena Bank,* (2002) 2 Ker LJ 255: (2002) 2 ICC 260 (Kant); *Punjab Ni Bank* v *Yarlapadda,* (1998) AIHC 3052 AP; *Industrial Finance Corpn of India Ltd* v *Cannanore* Sj *Wvg Mills Ltd,* (2002) 5 SCC 54: AIR 2002 SC 1841: (2002) 110 Comp Case 685: (2002) 2 Ker LT 8(No 100), nationalisation of the borrower mill (textile) did not result in discharge of contract of gu; on account of frustration. The guarantee had no co-relationship with the Nationalisation Act, 1974. an independent contract and had to be honoured to fulfil the contractual obligation between the sur creditor.

[254] *Charan Singh v Security Finance (P) Ltd, AIR 1988 Del 130.*
Meenakshi Sundaram Chettiar v Velambal Ammal, AIR 1944 Mad 423 and Nellore Coop Urban Ba A. Mallikarjirayya, AIR 1949 Mad 252.

(c) A contracts with *B* for a fixed price to build a house for *B* within a stipulated time. *B* supplying the necessary timber. *C* guarantees *A*'s performance of the contract. *B* omits to supply the timber. Cis discharged from his suretyship.

(i) Release of Principal Debtor

The section provides for two kinds of discharge from liability. In the first place, if the creditor makes any contract with the principal debtor by which the latter is released, the surety is discharged. Where, for example, the creditor accepts a compromise and releases the principal debtor, the surety is likewise released. Any release of the principal debtor is a release of the surety also. Where, however, the principal debtor is discharged by the operation of insolvency laws or, in the case of a company, by the process of liquidation, that does not absolve the surety of his liability.[72]

Effect of Debt Relief Acts

Where the liability of the principal debtor is reduced under the provisions of a statute, an important question arises whether the liability of the surety is also diminished thereby. The Nagpur High Court held that the intention of the statute is to relieve the principal debtor and not the surety.[73] But a Full Bench of the Madras High Court, applying the provisions of the Madras Agriculturists' Debt Relief Act, held that "the surety is liable only for the reduced amount".[74] This view of the Madras High Court had been supported by the Kerala High Court.[75] The court pointed out that on any other view, it would be open to the creditor to recover the debt as scaled down from the agriculturist-debtor, and the balance from the surety, and the latter in his turn could seek reimbursement from the principal debtor *(vide* Section 144 of the Contract Act). Such a construction would completely nullify the benefits of the ameliorative legislation to indebted agriculturists. This is indeed the most desirable interpretation of Section 128 which makes the liability of the surety co-extensive with that of the principal debtor.

Application of Insolvency Laws

The Supreme Court has laid down that though under Section 134 the surety is discharged by release or discharge of the principal debtor, a discharge which the principal debtor may secure by reason of winding up or insolvency does not absolve the surety of his liability. A bank guarantee for a sum of Rs 50,000 was submitted by a supplier to the Electricity Board. The bank was liable under the guarantee to pay the amount within 48 hours of demand by the Board. The Board demanded payment. The bank made it. The bank was now trying to realise the amount out of the securities deposited by the supplier for securing the guarantee. The supplier company went into liquidation. The liquidator sought to restrain the bank from realising the securities. But the Court allowed the bank

72 *Maharashtra SEB v Official Liquidator, (1982) 3 SCC 358: AIR 1982 SC 1497.*

73 *Balkrishna* v *Atmaram,* AIR 1944 Nag 277.

74 *Subramania Chettiurv M.P. Narayanswami Gounder, AIR 1951 Mad 48.*

Avpunni Mani v Devassy Kochouseph, AIR 1966 Ker 203.

--to go ahead. The bank was a secured creditor and was entitled to the benefit of securities. The bank had nothing to do with the state of the relations between the company and the Electricity Board.[255]

(ii) Act or Omission

The second ground of discharge provided in Section 134 is that when the creditor does "any act or omission the legal consequence of which is the discharge of the principal debtor", the surety would also be discharged from his liability. Where, for example, there is a contract for the construction of a building the performance of which is guaranteed by a surety, and the creditor has to supply the building material. An omission on his part to do so would discharge the contractor and so would the surety be discharged.

5. Composition, extension of time and promise not to sue [S. 135]

135. ***Discharge of surety when creditor compounds with, give time to, or agrees not to sue principal debtor.*—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract.**

The section provides for three modes of discharge from liability: (1) Composition; (2) Promise to give time; and (3) Promise not to sue the principal debtor.

Composition

If the creditor makes a composition with the principal debtor, without consulting the surety, the latter is discharged.

Promise to give Time

It is one of the duties of the creditor towards the surety not to allow the principal debtor more time for payment. "The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."[256] Where as a result of the acknowledgement by the principal debtor, the period of limitation became prolonged, it was held that the surety would continue to be liable for the extended period.[257]

Promise not to Sue

If the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged. "The main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt" when it is due and this right is positively violated when the creditor promises not to sue the principal debtor.

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[255] *Maharashtra SEB v Official liquidator, (1982) 3 SCC 358: AIR 1982 SC 1497.*

A unilateral extension of time without any contract with the principal debtor does not discharge the surety. At the best it is a forbearance to sue. *Uslia Devi* v *Bhagwan Das,* AIR 1967 MP 250.

[257] *Wandoor Jupiter Chits v K.P. Mathew, AIR 1980 Ker 190.*

Forbearance to Sue

This is, however, subject to two important qualifications. In the first place, a promise not to sue should be distinguished from a mere "forbearance to sue". A promise not to sue is "an engagement which ties the hands of the creditor". "It is not negatively refraining; not exacting the money at the time, but it is the act of the creditor depriving himself of the power of suing....". Section 137 accordingly provides that:

> **137. *Creditor's forbearance to sue does not discharge surety.*—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.**
>
> *Illustration*
>
> *B* owes to C a debt guaranteed by A. The debt becomes payable. C does not sue *B* for a year after the debt has become payable. *A* is not discharged from his suretyship.

Thus "mere forbearance to sue" does not discharge the surety. But suppose that the forbearance continues up to the expiry of the period of limitation and consequently the action against the principal debtor becomes time-barred, will the surety be discharged? According to Section 134 if the creditor is guilty of any act or omission the legal consequence of which is the discharge of the principal debtor, the surety is also discharged. The omission to sue the principal debtor within the period of limitation definitely discharges him. If Section 134 stood alone the surety would be discharged. But Section 137 declares that "mere forbearance to sue" does not discharge the surety. These two provisions naturally created a conflict of decisions which was ultimately resolved by the decision of the Privy Council in *Mahant Singh* v *U Ba* K.[79] Lord PORTER observed that "....a failure to sue the principal debtor until recovery is barred by the statutes of limitation does not operate as a discharge of the surety in England. The same view prevails in most of the High Courts in India." The decision further points out that an agreement not to sue the principal debtor or to give time with a reservation of the right against the surety, would not discharge the surety. The *Mahanth Singh* case was decided on this principle.

> The plaintiff was engaged as a contractor by certain trustees of a pagoda for construction work. The payment by the trustees was guaranteed by the defendants. The trustees defaulted and, therefore, the plaintiff sued the trustees and the surety. The beneficiaries of the trust replaced their trustees and the plaintiff dropped his case against them and was not allowed subsequently to sue them in their personal capacity. But the suit against the surety was maintained. It was held that the surety was not discharged.

[3] (1939) 181 IC 1 (PC): 66 IA 198: AIR 1939 PC 410; *Affirmed* by the Supreme Court in *Bombay Dyeing & Mfg Co Ltd* v *State of Bombay,* AIR 1958 SC 328: 1958 SCR 1122. *See* further *OrissaAgro Industries Corpn* v *Sakeswara Guru,* AIR 1985 Ori 270 where the suit against the principal debtor was dismissed but it was allowed against the surety. *Punjab National Bank* v *Surendra Prasad Sinha,* 1993 Supp (I) SCC 499: AIR 1992 SC 1815 which is to the effeCt-that where the debt becomes time-barred, the securities deposited by the surety can be used towards realisation.

Promise to give Time Made with Third Person

Secondly, Section 136 provides that "where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged".

136. ***Surety not discharged when agreement made with third person to give time to principal debtor.*****—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.**

Illustration

C, the holder of an overdue bill of exchange drawn by *A* as surety for *B*, and accepted by *B*, contracts with *M* to give time to *B*. *A* is not discharged.

6. By impairing surety's remedy [S. 139]

139. *Discharge of surety by creditor's act or omission impairing surety's eventual remedy.*— If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) *B* contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. *A* becomes surety to *C* for *B's* due performance of the contract. *C*, without the knowledge of *A*, prepays to *B* the last two instalments. *A* is discharged by this pre-payment.

(b) *C* lends money to *B* on the security of a joint and several promissory note made in *C's* favour by *B*, and A as surety for *B*, together with a bill of sale of *B's* furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, *C* sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. *A* is discharged from liability on the note.

(c) *A* puts *M* as apprentice to *B*, and gives a guarantee to *B* for *M's* fidelity. *B* promises on his part that he will, at least once a month, see *M* make up the cash. *B* omits to see this done as promised, and *M* embezzles. *A* is not liable to *B* on his guarantee.

If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is impaired, the surety is discharged. It is the plain duty of the creditor not to do anything inconsistent with the rights of the surety. A surety is entitled, after paying off the creditor, to his indemnity from the principal debtor. If the creditor's act or omission deprives the surety of the benefit of this remedy, the surety is discharged. Thus, where against the terms of the guarantee the Government allowed the contractor to remove felled trees from a forest without payment of price, the surety was held to be discharged.[80] Similarly, where a bank could not take sufficient care

so *Stare of M. P.* v *Kaluram*, AIR 1967 SC 1105: (1967) 1 SCR 266. *See* also *Amrit Lai Goverdhan Lalan* v *State Bank ofTravancore*, AIR 1968 SC 1432: (1968) 3 SCR 724, where the creditor's negligence in allowing the goods (securities) to fall short was held sufficient to discharge the surety.

of the contents of a godown pledged to it against a loan and consequently they were lost, the surety, who had guaranteed the loan, was allowed by the Supreme Court to claim discharge from liability to the extent of the value of the lost goods.[258] This has been further supplemented by the Supreme Court by the declaration in a subsequent case that the creditor must proceed in the first instance against the security, and then only against the surety for the balance.[259]

Creditor's Duty in Realising Security

Creditor's duty is not merely to handle the security carefully but also to use reasonable care in realising its value.[260] A company's borrowings from a bank were secured by a charge on assets and repayment was also guaranteed by the company's directors. The company defaulted and the bank appointed a receiver to sell the assets. The directors, as sureties, claimed damages from the receiver for failing to obtain a proper price. The court refused to recognise the duty on the part of the receiver towards the company's guarantors but said that such duty was owed only to the company.[261] Before disposing of the security the guarantor should be informed of it on principles of natural justice. This would enable him to exercise the option of taking over the security by paying off the dues. Where such notice was not given, the court did not permit shortfall to be recovered from the guarantor.[262]

Duty when security is hypothecation

Under a hypothecation goods remain in the custody of the borrower and he also enjoys the right to deal with them in the ordinary course of business. A hypothecation, being not a possessory security, not much duty can be expected from the creditor towards the care of the security. Accordingly, where the contents of a hypothecated godown were lost and the

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258 *State Bank of Saurashtra* v *Chitranjan Rangnath Raja*, (1980) 4 SCC 516: AIR 1980 SC 1528; *State Bank of India* v *Praveen Tanneries*, (1992) 2 Andh LJ 5 where the surety was discharged because the bank was not able to give to the surety the securities in the same condition as they formerly stood in the bank's hands.

259 *Union Bank of India* v *Manku Narayana*, (1987) 2 SCC 335: AIR 1987 SC 1078. It would be the duty of the creditor-bank to lay before the court all documents to satisfy it that bank had taken all reasonable steps to safeguard the security according to the facts and circumstances of the case, *Gopal Chandra Bagaria* v *SBI*, AIR 1994 Ori 329. This duty is the same in reference to hypothecated goods also, *Bhabani Shankar Patra* v *SBI*, AIR 1986 Ori 247.

260 *Bumlputra Merchant* v *Melewar Corpn*, (1990) 2 Current LJ 30 Malaysia, a security holder has the right to choose the time to sell and when he has decided to sell, he owes a common law duty to the owner to realise the true value. *Standard Chartered Bank Ltd* v *Walker*, (1982) 3 All ER 938, the duty to realise proper value is only a particular application of the general duty of care to your neighbour which was laid down in *Dono- ghue* v *Stevenson*, 1932 AC 562. The creditor holding security and the guarantor are clearly in very close proximity to those who conduct the sale.

261 *Latchford* v *Beirne*, [1981] 3 All ER 705.

262 *Hiranyaprava v Orissa State Financial Corpn, AIR 1995 Ori 1, following Kharavela v Orissa State Finan- % cial Corpn, AIR 1985 Ori 153.*

banker was not aware of any such loss otherwise than in the ordinary course of business, the guarantor was held to be not discharged to the extent of the value of the security.[263]

RIGHTS OF SURETY

A surety has certain rights against the debtor, creditor and co-sureties.

Rights against principal debtor

Following are the rights of the surety against the principal debtor:

1. Right of Subrogation [S. 140]

140. *Rights of surety on payment or performance.*—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

When the surety has paid all that he is liable for, he is invested with all the rights which the creditor had against the principal debtor. The surety steps into the shoes of the creditor. The creditor had the right to sue the principal debtor. The surety may, therefore, sue the principal debtor in the rights of the creditor. Thus, for example, in *Lampleigh Iron Ore Co Ltd, Re:*[264]

A director of a company in liquidation guaranteed and paid the rents due from the company before the date of the liquidation. It was held that he was entitled to stand in the place of the creditor, and to use all remedies, if need be, in the name of the creditor in any action to obtain indemnification from the principal debtor for the loss sustained.

The Supreme Court has laid down that "the surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor to have the securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor". This right of a surety stands not merely upon contract, but also upon natural justice.

Rights before Payment

[263] *Union Bank of India v M. P. Sreedharan Kartha, AIR 1993 Ker 285.*
[264] [1927] 1 Ch 308.

Under the right of subrogation the surety may get certain rights even before payment. The Calcutta High Court examined this possibility in a case where the surety found that the amount having become due, the principal debtor was disposing of his personal properties one after the other lest the surety, after paying, may seize them and the surety sought a temporary injunction to prevent the principal debtor from doing so. The court granted the

injunction.[88] Thus the surety has remedies against the principal debtor under two heads, viz., before payment and after payment. He can compel the debtor, after the debt has become due, to exonerate him from his liability by paying off the debt.[89]

2. *Right to Indemnity [S. 145]*

145. *Implied promise to indemnify surety.*—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and *A* is surety for the debt. *C* demands payment from *A* and on his refusal sues him for the amount. *A* defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from *B* the amount paid by him for costs, as well as the principal debt.

(*b*) C lends *B* a sum of money, and *A*, at the request of *B*, accepts a bill of exchange drawn by *B* upon *A* to secure the amount. C, the holder of the bill, demands payment of if from *A*, and on *A's* refusal to pay, sues him upon the bill. *A*, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from *B* the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by *C* to *B. C* supplies to *B* rice to a less amount than 2,000 rupees, but obtains from *A* payment of the sum of 2,000 rupees in respect of the rice supplied. *A* cannot recover from *B* more than the price of the rice actually supplied.

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The right enables the surety to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not the sums which he has paid wrongfully. The concept of rightful payment is illustrated by a Karnataka decision.[90] Four motor vehicles were hired out. Payment of the hire instalments was guaranteed by a surety. The hire-purchaser died. The surety was sued and he paid over. The surety sued the legal representatives of the purchaser contending that a sum of Rs 6,000 had remained outstanding, that he got it reduced to Rs 4,000 and then paid. The court required the surety to show what amount had been realised by the sale of four vehicles. He miserably failed to give any evidence. It was accordingly held that the payment made by the surety was not proper, penalities

Rights against creditor

The surety enjoys the following rights against the creditor: *Mamata*

Ghose v *United Industrial Bank,* AIR 1987 Cal 280 at p. 283.

89 The court cited passages to this effect from SNELL'S PRINCIPLES OF EQUITY and STORY ON EQUITY.

Chekkara Ponnamma v A. S. Tliammayya, AIR 1983 Kant 124.

1. Right to securities [S. 141]

141. *Surety's right to benefit of creditor's securities.*—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. *C* cancels the mortgage. *B* becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) *C,* a creditor, whose advance to *B* is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, *C* obtains from B a further security for the same debt. Subsequently C gives up the further security. A is not discharged.

The section recognises and incorporates the general rule of equity as expounded in *Craythorne* v *Swinburne*[91] that the surety is entitled to every remedy which the creditor has against the principal debtor, including enforcement of every security.[92]

On paying off the creditor the surety steps into his shoes and gets the rights to have the securities, if any, which the creditor has against the principal debtor. The right exits irrespective of the fact whether the surety knows of the existence of such security or not. "It is the duty of the creditor to keep the securities intact; not to give them up or to burthen with further advances."[93]

Where certain bills of exchange were given by way of collateral security and they being dishonoured, the creditor made them useless by not doing anything within the period of limitation, the surety was discharged to the extent of their value.[94]

"The expression security' in Section 141 is not used in any technical sense; it includes all rights which the creditor had against property at the date of contract." This statemerv occurs in the judgment of SHAH, J (afterwards CJ) of the Supreme Court in *State of M P.* v *Kaluram.*[265]

91 (1807) 14 Ves 160.

92 *Industrial Finance Corpn of India Ltd v Cannanore Spg and Wvg Mills Ltd, (2002) 5 SCC 54: AIR 2002 Si 1841: (2002) 110 Comp Cas 685.*

93 Where a car was delivered on hire-purchase, the payment of instalments of hire guaranteed by the surety an the car was seized because of the hirer's default but returned to him on his paying a small amount and undi no information to the surety, the latter was held to be absolved from liability, *Kunjuvarecth* v *Union oflndi* (1991) 1 Ker LT 49 Short Notes.

94 *M. Ramanarain (P) Ltd v State Transport Corpn, AIR 1988 Bom 45.*

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[265] AIR 1967 SC 1105: (1967) 1 SCR 266 at p. 272.

The State sold a lot of felled timbers to a person for a fixed price payable in four equal instalments, the payment of which was guaranteed by the defendant. The contract further provided that if a default was made in the payment of an instalment, the State would get the right to prevent further removal of the timber and to sell the remaining timber for the realisation of the price. The buyer defaulted but even so the State allowed him to remove the timber.

The surety was then sued for the loss. But he was held not liable.

When is the surety entitled to the securities? Obviously, only on paying the debt. Difficulty, however, arises when the surety has guaranteed only a part of the debt and consequently even when he has paid all that he was liable for, the creditor's claim against the principal debtor is not yet fully satisfied. The Bombay High Court considered the question in *Goverdhan Das* v *Bank of Bengal*.[266]

Certain mortgages were given to a bank as security for debts amounting to Rs 3,15,000. The plaintiff who was a surety in part, paid Rs 1,25,000 and claimed that he was entitled to that extent to stand in the place of the bank and to receive a share of the proceeds of the said securities proportioned to the sum which he had paid.

FARRAN, J said: "The equity between the creditor and the surety is that the creditor shall not do anything to deprive the surety of his right. But the creditor's right to hold his securities is paramount to the surety's claim upon such securities, which only arises when the creditor's claim against such securities has been satisfied."

The Madras High Court has differed not only from this opinion but also from the fact whether this is the effect of English decisions. The case before it was *Bhushayya* v *Sury- anarayna*,[267]

The Imperial Bank advanced three different loans to a person with three different sureties for each loan. The principal debtor did not repay the loans in time and, therefore, the bank obtained mortgage of his property. Ultimately the bank had to file suits and three different decrees were obtained against the principal debtor and the surety on each loan. The first two sureties paid off the decrees for which they were sureties but the third did not.

Now the question on these facts was whether the first two sureties who had paid off their obligations were entitled to a proportionate share in the mortgage, while a part of the bank's claim against the principal was still unsatisfied. KRISHNASWAMI AYYANGER, J held that they were so entitled.

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[266] (1891) 15 Bom 48.
[267] (1944) 1LR Mad 340: AIR 1944 Mad 195.

Where the evidence did not disclose that the creditor had anything to do with the loss of the hypothecated properties, the surety was not permitted to claim any reduction of liability in that respect. The act of losing or parting with a security has to be a volition act on the part of the creditor. The loss has to be due to an act which is attributable to the

creditor.[98] The decision of the Karnataka High Court[99] was on the basis of a surety bond which provided that the surety would not claim the benefit of Section 141. The section does not carry the words "notwithstanding anything contained to the contrary, etc.", but even so the court held that by reason of the provision in Section 128, which permits liability to be regulated by agreement, a surety can waive the benefit of any of the provisions touching his liability.[100]

2. Right of Set off

If the creditor sues the surety, the surety may have the benefit of the set off, if any, that the principal debtor had against the creditor. He is entitled to use the defences of the debtor against the creditor. If, for example, the creditor owes him something, or the creditor has in his hand something belonging to the debtor for which the debtor could have counter- claimed, the surety can also put up that counter claim. He can claim such a right not only against the creditor, but also against third parties who have derived their title from the creditor.

Right against co-sureties

Where a debt has been guaranteed by more than one person, they are called co-sureties. They have certain rights against each other.

1. *Effect of Releasing a Surety [S. 138]*

> **138. *Release of one co-surety does not discharge others.*—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.**

The creditor may at his will release any of the co-sureties from his liability. But that will not operate as a discharge of his co-sureties. However, the released co-surety will remain liable to the others for contribution in the event of default.[101]

2. *Right to Contribution [Ss. 146-147]*

> **146. *Co-sureties liable to contribute equally.*—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the cosureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.**

[93] *Industrial Finance Corpn of India Ltd v Cannanore Spg and Wvg Mills Ltd. (2002) 5 SCC 54.*

R. Lilavati v Bank ofBaroda, AIR 1987 Kant 2; following its own decision in Karnataka Bank Ltd v Gajanan S. R. Kulkarni, AIR 1977 Kant 14.

100 *See* also *Perwatra Habib Bank* v *Sehatian Development,* (1994) 1 Current LJ 394 (Malaysia) where a clause in the contract of guarantee enabled the creditor to vary the terms of the agreement without any need for reference to the guarantors.

Sri Chand v *Jagdish Pershad Kishan Chand,* (1966) 3 SCR 451 at pp. 456-7: AIR 1966 SC 1427.

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one- quarter, and C to the extent of one-half. E makes default in payment. As between the sureties. A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

147. *Liability of co-sureties bound in different sums.*—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for $D's$ duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees each.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for $D's$ duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for $D's$ duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and Chave to pay each the full penalty of his bond.

Where there are several sureties for the same debt and the principal debtor has committed a default, each surety is liable to contribute equally to the extent of the default. The principle will apply whether their liability is joint or several, under the same or different contracts, and whether with or without the knowledge of each other. The principle of equal contribution is subject of the maximum limit, if any, fixed by a surety to his liability. This is so because Section 147 lays down that "co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit".

Indemnity and guarantee distinguished

Indemnity and guarantee have this common feature that both are a device for providing protection against a probable loss. In either case the loss may arise due to human conduct. However, the technique of providing protection, the need and occasion for protection and the number of parties involved mark some differences between them.

1. The liability under a contract of indemnity is contingent in the sense that it may or may not arise. Under a guarantee, on the other hand, the liability is subsisting in the sense that once a guarantee has been acted upon, the liability of the surety automatically arises, though it remains in a suspended animation till the principal debtor commits default.

2. The undertaking in a guarantee is collateral, in an indemnity, it is original. The purpose of a guarantee is to support the primary liability of a third person. In an indemnity, there being no third person, the indemnifier's liability is in itself "primary".

3. In a contract of indemnity there are only two parties, namely, the indemnifier and the indemnity-holder. But there are three parties to a guarantee, the creditor, the principal debtor and the surety. It is a tripartite arrangement.

4. In an indemnity there is only one contract, that is, the contract of indemnity against loss between the indemnity-holder and the indemnifier. But in a guarantee there are three contracts, namely, a contract of loan between the principal debtor and the creditor; a contract of guarantee between the creditor and the surety and finally an implied contract of indemnity between the principal debtor and the surety.

Bailment

BAILMENT implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another. The ownership of the articles or goods is in one person and the possession in another. Delivering a cycle, watch or any other article for repair, or leaving a cycle or car, etc., at a stand, are all familiar situations which create the relationship of bailment. Thus, bailment is a subject of considerable public importance.

DEFINITION [S. 148]

"Bailment" is defined in Section 148 of the Contract Act:

> **148. *"Bailment", "bailor" and "bailee" defined.*—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".**
>
> ***Explanation*.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.**

"The person who delivers the goods is called the 'bailor', and the person to whom they are delivered is called the 'bailee'." The following essential features of "bailment" are emphasised by this definition.

1. Delivery of possession

The first important characteristic of bailment is delivery of possession by one person to another. "Delivery of possession" for this purpose should be distinguished from a mere "custody". "One who has custody without possession, like a servant, or a guest using his host's goods is not a bailee."[1] The goods must be handed over to the bailee for whatever is the purpose of bailment. Once this is done, a bailment arises, irrespective of the manner in which this happens.

[1] POLLOCK AND MULLA, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 1957, P. 560.

The plaintiff, an old customer, went into a restaurant for the purpose of dining t When he entered the room a waiter took his coat, without being asked, and hung a hook behind him. When the plaintiff rose to leave the coat was gone.[268]

What the waiter did might be no more than an act of voluntary courtesy towards the tiff, yet the restaurant keeper was held liable as a bailee.

If the customer had instructed the servant where and how the coat should be result, perhaps, would have been otherwise. A decision of the Madras High Cour trates this.[269]

A lady handed over to a goldsmith certain jewels for the purpose of being and utilised for making new jewels. Every evening as soon as the goldsmith's the day was over, the lady used to receive half-made jewels from the goldsmith them into a box in the goldsmith's room and keep the key in her possession. Th were lost one night. But the lady's action against the goldsmith failed.

In contrast to this where a jewellery-box with declared contents was hande a bank for safe custody, the relationship of bailment was constituted, the bank liable for loss of contents.[270]

Actual or constructive delivery

Section 149 explains the meaning of delivery of possession.

149. ***Delivery to bailee how made.*****—The delivery to the bailee may be mad anything which has the effect of putting the goods in the possession of the inte or of any person authorised to hold them on his behalf.**

An *Explanation* to Section 148 provides that "if a person already in posses goods of another contracts to hold them as a bailee, he thereby becomes the the owner becomes the bailor, of such goods although they may not have bee by way of bailment".

Delivery of possession is thus of two kinds, namely—(1) actual delivery, structive delivery. When the bailor hands over to the bailee physical posse goods, that is called "actual delivery". "Constructive delivery" takes place is no change of physical possession, goods remaining where they are but s done which has the effect of putting them in the possession of the bailee, son pledged the projector machinery of his cinema under an agreement w him to retain the machinery for the use of the cinema, the Andhra Pradesh observed:

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[268] *Ultzen* v *Nicolls*, [1894] 1 QB 92.

[269] *Kaliaperumal Pillai v Visalakshmi, AIR 1938 Mad 32.*

[270] *Jagdish Chandra Trikha v PNB. AIR 1998 Del 266.*

It must be held that there was a constructive delivery, or delivery by attornment to the bank. Since then there was a change in the legal character of the possession of goods, though not in the actual and physical custody. Even though the bailor continued to remain in possession, it was the possession of the bailee.

Bank Locker

On the same principle, the hiring of a bank's locker and storing things in it would not constitute a bailment. Things kept there are in a way put in a hired portion of the premises and not entrusted to the bank. The court also found that there was no proof of the fact that at the time when bank locker was robbed the customer had some items of jewellery in the locker. The court further said that it could not be inferred without proof that the strong room and lockers were not built according to specifications. The customer was not allowed to claim any damages.[271] The court said[272] that in order to constitute bailment within the meaning of S. 148 it is necessary to show that actual and exclusive possession of the property was given by the hirer of the locker to the bank. It is only then that the question of reasonable care and damages would arise. As it was, it was impossible to know the quantity, quality or the value of the jewellery that was there in the locker. It is also not a relationship of landlord and tenant. The locker-holder has no direct access to his locker, nor he can operate it of his own. He can do so only with the assistance of the bank.

2. Delivery upon contract

Delivery of goods should be made for some purpose and upon a contract that when the purpose is accomplished the goods shall be returned to the bailor. When a person's goods go into the possession of another without any contract, there is no bailment within the meaning of its definition in Section 148. A well-known illustration is the decision of the Allahabad High Court in *Ram Gulam* v *Government ofU.P.*[273]

The plaintiff's ornaments, having been stolen, were recovered by the police and, while in police custody, were stolen again. The plaintiff's action against the State for the loss was dismissed.

Because the ornaments were not made over to the Government under any contract, the Government never occupied the position of bailee to indemnify the plaintiff.

Non-contractual bailments

This decision has been criticised. English law recognises bailment without contract. In the words of Cheshire and Fifoot:

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[271] *A tu I Mehra* v *Bank of Maharashtra,* AIR 2003 P&H 11: (2003) 2 Banking Cases 570: (2002) 3 ICC 138.

[272] *Id.* at p. 17. *Citing* at p. 16. *Port Swettenham Authority vT.W.Wu&Co,* 1979 AC 580 (PC) at p. 589 statement to the effect that a banker is under no obligation to accept a parcel for safe custody and where he is asked to do so, he could ask to know the contents and value in order to» gauge the nature and extent of any possible liability.

[273] AIR 1950 All 206. *See* also *Om Prasad* v *Secy of State,* (1937) 172 IC 567.

At the present day, no doubt, in most instances where goods are lent or hired or deposited for safe custody, or as security for a debt, the delivery will be the result of a contract. But this ingredient, though usual, is not essential.[274]

The Bombay High Court in *Lasalgaon Merchants Cooperative Bank Ltd* v *Prabhudas Hathibhai*[275] has taken the lead in imposing the obligation of a bailee without a contract. The facts were as follows:

Certain packages of tobacco lying in the godown of a partnership firm were pledged to the plaintiff bank. Some of the partners, having failed to clear their income tax dues, the Income Tax Officer ordered seizure of the goods. The officials of the Collector- ate accordingly locked the godown and handed over the key to the police. Then came heavy rains. The roof of the godown leaked and the tobacco was damaged.

The court said: "Heavy rains do not (necessarily) amount to an act of God. It was the duty of Government officers to take such care as every prudent manager would take of his own goods. The Government stood in the position of bailees.

This view was accepted by the Supreme Court in *State of Gujarat* v *Memon Mohammad.* [276]

Certain motor vehicles and other goods belonging to the plaintiffs were seized by the State in the exercise of its powers under a Sea Customs Act. The goods while in the custody of the State remained totally uncared for.

It was contended on behalf of the State that as the State were not bailees, there was no obligation to take care.

The trend set by these cases has been affirmed by the Supreme Court, though without reference to them.'[277] The facts involved a repetition of the *Ram Gulam* story, namely, a theft, recovery by police, and final disappearance from police custody. The State was held liable.

When the Port Trust is required to store imported goods, the relationship of bailor and bailee comes into existence. Under Section 42(6) of the Major Port Trusts Act, 1963, the Port Trust of a Major Port would be regarded as the bailee of the goods coming into its possession. The provisions of Sections 151, 152 and 161 of the Contract Act become applicable (duty of care and duty to return).[278]

Contract, Express or Implied

The contract, where necessary, may be express or implied. Where with the consent of the station-master goods were stored on a railway company's platform, wagons being not

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[274] THE LAW OF CONTRACT, p. 73 (6th Edn, 1964).

[275] AIR 1966 Bom 134.

[276] AIR 1967 SC 1885.

[277] *Basavva K. D. Patil v State of Mysore, (1977) 4 SCC 358.*

[278] *Board of Trustees of the Port of Bombay v Sriyanesh Knitters, (1999) 7 SCC 359: AIR 1999 SC 2947.*

available, the company was held liable when they were damaged by fire caused by a spark emitted by a passing engine.[14]

3. Conditional delivery

Bailment of goods is always made for some purpose and is subject to the condition that when the purpose is accomplished the goods will be returned to the bailor or disposed of according to his mandate. If the person to whom the goods are delivered is not bound to restore them to the person delivering them or to deal with them according to his directions, their relationship will not be that of bailor and bailee.

It is this feature of bailment which distinguishes it from many other transactions of the same kind. A deposit of money with a banker is not a bailment as he is not bound to return the same notes and coins. Accordingly, a bank was not allowed to exercise the right of lien as a bailee on money held under a fixed deposit.[15] An agent who has collected money on his principal's behalf is not a bailee of the money for the same reason.[16]

In the words of SHETTY, J of the Supreme Court:[17] "One important distinguishing feature between agency and bailment is that the bailee does not represent the bailor. He merely exercises, with the leave of the bailor (under contract or otherwise) certain powers of the bailor in respect of his property. Secondly, the bailee has no power to make contracts on bailor's behalf, nor can he make the bailor liable, simply as bailor, for any acts he does." Applying this principle to the position of a banker who was holding the goods on behalf of its account holder for the purpose of delivering them to his customers against payment, the Court held that the bank was not thereby constituted into an agent and remained a bailee only.

A bailment is also distinguishable from sale, exchange or barter. In these transactions what is transferred is not mere possession, but also ownership and, therefore, the person buying is under no obligation to return. But hire-purchase contract is a bailment, though of course, not merely a bailment. It has two aspects, bailment plus an element of sale. A carrier is also a bailee.[18] The post office is a bailee of the articles of the sender.[19]

DUTY OF BAILOR

Duty of gratuitous bailor

150. ***Bailor's duty to disclose faults in goods bailed.*****—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially**

[14] *G. G. of India in Council v Jubilee Mills Ltd, AIR 1953 Bom 46. Union Bank of India v K.V. Venugopalan, AIR 1990 Ker223. Slwnker Lai v Bhura Lai, AIR 1951 Ajmer 24.*

[7] *UCO Bank* v *Hem Chandra Sarkar,* (1990) 3 SCC 389 at p. 395: AIR 1990 SC 1329.

[8] *CITv P.M. Rathod & Co,* AIR,1959 SC 1394: (1960) 1 SCR 401.

[19] *Ibid.*

interfere with the use of them, or expose the bailee to extraordinary risks; and if he d not make such disclosure, he is responsible for damage arising to the bailee directly fr such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whethei was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to *B.* He does not disclose the fact tha horse is vicious. The horse runs away. *B* is thrown and injured. *A* is responsible to *B* for dan sustained.

(,*b*) A hires a carriage of *B.* The carriage is unsafe, though *B* is not aware of it, and A is inji *B* is responsible to A for the injury.

According to Section 150 which deals with the duty of bailor, bailors are of two k namely—(1) gratuitous bailor, and (2) bailor for reward. A person who lends his art or goods without any charge, is called a "gratuitous bailor". His duty is naturally r less than that of a bailor for hire or consideration.

A person, for example, who lends his cycle or horse to a friend, and if he know: the cycle is without brakes or that the horse is unsound, he should disclose this fac his duty ends there. The conditions of his liability are—(1) He should have knowleC the defect and the bailee should not be aware. (2) The defect in the goods must be si exposes the bailee to extraordinary risks or materially interferes in the use of the gc

Duty of bailor for reward [S. 150]

The duty of a bailor for consideration is much greater. He is making profit from hi fession and, therefore, it is his duty to see that the goods which he delivers are reasc safe for the purpose of the bailment. It is no answer for him to say that he was not of the defect. Section 150 clearly says that "if the goods are bailed for hire, the b< responsible for such damage, whether he was or was not aware of such faults in the bailed". He has to examine the goods and remove such defects as reasonable exam would have disclosed. In *Hyman and Wife* v *Nye & Sons*:[279]

> The plaintiff hired from the defendant for a specific journey a carriage, a horses and a driver. During the journey a bolt in the underpart of the carriage brc splinter bar became displaced, the carriage was upset and the plaintiff injured.

The defendant was held liable. Similarly, in *Reed* v *Dean*:[280]

> The plaintiffs hired a motor launch from the defendant for a holiday on t Thames. The launch caught fire, and the plaintiffs were unable to extinguish it, fighting equipment being out of order. They were injured and suffered loss.

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[279] (1881) 6 QBD 685.
[280] [1949] 1 KB 188.

The court held that there was an implied undertaking that the launch was as fit for the purpose for which it was hired as reasonable care and skill could make it. The defendant was accordingly held liable.

Where a bailor delivers goods to another for carriage or for some other purpose, and if the goods are of dangerous nature, the fact should be disclosed to the bailee.

DUTIES OF BAILEE

1. Duty of reasonable care [S. 151]

151. *Care to be taken by bailee.*—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances take, of his own goods of the same bulk, quality and value as the goods bailed.

The section lays down a uniform standard of care for "all cases of bailment".

-For the purpose of duty of care modern English law divides bailees into two kinds only, namely, gratuitous bailee and bailee for reward. A gratuitous bailee is liable for loss of, or damage to, goods only if he is guilty of gross negligence. There is a certain degree of negligence to which everyone attaches great blame, and that may be called "gross negligence". But the present trend is towards a simple principle of liability for negligence in all cases. *Blount* v *War Office*[281] shows this trend.

A house belonging to the plaintiff was requisitioned by the War Office. The plaintiff was allowed to store certain articles in a strong-room in the house, which he locked. Of the troops stationed there, who were not kept under proper control, some broke into the room and stole a quantity of silver plates. The War Office was held liable.

In India, however, Section 151 prescribes a uniform standard of care in all cases of bailment, that is, a degree of care which a man of ordinary prudence would take of his own goods of the same type and under similar circumstances. If the care devoted by the bailee falls below this standard, he will be liable for loss of or damage to the goods, but not otherwise.

152. *Bailee when not liable for loss, etc., of thing bailed.*—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

"No cast-iron standard can be laid down for the measure of care due from a bailee and the nature and amount of care must vary with posture of each case." Nature, quality and bulk of the goods bailed, the purpose of bailment, facilities reasonably available for safe custody and the like, will be taken into account for determining whether proper care has been taken. Where on account of the partition of the country a bank had to flee along with

[281] [1953] 1 All ER 1071.

mass exodus from Pakistan to India, the bank was held to be not liable for goods bailed to it in Pakistan and which were thus lost there.[23]

Loss by Theft

Where the bailor's goods are stolen from the custody of the bailee, he will be liable, if there has been negligence on his part. Where the plaintiff stayed at a hotel and his articles were stolen while he was away, the hotel-keeper was held liable as the room was, to his knowledge, in an insecure condition.[24] Where a banker was rendering the service of receiving goods on behalf of its account holder and to hold them for the purpose of delivering them to the customers of the account holder against payment, it was held by the Supreme Court that the position of the banker was that of the bailee and the bank was liable for the account holder's loss inasmuch as the bank did not deliver goods to his customers from whom payment had been received.[282]

Burden of Proof

The burden of proof is on the bailee to show that he was exercising reasonable care and if he can prove this he will not be liable. If the bailee places before the court evidence to show that he had taken reasonable care to avoid damage which was reasonably foreseeable or had taken all reasonable precautions to obviate risks which were reasonably apprehended, he would be absolved of his liability.[26] Thus, where the railway administration was not able to explain how the barge carrying the plaintiff's goods sank and was lost, negligence was presumed making the railway liable.[283] Where the plaintiff's car was lost in a fire occurring in a garage to which the car was delivered for repair and the bailees did not lead any evidence to show as to how the incident took place, the Supreme Court held the bailees liable.[284] On the other hand, where certain engraving plates were gratuitously left with a bailee and they were lost and though he was not able to account for the manner of loss, he proved that the plates were kept in a proper place under the care of proper persons and in a proper arrangement. He was accordingly held not liable.[285]

23 *Gopal Singh* v *PNB*, AIR 1976 Del 115.

24 *Join & Son v Cameron, 1922 All 735.*

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282 *UCO Bank* v *Hem Chandra Sarkar*, (1990) 3 SCC 389 at p. 395: AIR 1990 SC 1329.

283 *Union of India* v *Sugauli Sugar Works (P) Ltd*, (1976) 3 SCC 32. *Raman & Co* v *Union of India*, AIR 1985 Bom 37, since the liability of the railways is that of bailee under Ss. 151-152, the burden was on them to show how loss occurred and that it occurred after the first 7 days after the completion of the transit; *Oriental Fire & General Ins Co* v *Union of India*, AIR 1993 Kant 385, the bailor has to lodge proof of his loss; a bare bill of repairs would not do; there should be proof of what was repaired, what materials were used and what labour charged paid.

284 *N.R. Srinivasa Iyer v New India Assurance Co Ltd, (1983) 3 SCC 458: AIR 1983 SC 899.*

285 *Bullen v Swan Electric Graving Co, (1907) 23 TLR 258.*

Loss due to act of Bailee's Servant

Where the loss has been due to the act of the bailee's servant, he would be liable if the servant's act is within the scope of his employment. Thus, in *Sanderson* v *Collins*:[286]

> The defendant sent his carriage to the plaintiff for repair and the latter lent his own carriage to the defendant while the repairs were going on. The defendant's coachman, without his knowledge, took away the carriage for his own purpose and damaged it.

The defendant was held not liable as the coachman, at the time when the injury was done to the carriage, was not acting within the course of his employment.

Where, on the other hand, the bailee's driver left the vehicle in which he was carrying the plaintiff's goods unattended and half the goods were stolen, the bailee was held liable. The court also rejected the argument that the bailee had contracted with a forwarding agent and not with the plaintiff, as the bailee knew that the goods belonged to the plaintiff.[287]

Bailee's own Goods Lost with those of Bailor

Where the bailee's own goods are lost along with those of the bailor, the bailee would naturally contend that he was taking as much care of the bailor's goods as he did of his own. But this would not be the deciding factor. The fact that the bailee is generally negligent with his own goods is no justification for his negligence towards the bailor's goods, unless the bailor is aware of his habits and, therefore, knew what to expect. Even in such cases the proper inquiry is whether reasonable care has been taken. Thus, where a general merchant going to consign his parcel for export, took out of voluntary courtesy his friend's parcel for similar consignment. He entered both the parcels under a wrong heading, consequently both were seized and lost. But he was held not liable as he had in good faith taken equal care of both the parcels.[288]

Involuntary Bailee

"A person who has come into possession of a chattel through no act of his own and without his consent", is called an involuntary bailee. An early illustration is to be found in the facts of *Howard* v *Harris*.[289] The author of a play, without being asked, sent his manuscript to a theatre operator, who lost it. The court held "that no duty of any kind was cast on the defendant by receipt of something he had not asked for". Subsequent decisions, however, do not support this view of the situation. And this is amply shown by *Newman* v *Bourne & Hollingsworth*:[290]

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[286] [1904] 1 KB 628.

[287] *Lee Cooper Ltd v C.H. Jenkins & Sons Ltd, [1965] 3 WLR 753.*

[288] *Sheills* v *Blackburne*, (1789) 1 HBL 158.

[289] (1884) C&E 253. See CHITTY ON CONTRACTS, 1961, 22nd Edn, Vol 2, p. 161.

[290] (1951) 31 TLR 209.

The plaintiff went to the defendant's shop to buy a coat. She was wearing a coat fastened with a diamond brooch, and she took the coat off, and put it on a glass case with the brooch by the side of it. When leaving she forgot the brooch and it was handed over by an assistant to the shopwalker who put it in his desk, from where it was lost. The defendant was held liable.

Contract to Contrary

It is still debatable whether a bailee can contract himself out of the duty prescribed by Section 151, or whether a contract of bailment can exempt the bailee from his liability for negligence? The argument is built chiefly on the ground that Section 152 opens with the remark: "in the absence of any special contract". This may show that the legislative intent was to permit him to reduce the scope of his liability. Judicial thinking on this line is in evidence in a Punjab and Haryana decision.[291] The court said that the words "in the absence of special contract" as used in Section 152 show that a bailee can contract himself out of the obligation under Section 151. The court cited the following observation from a Bombay decision:

This court in *Bombay Steam Navigation Co* v *Vasudev Baburao*[16] held that it was open to a bailee to contract himself out of the obligation imposed by Section 151. The Act does not expressly prohibit contracting out of Section 151 and it could be a startling thing to say that persons *sui juris* are not at liberty to enter into such a contract of bailment as they may think fit.

It is submitted with respect that this seems to be an unnatural reading of the two sections. Section 151 prescribes the minimum standard of care expected of a bailee and Section 152 has the effect of saying that unless the standard of care is enhanced by special contract, the bailee will be liable only when he fails to observe the requirement of Section 151. The words in Section 152 "in the absence of the special contract" would permit the standard of duty to be revised upwards and not to be diluted. Apart from this, it has always been held that it is unfair and unreasonable for any person to say that he would not be liable for negligence. No one can get a licence to be negligent. Thus in a Gujarat case bales of cloth were lost from bank custody under circumstances showing negligence. The banker was held liable irrespective of a clause which absolved him of all liability.[292]

Delivery of goods to railways for purpose of carriage is under a special contract because in addition to it being an ordinary contract of bailment, the provisions of the Railways Act[293] also apply. As ordinary bailees railways too are bound by the duty imposed by

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[291] *State Bank of India v Quality Bread Factory, AIR 1983 P&H 244.*

[292] *Mahendra Kumar Chandulal v CBI, AIR 1984 Guj (NOC) 53; R.S. Deboo vDrM.V. Hindelkar, AIR 1995* Bom 68, laundry receipt carrying the term that in case of loss of garment, 20% of dry-cleaning charge or half the value of the garment, whichever was less, would be paid was held to be unreasonable and therefore

Section 151. The railways were held liable where, instead of keeping the goods in their own godown, left them at the jetty of a port and they were destroyed by fire." Liability came to Railways when the goods they were carrying in a wagon were damaged due to percolation of rain water into the wagon.[294]

2. Duty not to make unauthorised use [S. 154]

154. ***Liability of bailee making unauthorised use of goods bailed.*****—If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.**

Illustrations

(a) *A* lends a horse to *B* for his own riding only. *B* allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

(b) A hires a horse in Calcutta from *B* expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to *B* for the injury to the horse.

Goods must be used by the bailee strictly for the purpose for which they have been bailed to him. Any unauthorised use of the goods would make the bailee absolutely liable for any loss of or damage to the goods. Even an act of God or inevitable accident would be no defence. A horse lent for riding should not be used for any other purpose and if it is used outside the scope of the bailment, the bailee would be liable for any damage to the horse howsoever happening. Apart from this, the bailor may terminate the contract at once and insist on the goods being returned to him. This is so provided in Section 153.

Where a vehicle was delivered to a workshop for repair and the owner of the workshop allowed an unlicensed employee to drive the vehicle and he caused an accident resulting in the death of a person, it was held that the bailee was liable to compensate the deceased as also the owner of the vehicle because it was an unauthorised use of the vehicle and the liability was absolute. The insurer was also liable to pay compensation to the deceased and recover indemnity from the vehicle owner.[295]

153. ***Termination of bailment by bailee's act inconsistent with conditions.*****—A contract of bailment is avoidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.**

Railways Act, 1989. Agreement to carry goods at the owner's risk is a special contract, *Milap Carriers* v *National Ins Co*, AIR 1994 AP 24.

[295] *Alias v E. M. Patil, AIR 2004 Ker 214.*

Union of India v *Hafiz Bashir Ahmed*, 1987 Supp SCC 174. The liability of a carrier is regulated by the Carriers Act, 1865 and that of the railways by the Railways Act, 1989. There are similar provisions in these Acts and, therefore, barring a few exceptions stated therein, the liability is absolute, see *Shah Jugaldas Amritlal* v *Shah Hira Lai*, AIR 1986 Guj 88.

40 *Union of India* v *Hari Shanker*, (2005) All LJ 2200 (All), S. 77, Railways Act, 1890.

Illustration

A lets to *B,* for hire, a horse for his own riding. *B* drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Duty not to mix [Ss. 155-157]

The bailee should maintain the separate identity of the bailor's goods. He should not mi> his own goods with those of the bailor and without his consent. If the goods are mixec with the consent of the bailor, both will have a proportionate interest in the mixture thu: produced. If the mixture is made without the bailor's consent, and if the goods can bf separated or divided the bailee is bound to bear the expenses of separation as well as an; damage arising from the mixture. But if the mixture is beyond separation, the bailee mus compensate the bailor for his loss.

155. ***Effect of mixture, with bailor's consent, of his goods with bailee's.*****—If the baile with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailc and the bailee shall have an interest, in proportion to their respective shares, in the mixta thus produced.**

156. ***Effect of mixture, without bailor's consent when the goods can be separated.*****—If tl bailee, without the consent of the bailor, mixes the goods of the bailor with his own good and the goods can be separated or divided, the property in the goods remains in the parti respectively; but the bailee is bound to bear the expense of separation or division, and ai damage arising from the mixture.**

Illustration

A bails 100 bales of cotton marked with a particular mark to *B. B,* without A's consent, mi: the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 1 bales returned, and *B* is bound to bear all the expenses incurred in the separation of the bal and any other incidental damage.

157. ***Effect of mixture, without bailor's consent, when the goods cannot be separated.*****- the bailee, without the consent of the bailor, mixes the goods of the bailor with his c goods, in such a manner that it is impossible to separate the goods bailed from the ot goods and deliver them back, the bailor is entitled to be compensated by the bailee for loss of the goods.**

Illustration

A bails a barrel of Cape flour worth Rs 45 to *B. B,* without A*'s* consent, mixes the flour ' country flour of his own, worth only Rs 25 a barrel. *B* must compensate A for the loss o flour.

Duty to return [Ss. 160 and 165]

160. ***Return of goods bailed, on expiration of time or accomplishment of purpose.*****— the duty of the bailee to return, or deliver according to the bailor's directions, the g bailed, without demand, as soon as the time for which they were bailed has expired, o purpose for which they were bailed has been accomplished.**

165. *Bailment by several joint owners.*—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

When the purpose of bailment in accomplished or the time for which the goods were bailed has expired, the bailee should return the goods to the bailor without demand.[42] If he fails to do so, he will keep the goods at his risk and will be responsible for any loss of or damage to the goods arising howsoever.[43] For example, in *Shaw & Co* v *Symmons & Sons:*[44]

> The plaintiff entrusted books to the defendant, a bookbinder, to be bound, the latter promising to return them within a reasonable time. The plaintiff having required the defendant to deliver the whole of the books then bound, the defendant failed to deliver them within a reasonable time and they were subsequently burnt in an accidental fire on his premises.

The defendant was held liable in damages for the loss of the books.[45]

Termination of Gratuitous Bailment

Where the loan of the goods is gratuitous, the bailor may at any time require the return of the goods, even though he lent them for a specified time or purpose. But if the bailee has acted on the faith of the loan made for a specified time or purpose in such manner that if the goods are demanded back before the agreed time, the bailee's loss would be greater than the benefits derived, the bailor must, if he compels the return, indemnify the bailee for the amount in which the loss occasioned exceeds the benefits derived. Section 159 deals with this matter.

159. *Restoration of goods lent gratuitously.*—The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

A gratuitous bailment is also terminated by the death either of the bailor or of the bailee. Section 162 provides:

[42] S. 157.

[43] S. 161. " [1971] 1 KB 799.

[45] *Rampal* v *Gourisliankar*, AIR 1952 Nag 8, pledgee failed to return goods even after tender of debt by pledger, subsequent theft, pledgee liable. *See* also *Dhian Singh Sobha Singh* v *Union of India*, AIR 1958 SC 274: 1958 SCR 781. Failure to account for the goods amounts to failure to deliver and, therefore, attracts the absolute liability of the section. *Chittagong Port Authority* v *Mohd Ishaque*, (1983) 35 DLR (AD) 364 Bangladesh Supreme Court. *Dinesh V. Pal* v *Chief Engineer, Naval Academy*, AIR 2003 Ker 280, excavator taken on hire for site work. There could be no justification for not returning the machine to the owner.

162. ***Termination of gratuitous bailment by death.—A*** **gratuitous bailment is terminatec by the death either of the bailor or of the bailee.**

5. Duty not to set up jus tertii *[Ss. 166-167]*

166. ***Bailee not responsible on re-delivery to bailor without title.—If the bailor has no titl to the goods, and the bailee, in good faith, delivers them back to, or according to the direc tions of the bailor, the bailee is not responsible to the owner in respect of such delivery.***

167. ***Right of third person claiming goods bailed.—If a person, other than the bailoi claims goods bailed, he may apply to the Court to stop the delivery of the goods to th bailor, and to decide the title to the goods.***

A bailee is not entitled to set up, as against the bailor's demand, the defence of *ju tertii,* that is to say, that the goods belong to a third person. The bailee is estopped fror denying the right of the bailor to bail the goods and to receive them back.[296] Even if there i a person who has a better title to the goods than that of the bailor or who claims ownershi of the goods, the bailee may safely return the goods to the bailor and he will not be liabl to the owner for conversion. But the person who claims the ownership may apply to th court to prevent the bailee from returning the goods to the bailor and to have the questic of title decided. Further, if the bailee has already delivered the goods to the person haviii a better title, and yet the bailor sues him, he may prove that such person had a better rigl to receive the goods as against the bailor.[297] In a case before the Supreme Court:[298]

> Oil was consigned with the Railways from Kanpur to Calcutta. It reached Calcut intact. The sender, however, instructed the railways to bring it back to Kanpur. Befo the formalities for the same could be complied with, the oil was seized by a fo(inspector, who found it adulterated and had it destroyed under the orders of the Court. The Railways were held liable.

Where goods have been bailed by several joint owners, the bailee may deliver the back to one joint owner without the consent of all, in the absence of any agreement to t contrary [S. 165].

tTransfer of Shipping Documents

Where the bill of lading, under which delivery of the cargo was effected to the carri was transferred by the shipper, it was held that the right to file a suit under the contr; of carriage became transferred to the bank when it became the holder of the bill of ladi under a transfer by the shipper. Even if the transfer was by the principal to its agent, t principal could not claim the right to sue. But even so the original contract of bailmi would continue to exist subject only to

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[296] S. 117 of the Indian Evidence Act (Act 1 of 1872). *" Explanation* (2) to S. 117 of the Indian Evidence Act, 1872.

[298] *Juggilal Kamlapat Oil Mills v Union of India, (1976) 1 SCC 893.*

the rights created under the transfer and subj also to the terms and conditions of the bill of lading. To that extent the original ship]

could sue the carriers for their failure to deliver the goods to the party entitled to them at the destination.[49]

6. Duty to return increase [S. 163]

In the absence of any agreement to the contrary, the bailee is bound to return to the bailor natural increases or profits accruing to the goods during the period of bailment.

163. ***Bailor entitled to increase or profit from goods bailed.*****—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.**

Illustration

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to *A.*

Where shares and securities were pledged with a bank and the bank received bonus shares and dividends and interest in respect thereof, it was held that the bank could not be compelled to handover such increment unless the pledged securities were redeemed.[50]

Finder [Ss. 168 and 169]

168. ***Right offinder of goods: May sue for specific reward offered.*****—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.**

169. ***When finder of thing commonly on sale may sell it.*****—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—**

(1) when the thing is in danger of perishing or of losing the greater part of its value, or

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

A finder of goods is a bailee thereof and as such bound by the duty of reasonable care. He does not have the right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner. Early English cases disallowed not only any compensation, but also right of lien for expenses. A finder fed a dog for 20 weeks and claimed 20 shillings for the same.[299] The court said he would be guilty of trover if he refused to deliver unless paid for his keeping.

[49] *East West Corpn v DKBS 1912 A/S, (2003) 2 All ER 700 (CA).*

[50] *Standard Chartered Bank* v *Custodian,* (2000) 6 SCC 427: AIR 2000 SC 1488.

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[299] *Binstead* v *Buck, 2* Black W 1117: 96 ER 660: (1976) 2 Win B1 117.

Sections 168 and 169, however, protect the interest of a finder in two ways. See 168 allows the finder to retain the goods against the owner until he receives compensa for trouble and expense. Further, where the owner has offered a specific reward for return of the goods lost, the finder may sue for such reward, and may retain the goods til he receives it. Section 169 allows the finder to sell the goods in certain circumstan Where the thing found is commonly the subject of sale and if the owner cannot be fo with reasonable diligence, or if he refuses to pay the lawful charges of the finder, finder may sell the goods in the following cases—(1) when the thing is in danger of ishing or of losing greater part of its value, or (2) when the lawful charges of the fin in respect of the thing found, amount to two-third of its value.

RIGHTS OF BAILEE

1. Right to compensation [S. 164]

If the bailor has no right to bail the goods, or to receive them back or to give direct respecting them and consequently the bailee is exposed to some loss, the bailor is res; sible for the same.

> **164. *Bailor's responsibility to bailee.*—The bailor is responsible to the bailee for anj which the bailee may sustain by reason that the bailor was not entitled to make the ment, or to receive back the goods, or to give directions respecting them.**

2. Right to necessary expenses or remuneration [S. 158]

The bailee is entitled to lawful charges for providing his services.

> **158. *Repayment, by bailor, of necessary expenses.*—Where, by the conditions of the ment, the goods are to be kept or to be carried, or to have work done upon them b; bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall rep the bailee the necessary expenses incurred by him for the purpose of the bailment.**

A ship carrying bulk wheat for its charterers, the Food Corporation of India, stra in the South China Sea. The master signed a salvage agreement on Lloyd's open for; behalf of the shipowner and cargo owner. To lighten the ship the cargo was off loadec carried to Manila where the salvors procured its storage. Warlike operations preve the completion of the salvage. The shipowners abandoned the voyage. The salvors sc reimbursement from the FCI for their expenses in stevedoring and storing the salv part of the cargo. The FCI was willing to pay them from the date of the shipowner's ; donment. The House of Lords held that the salvors were bailees of the cargo owners the very beginning. They owed a duty of care to the cargo owners. The right of reimb ment arose from this relationship of a bailor and bailee. [300]

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[300] *China-Pacific SA* v *FCI*, [1981] 3 WLR 860 HL; noted 1982 JBL 114.

A bailee is entitled to recover his agreed charges. But where there is no such agreement at all, Section 158 comes into play. The Calcutta High Court has laid down that this right is not linked with the right of lien. Lien can be exercised only as long as possession is retained whereas the right to charges remains alive even when possession has been parted with. In this case the State Trading Corporation had hired the plaintiff's storage tank for storing its oil. On account of a dispute, the STC appointed a special officer who took charge of the tank and delivered its contents to others as directed. The plaintiff thus lost possession of the oil and with it his lien, but his right to charges for protection and storage of the oil survived. The court said that the bailor had enjoyed the benefit of the bailee's services.[301]

3. Right tof lien [Ss. 170-171]

If the bailee's lawful charges are not paid he may retain the goods. The right to retain any property until the charges due in respect of the property are paid is called the right of lien. The Supreme Court[302] laid down that a lien is in primary sense a right given by law and not by contract. Liens are of two kinds, namely: (1) particular lien, and (2) general lien.

Particular lien [S. 170]

As a general rule a bailee is entitled only to particular lien, which means the right to retain only that particular property in respect of which the charge is due.

170. *Bailee's particular lien.*—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) *A* delivers a rough diamond to *B*, a jeweller, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.

(b) *A* gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give a three months' credit for the price. *B* is not entitled to retain the coat until he is paid.

Exercise of Labour and Skill

The right is available subject to certain important conditions. The foremost among them is that the bailee must have rendered some service involving the exercise of labour or skill in respect of the goods bailed. Further, it has been frequently pointed out that the labour or skill exercised by the bailee must be such as improves the goods.

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[301] *Surya Investment Co v STC.'AIR 1987 Cal 46.*

[4] *Syndicate Bank* v *Vijay Kumar,* (1992) 2 SCC 330: AIR 1992 SC 1066.

A job master has no lien at all for the amount of his bill in respect of feeding and keeping a horse at his stable, whereas a trainer does get a lien upon a horse for the improvements which he effects to the horse.[55]

Where a bailee claimed lien for storage of sugar, it was held that such custody, not being a service involving the exercise of labour or skill within the meaning of Section 170, the bailee was not entitled to lien.[56] On the same reason, a person to whom cattle are given for grazing does not have the right of lien on them for his charges.[57] Secondly, the labour or skill must have been exercised in accordance with the purpose of the bailment. Thirdly, only such goods can be retained on which the bailee has bestowed trouble and expense. He cannot retain any other goods belonging to the bailor which are in his custody. It is this element of "particular lien" which distinguishes it from "general lien". Lastly, the right depends on possession and is lost as soon as possession of the goods is lost. "Lien is a personal right which continues only so long as the possessor holds the goods".[303] The right of lien may also be defeated or excluded by an agreement to the contrary. By an agreement to that effect, a particular lien may be converted into a general lien. For, Section 171 says in the end that no other persons have the right of general lien unless there is an express contract to that effect.

General lien [S. 171]

The right of "general lien", as provided in Section 171, means the right to hold the goods bailed as security for a general balance of account. General lien entitles the bailee to detain any goods bailed to him for any amount due to him whether in respect of those good: or any other goods. For example, where a quantity of imported meat was stored with i warehouse-keeper, who by a general term of the trade had a general lien, it was held tha he could retain the meat for his charges due in respect of other goods.[304] Section 171 is a follows:

171. *General lien of bankers, factors, wharfingers, attorneys, and policy-brokers.*—Bank ers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absenc of a contract to the contrary, retain as a security for a general balance of account, an goods bailed to them; but no other persons have a right to retain, as a security for sue balance, goods bailed to them, unless there is an express contract to that effect.

[55] *Hull on v Car Maintenance Co, [1915] 1 Ch 621.*

[56] *Chand Mai* v *Ganda Singh*, (1885) Punj Rec No 60, p 126; *Kalloomal Tapeshwari Prasad & Co* v *R.C. & Ltd*, AIR 1990 All 214, lien not allowed for mere storage of fertilizers.

[57] *Vothoba Laxman Kalar v Maroti Ukandsa Kalar, AIR 1940 Nag 273.*

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[303] *Legg* v *Evans*, (1840) 151 ER 311.

[304] *Jowitt & Sons* v *Union Cold Storage Co*, [1913] 3 KB 1. Where the goods were seized by a banker uni a particular hypothecation, the terms of which did not permit such seizure, the loanee paid the amount, i bank was not permitted to detain the goods for other claims, *C.R. Narsimha Setty* v *Canara Bank*, (1990 Kant LJ 81.

The right of general lien is a privilege and is specially conferred by Section 171 on certain kinds of bailee only. They are: (1) Bankers, (2) Factors, (3) Wharfingers, (4) Attorneys of a High Court, and (5) Policy-brokers.

(a) Bankers

"The general lien of bankers, as judicially recognised and dealt with in Section 171, attaches to all goods and securities deposited with them as bankers by a customer or by a third person on a customer's account, provided there is no contract, express or implied inconsistent with such lien." It is necessary that the goods should have been given to the banker as a bailee, because the lien extends only to goods which have been bailed to the banker. "And there is a distinction between bailment and deposit. It has been held,[60] that money paid into a bank to be credited into the current account of the person making the payment does not constitute a bailment."[61] Fixed deposit receipts deposited by way of security for cash-credit facility have been held to be usable as security against the borrower's other debts to the bank.[62]

An illustration of a deposit for a special purpose is the case of *Mercantile Bank of India* v *Rochaldas Gidumal & Co:*[a] [63]

60 *Foley v Hill, (1840) 9 ER 1002; Official Assignee of Madras v Smith, 1LR 1908 Mad 68.*

61 *PURANIK J in Devendra Kumar v Chaudhary Gulab Singh. ILR 1946 Nag 210 at p. 212; Union Bank of India v Venugopalan, (1990) 1 Ker LT 262.*

62 *Syndicate Bank* v *Vijay Kumar,* (1992) 2 SCC 330: AIR 1992 SC 1066; *City Union Bank Ltd* v C. *Thanga- rajan,* (2003) 3'Banking Cases 528 (Mad), right of lien allowed to be exercised against dues under fixed deposit receipts. *State Bank of India* v *Goutmi Devi Gupta,* (2003) 1 BC 165, the surety is equally liable as a debtor and, therefore, the lender bank would have lien on the surety's fixed deposits and other amounts lying with the bank. The Gauhati High Court has held to the contrary. In *Tilendra Nath Mahanta* v *United Bank of India,* AIR 2002 Gau 1: (2003) 1 Ker LT 38 (Case No. 45), it was held that a fixed deposit is basically a loan in the hands of the bank. It has no connection with a loan in a different account. An amount in another account could not be adjusted against the claim in any suit. *Mahajan Chit Fund and Finance (P) Ltd* v *Punjab and Sind Bank,* (2003) 5 ALD 75 (AP), FDs deposited as security against cash credit facility, allowed to be adjusted against dues. *Aleklia Sahoo* v *Puri Urban Cooperative Bank Ltd,* AIR 2004 Ori 142: (2004) 97 CLT 769 (Ori), gold pledged with bank was not allowed to be retained after payment of the gold loan just only because the borrower was a guarantor in some other transaction. The pledgor was entitled to take back his security. *Narendra Singh* v *State of Bihar,* (2002) 1 ICC 468 (Pat), a banker can retain security for a general balance account any goods bailed to him and has a general lien over all forms of security deposited with him in the ordinary course of banking business, but has no legal justification to withhold payments from the customer's saving bank account. *Sri Biswambhar Acliarya* v *State Bank of India,* (2004) 97 CLT 408 (Ori), the bank not allowed to adjust against the proceeds of a Special Term Deposit if sufficient security has been provided otherwise. *Vijaya Bank* v *Naveen Mechanised Construction (P) Ltd,* AIR 2004 Kant 199, securities furnished under a bank guarantee became free because the obligation was discharged. The bank attempted to retain them because the guaranteeing director was also a director in some other company against which the bank had launched proceedings before DRT. This was not allowed.

63 AIR 1926 Sind 225. *Krishna Kisliore Rao* v *United Commercial Bank,* AIR 1982 Cal 62, where there was a special arrangement for reimbursement between the parties and that excluded particular lien. In reference to the contents of an account the court held that they could be withheld for debit balance in another account of the same customer. *Board of Trustees of the Port of Bombay* v *Sriyanesh Knitters,* AIR 1983 Bom 88. Special statutory rights excluded general lien. *Trustees of the Port of Bombay* v *Premier Automobiles.* The Supreme Court did not allow a bank to detain goods belonging to the firm against partners' individual accounts *Gur- bax Rai* v *Punjab National Bank,* (1984) 3 SCC 96: AIR 1984 SC 1012.

A customer gave his banker a sum of money for transmission by telegraphic transfer to his own firm at another place. The bank purported to hold the money for their balance of account against the firm.

The first question raised was whether "money" would be covered by the words "goods bailed" as used in Section 171. The word "goods" is not defined in the Contract Act. The Sale of Goods Act defines "goods" as excluding money. Thus the matter was an open question and following English authorities it was held that "money is a species of goods which may be the subject-matter of bailment and over which lien may be exercised".[64] But the court held that money given for telegraphic transfer is given for a special purpose inconsistent with the exercise of the right of lien.

Where a customer has two accounts, a deposit account and a loan account, the banker may in the exercise of his lien, transfer the money in the deposit account to the loan account without any specific instructions of the depositor to that effect.[65] "The banker's lien is not prejudiced by any defect in the title of the customer or equities of third parties, provided the banker acts honestly and without notice of any defect of title."[305] Where a banker knows that the securities deposited by a customer belong to some other person he cannot hold them in the exercise of his lien against the customer.[306] Where two firms have separate accounts in a bank and agree to give the bank a general lien over all monies of the two firms, the bank may hold the money in one account against a loan on the other account.

The lending branch of a bank can exercise lien for the advances made by it but not for advances made by other branches of the same bank.[307]

Where an equitable mortgage is created by deposit of title deeds for a particular loan whether the same can be withheld for a subsequent debt is a question to be answered or facts. The Karnataka High Court has held that they would not be the subject-matter of; general lien unless there was intention on the part of the depositor to that effect.[308]

The property mortgaged by the customer for the loan in question was attached an< sold in execution of a decree. The purchaser paid back the loan and asked for return o the title deeds. The bank sought to retain the deeds as against another loan for whicl the customer was a surety. The purchaser paid the surety money also under protesi got the title deeds released, and then sued the bank for refund of the surety money a having been paid under coercion.

He was allowed refund. The bank was not entitled to general lien.

64 *MisawCurrie*, (1876) 1 AC 554; *Nagalinga* v *Kayarohana*, AIR 1915 Mad 80.

65 *Devendra Kumar v Chaudliary Gulab Singh, 1LR 1946 Nag 210.*

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305 *Jai Kishan Das v Central Bank of India, AIR 1955 Punj 250.*

306 *Punjab National Bank v Satyapal Vtrmani, AIR 1956 Punj 118.*

307 *Syndicate Bank* v *Davendra Karkera,* AIR 1994 Kant 1. Money deposited in fixed deposit by the debtor joint account with his wife in another branch than the lending branch, not allowed to be held under lien, *Sta Bank of India* v *Javed Akhtar Hussain,* AIR 1993 Bom 67. *Mangalore Catholic Coop Bank Ltd* v *M. Sundara Shetty*, (1987) 3 Kant LJ21.

Where a person obtained a loan on a pledge of gold ornaments to the lending bank and subsequently became a guarantor for another person's loan, he was allowed to claim his ornaments on paying off his personal loan though the loan of another person guaranteed by him still subsisted.[7]"

(b) Factors

The word factor' in India, as in England, means an agent entrusted with possession of goods for the purpose of selling them for his principal. He is given the possession of the goods in the ordinary course of his business for the purpose of sale. He has a general lien on the goods of his principal for his balance of account against the principal. Thus where a motor car was delivered to an agent for sale, he was held entitled to retain the car until his charges were paid.[71] It is necessary for the lien to arise that the goods should have been delivered to the factor in the course of business and in his capacity as a "factor".

A factor, like a banker, will not have the right of lien on such goods as have come to his possession for a specific purpose which impliedly excludes the right of lien.[72]

(c) Wharfingers

"Wharf means a place contiguous to water, used for the purpose of loading and unloading goods, and over which the goods pass in loading and unloading. It is essential to a wharf that goods should be in transit over it. "Wharfinger is he that owns or keeps a wharf, or hath the oversight or the management of it." A wharfinger has general lien on the goods bailed to him until his wharfage, which means, charges due for the use of his wharf, are paid. "The fact that a manufacturer has a wharf upon which he receives goods brought to him by customers, does not entitle him to claim lien as a wharfinger upon such goods." He is not a wharfinger in the real sense of the word.

(d) Attorneys of High Court

An attorney or a solicitor who is engaged by a client is entitled to general lien until the fee for his professional service and other costs incurred by him are paid. The Bombay High Court held in a case that a solicitor who is discharged by his client, has the right to hold the papers entrusted to him subject to his lien for costs.[73] But if the attorney himself decides not to act for the client, he forfeits his lien and, therefore, must hand over the papers to the client, whether his costs are paid or not.

Advocates.—The Supreme Court has laid down in *R.D. Saxena* v *Balram Prasad Sharma*[74] that advocates have no right of lien over clients' papers for their unpaid fee. The Court said that files containing copies of records (perhaps some original documents

Jagdishwar Redely v Manager, Andhra Bank, (1988) 1 Andh LT 605.

E.H. Parakh v King-Emperor, AIR 1926 Oudh 202.

See *Spalding* v *Ruding*, (1843) 63 RR 120; *Frith* v *Forbes*, (1862) 135 RR 217. \ [73]

Balkesserbai v *Naranji Walji*, ILR-(1880) 4 Bom 352.

[74] (2000) 7 SCC 264: AIR 2000 SC 2912 at p. 2914.

also) could not be equated with the word "goods" referred in Section 171. It could not be said that files and papers of a client lying with the advocate were in the category of "goods bailed". In the case of litigation papers in the hands of the advocate there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word "goods" mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act. Thus they have to be saleable goods. There is no scope for converting the case-files into money, nor they can be sold to any buyer. Hence, an advocate cannot place reliance upon Section 171.

(e) Policy-brokers

An insurance agent who is employed to effect a policy of marine insurance is called a policy-broker. His lien extends to any balance on any insurance account due to him from the person who employed him to effect the policy.

Time-barred debts and lien

One of the great advantages of the right of lien is that it can be exercised for the realization of a debt even when an action for recovery of the debt would be time-barred.[309]

Types of lien covered by the Act

The Contract Act provides for the following types of lien:

1. Lien of finder of goods [S. 168],
2. Bailee's lien:
   - *(a)* Particular [S. 170].
   - (.b) General [S. 171].
3. Lien of pledgee or pawnee [Ss. 173-174].
4. Lien of agents [S. 221],

4. Right to sue [Ss. 180 and 181]

180. ***Suit by bailor or bailee against wrongdoer.*—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.**

181. ***Apportionment of relief or compensation obtained by such suits.*—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.**

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[309] *Bombay Dyeing & Mfg Co Ltd v Stale of Bombay. AIR 1958 SC 328: 1958 SCR 1122, 1135; S. Yashupalaiah v Vyasa Bank, <2002) 1 ICC 327 (Kant).*

Section 180 enables a bailee to sue any person who has wrongfully deprived him of the use or possession of the goods bailed or has done them any injury. The bailee's rights and remedies against the wrongdoer are just the same as those of the owner. An action may, Lierefore, be brought by the bailee or the bailor. "Whatever is obtained by way of relief cr compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests." For example, a firm which had consigned certain goods, of which it was a bailee, with a carrier, was allowed to sue the carrier for the loss c: the goods.[76]

Pledge

DEFINITION

SECTION 172 defines pledge.

172. *"Pledge", "pawnor" and "pawnee" defined.*—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

A pledge is only a special kind of bailment, and the chief basis of distinction is the object of the contract. Where the object of the delivery of goods is to provide a security for a loan or for the fulfilment of an obligation, that kind of bailment is called pledge. "Pawn or pledge is a bailment of personal property as a security for some debt or engagement. A pawner is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfilment of his liability."- Following are the essential characteristics of a pledge:

1. Delivery of possession

"Delivery of the chattel pawned is a necessary element in the making of a pawn." The property pledged should be delivered to the pawnee.[310] Where the producer of a film borrowed a sum of money from a financier-distributor, and agreed to deliver the final prints of the film when ready, the agreement was held not to amount to a pledge, there being no actual transfer of possession.[311] Delivery of possession may be actual or constructive. Delivery of the key of the godown where the goods are stored is an illustration of constructive delivery. Where the goods are in the possession of a third person, who, on the directions of the pledger, consents to hold them on the pledgee's behalf, that is enough delivery. It is sometimes called delivery by attornment. Delivery of documents of title which

310 SCR 233.

Bank of Rajasthan Ltd v *Hajarimal Milap C. Surana*, (2005) 10 SCC 238, delivery of precious stones to the lending bank for sale and realisation of the amount had the effect of creating pledge for securing repayment of the loan.

Revenue Authority v Sudarsanam Pictures, AIR 1968Mad3I9.

[311] *Hindustan Development Corpn v Modiluft Ltd, (2005) 4 CHN 14 (Cal).*

would enable the pledgee to obtain possession, is equally effective to create a pledge. This was recognised by the Supreme Court in *Morvi Mercantile Bank Ltd* v *Union of India.**

Certain goods were consigned with the railways to "self from Bombay for transit to Okhla. The consigner endorsed the railway receipts to the appellant bank against an advance of Rs 20,000. The goods having been lost in transit, the bank as an endorsee of the railway receipts and pledgee of the goods sued the railways for the loss of the goods which were worth Rs 35,500. The trial court rejected the action. The Bombay High Court allowed recovery up to Rs 20,000 only. There were cross-appeals against this decision.

The Supreme Court was called to decide whether a railway receipt could be equated with the goods covered by it for the purpose of constituting delivery of goods. SUBBA RAO, J (afterwards CJ), who delivered the majority opinion, held, that delivery of railway receipts was the same thing as delivery of goods; the pledge was, therefore, valid and the pledgee was entitled to sue for the loss.

Pledge by way of Hypothecation

Sometimes the goods are allowed to remain in the custody of the pledger for a special purpose. But that does not militate against the effectiveness of the pledge. *Reeves* v *Capper*,[5] is an early illustration.

The captain of a ship pledged his chronometer with the ship-owner who allowed him to use the instrument for the purpose of a voyage. The captain pledged it over again with another person.

The court held the first pledge to be valid. Another illustration is the decision of the And- hra Pradesh High Court in *Bank ofChittor* v *Narsimbulu.*[6]

A cinema projector and accessories were pledged with a bank. The bank allowed the property to remain with the pledgers, since they formed the equipment of a running cinema. Subsequently, the pledgers sold the machinery.

The court held that the sale was subject to the pledge.

Likewise, where certain motor vehicles pledged by a motor dealer were allowed to remain in his possession for demonstration purposes, the pledge was held to be valid.[7] In

AIR 1965 SC 1954: (1965) SCA 191.

5 (1838) 5 Bing NC 136: 132 ER 1057: 8 LJCP 44: 50 RR 634. *See* also *United Bank of India w New Glencoe Tea Co,* AIR 1987 Cal 143, a valid mortgage of moveables without delivery of possession.

6 AIR 1966 AP 163. Hypothecation is a contract and not a statutory creation. The terms of the contract would be the governing factor, *State Bank of India* v *S.B. Shall Ali, AIR* 1995 AP 134. The law recognises hypothecation not accompanied by possession as creating a good security in favour of the hypothecatee. It has the effect of a charge on or mortgage of movables. It may be effected orally or by writing. *Tehitram* v *D'Mello,* AIR 1916 Bom 77. Decisions on the validity and effectiveness of hypothecation have been surveyed in *Hindustan Machine Tools Ltd* v *Nedugadi Bank Ltd,* AIR 1995 Kant 185.

Appa Rao v *Salem Motors,* AIR 1955 Mad 505. In this respect a pledge becomes closer to a hypothecation because in a transaction of hypothecation, the material remains with the borrower, the lender getting only the

such cases the other creditors cannot claim anything from such goods unless the claim (the pledgee is first satisfied.[8]

2. In pursuance of contract

"Pledge is a conveyance pursuant to a contract, and it is essential to a valid pledge th; delivery of the chattel shall be made by the pledger to the pledgee in pursuance of tl contract of pledge." But it is not necessary that delivery of possession and the loan shou be contemporaneous. "Delivery and advance need not be simultaneous and a pledge ms be perfected by delivery after the advance is made."

RIGHTS OF PAWNEE

1. Right o f retainer [Ss. 173 and 174]

173.*Pawnee's right of retainer.*—The pawnee may retain the goods pledged, not only f< a payment of the debt or the performance of the promise, but for the interest of the deb and all necessary expenses incurred by him in respect of the possession or for the preserv: tion of the goods pledged.

174. *Pawnee not to retain for debt or promise other than that for which goods pledget Presumption in case of subsequent advances.*—The pawnee shall not, in the absence of contract to that effect, retain the goods pledged for any debt or promise other than the del or promise for which they are pledged; but such contract, in the absence of anything to tl contrary, shall be presumed in regard to subsequent advances made by the pawnee.

The first important right of a pawnee is the right to retain the goods pledged urn his dues are paid. He has a right to retain the goods not only for payment of the debt < performance of the promise, but for the interest due on the debt, and all necessary e: penses incurred by him in respect of the possession or for the preservation of the goo(pledged.

Special and Paramount Interest of Pledgee

The pledgee can retain the goods only for the payment of that particular debt for which tl goods were pledged and not for any other debt or promise, unless there is a contract to tl contrary. Where, however, after a pledge is created, a subsequent advance is made witho any other security, a contract to burden the same goods shall be presumed. The right < retainer is thus in the nature of a particular lien. Yet lien is different from pledge.

right to seize on default and to realise the value. He is not liable for any accident caused by a motor vehic which is under his hypothecation. *Bank of Baroda* v *Rabari Bachubhai Hirabhai*, AIR 1987 Guj 1. A sure cannot claim the benefit of S. 141 when the security is in the shape of hypothecated goods. *Bank of India Yogeshwar Kant Wadhera*, AIR 1987 P&H 176. *Bank of India* v *Binod Steel Ltd*, AIR 1977 MP 188.

Explaining the nature of the special property in the goods which is acquired by the pledgee in *Bank of Bihar* v *State of Bihar'* the Supreme Court observed:

> This special property or interest is to be distinguished from the mere right of retention which the holder of a lien possesses, in that it is transferable in the sense that a pawnee may assign or pledge his special property or interest in the goods.... Where judgment has been obtained against the pawner of goods and execution has issued thereon, the sheriff cannot seize the goods pawned unless he satisfies the claim of the pawnee.... On the bankruptcy of the pawner the pawnee is a secured creditor with respect to things pledged.

Thus, so long as the pawnee's claim is not satisfied no other creditor of the pawner has any right to take away the goods or their price. In that case, the goods which were under the pledge of a bank were seized by the State of Bihar. It was held that the seizure could not deprive the pledgee of his right to realise the amount for which the goods were pledged and, therefore, the State was bound to indemnify him up to the amount which would have been realised from the goods.

Hypothecatee has no Direct Right of Seizure

Where the pledge is by way of hypothecation, the creditor cannot directly seize the goods by entering premises or otherwise. He has to do so either with the consent of the borrower or through a court order. The creditor does not have the right to enter the premises, lock and seal the same. In *Union of India* v *Shenthilnatlian*[1(1] the most conspicuous feature of the agreement was that in case the borrower committed default in payment of the debt as stipulated, the lender was at liberty to seize the goods. The court held that this power was not directly exercisable.

(1972) 3 SCC 196: AIR 1971 SC 1210. *See* also *State Bank of Hyderabad* v *Susheela,* AIR 1980 AP 1; *Stale ofA.P.* v *Andhra Bank Ltd,* AIR 1988 AP 18, the courts pointing out that the English law is no different in this respect; *Central Bank of India* v *Grains and Gunny Agencies,* AIR 1989 MP 28, the bank not being able to produce goods, nor account for their loss, no relief; *State Bank of India* v *N. Sathiali,* AIR 1989 Mad 279, the pledgee is entitled to a clean decree and not one linked with the genuineness or spuriousness of the pledged article. *Union of India* v *Deep Chand,* AIR 2007 NOC 1756 Utr, seizure of pledged gold ornaments by Income Tax Deptt., pledgee allowed to recover back. *O. Konavalov* v *Commander,* Coast Guard Region, (2006) 4 SCC 620, property pledged was seized by the State under statutory power, lien of the pawnee for the purpose of his payment remained effective. *Bank of Baroda* v *Nainital Seeds Corpn,* AIR 2008 Utt, perishable items under pledge of bank were damaged due to bank's negligence, the total value of the goods lost was more than the loan amount, bank entitled to no recovery.

10 (1977) 2 Mad LJ 499; *Branch Manager, State Bank of Mysore* v *K. Amarnath,* (2003) 2 Kant LJ 31 (DB), the right of seizure could not be adjudicated upon in a writ jurisdiction. *Muthoo Leasing & Finance Ltd* v *Vasudeva Publicity Service,* AIR 2003 Del 372, seizure illegal where all the instalments were already paid off, but information as to state of account was not given. *Tarun Bhargava* v *State of 'Haryana,* AIR 2003 P&H 98, the instalments already paid could not be forfeited on default, they have to be brought into the account, criminal liability on direct forcible seizure.

2. Right to extraordinary expenses [S. 175]

The pawnee is entitled to receive from the pawner extraordinary expenses incurred by him for the preservation of the goods pledged. For such expenses, however, he does not have the right to retain the goods. He can only sue to recover them. This right is provided in Section 175 which is as follows:

175. *Pawnee's right as to extraordinary expenses incurred.*—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

3. Right of sale [S. 176]

176. *Pawnee's right where pawnor makes default.*—If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Upon a default being made by the pawnor in the payment of the debt or performance of the promise, the pledgee gets two distinct rights under Section 176 of the Act. Firstly, the pledgee may sue upon the debt and retain the goods as a collateral security. Secondly, he may sell the goods after reasonable notice of the intended sale to the pawner. The right to sue is a personal action and rests upon the contract of loan quite apart from the pledge. But until the money due is recovered, the pledged goods may be retained, though they would have to be surrendered when the loan is realised." If by reason of his own act, the pledgee is unable to return the goods, he cannot have judgment for the debt. This obvious element of pledge finds illustration in the decision of the Supreme Court in *Lallan Prasad* v *Rahmat Ali}*[2]

The defendant borrowed Rs 20,000 from the plaintiff on a promissory note and gave him aeroscrapes worth about Rs 35,000 as security for the loan. The plaintiff sued fo repayment of the loan, but was unable to produce the security, having sold it, and therefore, his action for the loan was rejected.

State of Orissa v *Harekrislma Mahatab*, AIR 1992 Ori 284 where the Govt was allowed to approach th court for recovery of the loan amount without selling the securities. *Ramprasad* v *Bherulal*, AIR 1992 M 44, the bank was not non-suited against the sureties only because the bank was not realising the securitif first.

[12] AIR 1967 SC 1322: (1967) 2 SCR 233. The goods are retained in such a case as a collateral security. See 5.J *Engineering Works* v *New Bank of India*, AIR 1987 P&H 90, the right of the bank to sue while retaining tl goods as a collateral security, allowed. *Bank ofBaroda* v *Rabari Bachubhai Hirabhai*, AIR 1987 Guj 1, tl bank does not become the owner of the goods, it has only the right to sell; *T.S. Rastogi* v *Tahsildar*, AIR 19! Kant 265, the right to sue can be exercised without notice, but not the right of sale. *Tapanga Light Found* v *State Bank of India*, AIR 1987 Ori 174.

Where certain shares were pledged with a bank, it was held that the bank had the right to sell them without intervention of the court.[273] The court also directed the company to register the transfer because without such registration the title of the purchaser would remain imperfect.[13]

Requirement of notice

Alternatively, the pledgee may sell the goods. Before making the sale he is required to give to the pawnor a reasonable notice of his intention to sell. The requirement of "reasonable notice" is a statutory obligation. It cannot be excluded by a contract to the contrary. In an Allahabad case:[312]

> One of the terms of an agreement of loan enabled the lending banker to sell the securities without any notice to the pawner. The pawnor defaulted in payment. The bank sent a reminder, but the pawnor asked for more time. The bank thereupon disposed of the securities.

The sale was held to be bad in law. "What is contemplated by Section 176," the Court said, "is not merely a notice but a reasonable' notice, meaning thereby a notice of intended sale of the security by the creditor within a certain date so as to afford an opportunity to the debtor to pay up the amount within the time mentioned in the notice." The court refused to agree with the bank's contention that the sale notice should be inferred from the pawner's request for time. "A notice of the character contemplated by Section 176 cannot be implied. Such notice has to be clear and specific in language...."[313]

If the proceeds of sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawner.

Supposing that a due notice of sale has been given so that the pledgee gets the right to sell, may he buy the goods himself? The Punjab High Court held,[314] following a Privy Council decision[315], that a sale to the pledgee himself is not void.

Loss of Security due to Pledgee's Negligence

Where goods are lost due to the negligence of the pledgee, the liability of the pledger is reduced to the extent of the value of such goods. In a case before the Supreme Court:

Prabluit Bank v *Babu Ram,* AIR 1966 Ali 34. *See* also *H.F.G. Coop M. & P. Society* v *U.I.F.P.,* AIR 1984 HP 18 where goods were sold after personal notice as well as advertisement, sale was held to be binding upon the owner.

313 An intimation of the proposed sale would be enough notice, whether the exact amount due is specified or not, *A. Srinivasulu Naidu* v *Gujraj Mehta,* (1990) 1 Mad LJ 188. Notice to the surety of the pledger is not necessary, but it would be better to inform; he may perhaps like to pay up, *Sankaranarayana* v *Kottayam Bank,* AIR 1950 Trav Co 66.

Dhani Ram and Sons v *Frontier Bank,* AIR 1962 Punj 321 at pp. 322-323. *Neckram*

Dobey v *Bank of Bengal,* ILR 19 Cal 322 at p. 323.

Certain goods in the godown of a firm were under the pledge of a bank. The godown was insured against fire. A part of them was damaged by fire. The bank received insurance money to the extent of the fire.

The bank was obliged by the court to give credit to the firm in its cash-credit account for the amount so received. The court also pointed out that the bank was not entitled to hold it under lien against partners' personal accounts. The goods were of the firm. They were not the goods of the partners. They were not offered as security for the individual debts of the partners. The goods were pledged against the cash-credit facility allowed to the firm.[316]

Where the bank admitted that the goods in question were actually hypothecated to it and since the goods were not traceable, the High Court said that the courts below were correct in holding that the goods were lost. It was for the bank to show that sufficient care was taken. But no proof was offered. The bank was held liable for loss of the goods while they were in its possession.[317]

Sale by Hypothecatee

A hypothecatee is not in actual possession of the goods. He grants the right of use to the borrower. He naturally has a right to take possession of the goods if the borrower makes default. He can then sell them in his capacity as a pledgee. Intervention of the court is not necessary. Where the goods have been subjected only to charge within the meaning of Section 100 of the Transfer of Property Act, not amounting to pledge, there also intervention of the court would be necessary for bringing about the sale of the property charged, terms of the agreement would be a guiding factor to find out whether what was created was a pledge or charge.[318]

Pawnor's right to redeem [S. 177]

Section 177 provides for the most valuable right of the pawnor:

> **177.** ***Defaulting pawnor's right to redeem.*****—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.**

"Satisfaction of the debt or engagement extinguishes the pawn and the pawnee, on such satisfaction, is bound to redeliver the property. The pawnor has an absolute right to

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316 *Gurbax Rai* v *Punjab National Bank*, (1984) 3 SCC 96: AIR 1984 SC 1012 at p. 1013; *Haiyana Pesticides* v *Bank of Rajasthan*, AIR 2004 P&H 83, the pledgor was under duty to insure the goods, the bank could also do so on his default, but neither did so, the pledgor not allowed to say that he was discharged from his liability to the extent of loss caused by want of insurance, distinguishing *Durga Das* v *Sansar Singh*, 2003 AIHC 2800.

317 *Canara Bank v Bliavani Oil Co, AIR 2004 Ker 273 (DB).*

State Bank of India v S.B. Shah Ali, AIR 1995 AP 134.

redeem the property pledged upon tender of the amount advanced."[21] The right to redeem is extinguished not by the expiry of time specified in the notice of sale, but by the actual sale of the goods. Where the pawnor redeems after the expiry of the specified time, he is bound to pay to the pawnee such expenses as have arisen on account of his default.

The pawnor has the right to take back with the goods the increase, if any, that the goods have undergone during the period of pledge. In a case before the Delhi High Court,[22] the pledge was that of certain shares of a company and during the period of pledge the company issued bonus and rights shares. It was held that these increases belonged to the pawner. If the pledgee cannot return the goods, he is not entitled to repayment. He cannot seek money decree against the pawnor.[23]

Heritable Right.—Certain gold ornaments were pledged with a bank as a security for a gold loan. The pawnor died. His wife sought to redeem the pledge by repaying the loan. She produced a "will" of her husband to show her right. The court said that she was entitled to redeem. The bank could not ask her for submitting a probate of the will or a succession certificate. Her son and daughter raised no objection.[24] In another similar case, the bank had asked the widow to produce letters of administration. The court said that such letters were not necessary. The refusal was wrongful and, therefore, interest ceased to run from the date of refusal.[25]

WHO CAN PLEDGE

Ordinarily goods may be pledged by the owner or by any person with the owner's authority. A pledge made by any other person may not be valid. Thus, for example, where goods were left in the possession of a servant, while the owner was temporarily absent, a pledge made by the servant was held to be invalid.[26] In a case before the Allahabad High Court,[27] the railway company delivered goods on a forged railway receipt. The goods were then pledged with the defendants. In a suit by the railways to recover the goods, the defendants contended that the railways were too negligent in delivering the goods to a wrong person. But the court held that this would not constitute an estoppel against the company and that the pledge was not valid. The principle is necessary to protect the individual interest in the ownership of property. But interests acquired in the course of lawful commercial transactions equally deserve to be protected. Accordingly, Sections 178 to 179 provide for certain circumstances in which a person, being left in possession with the consent of the owner, may make a valid pledge though without the owner's authority.

21 *Per* SHELAT, J in *Lallan Prasad* v *Rahmat Ali,* AIR 1967 SC 1322: (1967) 2 SCR 233.

22 *M.R. Dhawan v Madan Mohan, AIR 1969 Del 313.*

23 *Gunvanti* v *Mool Chand,* AIR 2008 NOC 683 Raj.

24 *Kamili Sarojini v Indian Bank, AIR 2008 AP 71.*

25 *State Bank of India v Mangala Bai G Deshmukh, (2005) 3 SCC 487 (Bom).*

26 *Biddomoy Dabee v Sittaram, ILR 4 Cal 497.*

27 *Purshottam Das v Union of India, AIR 1967 All 549.*

1. Pledge by mercantile agent [S. 178]

178. ***Pledge by mercantile agent.*—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same: Provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.**

***Explanation.*—In this section, the expressions "mercantile agent" and "documents of title" shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930 (III of 1930).**

The first exception is in favour of a pledge created by a mercantile agent. Section 178 provides that where a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, any pledge made by him while acting in the ordinary course of business shall be valid, provided that the pawnee acts in good faith and has no notice of the fact that the agent has no authority to pledge. The necessary conditions of validity under the section are as follows:

Mercantile Agent

There should be a mercantile agent. The explanation to the section says that the expression "mercantile agent" has the same meaning as is assigned to it by the Sale of Goods Act, 1930. In this Act, "mercantile agent means an agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods".

Possession with Owner's Consent

The mercantile agent should be in possession of the goods or documents of title with th consent of the owner. The Supreme Court has laid down that the word "consent" for thi purpose means agreeing on the same thing in the same sense as defined in Section 13 c the Contract Act.[28] If the consent is real, it is immaterial that it was obtained by fraud < misrepresentation or with dishonest intention.

In the Course of Business

Goods should have been entrusted to the agent in his capacity as a mercantile agent ai he should be in possession in that capacity. If the goods are entrusted to him in a differe capacity, it is not open to a third party who takes a pledge from him to say that they we in his possession as a mercantile agent and, therefore, he had the power to create a pled; In CHALMER'S SALE OF GOODS,[319] the principle is explained by this illustration:

> Suppose a house were let furnished to a man who happened to be an auctione Could he sell the furniture by auction and give a good title to the buyers? Surely nc

[28] *Central National Bank v United Industrial Bank, AIR 1954 SC 181 at p. 184: 1954 SCR 391.*

[319] CHALMER'S SALE OF GOODS, 202 (1957, 13th Edn) by Steighart.

It is further necessary that he should make the pledge in the ordinary course of his business as such agent.

Good faith

The last essential requirement is that the pawnee should act in good faith and should not have at the time of the pledge notice that the pawnor has no authority to pledge. The expressions "good faith" and "notice" are not defined in the Act. The definition of "good faith" as given in the General Clauses Act, 1895 is, therefore, applicable. According to that Act a thing is said to be done in good faith when it is done honestly, whether negligently or not. "Notice" will mean actual as well as constructive notice.

Pledge by documents of title [S. 178]

Where a mercantile agent is in possession of the document of title relating to his principal's goods, and if he pledges the same, the pledgee gets a good title if he acts in good faith and without notice. An explanation to Section 178 says that the expression "documents of title" shall have the same meaning as is assigned to it in the Sale of Goods Act, 1930. Section 2(4) of this Act provides that "documents of title to goods" includes a bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

2. Person in possession under voidable contract [S. 178-A]

178-A. ***Pledge by person in possession under voidable contract.*****—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.**

Where goods are pledged by a person who has obtained possession under a voidable contract, the pledge is valid, provided that the contract has not been rescinded at the time of the pledge and the pledgee has acted in good faith and without notice of the pledger's defect of title. In ***Phillips*** v ***Brooks Ltd:™***

> A fraudulent person, pretending to be a man of credit, induced the plaintiff to give him a valuable ring in return for his cheque which proved worthless. Before the fraud could be discovered, the ring was pledged with the defendants.

The pledge was held to be valid.

But if the contract under which possession is obtained is void, the person in possession cannot create a valid pledge.

[1919] 2 KB 243.

The contract must not have been rescinded at the time of the pledge. The usual methoc of rescinding a contract is by giving notice to the other party of the intention to rescind. The pledged the goods after receiving such notice, the pledge will not be valid. Where thi person who has taken away the goods keeps out of the way so that he cannot be contacted the contract can be rescinded by doing whatever the owner can do to regain possessior Thus, informing the police and requesting the Automobile Association to trace the CE which has been taken away by a swindler by giving a fake cheque has been held to be sufficient demonstration of the intent to rescind and any dealing with the goods after th will not bind the owner.[320]

3. Pledge by pledgee [S. 179]

179. ***Pledge where pawnor has only a limited interest.*****—Where a person pledges goods which he has only a limited interest, the pledge is valid to the extent of that interest.**

When a pledgee further pledges the goods the pledge will be valid only to the extent his interest and his interest is the amount for which the goods have been given to him a security. If he pledges for a larger amount, the original pledger will still be entitled to ' goods on paying the amount for which he himself pledged the goods.[321]

Where, on the other hand, an effective pledge in favour of the pledgee has not tal place, any repledge made by him will be equally ineffective. The Supreme Court decis in ***Jaswantrai Manilal Akhaney*** v ***State of Bombay***[11,] is an instructive illustration.

> A Co-operative Bank had an overdraft account with the Exchange Bank, which ' secured by the deposit of certain securities. After many dealings and adjustments last position of the account was that the overdraft limit was set at Rs 66,150 and securities under the pledge of the bank were worth Rs 75,000. The Co-operative B did not, however, make use of this overdraft facility for a very long time and wh< attempted to use it, the Exchange Bank was itself in financial straits and had plec the securities first with the Canara Bank and then having redeemed them, plec them again with a private financier.

The Supreme Court held that the pledge was not valid.

Additional exceptions under Sale of Goods Act

In addition to these exceptions, a pledge by a seller remaining in possession after sal by a buyer obtaining possession before sale is valid. Where one of several joint own in possession with the permission of all, a pledge by him would be valid, if the buyc no notice of the situation.

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[320] *Car and Universal Finance Co Ltd v Caldwell, 1964] 1 All ER 290: [1965] 1 QB 525 CA. See S. 66*

[321] *Thakurdas v Mathura Prasad, AIR 1958 All 66; Belgrum Urban Pioneer Coop Bank v Satyopromoi 1962 Mys 48.*

Agency

Definition of "agent"

AGENT is defined in Section 182 of the Contract Act:

> **182.** ***"Agent" and "principal" defined.*****—An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".**

The emphasis is on the power of the agent to represent his principal in dealings with third persons.

> The essence of the matter is that the principal authorised the agent to represent or act for him in bringing the principal into contractual relation with a third person.'

The concept of "agency" has been thus explained by RAMASWAMI, J of the Madras High Court in ***Krishna*** v ***Ganapathi:***[322]

> In legal phraseology, every person who acts for another is not an agent. A domestic servant renders to his master a personal service; a person may till another's field or tend his flocks or work in his shop or factory or mine or may be employed upon his roads or ways; one may act for another in aiding in the performance of his legal or contractual obligations to third persons.... In none of these capacities he is an agent and he is not acting for another in dealings with third persons. It is only when he acts as a representative of the other in business negotiations, that is to say, in the creation, modification or termination of contractual obligations, between that other and third persons, that he is an agent.... Representative character and derivative authority may briefly be said to be the distinguishing feature of an agent.

AIR 1955 Mad 648.

A "procurement agent" has been held to be not an agent, as he is only a person directed to do an act on a commission and not to represent another.[323] The appointment of a distributor on certain terms which provided for payment of price on delivery of vehicles and for

[323] *Stale of Madras v Jaya Lakshmi Rice Mills, ILR 1958 AP 671 at pp. 678-79.*

risk during transit to be borne by the distributor was held to constitute the distributor as principal buyer and not an agent.[4]

A person who was described under the Madras Foodgrains Procurement Order, 1947, as a "wholesale dealer" has been held to be an agent. He was to purchase and sell at a price fixed by the State and he was also responsible for safety. Thus, he was a channel through which the State was operating and became an agent of the State.[5] Similarly, where a person was authorised by the Government of India to procure rice in Nepal, to have it milled at a specified mill in Bihar and to dispatch it to different States as directed, he was held to be an agent of the State.[6]

Essentials of agency

Principal Should be Competent to Contract

An agency being a contract of employment to bring the principal into legal relations with a third party the first requisite is that the principal should be competent to contract. Section 183 clearly declares:

> **183.** ***Who may employ agent.*—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.**

It follows that a minor cannot appoint an agent. The appointment of an agent involves a contract, and a minor's agreement is void. But in situations where a minor is capable of binding himself by contract he may appoint an agent to contract on his behalf. Whatever a person can do personally he can do through an agent.[7]

Agent need not be Competent

But the agent need not be competent to contract. Section 184 lays down very clearly that "as between the principal and third persons any person may become an agent". Ordinarily, an agent incurs no personal liability while contracting for his principal and, therefore, it is not necessary that he should be competent to contract. Thus, a person may contract through a minor agent, but the minor will not be responsible to his principal.

> **184.** ***Who may be an agent.*—As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.**

" *Vijay Traders v Bajaj Auto Ltd. (1995) 6 SCC 566.*

G. Alluraiah v *State of A.P.*, AIR 1963 AP 394. For another example of a running State agency, see *Hari Chand Madan Gopal* v *State of Punjab*, (1973) 1 SCC 204: AIR 1973 SC 381. *Govt of India* v *Jamanadliar Rungta*, AIR 1960 AP 19. [7] *T.C. Mathai* v *District & Sessions Judge*, (1999) 3 SCC 614: AIR 1999 SC 1385: 1999 Cri LJ 2092, the principle that every person has the right to appoint an agent for any purpose does not apply where the act to be performed is personal in character or when it is annexed to a public office or to an office involving any fiduciary obligation.

In the days when married women lacked contractual capacity they could nevertheless act as agents. A company may act as an agent beyond its capacity (***ultra vires).***

Consideration for Appointment not Necessary

Lastly, no consideration is necessary to create an agency. Generally, an agent is remunerated by way of commission for services rendered, but no consideration is immediately necessary at the time of appointment.

185. ***Consideration not necessary.*****—No consideration is necessary to create an agency.**

Agent and servant

An agent occupies a position which in many respects is similar to that occupied by a servant, bailee or trustee. The distinction between an "agent" and a "servant" has been underlined by the Supreme Court in ***Lakshminarayan Ram Gopal and Sons Ltd*** v ***Govt of Hyderabad****** The main points of distinction which have been emphasised are as follows—

(1) An agent has the authority to act on behalf of his principal and to create contractual relations between the principal and a third party. This kind of power is not generally enjoyed by a servant.

(2) "A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done." "A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work. But an agent, though bound to exercise his authority in accordance with all lawful instructions...is not subject in its exercise to the direct control or supervision of the principal."

(3) The mode of remuneration is generally different. A servant is paid by way of salary or wages, an agent receives commission on the basis of the work done.

(4) A master is liable for the wrong of his servant if it occurs in the course of employment. A principal is liable for his agent's wrong done within the "scope of authority".

(5) A servant usually serves only one master, but an agent may work for several principals at the same time.

The court is not bound to go by the terminology of the parties, but by the substance of the relation. Where an agent was described and treated as a servant but the nature of the dealings showed that he was in essence an agent, it was held that he having invested his personal money and resources in the working of the agency, the same could not be terminated summarily. It required some reasonable notice.[9]

The managing director and the secretary of a company are its employees, but in respect of the matters that come under their domain, they become agents in dealings with third

AIR 1954 SC 364.

Popular Shoe Mart v Srinivasa Rao, AIR 1990 (NOC) AP 87.

persons.[324] Professional advisers, such as stockbrokers and architects often act as agents for their clients. Other professional persons are engaged simply to produce a specified result, e.g., to prepare a report or to paint a picture. Such persons have no power to act on behalf of their clients."

Agent and bailee

An agent differs from a bailee in certain respects. Firstly, the relationship of bailor ant- bailee subsists only so long as the bailee holds some goods belonging to the bailor, bu this is not necessary for the subsistence of agency relationship. Sometimes an agent ma; be in possession of his principal's property and to that extent he may also be a bailee. Anc sometimes an ordinary bailee may become an agent when he is authorised to dispose c the bailor's property according to his directions. Secondly, an agent is a representativ with a power to contract on behalf of his principal. A bailee does not have that powe The Supreme Court accepted these points of distinction in a case in which a banker ***hi*** accepted the responsibility of receiving the goods on behalf of an account holder and release them in favour of his customers against payment. The banker was thereby held n to have become an agent and remained only a bailee.[325]

Agent and buyer

A selling agency has to be distinguished from a transaction resulting in an out-and-c sale. The legal position of an independent buyer is different from that of an agent. T Supreme Court pointed out in ***Gordon Woodroffe & Co (Madras) Ltd*** v ***Sk. M.A. Majii*** that even an agent can become a purchaser when he pays the price to his principal ■< discloses to him that fact.

Kinds of agent

Agents are of several kinds. The word "agent" is used to describe various types of acth The types of agent that are known to the business world are however, fewer.

Factor

"The word factor' in India, as in England, means an agent entrusted with the possessic goods for the purpose of selling them." "He is a mercantile agent whose ordinary cc of business is to dispose of goods, of which he is entrusted with the possession or co by his principal."[326]

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[324] *Hely-Hutchinson* v *Brayheacl Ltd*, [1967] 3 All ER 98: (1968) 1 Comp LJ 263.

[325] *UCO Bank* v *Hem Chandra Sarkar*, (1990) 3 SCC 389 at p. 396: AIR 1990 SC 1329.

" BOWSTEAD ON AGENCY, (11 Ih Edn, 1951) p. 2, citing *Stevens* v *Biller*, (1883) 25 Ch D 31 CA.

Broker

A "broker" is also a kind of mercantile agent.[327] He is appointed to negotiate and make contracts for the sale or purchase of property on behalf of his principal, but is not given possession of the goods.

Del credere agent

A "***del credere*** agent" is another type of mercantile agent. Where an agent undertakes, on the payment of some extra commission, to be liable to the principal for the failure of the third party to perform the contract, he is called ***del credere*** agent and his extra commission for the guarantee is known as ***del credere*** commission. The position of such agent was explained in ***Couturier*** v ***Hastie:***[328]

> The defendants acting as ***del credere*** agents sold the plaintiff's goods which were supposed to be on a voyage but which unknown to the parties had already been sold by the captain owing to damage by heat. The buyer repudiated the contract and, therefore, the agents were sued for the buyer's failure to perform.

The question was "whether the defendants are responsible by reason of their charging a ***del credere*** commission, though they have not guaranteed by writing". The court said that they were.

The Allahabad High Court explained the nature of liability incurred by a ***del credere*** agent:[329]

> A ***del credere*** agent incurs only a secondary liability towards the principal. His legal position is partly'that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market.

A ***del credere*** agent is, however, not liable to the buyer for any default on the part of his principal.[330] Nor is he liable for any disputes between the principal and the buyer relating to the contract or the sum due.[331]

CREATION OF AGENCY

The relationship of principal and agent may be created in any of the following ways: (1) by express appointment; (2) by the conduct or situation of the parties; (3) by necessity of the case; or (4) by subsequent ratification of an unauthorised act.

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[327] *Commercial Enterprisers v Madan Mohan Singh, AIR 1951 Hyd 47.*

[328] (1856) 5 HLC 673: 25 LJ Ex 253: 10 ER 1065: (1852) 8 Exch 40: 101 RR 329.

[329] *CHAMPA RAM* v *TULSI RAM,* (1927) 26 ALL LJ 81, PER SEN, J AT P. 82.

[330] *Shaw* v *Woodcock,* (1872) 7 B & C 73: 31 RR 158.

[331] *Churchill & Sim v Goddard, [19-37] 1 KB 92.*

An early illustration is ***Pickering*** v ***Bust.***[1''']

A purchaser of hemp allowed it to remain in the custody of the broker through whom he had bought it. The broker's ordinary business was to buy and sell hemp. He sold the hemp and received the price.

The Court held that the sale and receipt of money were binding on the principal. ***Husband***

and Wife

A wife living with her husband has the implied authority of the husband to buy articles of household necessity. A wife's implied authority to bind her husband by her credit purchases is, however, subject to some important limitations. In the first place, it is necessary that the husband and wife should be living together. Secondly, they must be living together in a domestic establishment of their own. This well-known principle was established in ***Debenham*** v ***Mellon.***[332]

The defendant was the manager of a hotel, where his wife acted as the manageress. They lived together in the same hotel, but had no domestic establishment of their own. The wife incurred with a tradesman a debt for clothes, payment for which was demanded from the husband.

But he was held not liable, the court saying that the mere fact of cohabitation did not give rise to presumption of agency, unless it was in a domestic establishment.

If these conditions are fulfilled it is immaterial whether the tradesman did or did not know that the buyer was a married woman.[333]

Thirdly, the wife can run her husband into debt only for necessaries. But it has been held to include articles suited to the style in which the husband chooses to live, because "the husband conducting himself in the manner of a wealthy man no doubt...expects his wife to conduct herself in the manner of a wealthy man's wife".[334]

Lastly, the husband will not be liable if he makes a reasonable allowance to his wife for her needs. In ***Girdhari Lai*** v ***Crawford***[335] the Allahabad High Court held that the husband will not be liable even if the fact of allowance is not known to the seller. The husband can negative liability by proving—(1) that he expressly warned the tradesman not to supply goods on credit; (2) that the wife was already supplied with sufficiency of the articles in question and; (3) that the wife was supplied with sufficient means for the purpose of buying the articles without pledging the husband's credit.

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27 [1880] AC 24.

333 *Pacquin Ltd v Beaucletf, 1906 AC 148.*

Robert Simpson Co Ltd v *Rugglas,* borrowed from 8 Can BR 722. (1885) 9 All 147, following *Miss Gray Ltd* v *Cathcart,* (1922) 38 TLR 562.

Husband not Implied Agent of Wife

A husband has no original, inherent or implied power to act as an agent for his wife. His authority can arise from an appointment as agent, expressly or impliedly, or by ratification by his wife of acts done by him on her behalf. A husband has no implied authority to sell his wife's property.[29]

Agencies of necessity

The reason for the agency of necessity has been thus stated by Story:[30]

> Although the powers of the agents are, ordinarily, limited to particular acts; yet... extraordinary emergencies may arise, in which a person, who is an agent, may, from the necessities of the case, be justified in assuming extraordinary powers; and...his acts fairly done, under such circumstances, will be binding upon his principal.

Marine Adventures

The principle of agency of necessity was first applied to cases of marine adventures. Unforeseen emergencies may arise in the course of a marine adventure which may threaten the goods and the master of the ship is not able to communicate with the principal. In such circumstances the master gets the power and it is also his duty to sell the goods in order to save their value. The sale will bind the cargo owner. Initially, it was supposed "that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of the bill of exchange for the honour of the drawer".[31] But in subsequent cases the same principle was applied to carriers by land.[32] Thus, in ***Sims & Co*** v ***Midland Rly Co:***[3i]

A quantity of butter was consigned with the defendant railway company. It was delayed in transit owing to a strike. The goods being perishable the company sold them.

The sale was held binding on the owner. The company's action was justified by the necessities of the case and it was also not practicable to get instructions from the owner.

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Pre-existing Relationship not Necessary

It was also supposed at one time that the agency of necessity is confined to cases in which there is a subsisting relationship of principal and agent and the agent, in some emergency, exercises an authority which is not expressly provided in the contract. For example, SCRUTTON, LJ observed in ***Jebara*** v ***Ottoman***[34] that "the agency of necessity develops from an original and subsisting agency and only applies itself to unforeseen events

[29] *Jawaharlal Dalmia &Co\ Chinta Chittemma, (1989) Andh LT 335.*

[30] ON AGENCY, 9lh Edn, Section 141.

[31] See *Hawtayne* v *Bourne*, [1841] 10 LJ Ex 244: 56 RR 806, *per* PARKE, B.

[32] *Great N Rly Co v Swafield, (1874) LR 9 Ex 132.*

[33] [1913] 1 KB 103.

[34] [1927] 2 KB 254 at p. 257, reversed *in, Ottoman* v *Jebara*, 1928 AC 269.

not provided for in the original contract". Two cases have been usually cited in support of this proposition, namely, where the finder of a dog spent money on feeding it,[35] and a person spent money on rescuing logs from a river[36] and neither of them could claim a lien on the goods for his trouble and expense. The cases where help is volunteered by a pure stranger are covered in Roman law by the doctrine of ***Negotiorum Gestio.*** Referring to this doctrine it is observed in ANSON'S LAW OF CONTRACT:[37]

> Our law does not recognise the ***negotiorum gestor*** of Roman law—the man who voluntarily spends his own money upon the necessary protection of the property of another.

This may be the general principle of English law. But exceptions have been admitted. A person who carries on salvage at sea is entitled to his compensation from the person whose property has been salvaged.[38] But it has been pointed out by Lord GODDARD, CJ in ***Sachs*** v ***Milkos***[19] "that the court should be slow to increase the classes of those who can be looked upon as agents of necessity in selling or disposing of other people's goods without the authority of the owners".

In India a finder has no right of action, but he is entitled to lien unless his lawful charges are paid. He has also a limited right of sale.[336]

Relief of Injured. Persons

Another occasion for a person to act as an agent of necessity arises when an injured person is in urgent need of medical attendance. Any person acting on his behalf may call the services of a doctor; or any doctor may volunteer his services. The person benefited is bound to pay the charges of the service. Williston in his article on ***Agency of Necessity***[337] cites the following case as an illustration of the principle:

> In ***Matheson*** v ***Smiley***, the Manitoba Court of Appeal held that a surgeon was entitled to recover from the deceased man's estate reasonable remuneration for his services when he had, without request, given aid to a man who had attempted suicide.

Conditions for Application of the Principle

The conditions which enable a person to act as an agent of necessity of another have been stated by McCARDIE, J in ***Prager*** v ***Blastpiel Stamp and Heacock Ltd***[338]

35 *Binstead* v *Buck,* 2 Black W 1117: 96 ER 660: (1976) 2 Win Bi 117.

36 *Nicholson* v *Chapman*, (1793) 2 Hy BI 254: 3 RR 374.

37 (1964) 22nd Edn by Guest, p. 535.

38 *The Five Steel Barges, (1890) 15 PD 142.*

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336 i, Section 177.

(1944) 22 Can BR 492 at p. 506. "[2]

[1924] 1 KB 566 at pp. 571-72.

Inability to Communicate with Principal

"In the first place, agency of necessity does not arise if the agent can communicate wir his principal. A well-known illustration is ***Gwilliam*** v ***Twist.***[n]

> While the defendant's omnibus was being driven by their servant, a policeman thinking that the driver was drunk, ordered him to discontinue driving, the omnib_- being then only a quarter of a mile from the defendant's yard. The driver and the co:- ductor then authorised a person who happened to be standing by to drive the omnib_; home. That person through his negligence injured the plaintiff.

The plaintiff's action against the owners failed, because the defendants might have bee* easily communicated with and, therefore, there was no necessity for their servants : employ another person.

Act should be Reasonably Necessary

"In the next place, it is essential for the agent to prove that the sale was necessary. Wh. does this mean?" LlNDLEY, LJ observed in a case that "by necessary is meant reasona: necessary and in considering what is reasonably necessary every material circumstance must be taken into account ***e.g.*** danger, distance, accommodation, expense, time and - forth".[339]

The leading authority is Prager v Blastpiel Stamp and Heacock Ltd[340]

> During the First World War the defendant purchased for the plaintiffs as their age- fur skins to be despatched to Rumania. Owing to the occupation of Rumania by Ge- man forces it became impossible for the defendants to send the skins or any comm.'. cation to the plaintiffs. In the last year of the war, the defendants sold the skins.

When peace returned, the plaintiffs claimed their goods. The defendants sought to just: their action under the principle of agency of necessity. But the court held that there v. no necessity to sell the goods. They had been purchased by the plaintiff in time of war the hope of receiving them when peace returned. The goods being dressed furs were likely to deteriorate if care was used.

Bona fide in the Interest of Party Concerned

"In the third place, an alleged agent of necessity must satisfy the court that he was a ***bona fide*** in the interest of the parties concerned. In ***Tronson*** v ***Dent***[341] the Privy Co plainly indicated that ***bona fides*** was essential in addition to actual necessity".

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[339] *Phelps James & Co* v *Hill*, [1891] 1 QB 605 at pp. 610-11.

[340] [1924] 1 KB 566.

[341] (1853) 8 Moo PC 419 at p. 452.

Duties of Agent

Mutual rights and duties of principal and agent may be wholly provided for in their contract. But the following duties of general nature are imposed by law upon every agent:

1. Duty to Execute Mandate

The first and the foremost duty of every agent is to carry out the mandate of his principal. He should perform the work which he has been appointed to do. Any failure in this respect would make the agent absolutely liable for the principal's loss.

An example is Pannalal Jankidas v Mohanlal:[47]

> A commission agent purchased goods for his principal and stored them in a godown pending their despatch. The agent was under instruction to insure them. He actually charged the premium for insurance, but failed to insure the goods. The goods were lost in an explosion in the Bombay harbour.

The agent was held liable to compensate the principal for his loss minus the amount received under the Bombay Explosion (Compensation) Ordinance, 1944, under which the Government paid compensation up to fifty per cent in respect of the uninsured merchandise lost in the explosion.

2. Duty to follow instructions or customs [S. 211]

> **211.** ***Agent's duty in conducting principal's business.*****—An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.**
>
> *Illustrations*
>
> *(a)* A, an agent engaged in carrying on for *B* a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to *B* the interest usually obtained by such investments.
>
> *(b)* *B*, a broker, in whose business, it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. *B* must make good the loss to A.

The section provides that an agent is bound to conduct the business of his principal according to the directions given by the principal. In the absence of directions, the agent has to follow the custom which prevails in business of the same kind and at the place where

AIR 1951 SC 144: 1950 S,,CR 979: (1951) 21 Comp Cas: 53 BomLR472.

the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.[48] In *Lilley* v *Doubleday:*[49]

An agent was instructed to warehouse his principal's goods at a particular place. He placed a part of them at a different warehouse which was equally safe. But the goods were destroyed without negligence.

The agent was held liable for the loss.
In the absence of instructions, business customs must be followed.

3. Duty of reasonable care and skill [S. 212]

212. ***Skill and diligence required from agent.*—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.**

Illustrations

(a)A, a merchant in Calcutta, has an agent, *B,* in London, to whom a sum of money is paid on A's account, with orders to remit. *B* retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. *B* is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.

*(b)*A, an agent for the sale of goods, having authority to sell on credit, sells to *B* on credit, without making the proper and usual enquiries as to the solvency of *B. B,* at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

*(c)*A, an insurance-broker employed by *B* to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to *B.*

(d) A, a merchant in England, directs *B,* his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. *B,* having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. *B* is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Section 212 lays down the standard of care and skill required of an agent.[50]

[48] Section 212. *See* illustrations appended to the section.

[49] (1881) 7 QBD 510.

[50] See *Trojan & Co* v *R.M.N.N. Nagappa Chettiar,* AIR 1953 SC 235: 1953 SCR 789.

Every agent is bound to carry on the business of agency with reasonable skill and care. The standard of care and skill which an agent has to bestow depends upon the nature of his profession. An agent, having authority to sell on credit, must take care to ascertain the solvency of his buyer. An insurance broker must see that usual clauses for the protection of the principal are inserted in the policy. An estate agent should know the land laws and also must take care to ascertain the solvency of the tenant.[51]

If the principal suffers any loss owing to the agent's want of care or skill, the agent must compensate the principal for such loss. Section 212 limits the agent's liability to "direct consequences". It provides that the agent must "make compensation to his principal in respect of the direct consequences of his neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct". The meaning of the expression "direct consequences" has been explained by the Supreme Court in ***Pannalal Jankidas*** v ***Mohanlal.***[52]

> An agent, having been instructed to insure certain goods, failed to do so. The goods were lost in an explosion at the docks. Even if the agent had taken out a fire insurance policy in the usual form it would not have covered a loss of this kind, as fire due to explosion would have been an excepted peril. But the Bombay Government passed on Ordinance under which it undertook to pay half loss in cases of uninsured goods. Thus the principal got only half of what he would have got if the goods had been insured.

The agent contended that as the passing of the Ordinance could not have been anticipated, the loss was too remote. But, it was held by a majority, that the loss was the direct result of the agent's negligence.

Where the agent informed his principal that purchases have been effected on his behalf and subsequently confirmed it by reporting that the goods would be despatched as soon as transport strike was over whereas, in fact, he had done nothing in the matter, it was held by the Supreme Court that such a neglect and misconduct of the agent misinforming the principal was squarely within the wide terms of Section 212. "He must bear the brunt to pay damages," the court said.[53]

In cases of difficulty the agent's duty is to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions, if the principal can be communicated with by reasonable care, before taking any steps in facing the difficulty or emergency.[54]

Heys v *Tindall*, (1861) 1 B & S 296.

AIR 1951 SC 144: 1950 SCR 979: (1951) 21 Comp Cas: 53 Bom LR 472. *Jayabharathi Corpn* v *Sv. P.N. Sn. Rajesekaru Nadar*, 1993 Supp (1) SCC 401: AIR 1992 SC 596. Section 214; *Sushila Devi* v *State of Bihar*, AIR 2005 NOC 388 Pat, the matter of information relating to an accident was being handled by the police. Information of death to the police was attributed to the insurer.

Akin to this is the duty to maintain the business secrets of the principal. A bank is under a similar duty of secrecy so far as the customer's dealings with him are concerned and would be liable in damages if any loss is caused to the customer by leakage of secret information. Certain currency notes were deposited with a bank for demonetisation. The bank informed the Income Tax Authorities and the customer thereby lost the utilisation of that money. Even so the customer's action against the bank failed. The bank was under a higher national duty which superseded the duty to the customer.[342] An agent is also under a duty to maintain confidence, secrecy and non-disclosure of any sensitive information about the affairs of his principal. A banker may be liable if the state of his customer's account is leaked, except where the disclosure is under compulsion of law.

4. Duty to avoid conflict of interest [S. 215]

215. ***Right of principal when agent deals, on his own account, in business of agency without principal's consent.*****—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.**

Illustrations

(a) A directs *B* to sell A's estate. *B* buys the estate for himself in the name of C. A, on discovering that *B* has bought the estate for himself, may repudiate the sale, if he can show that *B* has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(,b) A directs *B* to sell A's estate. *B*, on looking over the estate before selling it, finds a mine on the estate which is unknown to *A.B* informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows *B* to buy in ignorance of the existence of the mine. A, on discovering that *B* knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

An agent occupies fiduciary position and, therefore, it is his duty not to do anything which would bring his personal interest and his duty to the principal in conflict with each other. This conflict invariably arises when the agent is personally interested in the principal's transaction, for example, where he buys himself the property he is appointed to sell or delivers his own goods when he is instructed to buy on behalf of the principal. A well-known illustration is the case of *De Busche* v *Alt*.[343]

The plaintiff consigned a ship to a company in China for sale "at £ 90,000 payable in cash". With the consent of the plaintiff, the company appointed the defendant, a Japanese agent, to sell the ship. The defendant attempted to sell the ship, but having failed to find a customer, bought the ship himself and without disclosing this, remitted

[342] *Shankerlal v State Bank of India, AIR 1987 Cal 29.*
[343] (1878) 8 Ch D 828.

the above sum through the company to the plaintiff. Soon thereafter a war broke out and ships were again in great demand. A Japanese prince bought it from the defendant at £ 1,00,000. The plaintiff sued the defendant to recover the profit made on resale.

He was held bound to account for the profit.

This principle is incorporated in Section 215, which provides that if an agent deals on his own account in the business of agency, without first obtaining the consent of his principal and acquainting him with full facts, the principal may repudiate the transaction if he can show that—

(a) a material fact has been dishonestly concealed from him, or

(b) the dealing of the agent has been disadvantageous to him.

The first illustration to the section says that if the agent has secretly bought the principal's property for himself, the principal may repudiate the transaction if he can show that the agent has concealed any material fact or that the sale has been disadvantageous to him.

5. Duty not to make secret profit [S. 216]

216. ***Principal's right to benefit gained by agent dealing on his own account in business of agency.*****—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.**

Illustration

A directs *B*, his agent, to buy a certain house for him. *B* tells *A* it cannot be bought, and buys the house for himself. A may, on discovering that *B* has bought the house, compel him to sell it to *A* at the price he gave for it.

Another aspect of this principle is the duty of the agent not to make any secret profit in the business of agency. His relationship with the principal is of fiduciary nature and this requires absolute good faith in the conduct of agency. What is meant by secret profit? It means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make but for his position as agent. Acceptance of bribe is a profit of this kind, even "if the employers are not actually injured, and the bribe fails to have the intended effect".[57]

Knowledge which is acquired by an agent in the course of business of agency and which he converts into his advantage does not require accountability if the agent neither uses the principal's property in the process nor diverts his business opportunities.[58] As a part of the agent's duty to be honest to his principal, it is necessary that the agent should not disclose any confidential information received by him from his principal. If he does so, the principal may terminate the contract and hold the agent liable in damages for his

Harrington v *Victoria Grdving Dock Co*, (1878) 3 QBD 549. [58] *Novdisk Insulin Laboratorium* v *C.L. Bernard*, [1953] CH 430; *Aas* v *Benham*, [1891] 2 Ch 244 (CA). For the position of an agent drawing commission from both sides see *Fullwood* v *Hurley*, [1928] 1 KB 498.

loss, if any.[59] One of the aspects of this duty is that the principal can restrain his agent, even after the expiry of the term of agency, from making use of the information which he acquired during the course of the agency.[60] Where an agent was induced by the third party by paying bribes to contract with him, the court upheld the principal's right to avoid such a contract as against the third party.[61] In addition, the principal can sue the third party for damages for any loss suffered by him on account of the bribery and it will be immaterial that the principal had already recovered the bribe money from the agent.[62]

6. Duty to remit sums

218. ***Agent's duty to pay sums received for principal.*****—Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.**

The agent is bound to pay to his principal all sums received on his account. The agent is, however, entitled to deduct his lawful charges, but subject only to this right, the principal's money must be remitted to him even if it has been received in pursuance to a void or illegal contract.

7. Duty to maintain accounts [S. 213]

213. ***Agent's accounts.*****—An agent is bound to render proper accounts to his principal on demand.**

Accounts are necessary for the proper performance of the agent's other duties, for example, the duty to remit sums to the principal. There is no provision in the Act enabling an agent to institute a suit for accounts against the principal. The Supreme Court in ***Narandas*** v ***S.RA.M. Papammal***[63] laid down that the provisions of the Contract Act are not exhaustive in this regard and that the right of an agent to sue the principal for accounts is an equitable right arising under special circumstances. One of those special circumstances is where all the accounts are in the possession of the principal. In a case before the Madras High Court,[64] an agent was running a mill which was taken over by the owners. The agent claimed that he lost his accounts in the process of take over and, therefore, claimed accounts from the principal. The court did not provide him any relief because he was not able to give any proof of the loss of his accounts.[65]

8. Duty not to delegate [S. 190]

Delegatus non potest delegare is a well-known maxim of the law of agency. The principal chooses a particular agent because he has trust and confidence in his integrity and

[59] *L.S. Harris Trustees v Power Packing Services, (1970] 2 Lloyd's Rep 65.*

[60] *Lamb* v *Evans*, (1893) 68 LT 131.

[61] *Shipway* v *Broadwood*, (1899) 80 LT 11: [1899] 1 QB 369.

[62] *Mayor, Alderman, etc v Lever, (1891) 63 LT658.*

[63] AIR 1967 SC 333.

[64] *State of T.N. v Alagir Subramanian, AIR 1988 Mad 248.*

[65] *Ibid,* at p. 253.

competence. Ordinarily, therefore, the agent cannot further delegate the work which has been delegated to him by his principal. But there are exceptions. In the following cases the agent may delegate the work to another:

(a) Nature of work.—Sometimes the very nature of work makes it necessary for the agent to appoint a sub-agent. For example, an agent appointed to sell an estate may retain the services of an auctioneer and the one authorised to file a suit may engage a lawyer.

(b) Trade custom.—Secondly, a sub-agent may be appointed and the work delegated to him if there is ordinary custom of trade to that effect. Thus, architects generally appoint surveyors.[66]

(c) Ministerial action.—An agent cannot, of course, delegate acts which he has expressly or impliedly undertaken to perform personally, e.g., acts requiring personal or professional skill. But the agent may delegate acts which are purely ministerial in nature, e.g., authority to sign.[67]

(d) Principal's consent.—The principal may expressly allow his agent to appoint a sub-agent. His consent may also be implied from the conduct of the parties. The principal may ratify his agent's unauthorised delegation.

EFFECTS OF DELEGATION

A person who is appointed by the agent and to whom the principal's work is delegated is known as "sub-agent". Section 191 defines "sub-agent" as "a person appointed by and acting under the control of the original agent in the business of the agency". The significance of the words "acting under the control of the original agent," appears from a judgment of the Supreme Court.[68] The plaintiff had sent an article by VPP (value payable post) to Pakistan. The Pakistani authorities received the dispatch, delivered it to the addressee and received the value from him. Commencement of hostilities at this stage resulted in suspension of the postal services agreement between the two countries. The amount was not received by the Government of India. Even so the plaintiff sued the Government contending that the failure of the Government was a failure of a sub-agent for which the original agent is liable. The Supreme Court did not consider it possible for anybody to say that by virtue of the postal treaty a foreign Government had become the sub-agent of the Union of India. The court said that when two sovereign powers enter into an agreement, neither of them can be described as an agent of the other.

Now, when a sub-agent is appointed, what relationship is constituted between the principal and the sub-agent and the agent? The answer depends upon whether the sub-agent has been properly or improperly appointed.

* *Moon* v *Witne Union*, (1837) 43 RR 802.

Mason v *Joseph*, (1804) 1 Smith KB 406.

* *Union of India v MohdNazim, (1980) 1 SCC 284.*

1. Improper delegation [S. 193]

193. *Agent's responsibility for sub-agent appointed without authority.*—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Delegation is improper when it is not authorised, that is, when it is not within any of the recognised exceptions. The effect is that the principal is not bound by the appointment. He is not represented by that person, nor bound by his acts. That person is also not responsible to the principal. But the agent will be responsible to the principal for any acs of that person. The agent stands in the position of principal towards the person and is a; such responsible for his acts to third parties.

2. Proper delegation [S. 192]

192. *Representation of principal by sub-agent properly appointed.*—Where a sub-agei is properly appointed, the principal is, so far as regards third persons, represented by tf sub-agent and is bound by and responsible for his acts, as if he were an agent original appointed by the principal.

***Agent's responsibility for sub-agent.*—The agent is responsible to the principal for t acts of the sub-agent.**

***Sub-agent's responsibility.*—The sub-agent is responsible for his acts to the agent, I not to the principal, except in case of fraud or wilful wrong.**

The following effects of the appointment are stated in Section 192:

Principal Represented by Sub-agent

In the first place, so far as regards third persons, the principal is represented by the s agent. He is bound by and responsible for his acts as if he were an agent originally pointed by the principal.[344]

Agent's Responsibility for Sub-agent

Secondly, the agent is responsible to the principal for the acts of the sub-agent. If example, the sub-agent has misappropriated the principal's property or its sale procf the agent is responsible for the same. There is no privity of contract between the prin and the sub-agent and, therefore, he cannot sue the sub-agent, except for fraud or ful wrong. Even where fraud or wilful wrong is established, the principal has the c

[344] *Raghunath Prasad v Sewa Ram, AIR 1980 All 15.*

to sue either the agent or the sub-agent.[345] But the agent may exempt himself from such liability.[346]

Sub-agent's Liability to Principal

The sub-agent is not directly liable to the principal, except for fraud and wilful wrong. A ***well-known illustration is Calico Printers' Association v Barclays Bank:***[347]

A sub-agent failed to insure the principal's goods, which were destroyed by fire. But the principal could not recover against the sub-agent.

A sub-agent is, however, bound by all the duties of an ordinary agent.

Substituted agent [Ss. 194 and 195]

194. ***Relation between principal and person duly appointed by agent to act in business of agency.*—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him.**

Illustrations

(a) A directs *B*, his solicitor, to sell estate by auction, and to employ an auctioneer for the purpose. *B* names C, an auctioneer, to conduct the sale, *C* is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorises *B*, a merchant in Calcutta to recover the moneys due to A from C *& Co. B* instructs D, a solicitor, to take legal proceedings against *C & Co*, for the recovery of the money. *D* is not a sub-agent, but is solicitor for A.

195. ***Agent's duty in naming such person.*—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.**

Illustrations

(a) A instructs *B*, a merchant, to buy a ship for him. *B* employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to A.

(b) A consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale.

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[345] *Nensukhdas* v *Birdichand*, (1917) 19 Bom LR 948.

[346] *Summon Singh* v *National City Bank of New York*, AIR 1952 Punj 172: ILR 1952 Punj 189; *Indian Airlines* v *Renu Gupta*. AIR 2007 DOC 116: (2006) 3 CPR 201, Indian Airlines sells tickets to its customers through its agents. One of them failed to inform its buyers of change in the time of departure with the result that the consumer had to wait for 6-7 hours. The Airline was held vicariously liable for the deficiency in the service of its agent.

[347] (1931) 145 LT51.

The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to A for the proceeds.

A sub-agent has to be distinguished from a substituted agent. Sections 194 and 195 contain special provisions about substituted agents. According to Section 194 when an agent has an express or implied authority of his principal to name a person to act for him and the agent has accordingly named a person, such person is not a sub-agent, but he becomes an agent for the principal in respect of the business which is entrusted to him.

One of the effects of appointing a substitute is that a direct privity of contract is established between the principal and the "substitute". The agent is not concerned about the work of the substitute. His only duty is to make the selection of the substitute with reasonable care. Section 195 says that "in selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected".

Principal's remedies against agent's breach of duty

The rights of the principal on agent committing breach of duty were briefly stated by Lord SUMNER in ***Christoforides*** v ***Terry:***[348]

> Principals have three rights as against agents who fail in their duty—they can recover damages for want of skill and care, and for disregard of the terms of the mandate; they can obtain an account and payment of secret and illicit profits, which have come to the hands of their agents as agents; and they can resist an agent's claim for commission and for indemnity against liability incurred as mandatory by showing that the agent has acted as a principal himself and not merely as an agent. Each remedy is distinct and is directed to a specific irregularity.

A defaulting agent can also be dismissed instantly and summarily.

RIGHTS OF AGENT

1. Right to remuneration FS. 219]

219. ***When agent's remuneration becomes due.*—In the absence of any special contract payment, for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.**

Every agent is clearly entitled to his agreed remuneration, or if there is no agreement, to a reasonable remuneration. The difficult question is as to when remuneration becomes

[348] [1924] All ER Rep 815.

due. Section 219 says that "in the absence of any special contract, payment for the performance of any act is not due until the completion of such act....

The provision raises two questions. When is the act complete and secondly, is the act a result of the agent's services? Both questions depend "first and last on particular terms of the particular contract".[349] Thus, where an agent was appointed to secure orders for advertisements in a newspaper, the commission in respect of an advertisement being payable when it was published, the agent was held entitled to commission on orders actually obtained by him although the advertisements to which the orders related were not published until after the termination of employment. As against it, where an agent was engaged to negotiate for the purchase of a house at a commission of 2 per cent on the purchase price, he was held not entitled to any commission till the completion of the purchase of the house.[350]

Secondly, the transaction that results must be due to the agent's services. The bargain must be the direct result of his service. In ***Green*** v ***Bartlett***[351] an agent was appointed to sell a house. He held an auction but failed to find a purchaser. One of the persons attending the auction obtained from him the address of the principal and purchased the house from him without intervention of the agent. Even so the transaction was held to be a result of the agent's effort entitling him to his commission.

Where an agent of a foreign company entered into a contract for sale of machinery to the defendant and one of the terms of the contract was that payment of commission to be payable by the defendant would be subject to installation of the machinery, but the defendant could not make the site for installation ready and, therefore, there could be no installation. The agent, being not responsible for the same, was entitled to his commission. The terms of the arrangement showed sufficient privity of contract between the defendant buyer and the agent of the foreign principal, e.g. provision for payment of commission to the agent directly by deducting it from price.[352]

Jurisdiction

Where the contract was entered into at Calcutta and communicated to the plaintiff at Delhi and payment of commission was also made at Delhi, it was held that the courts at Delhi had jurisdiction to enforce the contract since a part of the cause of action had arisen there.[353]

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[349] *Sellers v London County Newspapers, (1951) 1 All ER 554.*

Ayyanath Chetly v Subramania Iyer, (1923) 45 Mad LJ 409.

[351] (1863) 14 CB (NS) 681: 8 LT 503: 11 WR 834: 32 LJCP261.

[352] *- Continental & Eastern Agencies v Coal India Ltd, AIR 2003 Del 387. t8*

Ibid.

Effect of Misconduct [S. 220]

220. ***Agent not entitled to remuneration for business misconducted.*—An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.**

Illustrations

(a) A employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security. *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2000 rupees. *B* is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2,000 rupees to *B.*

(b) A employs *B* to recover 1000 rupees from C. Through, *B's* misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

An agent is not entitled to any commission in respect of that part of the business which he has misconducted. Section 220 accordingly provides that an agent who is guilty of misconduct in the business of agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.[354] The effect of misconduct is two-fold. Firstly, the agent forfeits his right to commission. This is irrespective of any loss suffered by the principal. "The principle underlying the rule is that a principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission'.[355]Secondly, the principal is entitled to recover compensation for any loss caused by the misconduct.

2. Right of retainer [S. 217]

217. ***Agent's right of retainer out of sums received on principal's account.*—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.**

The agent has the right to retain his principal's money until his claims, if any, in respect of his remuneration or advances made or expenses incurred in conducting the business of agency are paid. The right can be exercised on "any sums received on account of the principal in the business of the agency". He can retain only such money as is in his possession.[356] He is not entitled to an equitable lien, that is, the right to have his claims satisfied in preference to other creditors out of the principal's money not in his possession. But a solicitor or ***vakil*** is entitled to an equitable lien on the proceeds of an action conducted

[354] *Sirdhar Vesanta Rao v Gopal Rao, AIR 1940 Mad 299 at p. 301.*

[355] *See Purushottam v Amruth Ghee Co, AIR 1961 AP 143.*

by him till his costs are paid. His fee is a first charge on the proceeds even if they are not in his possession. He is also entitled, for this purpose, to have the proceeds pass through his hands.[357]

3. Right of lien [S. 221]

221. *Agent's lien on principal's property.*—In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property, whether movable, or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

In addition to the above right of retainer, the "agent has the right to retain goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him".[358] The conditions of this right are:

(1) The agent should be lawfully entitled to receive from the principal a sum of money by way of commission earned or disbursements made or services rendered in the proper execution of the business of agency.

(2) The property over which the lien is to be exercised should belong to the principal and it should have been received by the agent in his capacity and during the course of his ordinary duties as agent. The property is considered to be sufficiently in the possession of the agent where he has been dealing with it. The agent's possession must be lawful.

(3) The agent has only a particular lien. A particular lien attaches only to that specific subject-matter in respect of which the charges are due. No other property can be retained.

Effect of lien.—The effect of lien as between the principal and the agent has been thus stated by A.H. KHAN, J in *Gopaldas* v *Thakurdas:*[M]

> The agent's lien does not give unrestricted authority to the agent to deal with the property in any manner the agent may like. The right is limited in nature; it enables the agent to retain the property till his dues are paid. But this confers no authority on the agent to sell or otherwise dispose of the property without the consent of the owner.

Where, however, in terms of his agreement with the principal, the agent has become a pledgee of the goods, he may sell them after giving a notice to the principal of his intention to sell.[85]

As against third parties the lien is effective only to the extent of the principal's rights on the property. If the principal has limited rights, the lien will be equally limited. If the property is already subject to some rights or equities in favour of third persons, the lien

[82] *Menon v Cochine Mercantiles Ltd, (1962) 32 Comp Cas 378.*

[83] Lord ELLENBOROUGH in *Houghton* v *Matliew,* 8 B & P 494.

Bombay Saw Mills Co, Re, ILR (1888) 13 Bom 314. This right does not confer any ownership on the agent The money remains that of the principal. *Turner Morrison & Co Ltd* v *CIT,* AIR 1953 SC 140: 1953 SCR 520.

will also be subject to them. But where the property on which the lien is exercised is a negotiable instrument, the agent will become a holder for value of the extent of his lien and will acquire a title free of prior equities if he acts in good faith and without notice of them.[86]

Loss of lien.—'The agent's lien is lost in the following circumstances:

(1) Lien being a possessory right, is lost as soon as possession is lost. Possession is lost when the agent delivers the goods to the principal himself or to some carrier for the purpose of transmission to the principal. In the latter case the agent cannot revive his lien by stopping the goods in transit. But where the property has been delivered for a special purpose, like safe custody, which is consistent with lien, the lien is not lost. As long as the agent remains in possession, his lien is effective, and is not affected by the fact that the company to which the goods belonged has been ordered to be wound up,[87] or that the principal has become insolvent.

(2) The lien is lost when the agent waives his right. The waiver may arise out of an agreement, express or implied, or may be inferred from conduct inconsistent with the right.

(3) The agent's lien is subject to a contract to the contrary and, therefore, does not exist where the agent has by his agreement with the principal excluded it.[88]

4. The right to indemnity [Ss. 222 and 223]

The right to indemnity is founded upon the statutory provision contained in Section 222 of the Indian Contract Act.[89]

222. *Agent to be indemnified against consequences of lawful acts.*—The employer of ai agent is bound to indemnify him against the consequences of all lawful acts done by sucl agent in exercise of the authority conferred upon him.

Illustrations

(a) *B*, at Singapur, under instructions from *A* of Calcutta, contracts with *C* to deliver certai goods to him. *A* does not send the goods to *B*, and *C* sues *B* for breach of contract. *B* informs, of the suit, and A authorizes him to defend the suit. *B* defends the suit, and is compelled to pa damages and costs, and incurs expenses. *A* is liable to *B* for such damages, costs and expense;

(b) *B*, a broker at Calcutta, by the orders of A, a merchant there, contracts with *C* for the pu chase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and *C* sues *B. B* informs, who repudiates the contract altogether. *B* defends, but unsuccessfully, and has to pay damag and costs and incurs expenses. *A* is liable to *B* for such damages, costs and expenses.

[86] *London and Joint Stock Bank v Simmons, [1892] AC 201.*

[87] *Chidambaram Cliettiar\ Tinnevelly Sugar Mills Co, (1908) 31 Mad 123.*

[88] *Ram Prasad* v *State ofM.P.*, (1969) 3 SCC 24 at p. 27: (1970) 2 SCR 677: AIR 1970 SC 1818.

[89] B.K. MUKHERJEE J in *Kishan Lai* v *Bhanwar Lai*, AIR 1954 SC 500 at p. 502.

223. ***Agent to be indemnified against consequences of acts done in good faith.*—Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.**

Illustrations

(a) *A*, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to *C* and for B's own expenses.

The right to indemnity extends to all losses and expenses incurred by the agent in the conduct of the business. Where, for example, a stockbroker, on the instructions of a solicitor, contracted to sell certain shares and had to incur liability to the purchaser by reason of the owner's refusal to complete the sale, the stockbroker was held entitled to recover indemnity from the principal.[359]

The agent must have been damnified in the lawful conduct of the business of agency. A wagering agreement is not unlawful. It is only void. Accordingly, the Supreme Court in ***Kishanlal*** v ***Banwarilal***,[360] allowed an agent to recover indemnity for losses incurred by him in wagering transactions entered into on instructions of his principal.

Where the act done by the agent on instructions from his principal is apparently lawful, but it turns out to be unlawful or injurious to a third person, the agent is entitled to indemnity against the consequences of the act.

One of the illustrations appended to Section 223 seems to be based upon the facts of ***Adamson*** v ***Jarvis:***[361]

> An auctioneer sold certain cattle on instructions from the defendant and was held liable to the true owner for conversion. He recovered indemnity from the principal because the act in question was apparently lawful.

Where an agent, on the instructions of his principal, reserved a shipping space but the principal did not send the goods and, consequently, the agent had to pay the shipowner

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359 *Hichens* v *Jackson,* [1943] AC 266 HL.

AIR 1954 SC 500.

(1827) 4 Bing 66: 5 LJ (OS) (CP) 68: 29 RR 503. The Supreme Court has held in A. *Thangal Kunju Musaiar* v *M. Venkatachalam Potti,* (1955) 2 SCR 1196: AIR 1956 SC 246, that there can be no agency for the commission of a crime. The wrongdoer would be personally liable.

damages for dead freight, the agent was allowed indemnity for his loss from the principal.[362]

Where, however, the act in question is apparently unlawful or criminal, such as beating a person or publication of a libel, the principal will not be liable upon an express or implied promise to indemnify the agent against the consequences of such act. For example, an agent appointed to import adulterated mustard oil, suffered loss and punishment, but he could not recover indemnity.[363]

224. ***Non-liability of employer of agent to do a criminal act.*****—Where one person employes another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.**

Illustration

A employs *B* to beat C, and agrees to indemnify him against all consequences of the act. *B* thereupon beats C, and has to pay damages to *C* for so doing. *A* is not liable to indemnify ***B*** for those damages.

Where the act in question is apparently tortious, the agent, who has been held liable for it, may recover contribution from the principal (not indemnity) under the Law Reform (Married Women and Tortfeasors) Act, 1955.

5. Right to compensation [S. 225]

225. ***Compensation to agent for injury caused by principal's neglect.*****—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.**

Illustration

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and *B* is in consequence hurt. A must make compensation to *B.*

Thus, every principal owes to his agent the duty of care not to expose him to unreasonable risks. The illustration appended to the section makes the point clear.[364]

RELATIONS OF PRINCIPAL WITH THIRD PARTIES AGENT'S AUTHORITY

The acts of the agent within the scope of his authority bind the principal. Section 226 of the Contract Act gives statutory effect to the principal by declaring that:

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[362] *Anglo Overseas Transport Ltd v Titan Industrial Corpn, [1959] 2 Lloyd's Rep 152.*
Ram Kumar v Laksmi Narayan, AIR 1947 Cal 157.
Federal Ins Co v *Nakano Singapore P Ltd*, (1992) 1 Current LJ 539 CA Singapore, liability for weak scaffolding.

226. ***Enforcement and consequences of agent's contracts.*****—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.**

Illustrations

(a) A buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B's* principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*.

(b) A, being *B's* agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

It is necessary for this effect to follow that the agent must have done the act within the scope of his authority. The authority of an agent means his capacity to bind the principal. It refers to the sum total of the acts it has been agreed between principal and agent that the agent should do on behalf of the principal. When the agent does any of such acts, it is said he has acted within his authority.

Actual authority [Ss. 186-187]

Agent's authority may be expressed or implied.**—The authority of an agent may be expressed or implied.**

Definitions of express and implied authority.**—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.**

Illustration

A owns a shop in Seramuore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of A for the purposes of the shop, and of paying for them out of *A's* funds with A's knowledge. *B* has an implied authority from A to order goods from *C* in the name of A for the purposes of the shop.

Actual authority of an agent is the authority conferred on him by the principal. It is of two kinds, namely, express or implied.

1. Express authority [S. 186],—Where the authority is conferred by words, spoken or written, it is called express authority. A power of attorney, for example, which is a kind of deed and authorises the agent to do certain acts, is an illustration of express authority. But however precisely the authority of an agent may be drawn, disputes as to its scope are likely to arise. Where a principal, while going abroad, authorised his agent and partner to carry on the business, and his wife to accept bills on his behalf for his personal business, he was held not bound when his wife accepted bills for the business which the agent was conducting and which was different from his personal business.[96] The decision has been

* *Attwood* v *Munnings*, (1827) 7 B & C 278.

criticised, particularly, because the agent and the third party had acted in good faith to meet the principal's genuine business needs. Accordingly, in a subsequent case of agency by power of attorney, where the agent obtained a loan outside his authority by signing a cheque on behalf of his principal to pay the principal's workmen, the principal was held bound.[97]

Where the third party has knowledge of the limitation on the agent's authority or could have discovered it by reasonable examination of the documents of authority, he would be bound by it.

An agent cannot borrow on behalf of his principal unless he has clear authority to do so. Where the agent has the power to borrow, the fact that he borrowed beyond the authorised limit, does not prevent the third party from holding the principal liable, because the third party has no means of ascertaining that fact. Similarly, the fact that an agent has acted from improper motive does not take the case beyond the scope of his authority.

2. Implied authority [S. 187],—"An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written or the ordinary course of dealing, may be accounted circumstances of the case."[98]

Implied authority is an instance of real or actual authority, for it is conferred upon the agent by the conduct of the principal as interpreted in the circumstances of the case.

An illustration of implied authority is to be found in ***Ryan*** v ***Pilkington***[99] An estate agent was appointed to find a purchaser for certain property. He accepted a deposit from a prospective customer and misappropriated it. The principal was held liable, because an estate agent has an implied authority to take a deposit. He cannot, however, receive payment or give any warranty unless actually authorised.[100]

An insurance agent does not have the authority to collect premium on behalf of the life insurance corporation. Where a policy lapsed because the insurance agent who collected money from the policy holder did not deposit it, the Supreme Court ordered on compassionate grounds, the insurer to pay back the total deposit amount with interest.[101]

Thus, the extent of an agent's authority, whether express or implied, depends upon—

(1) the nature of the act or business he is appointed to do;

(2) things which are incidental to the business or are usually done in carrying it out;

(3) the usual customs and usages of the trade.

97 *Reid* v *Rigby*, [1894] 2 QB 40; *State ofRajasthan* v *Basant Niliata*, (2005) 12 SCC 77: AIR 2005 SC 3401, registration of deed for appointing power of attorney is not necessary unless required under the Registration Act.

98 *See* illustration to S. 187.

" [1959] 1 WLR 403: 1 All ER 689 (CA).

100 *Foujdar Kameshwar Dutt Singh v Ghansliyamdas, 1987 Supp SCC 689.*

Harshad J. Shah v *L/C of India*, (1997) 5 SCC 64: AIR 1997 SC 2459.

This is the essence of Section 188 which defines the extent of the agent's authority in the following words:

> **188.** ***Extent of agent's authority.*****—An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.**
>
> **An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.**

Illustrations

> *(a) A* is employed by *B,* residing in London, to recover at Bombay a debt due to *B. A* may adopt any legal process necessary for purpose of recovering the debt, and may give a valid discharge for the same.
>
> *(b) A* constitutes *B,* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

A well-known illustration is the case of ***Dingle*** v ***Hare.***[102]

> An agent was authorised to sell artificial manure. He had no authority to give any warranty about the goods. Yet he warranted to the buyer that the manure contained 30 per cent phosphate of lime.

The warranty turned out to be false and the principal was sued for its breach. He was held liable, because it was usual in the artificial manure trade to give a warranty of this kind.

Every agent has the implied authority to act according to the customs and usages of a particular market or trade. The principal is bound by such usages even if he is unaware of them[103] or even if they conflict with his instructions. But the custom or usage must not be unlawful or unreasonable. Whether a custom or usage is unlawful is a question of law. Any custom which changes the very nature of the agency, as for example, which converts the agent into a principal, is unreasonable. ***Robinson*** v ***Mollet***[m] is an illustration in point.

> *R* authorised a broker *M* to purchase for him 50 tons of tallow. *M* supplied his own tallow as there was a custom in his trade to buy large quantities of tallow in his own name and then to allocate it to his principals.

The House of Lords held the custom to be unreasonable. It made *M* a wholesaler rather than agent. It also created a conflict between his duty to the principal and his personal interest.

Similarly, a custom which gives the agent liberty to adjust his personal account by way of set-off or otherwise for the claims of the principal is unreasonable.

^ (1859) 7 CB (NS) 145: 29 LJ (CP) 143: 1 LT 38. [33]
Scott & Harton v *Godfrey* [1901] 2 KB 726. * (1874)
LR 7 HL 802: 44 LJ CP 362: 33 LT 544.

It seems almost as a natural corollary of the authority to sell goods that the agent would have the authority to receive payment also. But this is not essentially so. An agent was appointed to sell certain coats. The purchaser of the coats paid the agent but the latter did not pay the principal. The principal successfully sued the purchaser for the price.[105] The court relied upon an earlier authority where it was said[106] "that an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority."

Authority of special agents

Factor.—A factor is a mercantile agent who is put in possession of the goods of his principal for sale. He has the authority to sell them in his own name, to warrant them if it is usual to do so, to fix the selling price and to receive payment.

Broker.—A broker is a mercantile agent appointed to sell the goods of his principal, but he is not given possession thereof. He may sell the goods in his own name, and may receive payment. But if he discloses the name of the principal, he cannot receive payment.

Estate or house agent.—A house or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he has to deal and which does not pass by a short instrument as stocks and shares do, but has to be transferred after investigation of title as to which various stipulations which might be of particular concern to the owner, may have to be inserted in a concluded contract relating to such property. The parties, therefore, do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. That is why it has been held both in England and here, that authority given to a broker to negotiate a sale and find a purchaser, without furnishing him with all the terms means to find a man willing to become a purchaser and not to find him and make him a purchaser.' This passage occurs in the judgment of the Supreme Court in ***Abdulla Ahmed*** v ***Animendra Kissen Mitter.***[107]

> The facts of the case were that an estate broker was appointed with an authority for one month to negotiate the sale of a property on certain terms as to price and with which his commission was also linked. Before the expiry of the month he found a customer ready and willing to purchase and communicated the fact to the principal. The principal terminated the authority of the agent and directly entered into a contract with a nominee of the person found by the agent. The agent claimed his commission.

It was held that the agent having negotiated the sale and secured a buyer who made a firm offer acquired the right to commission on the basis of the proffered price subject to the condition that the buyer should complete the transaction, and as this condition was

[105] *Butwick* v *Grant*, [1924] All ER Rep 274; *Unit Trust of India* v *Ravinder Kumar Shukla*, (2005) 7 SCC 428: AIR 2005 SC 3528, a cheque was sent by UTI by registered post, but it was not delivered to the payee, there was no understanding or any request by the payee for such delivery. The court said that the post office 'acted as an agent of UTI. Liability for non-delivery was that of the UTI and not that of the post office.'

[106] *Drakeford* v *Piercy*, (1866) 7 B & S 216.

[107] AIR 1950 SC 15: 1950 SCR 30.

fulfilled, the agent's right to commission became absolute and could not be affected by the circumstances that the principal for some reason of his own sold the property at a lower price.

Auctioneer.—An auctioneer is an agent appointed to sell goods at a public auction. He, therefore, does not have the authority to sell by private contract. He cannot sell on credit, or accept any payment other than cash, or warrant the goods.

Ostensible or apparent authority [S. 237]

The apparent authority of an agent is thus explained by DENNING, LJ:[108]

> Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board (of directors) appoint one of their members to be a managing director they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ***ostensible*** authority includes all the usual authority of a managing director. The company is bound by his ***ostensible*** authority in his dealings with those who do not know of the limitation. Thus, if he orders goods worth £1,000, the company is bound to the other party who does not know of the £500 limitation.

Thus, when it is said that an agent's act was within the scope of his apparent authority all that is meant is that the act appeared to be authorised. A leading authority is ***Watteau*** v ***Fenwick:***[109]

> The defendants had forbidden the manager of their hotel from buying cigars on credit. The plaintiff gave cigars to the manager on credit, which were used in business. The manager's name appeared over the board and the plaintiff trusted him and had never heard of the defendants. Being unable to recover the price from the manager, the plaintiff sued the defendants.

The court found that "cigars were...such as would naturally be supplied to and dealt in such an establishment". WILLIS, J, therefore, held that "once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applied, •hat the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority".

" *Hely-Hutchinson* v *Bray head Ltd,* [1967] 3 All ER 98: (1968) 1 Comp LJ 263 at p. 267.

= [1893] 1 QB 346.

Similarly, in a case before the *Kerala High Court*,[110] it was held that a person having responsibility to carry on the business of the store of a co-operative society must be deemed to have authority to purchase goods on credit notwithstanding that the society had advanced him enough money for the purpose.

An appearance of authority may arise from the course of dealing adopted in a particular case. Where a principal once authorised his servant to purchase iron on credit and paid for it, he was liable when on a subsequent occasion he sent the servant with ready cash, but the servant again incurred credit."[365] But if the original act had been unauthorised, the principal would not have been liable for the second, even if he had paid for the first. "Thus in *Barret* v *Irvine*,[366] it was laid down that a mother who has once paid for a horse for her infant son does not thereby raise an inference of a general authorisation to him to pledge her credit for his future equine purchases."[367]

A representation of authority has to emanate from some conduct of the principal. There must be some conduct on his part which enables the agent to occupy a position of apparent authority. The Privy Council held that an apparent authority cannot be inferred from the fact that the act itself was of a class which the principal had previously authorised the agent to do. An agent was instructed not to carry on valuations for a group of companies because of the group's failure to pay for the past services. The agent later became a director of one of the companies and, without the employer's knowledge, performed a number of valuations for them. The valuations had been negligently done and the person who suffered loss by relying on them, sued the employer. It was held that no authority to perform these valuations could be inferred from the fact that the employer had authorised the employee to perform certain others.[368] On the other hand, in the American case of ***Kannelles*** v ***Locke,***[369] the principal was held liable for the act of a complete imposter. The plaintiff arrived at night at a small hotel. She was greeted by a man in the corridor. He booked a room for her and took charge of her valuable articles and issued a receipt in the principal's name. He disappeared with the articles. The hotel-keeper was held liable because the imposter could not have occupied that position of apparent authority without the hotel-keeper's negligence. In ***Panorama Developments (Guildford) Ltd*** v ***Fidelis Furnishing Fabrics Ltd***[370] the facts were:

> The plaintiff ran a car on hire service. The defendant company's secretary hired cars from the plaintiff ostensibly for the company's business, telling him that the cars were wanted to carry the important customers of the company. He wrote on the company's

[110] *Valapad Coop Stores Ltd v Srinevasa Iyer, AIR 1964 Ker 176.*

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[365] *Hazard* v *Tredwell*, (1722) 1 Stra 506.
[366] (1907) 2 Ir R 462.
[367] HANBURY, THE PRINCIPLES OF AGENCY, P. 28 (1952 EDN).
[368] *Keooragang Investments v Richardson and Wrench, [1981] 3 WLR 439 PC.*
[369] (1919) 12 Ohio App 210.
[370] [1971] 2 QB 711: [1971] 1 WLR 440: [1971] 3 All ER 16, CA.

paper ordering the cars signing himself "company secretary". In fact he used the cars for his own purposes and not for those of the company.

It was held that the secretary had ostensible authority to enter into contracts for hiring cars for which the company must pay.

Employer's undertaking to pay insurance premia

Where an employer, in a group savings linked insurance scheme, undertook to pay monthly premiums to the insurer from wages or salaries of employees, but when a worker died, it came to light that the premiums were in default, it was held that the insurer was bound to pay the insurance money to employee's family. The employer had become the agent of the insurer for the agreed purpose. Lack of consideration between the insurer and employer was immaterial because no consideration is necessary at the time creation of agency. Consideration in such cases is promotion of business.[371]

Where the premium was to be deducted by the employer from the salary of the employee and for forwarding it to the insurer and this arrangement was in terms of an agreement between the insurer and employer, it was held that the employer had become an agent of the insurer for this purpose. Failure of the employer to send two instalments by reason of which the policy was in a state of lapse at the time of the employee's death was not to go against the employee. It was the failure of the insurer's agent and not that of the employee."[8]

Statutory provision about apparent authority.—The doctrine of ostensible authority is given statutory shape in Section 237 of the Contract Act.

237. ***Liability ofprincipal inducing belief that agent's unauthorised acts were authorised.*— When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.**

Illustrations

(a) *A* consigns goods to *B* for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of *B's* instructions, enters into a contract with *B* to buy the goods at a price lower than the reserved price. *A* is bound by the contract.

(b) *A* entrusts *B* with negotiable instruments endorsed in blank. *B* sells them to *C* in violation of private orders from *A.* The sale is good.

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[371] *L1C* v *Divisional Office, Unit I,* (2004) 1 Kant LJ 216 (DB); *Naseem Bano* v *LIC of India,* (2004) 3 MP HT 358 (MP): (2004) 2 MP LJ 529.

The provision has been used in quite a few cases to fix the principal with liability for unauthorised acts of his agent. The prominent among them seems to be a decision of the Nagpur High Court,[372] where a banking firm was held liable for the misappropriation of the funds of a customer by a person who, to the knowledge of the firm, was accepting deposits from customers. The court said: "Their Lordships of the Judicial Committee of the Privy Council ruled in ***Ram Pertab*** v ***Marshall***[373] that the right of a third party against the principal on the contract of his agent though made in excess of the agent's actual authority was nevertheless to be enforced when the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him."

Actual or Constructive Notice of lack of Authority.—Where, however, a person contracting with the agent has actual or constructive notice of any restriction on the agent's ostensible authority, he is bound by the restriction.

Once an ostensible authority is created, the principal becomes bound by his agent's acts within the scope of such authority. The principal cannot rely upon any private restrictions on the agent's authority.[374]

Agent's authority in emergency [S. 189]

189. ***Agent's authority in an emergency.*—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.**

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(,b) A consigns provision to *B* at Calcutta, with directions to send them immediately to *C*, at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear journey to Cuttack without spoiling.

Where agent exceeds authority [Ss. 227-228]

227. ***Principal how far bound, when agent exceeds authority.*—When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.**

Illustration

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on

[119] *Raj Bahadur Benilal Abir Chand v Kabulchand, ILR (1945) Nag 204.*

LIC v *Mukesh Devi*, AIR 2002 Raj 404. Another similar ruling is *LIC* v *K. Ranga Iyer*, AIR 2004 Kant HCR 594, (2004) 1 Kar LJ 216 DB: *Chairman, LIC* v *Rajiv Kumar Bhaskar*, (2005) 6 SCC 188: AIR 2005 SC 3087, insurer had to pay in spite of the employer's default in sending premia out of employee's salary. *Sushila Devi* v *State of Bihar*, 2005 AIHC 1514 Pat, group insurance, police authorities failed to inform the insurer within time of the death of an employee covered under the scheme. The knowledge of the Department was attributed to the insurer making it liable. LIC not allowed to deny liability.

[373] ILR (1898) 26 Cal 701.

[374] *Sarshar Ali v Roberts Cotton Assn, (1963) 1 SC 244 (Pak).*

the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

228. *Principal not bound when excess of agent's authority is not separable.*—When an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration

A authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

Where an agent exceeds his authority, actual or apparent, the principal is not bound by the excess work, but where it is separable from the authorised work the principal is bound to that extent. Where the agent was authorised to sell half a right over a property and he contracted to sell all the rights, the principal became bound only to the extent of half the rights authorised by him, they being separable from the rest.[122]

Where the authorised work is not separable from the rest, the principal may repudiate the whole of the transaction. For example, an agent is authorised to buy 500 sheep. He buys 500 sheep and 200 lambs for one sum of 6,000 rupees. The principal may repudiate the whole transaction. Where an agent was authorised to draw bills up to Rs 200 each, the principal was held not liable when the agent drew up to Rs 1000 each.

Effect of notice to agent

229. *Consequences of notice given to agent.*—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations

(a) A is employed by *B* to buy from C certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from C against the price of the goods.

(.b) A is employed by *B* to buy from *C* goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but *B* is ignorant of that fact. In spite of the knowledge of his agent, *B* may set-off against the price of the goods a debt owing to him from C.

The effect of the provision is that notice given to or information obtained by an agent in the course of the business transacted by him on behalf of his principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal. Acting on the principle of the section the Calcutta High

[22] *Ahammed v Mohd Kunhi, AIR 1987 Ker 228.*

Court held that where the secretary of a society was ***de facto*** as well as ***de jure*** incharge of the affairs of the society, a notice given to him of the fact that a partner of a firm with which the society had dealings had retired, operated as a notice to the society.[375]

Liability for agent's wrongful acts [S. 238]

Section 238 of the Contract Act lays down the principle by which the liability of the principal for the wrongful acts of the agent is to be determined. The section provides:

> **238.** ***Effect, on agreement, of misrepresentation or fraud by agent.*****—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals.**

Illustrations

(a) *A*, being B's agent for the sale of goods, induces *C* to buy them by a misrepresentation, which he was not authorized by *B* to make. The contract is voidable, as between *B* and C, at the option of C.

(b) *A*, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

To fix the principal with vicarious liability for the wrongs of his agent, it is necessary that the wrong must have been committed in the course of the principal's business. Although the particular act may not be authorised but, if it is done in the course of carrying on the authorised business, the principal is liable.[376]

A master is liable for the wrongs of his servant committed in the course of the servant's employment, whereas a principal is liable for wrongs done by the agent in the course of business. The expression "course of business" has been generally taken to mean the same thing as "course of employment".

Secondly, although Section 238 speaks of "misrepresentations" and "frauds" in reference to "agreements made by agents" the principle is applicable to all cases whether an agreement is involved or not.

Misrepresentations and frauds.—An agent appointed to sell his principal's goods or property has often to make statements concerning the nature and quality of the property and, in his enthusiasm to find a customer, he may make exaggerated statements. The law does not like to hold the principal liable for the agent's extravagant statements unless it finds some fault with the principal himself.

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[375] *Jani Nautamlal Venisltanker v Vivekanand Coop Housing Society, AIR 1986 Guj 162.*

[376] There can be no agency for wrongful acts. *A. Thangal Kunju Musaliar* v *M. Venkatachalam Potti,* (1955) 2 SCR 1196: AIR 1956 SC246.

Agent's torts.—One who chooses to do business through an agent may in certain situations be liable for a tort committed by the agent. The doctrine of ***respondeat superior*** (let the superior answer) will be applied to make the principal liable where the agent commits a tort while engaged in the business of the principal, or, as it is commonly said, when the tort is committed by the agent while acting in the course of and within the scope of his agency.

It is not necessary that the act should have been done by the agent for the principal's benefit. The House of Lords in their decision in ***Lloyd*** v ***Grace Smith and*** Co[377] clearly ruled that the only condition of the principal's liability is that the act in question must be within the course of the agency business. The facts of the case were as follows:

> Grace Smith and Co were a firm of solicitors of some repute and respectability. Mrs Lloyd, a widow, being dissatisfied with the income of her two cottages, consulted the firm's clerk, who was incharge of the conveyancing business, as to how to improve the income. He advised her to dispose of the cottages. He asked her to bring the title deeds which she did and obtained her signatures on two papers. He converted these papers into a sale deed to himself and subsequently disposed of the property and misappropriated the proceeds. It was held "that the firm was responsible for the fraud committed by their representative in the course of his employment".

RIGHTS AND LIABILITIES OF UNDISCLOSED PRINCIPAL

The rights and liabilities of a principal under contracts made by his agent depend upon whether—***(a)*** the principal's existence and name were disclosed by the agent; (***b***) the principal's existence was disclosed but not his name and; (c) neither existence nor name of the principal were disclosed.

Where principal disclosed

Where the existence of the principal is disclosed, Section 226 applies, according to which the agent's acts and contracts "will have the same legal consequence as if the contracts had been entered into and the acts done by the principal in person". The principal may sue the third party upon the contract and ***vice versa.*** The agent can neither sue nor be sued upon a contract made by him on behalf of his principal. The contract is the contract of the principal, not that of the agent, and prima facie at common law the only person who can sue is the principal and the only person who can be sued is the principal.

Unnamed principal

Even where the agent does not disclose the name of his principal, but discloses his representative character, the contract will be the contract of the principal, unless there is something in its form or signature to show that he intended to be personally liable.

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[377] 1912 AC 716.

Undisclosed principal

The doctrine of undisclosed principal comes into play when the agent neither discloses the existence of his principal nor his representative character. In such circumstances the question arises what are the mutual rights and liabilities of the principal, the agent and the third party. There is nothing unusual in this doctrine insofar as the relations between the agent and the third party are concerned. Since the agent has contracted in his own name, he is bound by the contract. He may be sued on it and he has the right to sue the third party and the principal is not liable in such cases.[126] But the principal too has the right to intervene and assert his position as an undisclosed party to the contract. The right of the principal is protected by the Contract Act itself. Section 231 declares:

> **231.** ***Rights of parties to a contract made by agent not disclosed.*****—If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract; but the other contracting part} has, as against the principal, the same rights as he would have had as against the agent i the agent had been principal.**
>
> **If the principal discloses himself before the contract is completed, the other contractin party may refuse to fulfil the contract, if he can show that, if he had known who was th principal in the contract or if he had known that the agent was not a principal, he woul not have entered into the contract**

This right of the principal has been described as "anomalous" because it does not fit any of the established principles of the law of contract.

An agent sells his principal's property in his own name and receives the price, t principal is obviously entitled to trace his money and recover it, even if the agent has gc bankrupt. An action of this kind was allowed as early as ***Gurratt*** v ***Cullum.***'[27] The right the undisclosed principal to intervene and sue the third party is, however, subject to following qualifications:

Firstly, the other contracting party would have against the principal "the same ri; which he would have had against the agent if the agent had been principal". This decl tion of Section 231 is further supplemented by Section 232 which says that "the princ if he requires the performance of the contract, can only obtain such performance sut to the rights and obligations subsisting between the agent and the other party to the tract. The main concern of these sections is to ensure that the third party is not put tc disadvantage by the intervention of the principal.

> **232.** ***Performance of contract with agent supposed to be principal.*****—Where one makes a contract with another, neither knowing nor having reasonable ground to si that the other is an agent, the principal, if he requires the performance of the contra* only obtain such performance subject to the rights and obligations subsisting betwe agent and the other party to the contract.**

126 *J. Thomas & Co v Bengal Jute Baling Co, AIR 1979 Cal 20.*

Illustration

A, who owes 500 rupees to *B*, sells 1000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off A's debt.

If, for example, the agent owes some money to the third party, which the latter could have set off against the price of the goods sold to him, he would have the same right if the principal sues him for the price. ***Montague*** v ***Forwood***[m] is an illustration in point.

The plaintiffs, who were acting for the owners of a cargo, employed ***B & Co*** as their agents to collect from underwriters contributions in respect of general average loss. ***B & Co*** not being brokers, employed the defendants, who were brokers at Lloyd's, to collect the money, and they did so. At the time when the defendants received the money there was a debt due to them from ***B & Co.*** The defendants did not know and there was nothing to lead them to suppose that ***B & Co*** were not acting as principals in the matter and the defendants believed that ***B & Co*** were acting as principals.

It was held that the defendants were entitled to stand in the position in which they would have stood if ***B & Co*** had really been principals; and that consequently, the defendants were entitled to set off against the demand of the plaintiffs for the money which they had collected the debt due to them from ***B & Co.***

But where the third party does not believe the agent to be a principal or there are suspicious circumstances, he may not be able to claim a set off. Thus, for example, in ***Cook*** v ***Eshelby:***[29]

L & Co sold cotton to C, in their own names, but really on behalf of an undisclosed principal. C knew that ***L & Co*** were in the habit of dealing both for principals and on their own account and had no belief on the subject whether they made this contract on their own account or for a principal.

It was held that C could not, in an action brought by the principal for the price of cotton, set off a debt due from ***L & Co.***

Secondly, if the principal discloses himself before the contract is completed, the third party may repudiate the contract if he can show that if he had known who the principal was or that the agent was not the principal, he would not have contracted. The right of the third party to repudiate the contract arises only when the identity of the undisclosed principal would have been so material to him that if he had known the true facts, he would not have contracted. Thus, in ***Said*** v ***Butt:***[m]

A theatre ticket was purchased by a person through an undisclosed agent knowing fully well that a ticket would not have been issued to him on personal grounds. It was

[1893] 2 QB 350 (CA).

[3] (1887) 12 App Cas 271.

110 [1920] 3 KB 497.

held that the theatre-owner had the right to repudiate the contract and exclude him from admission.

It means that an undisclosed principal cannot intervene when he knows that the other party would not have dealt with him.

Lastly, an undisclosed principal cannot intervene if some express or implied term of the contract excludes him from the contract.

Third party's right against undisclosed principal.—Just as the undisclosed principal has the right to sue the third party, the latter has the right to sue the principal. Difficult questions in this connection have arisen where the principal has already paid the agent, trusting that he has paid or will pay the third party, but the agent has defaulted or has gone bankrupt before payment. This happened in ***Davison*** v ***Donaldson.***[m] The managing owner and the husband of a ship purchased goods on credit from the plaintiff for the purposes of the ship. The undisclosed partner settled his account with the husband believing that the latter had paid the plaintiff. But he had not done so and had gone bankrupt. The plaintiff sued the principal. The court said: "When a person is supplied with goods it is his duty to see that the seller is paid.... Partners ought not to settle with their co-partners without satisfying themselves that the payments have been actually made."

PERSONAL LIABILITY OF AGENT [S. 230]

230. ***Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.*— In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal, nor is he personally bound by them.**

***Presumption of contract to contrary.*—Such a contract shall be presumed to exist in the following cases—**

(1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Section 230 provides that in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

This is known as the principle of the agent's immunity from personal liability. This rule applies even where the agent has contracted beyond his authority and the principal would not be liable. Even then the agent cannot be sued on the contract if he professed to act for the principal, though he will be liable to the third party for the deception played by him. Where a charter-party agreement was signed by agents adding to their signature the words "as agents" and though their principal was not named, they were held to be not

liable in respect of the agreement. Their signature "as agents" clearly indicated that they were acting only in that capacity.'[32]

The agent may contract to undertake personal liability. The section further goes on to provide that such contract is presumed in the following cases:

1. Foreign principal [S. 230(1)]

When an agent contracts for "a merchant resident abroad" there is the presumption that the agent undertakes personal liability. The original presumption of English law was that the agent alone was liable and he had no right to pledge the credit of a foreign principal. The presumption still stands, but it has declined in importance. The presumption has statutory force in India. An agent can only overthrow it by contracting in a manner showing an intention not to incur personal liability. A company registered in England, and having a place of business in India, has been held to be a foreign principal for the purposes of this presumption and the Indian agent acting for it was held personally liable.[133]

Where there was a short landing of goods and a suit for damages was filed against the foreign principal, the carrier, it was held that the Indian agent was automatically discharged of liability. The court said that both the principal and agent could not be sued together.[134]

2. Principal unnamed [S. 230(2)]

The presumption of agent's personal liability arises when he "does not disclose the name of his principal". Where an agent contracts for an undisclosed principal, he definitely is personally liable, being a party to the contract. But when he contracts for an unnamed principal, there is only a presumption of his personal liability. The presumption may arise even where the agent discloses his representative character, but not the name of his principal. Accordingly, the honorary secretary of a school was held personally liable for the rent of a house hired by him in his own name though for purposes of the school.[135] But where an agent disclosed his character as the secretary of a club, personal liability could not be imposed on him.'[36]

In one case[137] an auctioneer auctioned a car for an unnamed principal. It subsequently came to light that the car, being already subject to a hire-purchase agreement, could not be transferred. The buyer sued the auctioneer for breach of warranty. The action failed

[132] *Universal Steam Navigation Co Ltd* v *James McKelvie,* (1903) 129 LT 595; *J.M. Baxiv Food Corpn of India,* AIR 2006 Cal 94, the principal sent loss goods to the buyer than agreed, the principal accepted responsibility, agent not liable. *Taslii Delek Gaming Solutions Ltd* v *State ofKarnataka,* (2006) 1 SCC 442, agents entitled to file writ against the ban on their business, principal not necessary party.

[•13] *Tutika Basavraju v Pary & Co, (1903) 27 Mad 315.*

[<34] *W.B. Essential Commodities Supply Corpn Ltd v Koren Foreign Transportation Corpn, AIR 2002 Cal 211.*

[135] *Bhojabhai v Hayen Samuel, (1898) 22 Bom 754. ,*

North-Western Provinces Club VSadullali, (1898) 20 All 497.

[137] *Benton v Campbell, Parker & Co Ltd, [1925] All ER Rep 187.*

because the auctioneer had not given any warranty about his principal's right to sell. The court pointed out that if it were a sale of unascertained goods the presumption would have prevailed.

3. Non-existent or incompetent principal [S. 230(3)]

An agent is presumed to incur personal liability where he contracts on behalf of a principal who, "though disclosed cannot be sued". An agent who contracts for a minor, the minor being not liable, the agent becomes personally liable. This result may not, however, follow where the other party already knows that the principal is a minor.[378] The Calcutta High Court did not permit an agent of the Russian Government to be sued personally because it was neither averred nor proved that the Government of Russia could not be sued in India or elsewhere. The mere fact that such a suit required permission of the Government of India could not be taken to mean that no suit was possible.[379]

Election by third party [S. 232]

232. *Performance of contract with agent, supposed to be principal.*—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to *B*, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for C in the transaction, but *B* has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel *B* to take the rice without allowing him to set-off A's debt.

In all the above situations "where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable".

233. *Right of person dealing with agent personally liable.*—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable.[380]

4. Pretended agent [S. 235]

235. *Liability of pretended agent.*—A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

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[378] *ShetManibhai v Bai Rupaliba, (1899) 24 Bom 166.*

[379] *Union of India v Chinoy Chablani & Co, AIR 1976 Cal 467.*

140 *Link International* v *Mandya National Paper Mills Ltd*, (2004) 6 SCC 516, fraud committed through agent both could be sued.

Where a person pretends to act as the agent of another, he may be saved by the principal by ratifying his act. But if no ratification is forthcoming the pretended agent becomes personally liable, to the third party for any loss that he may have suffered by relying upon the representation of authority. The false representation must be the cause of the contract. If the truth is already known to the other party, no liability arises.[381] The false representation must be the cause of the contract. A person who acknowledged the liability of a firm pretending to be one of its partners was held to have incurred personal liability under the acknowledgement.[382] Since the action in such cases is under the tort of deceit, tort principles as to damages would apply rather than those applicable to breach of contract.[383]Where the pretension is as to a matter of law, the agent would not be liable. The agent himself cannot sue on a contract which he has made pretending to be an agent. This disability is clinched upon agents by Section 236.

236. ***Person falsely contracting as agent, not entitled to performance.*—A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.**

When a person has, in fact, no principal, yet persuades the other to contract with him as an agent of another, he is estopped from saying that he had no principal, and since the contract was with his principal and not with him he has no locus to sue under that right. This will be so whether he feigns a named or unnamed principal.[384] Where a shipping agent gave a personal commitment of issuing a bill of lading after the mate's receipt and did not do so, he was held personally liable to the principal for the tort of conversion and for breach of contract under Section 73 of the Contract Act.[385]

5. Breach of warranty of authority

Closely allied to the liability of a pretended agent is the liability of an agent for breach of warranty of authority. Where a person is in fact an agent, but exceeds his authority, or represents to have a kind of authority which he in fact does not have, he commits breach of warranty of authority and is personally liable to the third party for any loss caused to him by reason of acting on the false representation.[386] This is the principle of ***Collen*** v ***Wright.***[387]

W was land agent for one ***G. W*** agreed to grant to the plaintiff a lease of G's farm for 12 1/2 years. He honestly believed that he had the authority to do so. But Wrefused

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[381] *Shet Manibhai* v *Bai Rupaliba*, (1899) 24 Bom 166, a mother representing herself to be the agent of her minor son, was held not liable as the other party already knew the principal's minority.

[382] *Bheck Chand* v *Prabhuji*, AIR 1963 Raj 84: (1963) 13 Raj 84.

[383] *Vairavan Chettiar v Avicha Chettiar. (1915) 38 Mad 275.*
Sewdutt Roy Maskara v Napapiet, (1907) 54 Cal 628; Nand Lai Roy v Gurupada Haldar, (1924) 51 Cal 588: 81 IC 721.

[384] *Nepal Food Corpn v U.P.T. Import and Export Ltd, AIR 1988 Cal 283.*

[385] *Ganpat Prasad v Sarju, (1911).9 All LJ 8.*

[386] (1857) 8 E & B 647: 27 LJ QB 215: 30 LT 209.

to execute the lease and he proved that he had given no such authority to the agent. ***W,*** having died in the meantime, the plaintiff sued his executors for the loss he had suffered in entering upon the farm, and they were held liable.

An agent gives warranty of his authority; he does not give a guarantee that, if the contract is within authority, the principal would not commit breach.

Liability of dealer under Consumer Protection Act

A dealer in motor vehicles was held personally liable for passing a defective vehicle to the complainant. The National Commission did not accept his defence that the real liability was that of the manufacturer. He could seek reimbursement from the manufacturer.[148]

RATIFICATION

The doctrine of ratification comes into play when a person has done an act on behalf of another without his knowledge or consent. The doctrine gives the person on whose behalf the act is done an option either to adopt the act by ratification or to disown it. Ratification is thus a kind of affirmation of unauthorised acts. It is thus explained in Section 196:

196. ***Right of person as to acts done for him without his authority: Effect of ratification.*— Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.**

Where, for example, a person insures the goods of another without his authority, the owner may ratify the policy and then the policy will be as valid as if the agent had been authorised to insure the goods.[149]

Ratification may be express or implied. Section 197 provides:

197. ***Ratification may be expressed or implied.*—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.**

The section carries the following illustrations:

(a) A, without authority, buys goods for *B.* Afterwards *B* sells them to *C* on his own account; *B's* conduct implies a ratification of the purchase made for him by A.

(*.b*) A, without *B's* authority, lends *B's* money to C. Afterwards *B* accepts interest on the money from *C. B's* conduct implies a ratification of the loan.

Conditions of ratification

A valid ratification has to fulfil certain conditions. Some of them are as follows:

[148] *Marikar (Motors) Ltd v Lalcm Carmu, (2004) All LJ 522 (NC).*

Williams v North China Insurance Co, (1876) 1 CPD 757.

In the first place, it is necessary that the act in question must have been done on behalf of the person who wants to ratify it. "It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract." If the agent acts in his own name and "makes no allusion to agency"[150] his act cannot be ratified by any other person even if the agent in his secret mind intended to act for another. This is the principle of the famous case of ***Keighley, Maxsted & Co*** v ***Durante***

KM & Co, authorised their agent to buy Karachi wheat at specified rates on their joint account. Wheat was not obtainable at those rates. He bought wheat from Durant at a higher rate. He did so in the hope and confidence that his act would be adopted by the principals, but he never mentioned the principals and contracted in his own name. The principals approved the purchase, but, when the price of wheat fell, refused to take delivery. Durant sued the agent and the principals for breach of contract.

But the principals were held not liable.

A construction company took out a policy of insurance in which the assured was described as "the company, all its subsidiary, associated and related companies, all contractors and sub-contractors and/or suppliers". An employee of one of the sub-contractors who was engaged to work at a particular site suffered an accident and obtained judgment against the sub-contractor and the latter claimed the amount from the insurer. Supposing that no formal notification of ratification was necessary and that the filing of a claim under the policy amounted to ratification, the questions still remained whether the policy was taken out on behalf of the sub-contractor to enable him to ratify and whether the ratification was within reasonable time. On the first question the judgment was that the contract should be made on behalf of a person who is presently ascertainable. Since the sub-contractor did not then exist, he was possibly only a future beneficiary and, therefore, not entitled to ratify. The court, however, did not accept the argument that the contract was not ratifiable after the occurrence of the loss.[152]

The section, however, does not insist upon the name of the principal being disclosed.

2. *Competence of Principal*

Since ratification relates back to the date when the contract was originally made by the agent, it is necessary that the principal who purports to ratify must be in existence at the time of the contract and should also be competent.

"50 Cheshire and Fifoot, THE LAW OF CONTRACT, p 405 (6th Edn, 1964). [1901] AC 240.

"" *Trident General Insurance Co Ltd v McNiece Brothers Pty Ltd, Mar 31, 1987, 1987 JBL 378.*

3. *What acts can be Ratified [S. 200]*

Only lawful acts are open to ratification. An act which is void from the very beginning cannot be ratified. The Privy Council observed in a case'[53] that ratification "must be in relation to a transaction which may be valid in itself and not illegal". Section 200 says that an act cannot be ratified which by ratification "would have the effect of subjecting a third person to damages". The following illustrations are given in the section:

(a) A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from *C,* who is in possession of it. This demand cannot be ratified by B, so as to make *C* liable for damages for his refusal to deliver.

(b) *A* holds a lease from B, terminable on three months' notice. C, an unauthorized person gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Where the managing director of a company removed an employee whom he was no authorised to remove, it was held that such illegal termination could not be ratified.[388]

Acts done on behalf of Government.—Such acts are ratifiable in the same way i which private acts can be. Thus, acts of public servants in excess of their authority may t ratified by the Government. Where public officers exceed their authority, the State will 1 liable only to the extent it has expressly or impliedly ratified or approved the acts of sue officers. This was laid down specifically as early as 1861 in ***Collector of Masulipatam Cavaly Vencata Narrianpah***,[389] where the court said:

> The acts of a Government officer bind the Government only when he is acting the discharge of certain duty within the limits of the authority or if he exceeds tl authority, when the Government, in fact or in law, directly or by implication ratif the excess.

4. *Knowledge of Facts [S. 198]*

Section 198 declares: "No valid ratification can be made by a person whose knowle of the facts is materially defective." "To constitute a binding adoption of acts as ***a pr*** unauthorised these conditions must exist: (1) the acts must have been done for and in name of the supposed principal, and (2) there must be full knowledge of what those were, or such an unqualified adoption that the inference may properly be drawn thai principal intended to take upon himself the responsibility for such acts, whatever were."[390]

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[388] *Sunil* v *Maharashtra, State Mining Corpn,* (2006) 1 Mh LJ 495; *Krishna Kumar* v. *Divisional Asstt Ele Engineer,* (1979) 4 SCC 289, appointing authority is the company's board of directors.

[389] (1861) 8 Moore IA 529, 554 PC.

[390] *Fitzmaurice* v *Bayley,* (l 856) 6 E&B 868.

5. ***Whole Transaction [S. 199]***

A person ratifying any unauthorised act done on his behalf, ratifies the whole of the transaction of which such act forms a part. A person cannot ratify a part of the transaction which is beneficial to him and repudiate the rest.

6. ***Within Reasonable Time***

A ratification to be effective must come within reasonable time. If a time is fixed for performance of the contract, ratification must come before that time otherwise it will be too late. For example, a tender for supply of eggs was approved by a board, but not formally. The time for commencement of performance was September. Before this date the tender was withdrawn. The board ratified its approval of the tender on October 6. It was held that this was too late as it was done after the date fixed for performance.[157]

Effects of ratification

Ratification has the following effects:

(1) It establishes the relationship of principal and agent insofar as the act ratified is concerned between the person ratifying and the person doing the act.

(2) Ratification establishes the relationship of contract between the principal and the third party.

Doctrine of Relation Back

Ratification relates back to the date on which the agent first contracted. Section 196 declares that if an unauthorised act is ratified by the person on whose behalf it was done, "the same effects will follow as if they had been performed by his authority". One of the effects of relation back is demonstrated by ***Bolton*** v ***Lambert:***[15S]

> The defendant made an offer to the managing director of a company, who having no authority to do so, accepted it. That gave the company an option to ratify the contract. But the company ratified only after the defendant had withdrawn his offer. The company sued the defendant for specific performance.

The company was held entitled to it.

The decision has been criticised on the ground that it leaves the third party in a worse position than he would have been if he had contracted with the principal, for then he would rave revoked his offer until the principal had accepted it. But if he contracts through an unauthorised agent, he neither has a contract (until ratified) nor can withdraw from it.

The decision has also been justified. The defendant had contracted to sell the property " :r a certain price and was given the same terms. The ratification had not caused him any

" Metropolitan Asylum Board v Kingham & Son, (1890) 6 TLR 217.

1889)41 C h D 295.

prejudice. But the general trend of opinion is against the decision. That is why it is not to be extended and was not followed in ***Watson*** v ***Davies:***[159]

The defendant offered to sell his property to a charitable institution. The offer was accepted by a few members of the board "subject to approval by full members of the board". The day on which the board was to meet, the defendant withdrew his offer. The board ratified it and brought an action for specific performance.

The ratification was held to be too late, and the revocation effective.

The doctrine of ratification does not come into play where the contract made by the agent says that it is "subject to approval or ratification". In such cases the other party would have the option to withdraw until ratification.[160] Retrospective ratification also becomes ruled out where the agent and third party have already by mutual consent cancelled the contract.[391]

DETERMINATION OF AGENCY

201. ***Termination of agency.*****—An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.**

The relationship of principal and agent may end in any of the ways mentioned in Section 201. The section provides for the following modes of termination:

1. Revocation.
2. Renunciation by agents.
3. Completion of business.
4. Principal or agent's death.
5. Principal or agent becoming person of unsound mind.
6. Insolvency of principal.
7. Expiry of time.

1. By revocation [S. 203]

The principal may revoke his agent's authority and that puts an end to the agency. Section 203 clearly declares:

159 [1931] 1 Ch 455.

160 *Warehousing and Forwarding Co of East Africa Ltd v Jafferali & Sons Ltd, 1964 AC 1.*

[391] *Walter v James,* (1871) LR 6 Ex 124.

203. *When principal may revoke agent's authority.*—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Section 207 further provides that revocation may be express or implied from the conduct of the principal. An illustration appended to the section says:

,4 empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

Where the owner of a colliery appointed a sole selling agent for his coal for seven years, it was held that the owner could sell the colliery even before the expiry of this period and thus terminate the agency. He was not bound to keep his colliery.[162]

An agent provided a charterparty to the owner of a ship to run for a period of 18 months, the agent receiving commission on hire paid and earned. The owner sold the ship to the charterers within four months. The charter-party ended and so did the agency. The agent could not recover any damages, for the principal was not bound to keep the ship for the period of charterparty.[163]

An agency was deemed to have ended automatically by operation of law when a war broke out between the two countries to which the principal and agent respectively belonged.[164] This is so because agency as a contract is determined by any event which terminates a contract.

Revocation is subject to the following conditions: ***(a)***

Revocation Operates Prospectively [S. 204]

Even where the agent has partly exercised his authority, the principal may revoke it for the future. But it is irrevocable "as regards such acts and obligations as arise from acts already done in the agency". The following illustrations are appended to Section 204:

(a) A authorises B to buy 1000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

"(b)'A authorises B to buy 1000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1000 bales of cotton in A's name, and so as not to render siimself personally liable for the price. A can revoke B's authority to pay for the cotton.

' *t/jdes* v *Forwood,* (1876) 1 App Cas 256: [1874-80] All ER Rep 476. An example of implied revocation *• found in a case in which a father, after executing a power of attorney in favour of his son, fell into ~i.ned relations with him so that the son became an adversary and was, therefore, no more capable of acting ■ an -gent, *Amrik Singh* v *Solum Singh,* (1988-1) 43 Punj LR 541. _ *-rrncli & Co Ltd* v *Leeston Shipping Co Ltd,* [1922] All ER Rep 314.

s^~mson &. Sons Ltd v *Akt Fur Cartonnagen Industries,* 11917] I QB 842. Another example of justified ^TEmation, *G.L. Kilikar* v *State of Kerala,* (1971) 3 SCC 751: AIR 1971 SC 1196.

(b) Notice Precedent to Revocation [S. 206]

Where an agency has been created for a fixed period, a reasonable notice would be necessary to terminate it. The length of notice will depend, among other things, upon the length for which the agency has continued. In a Madras case reasonable notice for premature determination was not given. The agent was earning Rs 4000 per month. The court allowed Rs 12,000 as compensation in lieu of reasonable notice which should at least have been for three months.[165]

(c) Liability to Compensate [Ss. 205-206]

205.*Compensation for revocation by principal, or renunciation by agent.*—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206.*Notice of revocation or renunciation.*—Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

If the agency is determined without reasonable notice, "the damages thereby resulting to the agent must be made good" by the principal. Where an agency has been created for a fixed period, compensation would have to be paid for its premature termination, if the termination is without sufficient cause. An agency was created for a period of five years. The function of the agent was to sell "any shirts or other goods manufactured or sold" by the principal. After two years the principal's factory was burnt down by a chance fire throwing him out of business. The agent's action against him for breach of contract succeeded.[392]

The liability to pay compensation does not arise where the agency is not for a fixed period. The Madras High Court did not allow any compensation to the agent for the unilateral termination of an agency which, though created without any stipulation for its duration, had lasted from 1952 to 1964.[393] Thus, no compensation is payable in the following cases:

(1) Where the agency has not been created for any definite period.

(2) Where, though created for a specified length of time, reasonable notice for its termination has been given or the termination is otherwise based upon a sufficient cause.

[165] *J.K. Sayani v Bright Brothers, AIR 1980 Mad 162.*

[392] *Turner* v *Goldsmith,* [1891] 1 QB 544: [1891-4] All ER Rep 384 CA: [1891] 64LT301.

[393] *Bright Brothers v J.K. Sayani, AIR 1976 Mad 55.*

(d) Agency Coupled with Interest [S. 202]

In certain circumstances, however, an agency becomes irrevocable. This happens when the agent is personally interested in the subject-matter of agency. Section 202 provides:

> **202. *Termination of agency, where agent has an interest in subject-matter.*—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.**
>
> *Illustrations*
>
> *(a) A* gives authority to *B* to sell A's land, and to pay himself, out of the proceeds, the debts due to him from *A. A* cannot revoke this authority, nor can it be terminated by his insanity or death.
>
> *(,b) A* consigns 1000 bales of cotton to *B,* who has made advances to him on such cotton and desires *B* to sell the cotton, and to repay himself, out of the price, the amount of his own advances. *A* cannot revoke this authority, nor is it terminated by his insanity or death.

In the well-known case of ***Smart*** v ***Sanders***[m] WILDE, CJ stated the rule thus: "Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable." The simplest case of such agency occurs when the principal owes something to the agent and authorises him to sell the principal's goods and pay himself out of the sale proceeds."[19] But an authority to pay the debts which the principal owes to some third person does not make the agency irrevocable.'[70] In a case before the Madras High Court, a person was entitled to be maintained out of the income of a property, known as ***tarwad*** property. He was subsequently given the authority to collect rents of the property. The authority was held to be not revocable.[171]

An agency of this kind is not even terminated by the principal's death. A principal owed a sum of money to his agent and gave him an accepted bill of exchange with an authority to fill the drawer's name. The principal died before the agent could complete the bill. His authority to fill in the drawer's name was held to be not terminated.[172] But the matter is not free from controversy.

But the doctrine of agency coupled with interest is not without qualification. In the first place, the interest of the agent must exist at the time of the creation of the agency.

168 (1848) 75 RR 849: (1848) 5 CB 895: 17 LJ (CP) 258: 11 LT (OS) 178.

169 *Pestanji* v *Matchett,* (1870) 7 BHCAC 10; *Subrahmania* v *Narayanan,* (1901) 24 Mad 130; *Subba Rao* v *Varadaiah,* AIR 1943 Mad 482, buyer authorised to pay off mortgage out of sale proceeds in his hands. [70] *Clerk* v *Laurie,* (1857) 2 H &W 197: 115 RR 489.

171 *Paliyankotan Kuruvan Parambath & Chathu Kutti Nair v Kundan Appa, AIR 1932 Mad 70.* [72] *Carter v White, (1883) 2 Ch D 666.*

In ***Smart*** v ***Sanders,*** goods were consigned to a factor for sale and he subsequently made advances to his principal on the credit of the goods. It was held that the subsequent advance could not convert the agency into one coupled with interest. "The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not arise independently of agreement."

Secondly, "the test to be applied for finding out whether a power of attorney given to an agent is irrevocable or not is to see whether the primary object in giving the power was for the purpose of protecting or securing any interest of the agent. If the primary object was to recover on behalf of the principal the fruits of his decree and, in doing so, the agent's rights were also incidentally protected, then the power is revocable".[394]

2. By renunciation by agent [S. 206]

An agent may renounce the business of agency in the same manner in which the principal has the right of renunciation. In the first place, if the agency is for a fixed period, the agent would have to compensate the principal for any previous renunciation without sufficient cause. Secondly, a reasonable notice of renunciation is necessary. If the agent renounces without proper notice, he shall have to make good any damage thereby resulting to the principal.

3. Completion of business [S. 201]

An agency is automatically and by operation of law determined when its business is completed. Thus, for example, the authority of an agent appointed to sell goods ceases to be exercisable when the sale is completed. He cannot afterwards alter the terms of the sale.[395]

4. Death or insanity [S. 201]

An agency is determined automatically on the death or insanity of the principal or the agent.[396]

5. Principal's insolvency [S. 201]

An agency ends on the principal being adjudicated insolvent.

6. On expiry of time

"Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not."'[76]

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[394] MOCKET, J in *Palani* v *Krishna Swami,* (1946) ILR Mad 121.

[395] *Venkatachalam v Narayanan, (1914) 39 Mad 376.*

Acts done prior to death or insanity remain valid even if they have to be completed after death, etc, *Nasib Kaur* v *Chanan Singh,* (1991) 99 Punj LR 216.

176 *Lalljee v Dadabhai, (1915) 23 Cal LJ 190 at p. 202, per MOOKERJEE, J.*

An agency comes to an automatic end on the expiry of its term. Where the agency was to run a petrol pump for a specified period, it was held that the agent was bound to vacate the premises on expiry of the period. There was no renewal clause, nor in fact there was any renewal.[177]

Effects of termination [S. 208]

208. ***When termination of agent's authority takes effect as to agent, and as to third persons.*—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.**

Illustrations

(a) A directs *B* to sell goods for him, and agrees to give *B* five per cent commission on the price fetched by the goods. *A* afterwards, by letter, revokes *B*'s authority. *B.* after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.

0*b) A*, at Madras, by letter, directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs *B* to send the cotton to Madras. *B*, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays *B* the money, with which *B* absconds. *C*s payment is good as against *A.*

(c) A directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after A's death, but before hearing of it, pays the money to *C.* The payment to good as against *D*, the executor.

As between the principal and the agent, the authority of the agent ends when he comes to know of the termination. But as regards third persons the agency does not terminate until they come to know of the fact of termination. Even when the agency is terminated by the death of the principal, the termination is effective only when it comes to the knowledge of the agent.

Section 210 provides that the termination of an agent's authority amounts to termination of all sub-agents appointed by him. Section 209 charges the agent with duty to protect his principal's interest where the principal has died or has become a person of unsound mind.

Agent's duty on termination [S. 209]

209. ***Agent's duty on termination of agency by principal's death or insanity.*—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.**

177 *P. Sukhadev v Commr of Endowments, (1998) 1 BC 403 (AP) (DB).*

The Specific Relief Act, 1963[397]

[Act 47 of 1963]

[13th December, 1963]

An Act to define and amend the law relating to certain kinds of Specific Relief

Prefatory Note.—The following extract from the Statement of Objects and Reasons is given below:

"This Bill seeks to implement the recommendations of the Law Commission contained in its Ninth Report on the Specific Relief Act, 1877, except in regard to Section 42 which is being retained as it now stands. An earlier Bill on the subject introduced in the Lok Sabha on the 23rd December, 1960, lapsed due to dissolution. The notes on clauses, extracted from the Report of the Law Commission, explain the changes made in the existing Act." *(Vide* Gazette of India, Extra., Part II, Section 2, dated June 15, 1962.)

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:—

PART I PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Specific Relief Act, 1963.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

[397] The Act received the assent of the President on 13th December, 1963 and published in the Gazette of India. Extra, Part II, Section 1, dated 16th December, 1963.

(3) It shall come into force on such date[398] as the Central Government may, by notification in the Official Gazette, appoint.

Act not exhaustive

Though Specific Relief Act widens the sphere of the civil court, its preamble shows that the Act is not exhaustive of all kinds of specific reliefs. The Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields. Even so, the Act does not cover all specific reliefs conceivable.[399]

Definitions.—In this Act, unless the context otherwise requires,—

(a) "obligation" includes every duty enforceable by law;

(£>) "settlement" means an instrument [other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925)] whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;

(c) "trust" has the same meaning as Section 3 of the Indian Trusts Act, 1882 (2 of 1882), and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act;

(d) "trustee" includes every person holding property in trust;

(e) all. other words and expressions used herein but not defined, and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings respectively assigned to them in that Act.

3. Savings.—Except as otherwise provided herein, nothing in this Act shall be deemed—

(a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or

(.b) to affect the operation of the Indian Registration Act, 1908 (16 of 1908), on documents.

4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.—Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

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[398] March 1, 1964, *vide* Notification No S.O. 189, dated January 13, 1964, Gazette of India, Part II, Section 3(2!), p. 214.

[399] *Asliok Kumar Srivastav </*National Insurance Co Ltd*, (1998) 4 SCC 361: 1998 SCC (L&S) 1137: (1998) 2 LLN 987: (1998) 2 LLJ 699.

Introduction to the outline of the Act

A large number of remedial aspects of law have been taken care of by the Specific Relief Act of 1963 (47 of 1963). This Act is a replacement of the earlier Act of 1877. A mere declaration of rights and duties is not sufficient to give protection to life and property. Enumeration of rights and duties must be supplemented by legal devices which can help the individual to enforce his rights. Every person who is injured in the social process must have a social redress. Only then it will be possible to say that human societies have been so organised as to assure that wherever there is a wrong there must be a remedy. This is the mission of the Specific Relief Act. Generally, remedies are also provided by the branch of substantive law which defines rights and duties for its own purposes. The law of contract provides the remedy of damages for breach of contract. The law of torts similarly provides for recovery of damages in several cases of tortious wrongs. Substantive laws, however, can never afford to be exhaustive in terms of their remedies and reliefs. Scope remains for an Act whose only purpose is to provide a network of reliefs in certain specific terms. Such an Act does not confer any rights in itself. It only provides a specific relief so as to remedy the violation of a legal right. The network of reliefs allowed by the Act falls under the following outlines:

1. *Recovery of Possession of Property*

Though the Specific Relief Act is concerned only with the enforcement of civil rights and not penal laws, even civil law has to take care of certain rights, the violation of which is capable of creating serious violent clashes, and these are rights to possession of property. The very first chapter provides relief to those who have been dispossessed of their property.

2. *Specific Performance of Contracts*

One of the most important aspects of civil rights is the fulfilment of expectations created by a contract voluntarily made by the parties. Contracts are at the base of almost all economic relations. All employments and professions are contract bound. All property, whether business assets or personal, remain locked up under contracts. For example, money in banks and in other forms of investment is contractually bound. Thus contract constitute the modern wealth. They are sacred *per se.* Moreover, a particular contract not just an isolated transaction. It is often a link in a chain of several contracts. A failure at one place can cause a serious dislocation of economic and social life. Contracts mi.- be enforced. But the only way the law of contract can enforce a contract is by awarding compensation to the injured person. In many cases, however, compensation fails to sen; the economic purpose of the contract. A hospital is, for example, interested in the fulfilment of its requirements and not in receiving compensation from a failed supplier. The:; was thus the need for a remedy which would compel a defaulting contractor to actual

perform his contract. This important function is undertaken by the second chapter of the Specific Relief Act under the heading: SPECIFIC PERFORMANCE OF CONTRACTS,

3. *Rectification and Cancellation of Instruments and Rescission of Contracts*

Many transactions are required by law to be in writing. Many more transactions are put into writing because of expediency. A written transaction is an instrument. An instrument is the result of negotiations. Occasionally it happens that the instrument that emerges fails to express the intention of the parties. Its rectification may become necessary. Accordingly, Chapter III of the Specific Relief Act helps parties who want to have their mistakenly executed documents rectified.

Closely allied with documents mistakenly executed is the category of documents which are afterwards discovered to be void or which become void. They ought to be cancelled. Chapter V provides relief from such kinds of documents.

Then there is a category of contracts which, for one reason or another, such as, for example, lack of free consent, are voidable at the option of the party whose consent was not free. He has a right to have the contract rescinded. Relief by way of rescission is provided by Chapter IV of the Act.

4. *Preventive Relief*

There are cases in which the nature of the contract does not admit of specific performance, nor damages are likely to serve any purpose. In such cases the court may have to restrain the party threatening breach, to the extent to which it is possible to do so. For example, a person contracts to sing at a particular place and also undertakes not to sing elsewhere during the same period. He threatens breach. The court cannot force him to sing. The positive side of the bargain is not specifically enforceable. But the negative undertaking "not to sing elsewhere" can be enforced by restraining him from giving his performances elsewhere. When he is so prevented from resorting to other openings, it may exert some pressure upon his mind and he may be persuaded to go ahead with the performance of his contract. This type of remedy is known as preventive relief. It is granted by issuing an order, known as "injunction", upon the party concerned directing him not to do a particular act or asking him to perform a particular duty, known as a mandatory injunction. Such relief is granted under the provisions of Part III of the Act running from Chapter VII to the end.

5. *Declaratory Relief*

There is one more matter of which the Specific Relief Act takes care and that is "declaratory relief'. Occasionally it may happen that a person is entitled to some status or character or has a right in some property, but there are persons who are denying him the enjoyment of his right. He is allowed by Chapter VI of the Specific Relief Act to proceed against any person who is denying or interested in denying him his right and the court may issue a general declaration as to his entitlement to such right (declaratory decrees).

Recovery of possession of immovable property

Section 5 of the Specific Relief Act, 1963 provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, 1908.[400]

5. Recovery of specific immovable property.—A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

This section deals with action for recovery of possession of specific immovable property based on title. The essence of the section is that whoever proves a 'better title' is £ person 'entitled to possession'. The title may be on the basis of ownership or possession Thus, suppose *A* enters into peaceful possession of land claiming it as his own althougl he might have no title to it, still he can sue another who has forcibly ousted him fron possession and who has no better title to it, because *A*, although he has no legal title, ha at least a possessory title. The purpose behind Section 6 is to restrain a person from us ing force and to dispossess a person without his consent otherwise than in due course c law.[401]

A suit under Section 5 is an ordinary suit under the general law and the plaintiff has[1] prove that he has a better title. Further, specific performance can be decreed only again the executant of the contract having the right to dispose of the property in question.[402]

It is a principle of law that a person who has been in long continuous possession of immovable property, can protect the same by seeking an injunction against any pers in the world other than the true owner. It is also well settled that even the owner of t property can get back his possession only by resorting to the due process of law.[403]

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[400] *Sanjay Kumar Pandey* v *Gulbahar Sheikh,* (2004) 4 SCC 664, the proceedings under the section an summary nature and limited in their scope to finding out the fact of possession within period of 6 mo preceding to the institution of the suit. The question of title is ignored in these proceedings. If the sumn proceeding is unsuccessful, the person in question should file a regular suit for title to be decided on mt The remedy of revision is available but only by way of exception and not as a general rule. A case has t made out under S. 115 CPC. *Bajranglal Shivchandrai Ruia* v *Shashikant N. Ruia,* (2004) 5 SCC 272 success of his suit the plaintiff would have to established his title.

[401] *East India Hotels Ltd* v *Syndicate Bank, 1992* Supp (2) SCC 29, 36, lease premises had to be vacatei cause of fire, earlier the lessor had terminated the lease on expiry of term, the lessee was seeking extei for another term, whether the lessee was entitled to be put back into possession, directed to be referr larger Bench. *Ramachandran Nair* v *Sukumaran,* AIR 2002 Ker 394, possession not proved. *Puthuk Parangodan* v *Puthukkattil Parameswaran,* AIR 2002 Ker 221, the subject-matter of the tenancy was pletely destroyed and the lease automatically terminated. But even so the landlord could claim and re possession only through the court process.

[402] *Annapoorani Ammal v G. Thangapalam, (1989) 3 SCC 287.*

[403] *Prataprai N. Kothari* v *John Braganza,* (1999) 4 SCC 403: AIR 1999 SC 1666, *Ram Chander Agai Hans Raj Banga,* AIR 2003 NOC 109 (Del): 2002 AIHC 4102, the plaintiff has to prove his right to p sion. He could not prove in this case that he had purchased the premises. The sale certificate produ< him was found to be not reliable.

A decision as to a specified part of the property in question may not constitute *res judicata* in respect of any subsequent proceedings about the entire property.[8]

6. Suit by person dispossessed of immovable property.—(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought—

(a) after the expiry of six months from the date of dispossession; or

(b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suit to establish his title to such property and to recover possession thereof.

Sections 5 and 6 give alternative remedies and are mutually exclusive. Under Section 5 a person dispossessed can get possession on the basis of title, whereas under Section 6 a person dispossessed may recover possession merely by proving previous possession and subsequent wrongful dispossession. Under Section 6 he need not prove a better title against the occupier. The occupier will not be allowed to show his title by ownership, contract, prescription or inheritance.

Clause (4) of Section 6, however, provides that the person against whom a decree may be passed under clause (1) of Section 6 may, notwithstanding such a decree, sue to establish his title and to recover possession.

The objects of Section 6 are:

(0 To discourage people from taking the law into their own hands, however good their title may be.

(ii) To provide a summary, cheap and useful remedy to a person dispossessed of immovable property otherwise than in due course of law.

Section 6 is applicable only if the plaintiff proves—

(1) that he was in juridical possession of the immovable property in dispute;[9]

(2) that he had been dispossessed without his consent and otherwise than in due course of law;[10] **and**

V. Rajeshwari v T.C. Saravanabava, (2004) 1 SCC 551.

[9] *Prem Sharma* v *Nishi Sharmci,* AIR 2003 HP 45, entries in the Municipal Register of Assessments and the report lodged with the police of dispossession showed that the complainant was in possession of the house immediately before he was dispossessed. Relief for recovery of possession was granted.

Narbada Devi Gupta v *Birendra Kumar Jaiswal,* (2003) 8 SCC 745: AIR 2004 SC 175, receipt for payment of rent shown with thumb impression of the land lady at back side and also signed by her son (plaintiff) at

(3) that the dispossession took place within six months from the date of the suit."

Possession here means legal possession which may exist with or without actual possession and with or without a rightful origin. Thus, where a trespasser is allowed to continue on the property and the owner sleeps upon his rights and makes no efforts to remove him. he will gain possession under Section 6. The possession of a tenant after the termination of the tenancy continues to be a juridical possession. His right to possession remains unless the owner gets a decree of eviction against him. Till then if he is dispossessed he is entitled to seek restitution of his possession.[12] In the matter of *Express Newspapers (P) Ltd* v *Union of India"* the Supreme Court reminded the Government that even where a perpetual lease for construction of an office block provided for the lessor's right of re-entry upon forfeiture of lease upon breaches of the conditions of the lease, the lessor would not have the right to declare such forfeiture all by itself and then take to itself to throw out the lessee either directly or through the summary procedure under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The Court said that where a breach is found, the lessor must adopt the due process of law by filing a civil suit to enforce the right of re-entry. Such a lessee is not an "unauthorised occupant" of a "public premises". He will be entitled to relief against such eviction.

Regarding appeals, the section itself says that there is no right of "appeal" against a decree in a suit under this section. Similarly a "review" of the decision is also barred. But a revision under Section 115, CPC may lie to the High Court, although courts have not favoured this remedy because the aggrieved party has another remedy open to him by way of a regular suit.

An interesting question may arise: Whether an action under Section 6 can be maintained in relation to incorporeal or intangible property, e.g. right of ferry, right of fishery, right to collect rents, right to cut grass, etc. There is a conflict of decisions on the point. The High Courts of Bombay and Madras have answered this question in the affirmative.[1]"

the back. The plaintiff admitted his signature. Thus tenancy became established ruling out a case of dispossession. The court said that the tenant had not to produce further evidence or the point. *" Nair Service Society Ltd* v *K.C. Alexander*, (1968) SCD 500: AIR 1968 SC 1165. *Tirumala Tirupati Dev- asthanams* v *KM. Krishnaiah,* (1998) 3 SCC 331: AIR 1998 SC 1132, where the suit for possession could not be filed within 6 months, the court said that a regular civil suit could be filed thereafter. *George Thomas* v *Sividya,* AIR 2003 Mad 290, property in wife's name, assessment in her name for payment of taxes, the building plan was also sanctioned in her name. The court did not accept the theory of *benami* for evasion of taxes. She was allowed to recover possession and damages.

12 See *K.K. Vermav Union of India,* AIR 1954 Bom 358: 1954ILR Bom 950: *Lallu Yeshwant Singh* v *Rao Jag- dish Singh,* AIR 1968 SC 620; *Krishna Ram Malwile* v *Shobha Venkat Rao,* (1989) 4 SCC 131: AIR 1989 SC 2097; *Krishna Kishore Firm* v *Govt of A. P.,* (1991) 1 SCC 184: AIR 1990 SC 2292, the provision is founded more on public policy rather than on jurisprudence. *S.R. Ejaz* v *T.N. Handloom Weavers' Coop Society Ltd.* (2002) 3 SCC 137: AIR 2002 SC 1152, the tenant proved that he was dispossessed, remand of the matter after a long period was held be wrongful because it had defeated the very purpose of the summary remedy.

13 *Express Newspapers (P) Ltd v Union of India, (1986) 1 SCC 133: AIR 1986 SC 872.*

14 *Mangaldas v Jivan Ram, 23 Bom 673; Krishna v Akilanda, 13 Mad 54.*

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These courts have held that a man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with it is removed. But a contrary view has been expressed by the Calcutta High Court,[15] which has pointed out that this section does not extend to incorporeal rights because they are not rights of which possession can be taken and delivered to the plaintiff.

Further, it should be noted that the only prayer in a suit under Section 6 can be a prayer for recovery of possession. Consequently a claim for damages cannot be combined with that for possession. The section does not apply to suits based on title to property.[404]

Possession, under the section, may be actual (i.e. physical) or constructive. Hence the possession of a mortgagee or a lessee is that of the mortgagor or the lessor and *vice versa.*[405]

A person who is in settled possession cannot be summarily dispossessed. Settled possession creates such a right that even the rightful owner may recover only by taking recourse to a Court of law. The settled possession even of a trespasser may be protected.[406]

Recovery of possession where possession gratuitous [S. 6]

Where the grant of possession was purely gratuitous, the owner had the right to reclaim possession even without the knowledge of the person in possession. The party in possession in this case was using the garage owned by his sister. The owner dispossessed him. The trial court ordered restoration of possession. The High Court confirmed this order. The Supreme Court described this as an error.

It was evident that the respondent was using the garage of the appellant on permission having been granted by the sister to the brother. According to the judgment of the High Court the respondent was claiming no legal interest in the said garage as he was not claiming its ownership because he was not claiming to be a tenant or even a licensee. His possession was purely gratuitous and even if without the knowledge of the respondent the appellant has reclaimed the possession, it was not a fit case for the High Court to have interfered under Article 227 of the Constitution.[407]

Prayer for declaration of title

Although normally such a suit is not maintainable in the absence of a prayer for declaration of title, it was held on facts that as the necessary averments were made in the plaint (that registered lease deed for 99 years in favour of appellant-lessee was void and not

[15] *Pedu Jhela v Gour Mohan Jhela, 19 Cal 544.*

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[404] *Nagar Palika* v *Jagat Singh,* (1995) 3 SCC 426: AIR 1995 SC 1377.

[405] *Jogeshwarv Jawahar,* 1 All 311; *Sudhir Jaggi* v *Sunil Akasli Sinha Choudhury,* (2004) 7 SCC 515, concept possession, test for determining explained.

406 *Rame Gowda v M. Varadap'pa Naidu, (2004) 1 SCC 769; Sopan Sukhdeo Sable v Asstt Charity Commr, (2004) 3 SCC 137: AIR 2004 SC 1801.*

Anima Mallick v Ajoy Kumar Roy, (2000) 4 SCC 119.

binding and that suit property was trust property), and answered in the written statement, issues framed, evidence led and arguments advanced, no prejudice was caused to the appellant-defendant by the fact that there was no formal prayer seeking a declaration. The High Court rightly dismissed the LPA filed by the appellant-defendant under the Civil Procedure Code, 1908, Order 6, Rule 1.

The Court said:

> **"Even though there was no formal prayer, no prejudice has been caused to the appellant inasmuch as he has not been prevented from leading evidence on this aspec and has not been precluded from raising contentions in this behalf. All that was neces sary to cure the defect was an amendment by incorporating one prayer. This could havi been done at any stage."[20]**

Application of Limitation Act

Section 14 of the Limitation Act, 1963 applies to proceedings against dispossession. On of the effects would be that time taken in prosecuting proceedings under writ jurisdictic would be excluded.[21]

RECOVERY OF POSSESSION OF MOVABLE PROPERTY [SECTIONS 7 & 8]

Sections 7 and 8 of the Specific Relief Act, 1963 provide methods for recovery of pc session of some specific movable property.

7. Recovery of specific movable property.—A person entitled to the possession specific movable property may recover it in the manner provided by the Code of Ci Procedure, 1908 (5 of 1908).

***Explanation I.*—A trustee may sue under this section for the possession of mova property to the beneficial interest in which the person for whom he is trustee is entitle**

***Explanation II.*—A special or temporary right to the present possession of mov£ property is sufficient to support a suit under this section.**

By Section 7, it is provided that a person entitled to the possession of the spec movable property may recover the same in the manner prescribed by the Code of C Procedure.[22]

The main ingredients of this section are:

> **(i) The plaintiff must be entitled to the possession. A person may be entitle possession either by ownership or as provided by Explanation 2 to Secti**

[20] *Santokh Singh v Mahant tqbal Singh, (2000) 7 SCC 215.*

[21] *Pratapsing Ganpatrao Kadam* v *Maruti Raghunath Todkar,* AIR 2003 Bom 11. *Punjab Urban Planning & Development Authority* v *Shiv Saraswati Iron & Steel Re-Rolling Mills,* (l[1] SCC 539, the plaintiff has to prove his own case. He cannot think of succeeding because of the weaki the defendant's case.

by virtue of a special or temporary right. It is not necessary, however, that the plaintiff should have been previously in possession, or that the goods should have been removed from his possession. A special or temporary right may arise by either:

(a) **the act of the owner of the goods, e.g., bailment, pawn, etc. In this case the bailee or pawnee has special right, or;**

(b) **not by the act of the owner of goods, e.g., finder of lost goods. In this case the finder of lost goods has a special right to possession except against the true owner.**

Explanation I **makes it clear that a trustee is the person entitled to the immediate possession of trust property. Hence if trust property is taken away by someone, he can recover the same.**

A person who does not have a right to present possession of movable property cannot maintain a suit under this section. An illustration in point is: A pledges certain jewels with *B* to secure a loan. *B* disposes the jewels to *C* before he is entitled to do so. A without having paid the amount of the loan, sues C for possession of jewels. The suit should be dismissed, as A is not entitled to immediate possession of jewels, whatever interest he may have to secure their safe custody.

(,ii) Property in question must be specific movable property. Specific means that which.is ascertained or ascertainable. Specific property means the very property itself, not its equivalent. Thus coins or grains are not specific movable property, because they cannot be distinguished from other coins or grain.

The specific movable property must be capable of being seized and delivered. Where the goods have ceased to be recoverable or are not in possession or control of the defendant, the plaintiff is not entitled to a decree for recovery *in specie*; his only remedy then being damages or compensation.

Limitation

Article 91 *(b)* of the Limitation Act, 1963 prescribes a period of three years' limitation for the suit computable from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Liability to deliver possession to person entitled

Section 8 of the Specific Relief Act, 1963 provides:

8. Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.—Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be com

pelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:

(a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff.[408]

(,b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed.[409]

(c) **when it would be extremely difficult to ascertain the actual damage caused by its loss;**[410]

(d) **when the possession of the thing claimed has been wrongfully transferred from the plaintiff.**[411]

***Explanation.*—Unless and until the contrary is proved, the court shall in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume—**

(a) **that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;**

(b) **that it would be extremely difficult to ascertain the actual damage caused by its loss.**

In order that Section 8 may come into operation the following ingredients must coexist—

(1) the defendant has possession or control of the particular article claimed;

(2) such article is movable property;

(3) the defendant is not the owner of the article;

(4) the person claiming, that is, the plaintiff, is entitled to immediate possession, and

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[408] Proof of entrustment of the property in question would be necessary. *Ganga Bishen* v *Jui Narain,* (1986 SCC 75: AIR 1986 SC 441. In cases under this class, there is a fiduciary relationship existing between tht parties.

[409] Proof of entrustment of the property in question would be necessary. *Ganga Bislien* v *Jai Narain,* (1986) 1 SCC 75: AIR 1986 SC 441. There may be a thing which may not have much intrinsic value, but, by reasoc of peculiar association or some special consideration, have obtained in the eyes of its holders a value tha cannot be estimated in money, *e.g.* family idol. It would be great injustice if an individual cannot have be property without being liable to the estimate of people who have not their feelings upon it. A thing may ha t a *pretium aflections* which it is impossible to value in sordid gold or silver. However, the principle must rxt be extended to cases founded in weakness and folly. It would, therefore, be a perversion of the rule to app> it to the delivery of a lady's lap dog.

[410] There exists no standard to ascertain their value, *e.g.* rare picture painted by a dead painter, articles of antiquity and the like.

E.g. by a tort, or where defendant has obtained the goods by fraud or where servant has pawned the goods: master without the authority of the master.

(5) the thing claimed is held by the defendant as the plaintiff's agent or trustee; of

when compensation in money would not afford adequate relief for the loss of the thing claimed; or

when it is extremely difficult to ascertain the actual damage caused by the loss of the thing claimed; or

when the possession of the thing claimed has been wrongfully transferred from the claimant.

An illustration of the types of cases falling under this section would be like this. A person, while going abroad, leaves his furniture under the care of his friend. The friend is a trustee of the articles and is bound to return them when demanded. If the friend pledges the furniture, the pledgee will also remain subject to the same trust and similarly bound to return to the owner when demanded by him.[412]

An illustration under clause (b) would be, for example, when the idol of a family temple is in the custody of a retired priest, he is bound to return it to the family.

Cases coming under clause (c) would be, for example, when articles of rare value, like original paintings of a deceased painter, are in the possession of another. Since they are articles of irreplaceable nature and their market value is of unascertainable nature, the owner has a right to recover them *in specie.*[2]*

Under clause (a) the onus is on the plaintiff to prove the fiduciary relationship and under clause (*d*) the onus is on the plaintiff to prove the wrongful transfer. The *Explanation* deals with the onus under clauses (*b*) and (c), which is placed on the defendant and the defendant has to prove that compensation in money would be adequate relief and that it would not be extremely difficult to ascertain the actual damage caused by the loss of the chattel.

Difference between Sections 7 and 8

(0 Under Section 8, no suit can be brought against the owner, while under Section 7, a person having a special or temporary right to present possession may bring the suit even against the owner of the property.

(//) Under Section 7, a decree is for the return of movable property, or for the money value thereof in the alternative, while under Section 8 the decree is only for the return of the specific article.

SPECIFIC PERFORMANCE OF CONTRACTS

Specific performance is equitable relief given by a Court in case of breach of contract in the form of a judgment that the defendant is to actually perform the contract according to its terms and stipulations.

[412] Based on *Wood* v *Rowcliffe,* (J 844) 3 Hare 304: 64 RR 303.

A contract, according to the Indian Contract Act, is an agreement enforceable by law. From every contract there immediately and directly results an obligation on each of the contracting parties towards the other to perform such of the terms of the contract as he has undertaken to perform.[413] And if the person on whom this obligation rests, fails to discharge it, there results in morality to the other party a right at his election either to insist on the actual performance of the contract or to obtain satisfaction for the nonperformance of it.

An obligation includes every duty enforceable by law. Consequently, whenever a man comes under a liability to do or forbear from doing anything, he remains under an obligation. This liability may be a consequence of either a contract or a tort. An obligation to forbear is a positive duty generally imposed by a contract. This form of specific relief is described as "the specific performance of contract".

Defences against suits for specific performance based on contracts [S. 9]

9. Defences respecting suits for relief based on contract.— Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts.

Section 9 of the Specific Relief Act, 1963 provides that except as provided in this chapter *(i.e.* Chapter II, Sections 9 to 25) all defences open under the law of contract shall be'open to a defendant, where any relief is claimed under this Chapter in respect of a contract. Defences that are available under the law of contract, such as incapacity of parties, the uncertainty of contracts, coercion, undue influence, fraud, misrepresentation, mistake, etc. have all been dealt with in the Indian Contract Act. This section avoids their repetition in the Specific Relief Act. Thus it is necessary that the contract in question should be valid and enforceable. The Supreme Court refused to grant the relief of specific performance where the contract was in an alternative form and one form had failed to materialise and the other was void, being not enforceable by virtue of uncertainty. It was a contract of sale stipulating that if the co-seller failed to sign the sale deed then the principal seller would execute a sale deed of her own "one of two shares", otherwise pa> back the advance and compensation in the same amount. The co-seller did not sign. The alternative for the promisor was either to sell her share or pay compensation. If she optec for compensation there was no breach and no question of specific performance, whicl was also not possible because her share was not defined nor was there any indication o the part of the lump sum consideration which was applicable to her share.[414]

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413 *Kumari Anandan* v *T. Balamukunda Rao,* AIR 2002 Mad 472; *Ameer Mohammed* v *BarkalAli,* AIR 2002 R; 406, in both these cases the action was founded upon oral agreement, but the details of the agreement wei not proved and, therefore, no relief could be allowed. *Balwinder Kaur* v *Bawa Singh,* AIR 2002 P&H 37 execution of the 30 agreement not proved, no relief.

Mayawanti v *Kaushalya Devi,* (1990) 3 SCC 1. A contract with the Government which did not comply wi the requirements of Article 299 of the Constitution was not allowed to be enforced. *Sohan Lai* v *Union*

A contingent contract to the effect that the mortgaged house would be sold as soon as the mortgage was redeemed was held by the Supreme Court to be specifically enforceable on the redemption of the mortgage, though no relief could be provided on facts because the claim was filed more than three years after the date of redemption.[31]

Government contracts

It has been held that a Government contract which is concluded without fulfilling the requirements prescribed by Article 299 of the Constitution of India cannot be specifically enforced.[32]

Validity of original contract

In a suit for specific performance, the subsequent purchaser challenged the contention that the original contract to sell was fictitious and not genuine, but the suit was ultimately decreed. It was held that the first appellate court ought to have considered the evidence and recorded its own finding as to whether the original agreement was true and valid.[33]

The defence that the purchase was made *bona fide* for consideration without notice of the earlier agreement for sale would have to be proved by the second purchaser. This defence can be defeated by showing that a notice of the sale was given to him. Where the only evidence of prior notice was a copy of an application appearing to be endorsed by the Sub-Registrar but there was no corresponding record or entry in the records of the Sub- Registrar, it was held that such an application would not constitute prior notice.[34]

Delay as ground of defence under law of contract

Where a suit was within the period of limitation, but delay had resulted in third parties acquiring rights in the subject-matter of the suit or had given rise to a plea of waiver it was held that it would provide grounds of defence in a suit for specific performance of contract for sale of immovable property.[35] The Supreme Court allowed the appeal against this judgment with costs. The Court said:

"The aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property are:

(*i*) delay running beyond the period prescribed under the Limitation Act;

India, (1991) 1 SCC 438: AIR 1991 SC 955. C. *Bala Subba Reddy* v *Lakshmi Narasamma*, (2002) 10 SCC 247: AIR 2002 SC 390, a new plea not allowed to be raised at the appellate stage.

Ramzan v *Hussaini*, (1990) 1 SCC 104. *Parnianand* v *Bajrang*, (2001) 7 SCC 705, the defence raised was that money was not taken as a consideration for sale but by way of loan and the property was offered as a security for repayment of loan and he sought adjournment for adducing evidence to prove the real nature of the transaction, rejecting his defence without giving him the opportunity to prove it was held to be wrong. The suit was remanded for retrial.

[32] *Bishandayal and Sons v State of Orissa, (2001) 1 SCC 555: AIR 2001 SC 544.*

[33] *Ram Niwas* v *Bano*, (2000) 6 SCC 685: AIR 2000 SC 2921.

Zorawar Singh v *Sarwan Singh',12*002) 4 SCC 460.

Limitation Act, 1963, Article 34.

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(ii) delay in cases where, though the suit is within the period of limitation, yet:

(a) due to delay the third parties have acquired rights in the subject-matter of the suit;

(b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.

Here none of the above-mentioned aspects applied. The last notice was issued on 26-11-1978 and from that date the suit was filed only after nine months and not after more than a year as noted by the High Court.

Therefore on the facts of this case the ground of delay cannot be invoked to deny relief to the plaintiff."[415]

Contracts which are specifically enforceable [S. 10]

Section 10 of the Specific Relief Act enumerates those cases in which the specific performance of contracts can be enforced.

10. Cases in which specific performance of contract enforceable.—Except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(,b) when the act agreed to be done is such that compensation in money, for its non-performance would not afford adequate relief.

***Explanation.*—Unless and until the contrary is proved, the Court shall presume—**

(0 that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

In a case before the Supreme Court a family woman (appellant's mother) borrowed a sum of money from a family member (respondent's father) and executed a deed of

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[415] *Motilal Jain* v *Ramdasi Devi*, (2000) 6 SCC 420: AIR 2000 SC 2408.

sale of her property in favour of the lender's minor son with an agreement of reconveyance on repayment of the loan. The dues under the loan were paid back and on denial of reconveyance, the Supreme Court upheld the decree of specific performance ordering reconveyance. The mortgagee having disposed of the property, the decree was allowed to be enforced against such buyer also.[416]

The shares of a private company have been held to be goods of such a nature as they are not easily obtainable in the market. The court, therefore, laid down that specific performance should be granted in such cases.[417] The court cited the following opinion of the Privy Council:[418] "It is also the opinion of the Board that having regard to the nature of the company and limited market for its shares, damages would not be an adequate remedy."

Agreement for reconveyance or repurchase

An agreement to repurchase property which had been sold, popularly known as agreement for reconveyance, has been held to be specifically enforceable. Referring to such an agreement in *V. Pechimuthu* v *Gowrammal*[419], the Supreme Court said:

> **"Such an agreement, not being merely a privilege or concession, such as an option to purchase, granted to the owner, remains an agreement for sale of immovable property and must be governed by the same provisions of law as are applicable to ordinary agreements for sale. Decision as to whether an agreement is an option to purchase or an ordinary agreement depends on interpretation of its terms. It was held on the facts that the reconveyance agreement in favour of the appellant-plaintiff, the original vendor, was an ordinary agreement for sale. The High Court in second appeal erred in reversing the decree of specific performance in his favour granted by trial court and affirmed by first appellate court."**

Delay

Unreasonable delay by a plaintiff in performing his part of the contract operates as a bar to his obtaining specific performance, provided that—

(0 time was originally the essential element of the contract; or

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[416] *Nivarti Govind In gale* v *R.B. Patil*, (1997) 1 SCC 475. *Kaulashwari Devi* v *Nawal Kishore*, 1955 Supp (1) SCC 141: AIR 1994 SC 1200, subsequent buyer of the property affected by the decree. *M. Ramalingam* v *Subramanyam*, AIR 2003 Mad 305, registered sale deed, the seller could not prove that it was a mortgage transaction. Consideration not low, thus the agreement was for sale, the defendant compellable to perform his part of the contract. *Aniglass Yohannan* v *Ramalaltha*, AIR 2003 Ker 261, found from averments in the plaint and from evidence that the plaintiff had complied with statutory requirements. He was entitled to specific relief.

M.S. Madhusoodhanan v *Kerala Kaumudi (P) Ltd*, (2004) 9 SCC 204: AIR 2004 SC 909 at p. 935: (2003) 117 Comp Cas 19.

[418] *Bank of India Ltd* v *Jamsetji A.H. Chinoy, AIR 1950 PC 90. The court also cited Jainarain Ram Lundia v Surajmull Sagarmull, AIR 1949 FC 211, 218.*

[419] (2001) 7 SCC 617: AIR 2001 SC 2446. *Bismillah Begum* v *Rahamatullah Khan*, (1998) 2 SCC 226: (1998) 2 Mad LJ 6, time is of the essence in a contract of reconveyance.

(/'(') it was made an essential element by a subsequent notice; or

(iii) **the delay has been so unreasonable and long that it amounts to abandonment of the contract.**[420]

As a general proposition of law, in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed within a reasonable time if the conditions are evident:

(i) **from the express terms of the contract;**

(ii) **from the nature of the property; and**

(iii) **from the surrounding circumstances, for example, the object of making the contract.**

From the expression, "Rs 98,000 (rupees ninety-eight thousand only) will be paid by the second party to the first party within a period of ten days only" in the contract, it is clear that the amount of Rs 98,000 ought to have been paid on or before the 10th day. Failure to do so constituted a breach committed by the defendant. The word "only" has been used twice over (1) to qualify the amount of Rs 98,000, and (2) to qualify the period of 10 days. The evidence also showed that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. The notices which were exchanged between the parties have to be looked into in determining readiness and willingness.[421]

It has been held that a person seeking specific enforcement of a contract must approach the court within reasonable time even if time is not of the essence of the contract. It was further held that "reasonable time" means as soon as circumstances permit. Where the defendant was to remove a telegraph pole from a property and then to execute the sale deed, but he only removed the pole and did not execute the sale deed despite notice and the plaintiff filed a suit within one month of removal of the pole, it was held, on the facts, that the suit was filed within reasonable time. Time was not of the essence of the present contract. The Court said:

> **"The word 'reasonable' has in law a prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of 'reasonable time' is to be so much time as is necessary, un**

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[420] *K.S. Vidyanadam* v *Vairavan,* (1997) 3 SCC 1. delay of *2Vi* years after paying a small amount by way of earnest money for purchasing immovable property, disentitled from claiming specific recovery of property. *Deokabai* v *Uttam,* (1993) 4 SCC 181, delay in executing the conditions of the sale deprived the right to specific performance, refund of earnest money ordered.

[421] *Chand Rani* v *Kainal Rani,* (1993) 1 SCC 519: AIR 1993 SC 1742.

der the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit.

The legal action initiated by the appellant-plaintiff was rightly held by the trial court and the first appellate court to have been commenced without delay and definitely within a reasonable time. The High Court was not justified in disturbing the finding of fact arrived at on appreciation of the evidence, while disposing of the second appeal."[43]

A valid contract of sale must be proved by producing the original document. In this case a copy of the contract typed in duplicate was produced before the court. The son of the deceased vendor admitted the signature of his father. The High Court found on evidence that the original document was retained by the vendor and he did not produce it. The High Court accepted the document as genuine and its contents as true. The Supreme Court held that on the evidence on the record, sufficient foundation for accepting the document by way of secondary evidence in terms of Section 65 of the Evidence Act had been laid.[44]

Sale by joint owners

The Supreme Court propounded the following proposition:

"Where any property is held jointly, and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, he is bound to execute the sale deed. However, in the absence of the other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the appellants in such property to other such contracting party. In the present case, it is not in dispute that the appellants have 5/6ths share in the property. So, the plaintiff's suit for specific performance to the extent of this 5/6ths share was rightly decreed by the High Court which requires no interference."[45]

Performance of trust

Section 11(1) provides another circumstance in which contracts can be specifically enforced.

" *Veerayee Ammal* v *Seeni Ammal*, (2002) 1 SCC 134: AIR 2001 SC 2920. Where there is no concluded contract, the relief of specific performance cannot be had, *Ganesh Shet* v *C.S.G.K. Setty*, (1998) 5 SCC 381. *T. Mohan* v *Kannammal*, (2002) 10 SCC 82.

45 *A. Abdul Rashid Khan* v *PA.K.A. Shahul Hamid*, (2000) 10 SCC 636. *Surinder Singh* v *Kapoor Singh*, (2002) 10 SCC 109, the other joint owner contested the suit on the ground that she was not a party to the contract. The court dissented from the decision in *Kartar Singh* v *Harjinder Singh*, (1990) 3 SCC 517 in which the court ordered delivery of half share of the joint property on payment of half of the consideration money. *Awadesh Yadav* v *Suresh Thakur*, (2002) 10 SCC 156, joint Hindu family property, the *Karta* was found to be not competent to sell.

11. Cases in which specific performance of contracts connected with trusts enforceable.—(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

Enforcement of trustee's duty

The creation of a trust imposes a duty on the trustees, which may be enforced even by strangers to the transaction who may not have been in existence at its date, if they have an interest under the contract. Thus contracts connected with trusts can be specifically enforced either at the instance of the beneficiaries or at the instance of the trustees.

Section 11(2), however, provides that a contract made by a trustee:

(i) in excess of his powers, or

(,ii) in breach of trust,

cannot be specifically enforced.

In the first case it is beyond his competence and, in the second case, it is unlawful. "In breach of trust" means acting in violation of the duties and obligations imposed by the trust.

Limitation

A suit for specific enforcement should be filed for specific performance within the period stipulated under Article 54 of the Limitation Act, 1963.[46] In a contract where no date for performance was final, the court said that the period of limitation would start running from the date on which the plaintiff comes to know that the other party was refusing performance.[422]

Specific performance of part of contract [S. 12]

Section 12 deals with specific performance of a part of a contract. It provides in clause (1) that as a general rule, the court shall not grant specific performance of a part of a contract. The section, however, recognises in clauses (2) to (4) certain exceptions to the above rule. Whether specific performance of a part of the contract is to be ordered or not has been wholly left by the section to one deciding factor, namely, the proportion the part which can be performed bears to that which cannot be performed. Where the pan which cannot be performed bears only a small proportion to the whole in value and the unperformed part can be compensated adequately in terms of money, the court may order specific performance of one part and compensation for the other.

[46] *Thakamma Mathew* v *M. Azamathula Khan,* 1993 Supp (4) SCC 492: AIR 1993 SC 1120.

[422] *M. K. Usman Koya v C.S. Santha, AIR 2003 Ker 191.*

A slightly different principle comes into play where the part which cannot be performed forms a considerable part of the whole. In such cases the court has first to see whether the major part which has to be left out admits of money compensation or does not do so. If the unperformed portion can be compensated in terms of money the court may order specific performance of the rest, provided that the party seeking relief has paid his consideration under the contract as reduced by the amount of compensation for the unperformed portion. Where the matter does not admit of compensation the court may order specific performance only when the party seeking relief has paid his whole consideration without any reduction whatsoever.

Where the part that would remain unperformed does not admit of compensation in terms of money, the court would order specific performance only if the party seeking performance undertakes to pay the consideration for the whole of the contract without any abatement. In either situation, the party seeking performance of a part of a contract has to relinquish all claims to the performance of the remaining part and also all rights to compensation either for the deficiency or for any loss or damage sustained through the defendant's default as to performance. An illustrative account of the working of the principle is to be found in *Rutheiford* v *Acton Adams.*™

If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to this remedy. Another possible case arises where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on the terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the court holds him to have even a larger right. Subject to considerations of hardship, he may elect to take all he can get, and to have a proportionate abatement of the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract.

In a contract for the sale and purchase of a house and lands for 2 lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Where a contract was incapable of being performed and a party categorically refused to accept part-performance, it was held that there was no readiness and willingness at all stages to accept part-performance. Therefore such a party could not be permitted later to change its position and elect to accept part-performance.[49] The Court said:

" (1915) AC 866 (appeal from New Zealand): 84 LJPC 238: 113 LT 931. Where the property came to the share of two brothers jointly and one of them sold the whole to a neighbour, the buyer was allowed to recover only the selling member's share. *Sardar Singh* v *Krishna Devi,* (1994) 4 SCC 18. "[9] *Surjit Kaur* v *Naurata Singh,* (2000) 7 SCC 379: AIR 2000 SC 2927.

"In cases where a contract is not capable of being performed in whole then the readiness and willingness, at all stages, is the readiness and willingness to accept part- performance. If a contract is not capable of being performed in whole and a party clearly indicates that he is not willing to accept part performance then there is no readiness and willingness, at all stages, to accept part-performance. In that case there can be no specific performance of a part of the contract at a later stage."

In a case under the J&K Specific Relief Act, 1977 (Section 15) it was held that where a party was unable to perform the whole of his part, the court could direct the performance of so much of his part as he was capable of performing (l/3rd share of the property).[50]

12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) **forms a considerable part of the whole, though admitting of compensation in money; or**

(b) **does not admit of compensation in money;**

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(0 in a case falling under clause *(a)*, pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (b), [51] [pays or has paid] the consideration for the whole of the contract without any abatement; and 07) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficienc) or for the loss or damage sustained by him through the default of the defendant.[52]

[50] *Manzoor Ahmed Magray v Ghulam Hassan Aram, (1999) 7 SCC 703.*

[51] *Ins.* by the Repealing and Amending Act, 1964 (52 of 1964), Section 3 and Second Schedule.
While clause (2) relaxes the rule that part of a contract cannot be specifically enforced in favour of both th: parties, clause (3) does so in favour of the party not in default. Party in default is the party who is unable to perform the whole of his part of the contract. The principle underlying clause (3) is that the party who is r.:-

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.[53]

***Explanation.*—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject- matter existing at the date of the contract has ceased to exist at the time of its performance.**

The requirements of the section were stated by the Supreme Court as follows:[54]

"The ingredients which would attract specific performance of the part of the contract under the latter part of sub-section (3) of Section 12 are: *(i)* if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and *(ii)* the other party to an agreement must, in a suit for such specific performance, either pay or have paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable of performing and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

***Illustrations as to Explanation.—(a) A* contracts to sell a house to *B* for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase-money.**

(*b*) In consideration of a sum of money payable by *B, A* contracts to grant an annuity to *B* for *B's* life. The day after the contract has been made, *B* is thrown from his house and billed. *B's* representative may be compelled to pay the purchase-money.

at default is entitled to specific performance of so much of a contract as the other can perform. *Rachakonda Narayana* v *Ponthala Parvathamma,* (2001) 8 SCC 173, the relief of directing the defendant party to perform specifically so much of his part of the contract as he can perform can be pleaded at the appellate stage also when the fact of the defaulting party's inability to perform a part of the contract comes to the knowledge of the party seeking specific performance.

For example, if, at an auction, a person purchases several plots of land, the inability of the vendor to make out good title to one plot will not prevent him from enforcing specific performance of the sale of other plots. *Balliar Singh* v *Mohabat Singh,* AIR 2004 P&H 340, agreement for sale of defendant's share in property as well as share of his minor son without court permission, enforceable to the extent of defendant's share reducing consideration proportionally.

Rachakonda Narayana v *Ponthala Parvathamma,* (2001) 8 SCC 173. *Chenguni Othayoth Thankom* v *Kool- oth Balakrishnan Nair,* AIR 2002 Ker 297, reducing the claim to a part of the property at the appellate stage was not material to relief because the plaintiff know from the very beginning that the document was defective.

Rights of purchaser or lessee where seller's or lessor's title imperfect [S. 13]

Section 13 deals with the rights of a purchaser or lessee against a person with no title or imperfect title. The idea underlying this section is that when a person enters into a contract without the power for performing that contract and subsequently he acquires the power of performing the same, he is bound to do so. This section is, however, limited to contracts to sell or let property.

The different clauses of Section 13 affect the remedy of the buyer and the obligation of the seller. The section comes into play when the seller of immovable property has no title or only an imperfect title. If he acquires any interest in the property subsequently, the purchaser can compel him to make good the contract out of such interest. Where concurrence of or conveyance by some other person is necessary to enable the vendor to validate his transfer, and if that person is bound to concur at the direction of the vendor, the purchaser can compel the vendor to procure such concurrence and validate the transfer. Where the vendor purported to sell the property as free from any encumbrance, etc., but the property is in fact subject to a mortgage and, if the amount of the mortgage is equal to the sale price, the buyer may compel the vendor to redeem the mortgage and transfer the property to him free from the mortgage. Where the contract of transfer was subject to the responsibility of the vendor to apply for and to get the agricultural land converted into non-agricultural use and though he had not obtained such permission, the land in question was held to be specifically recoverable from him when, by virtue of an intervening statutory enactment, the vendee was able to get the land converted to his use.[423] Where the vendor sues the buyer for specific performance and the suit is dismissed on the ground of want of title or imperfect title, the vendee would be entitled to refund of his deposit along with interest and also costs and this claim will operate as a charge upon the interest, if any. of the vendor in the property.

13. Rights of purchaser or lessee against person with no title or imperfect title.—(1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely—

(a) **if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;**

(b) **where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;**

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[423] *Rojasara Ramjibhai v Jani Narottamdas Lallubhai, (1986) 3 SCC 300: AIR 1986 SC 1912.*

(c) **where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;**

(d) **where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject- matter of the contract.**

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

14. Contracts not specifically enforceable.—(1) The following contracts cannot be specifically enforced, namely—

a contract for the non-performance of which compensation in money is an adequate relief;

a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

a contract which is in its nature determinable;

a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause *(a)* or clause (c) or clause *(d)* of sub-section (1), the court may enforce specific performance in the following cases—

(a) **where the suit is for the enforcement of a contract,—**

(0 to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

(ii) to take up and pay for any debentures of a company; (.b)

where the suit is for—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or

(ii) the purchase of a share of a partner in a firm;

(c) where the suit is for enforcement of contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:—

***(i)* the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;**

***(ii)* the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and**

***(iii)* the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.**

Contracts which cannot be specifically enforced

The effect of the provisions in Section 14 can be stated in terms of certain propositions, namely, that in the case of the following contracts the relief of specific performance cannot be allowed:

1. ***Where Compensation is Adequate Remedy***

Courts will not order specific performance of a contract where the aggrieved party can be adequately compensated in terms of money. An ordinary contract to lend or borrow money whether with or without security is an example of a contract which cannot be specifically enforced, though where a loan has been already advanced on the understanding that a security would be provided against it, this can be specifically enforced.[56]

2. ***Contracts Involving Personal Skill***

It is not possible for the court to supervise the performance of a contract which rurt> into minute and numerous details or is dependent upon the personal qualifications of the promisor or is otherwise of volitional nature. Contracts of employment, contract of personal service, contracts involving performance of artistic skill, like contracts :

[56] Section 14(3). *Meenakshisundara* v *Rathnasami*, (1918) 41 Mad 959.

sing, to paint, to act, contracts of authorship, are ordinary examples of things requiring personal skill and, therefore, beyond the capacity of the judicial process to enforce their actual performance. The only choice in such cases is to be content with damages.[57] An employer may not be compellable to keep an employee in accordance with a contract of employment, but the position will be different where an employee has been removed, for, in that case, if the removal is wrongful, the employee can be reinstated. The Supreme Court, however, did not approve of an arbitrator's award reinstating a professor removed by the Delhi University.[58] A contract to publish a piece of music and a contract to build a house[59] have been specifically enforced because both are purely mechanical functions. It is observed in CHITTY ON CONTRACTS:[6]"

> **"But specific performance of a contract to build can be decreed if (/) the work is precisely defined; (*i i*) damages will not adequately compensate the plaintiff; and *{H i)* the defendant is in possession of the land on which the work is to be done so that the plaintiff cannot get the work done by another builder."[61]**

***Contracts involving personal, confidential and fiduciary service.*—The specific performance of a contract for personal, confidential and fiduciary service dependent on mutual trust, faith and confidence has been held to be barred from specific enforcement under S. 14(1)0), *(b)&(d).*[62]**

3. Contracts of Determinable Nature

Specific performance is not ordered of a contract which is in its nature determinable. An illustration appearing under the corresponding provision in the repealed Act of 1877 sufficiently explains this point:

> **A and B contract to become partners in a certain business, the contract did not specify the duration of the proposed partnership. The contract cannot be specifically**

Gunpat Narain Singh, Re, (1876) 1 Cal 74. contract of marriage; *Bansi Sah* v *Krishna Chandra,* AIR 1951 Punj 508, a lease carrying personal covenants for repair.

58 *S. Dutt (Dr)* v *University of Delhi,* AIR 1958 SC 1050: 1959 SCR 236. *Pearlite Liners (P) Ltd* v *Manorama Sirsi,* (2004) 3 SCC 172: 2004 SCC (L&S) 453: AIR 2004 SC 1373, private employment, oral appointment, the employee did not comply with order of transfer and sought declaration that the transfer was illegal, that her service and benefits must be maintained, and that the employer should be restrained from holding inquiry against her. The court said that such a relief, if granted, would amount to enforcing a contract of personal service, which is not possible under the law. *Shiv Kumar Tiwari* v *Jagat Narain Rai,* (2001) 10 SCC 11: AIR 2002 SC 211, a declaration given by a civil court that the person in question was a permanent lecturer in the college, no binding efficacy, set aside.

59 *Barrow* v *Chappel & Co* (unrep) cited in *Joseph* v *National Magazine Co,* (1959) Ch 14, *cited* in CHITTY ON CONTRACTS, p. 1645 (Vol 1, ^4th Edn, 1977).

60 *Ibid.,* at p. 1646.

61 Citing *Wolverhampton Corpn* v *Emmons,* (1901) 1 QB 515 as *modified* by *Carpenters Estates Ltd* v *Davies,* (1940) Ch 160; *Jeune* v *Queens Cross Properties Ltd,* (1974) Ch 97 (Landlord ordered to restore collapsed balcony in performance'of repairing covenant). [6] *Percept D'Mark (India) P Ltd* v *Zaheer Khan,* (2006) 4 SCC 227.

performed, for, if it were so performed, either A or *B* might at once dissolve the partnership.[63]

Similarly, no order of specific performance is likely to be passed when the contract is revocable at the option of the opposite party. A revocable lease is in this category.[64] But a tenancy from year to year, determinable by either party by half a year's notice to quit, is specifically enforceable.[65]

A contract of employment is not specifically enforceable. A person who was selected was not allowed to get the position to which he was selected. The Court observed: "Courts do not ordinarily enforce performance of contracts of a personal character, such as a contract of employment. The remedy is to sue for damages. The grant of specific performance is purely discretionary and must be refused when not warranted by the ends of justice. Such relief can be granted only on sound legal principles. In the absence of any statutory requirement, courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer. There are, of course, certain exceptions to this rule, such as in the case of a public servant dismissed from service in contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial Law; a statutory body acting in breach of statutory obligations, and the like. The facts of this case do not fall within the exceptions. Therefore, the plaintiff's suit for mandatory injunction, on the facts of the case, was rightly dismissed by the trial court and wrongly decreed by the first appellate court and the High Court."[66]

A distributorship was held to be determinable in nature. An order could not be passed for its restoration.[67] Where the plaintiff claimed that an agreement in his favour to run a restaurant was illegally terminated, the court said that the contract not being, specifically enforceable an interim injunction to restrain the termination could not be granted.[68]

63 Based on *Scott* v *Rayment*, (1868) LR Eq 112, otherwise where the agreement is for a definite term, *England* v *Curling*, (1844) 8 Beav 129: 68 RR 39.

64 *Lewis* v *Bond*, 18 Beav 85: 104 RR 377. *Oil and Natural Gas Corpn Ltd* v *Streamline Shipping Co P Ltd.* AIR 2002 Bom 420, a contract of hiring vessels for three years with the right reserved in the hirer to terminate it after one year, the court said that the hirer could not be prevented from exercising this right.

65 *Lever* v *Koffler*, (1901) 1 Ch 543.

66 *Nandganj Sihori Sugar Co Ltd* v *Badri Nath Dixit*, (1991) 3 SCC 54: 1991 SCC (L&S) 981: AIR 1991 SC 1525: (1991) 2 SLR 768: (1991) 2 CLR 135: 1991 All LJ 213. *M. K. Usman Koya* v *C.S. Santha*, AIR 2003 Ker 191, in a pending eviction proceeding, the landlord entered into an agreement with the tenant that even if a decree of eviction was passed, it would not be enforced and the parties would enter into a fresh tenanc} agreement. Even so, the tenant did not pay rent for 14 years and also did not pay the premium amount. It was also not clear what would be the terms of the new rent deed. Thus the tenant was not performing his part of the contract. He was not able to get an order from the court directing the landlord to execute the deed.

67 *Indian Oil Corpn Ltd v Amritsar Gas Service, (1991) 1 SCC 533.*
Vidya Securities Ltd v *Comfort Living Hotels P Ltd*, AIR 2003 Del 214; *Shanti Prasad Devi* v *Shankar Mahto*, (2005) 5 SCC 543: AIR 2005 SC 2905, a renewable lease was not allowed to be renewed against its terms for renewal.

4. Contract Requiring Constant Supervision

Clause (d) of Section 14(1) says that a contract cannot be specifically enforced where it involves the performance of a continuous duty which the court cannot supervise.

For this reason courts have refused specifically to enforce an undertaking by the lessor of a service flat to have a porter "constantly in attendance";[69] a tenant's undertaking to cultivate a farm in a particular manner;[70] the obligation of a railway company to operate signals and to provide engine power;[71] a contract to keep an airfield in operation;[72] the obligation of a shipowner under a charter party[73] and a contract to deliver goods by instalments.[74]

Where a tenant vacated a site for purposes of reconstruction under an understanding that a portion of the building would be reallotted to him, the court held that the landlord was bound to provide the premises as promised.[75]

Sub-section (3) qualifies to a certain extent the operation of the clauses dealing with situations where compensation is an adequate relief and where the contract is unilaterally revocable. It says that an agreement to provide a security or to execute a mortgage against a loan which has already been provided is specifically enforceable, if the borrower is not willing to pay back the loan at once. Where the lender has advanced only a part of the loan, he can claim specific relief only when he is ready and willing to advance the remaining part of the loan also. An agreement to take up, and pay for, the debentures of a company is also specifically enforceable. Agreements to execute a formal deed of partnership where the partners have already commenced business and to purchase the share of a partner in a firm are also specifically enforceable.

Construction Contracts [S. 14(3)(c)]

As for agreements for the construction of a building, the principles crystallised in English law have been adopted by sub-section (3)(c). The agreement will be enforceable if the nature of the building is of exact nature, the plaintiff has a substantial interest in the work and the work is also of such nature that it cannot be compensated for in terms of money and the defendant is in possession of the whole or a part of the site.

69 *Ryan v Mutual Tontine Assn, (1893) 1 Ch 116.*

70 *Rayner* v *Stone,* (1762) Edn, 123; *Phipps* v *Jackson,* (1887) 56 LJ Ch 550.

71 *Powell Duffryn Steam Coal Co v Taj] Vale Rly Co, (1874) LR 9 Ch App 331; Blackett v Bates, (1865) LR 1 ChApp 117.*

72 *Dowty Boulton Paul Ltd v Wolverhampton, (1971) WLR 204.* [3] *De Mattos v Gibson, (1858) 4 D&J 276: 124 RR 250.*

74 *Dominion Coal Co v Dominion Iron & Steel Co, 1919 AC 293.*

75 *Jaina Beevi v Govindaswami, AIR 1967 Mad 369.*

In a case before the Supreme Court,[76] the Authority which had to supervise the performance of the contract had ceased to exist. The Court said:

> **"There is also force in the contention that the agreement is not specifically enforceable in view of clause *(d)* of sub-section (1) of Section 14 of the Specific Relief Act 1963. This provision provides that a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise, is not specifically enforceable. Having regard to the nature of the Scheme and the facts and circumstances of the case, it is clear that the performance of the contract involves continuous supervision which is not possible for the court. After repeal, such continuous supervision cannot be directed to be undertaken by the competent authority as such an authority is now non-existent."**

Where the contract involved a project of public interest and the plaintiff was not able to prove any *prima facie* case in his favour and his loss was also ascertainable in monetary terms, the court refused to grant an injunction restraining the execution of a public project.[77]

Arbitration

Section 14 provides in sub-section (2) that, except as provided by the Arbitration Act. 1940, (now Arbitration and Conciliation Act, 1996) a contract to refer a present or future dispute to arbitration shall not be specifically enforced. An arbitration agreement operates as a bar to the filing of a suit.

Lack of free consent

Where the plea that the sale deed was executed under distress was not taken by the vendor in his written statement and this being a question of fact, it was not allowed to be raised for the first time in second appeal. The court found the sale agreement to be genuine and also supported by lawful consideration. The plea raised at this stage that the decree, If passed, would cause hardship to him, was not entertained.[78]

Family settlement

An agreement for transfer of property which was found to be a part of the settlement was held to be not bereft of consideration. The settlement is a consideration in itself. T'r = deed of settlement was produced. It carried the provision for the transfer in question. The court held that it could not be said that the settlement had not been proved. The decree of specific performance was passed.[79]

[76] *Her Highness Maharani Shantidevi P. Gaikwad v Savjibhai Haribhai Patel, (2001) 5 SCC 101: AIR 2CCi SC 1462.*

Envision Engineering v Sachin Infa Enviro Ltd, AIR 2003 Guj 164.

[78] *Ammi Sethi Chandram v Chodasani Suryanarayana, AIR 2003 AP 269.*

Kanigolla Lakshmanna Rao v Gudimella Ratna, AIR 2003 AP 241.

[79]

Agreement signed by one party

An agreement which was not signed by the vendee and was signed only by the vendor was held to be a concluded contract. The court said that what was necessary for enforceability was *consensus ad idem*. Suit for specific performance can be maintained even on the strength of an oral agreement.[8]"

Persons for or against whom Contracts may be Specifically Enforced [S. 15]

IS. Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

any party thereto;

the representative-in-interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative-in-interest, or his principal, has been accepted by the other party;

where the contract is a settlement on marriage, or a compromise of doubtful rights between the members of the same family, any person beneficially entitled thereunder;

where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;

a reversioner in possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant;

***if)* a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;**

(,g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

***(h)* when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:**

Mohd Abdul Hakeem v Naiyaz Ahmad, (2004) 3 CLT 137 (AP).

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

Assignee from legal heir

The expression "representative-in-interest" includes the assignee of a right to purchase the property and, therefore, he would have the title to claim specific performance.[424]

Lease or sale in favour of company before incorporation

Where a lease was granted in favour of a company before its incorporation and the promoters of the company, instead formed only a partnership, it was held that such partnership firm could not claim any rights or interest under clause (h) in the property. The lease deed was signed only by the lessor. The transaction was ineffective even otherwise.[425]

The promoters of an unincorporated company purchased certain property for the purposes of the company. Clause (h) provides that such lease can be enforced by the company after incorporation provided that it has accepted the contract and communicated its acceptance to the other party. In this case, after its incorporation, the company filed a suit against the seller for a declaration that the company was the owner of the property. The court said that this amounted an acceptance of the contract and communication to the other party. On the facts, however, the company could not get the relief of recovery of property because there was undesirable conduct of frivolous litigation on the part of both parties. The company was allowed compensation and refund of the earnest money with 12% interest.[426]

All buyers or contractees must join

In order to obtain the relief of specific performance, all co-contractees must be before the court but all of them need not be on the same side. Others can be joined as co-defendants. Where there is a single indivisible contract to convey land to several persons, some of them only cannot seek specific performance if the others do not want it. [427]

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[424] *T.M. Balakrishna Mudaliar* v *M. Satyanarayana Rao,* (1993) 2 *SCC* 740: AIR 1993 SC 2449; *Khiria Devi* v *Rameshwar Sao,* 1992 Supp (2) SCC I: AIR 1992 SC 1482, suit for reconveyance. *Ashok Kumar J. Pandya* v *Suyog Co-op Housing Society Ltd,* AIR 2003 (NOC) Guj 118: 2002 AIHC 3401, a clause in the agreement to sell subject to the condition that in case of rejection by the Government under Ceilings Act, the agreement would be treated as cancelled. Specific enforcement was not allowed when the agreement became cancelled by reason of the Government refusal. *Raghuvir Singh Bhatty* v *Ram Chandra Waman Subhedar,* AIR 2002 All 13, refusal of permission by ceiling Authority, repeal of Ceilings Act, legal hurdle removed, decree of specific performance could be passed. The purchaser had caused delay in applying for permission. Prices escalated in the meantime. Decree of specific performance not allowed.

[425] *Murari Ganguli v Kanailal Garni, AIR 2003 Cal 105.*

Jai Narain Parasrampuria v Pushpa Devi Saraf, (2006) 7 SCC 756.

Mukesh Kumar v Col Harbans Waratch, (1999) 9 SCC 380.

Personal bars to relief [S. 16]

The relief of specific performance cannot be awarded in favour of the following persons:

1. **A person cannot seek specific performance where the circumstances are such that he would not have been entitled to compensation for breach of contract.**
2. **A person who is guilty of any of the following cannot claim specific performance:**
   - **(a) he has become incapable of performing his part of the contract;**
   - **(b) he has violated any essential term of the contract that on his part remained to be performed;**
   - **(c) he has acted in fraud of the contract;**
   - **(d) he has wilfully acted at variance with or in subversion of the relation intended to be established by the contract.**
3. **A person who has failed to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which were to be performed by him excepting those terms which he has been prevented from performing by the other party or the performance of which the other party has waived.**

Where the contract involves payment of money, it is not essential for the plaintiff to actually tender to the other party or to deposit in court any money except when so directed by the court. Performance must be offered according to the true construction of the contract.

Before acting under Order 8, Rule 10 of the Civil Procedure Code, the court in a suit for specific performance has to scrutinise the facts set out in the plaint to find out whether all the requirements, in particular those indicated in .Section 16 of the Specific Relief Act regarding readiness and willingness, have been complied with or not.[85]

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

- **(a) who would not be entitled to recover compensation for its breach;**
- **(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or**
- **(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be per-**

"fe
Syed Dastagir v *T.R. Gopalakrishna Setty*, (1999) 6 SCC 337: AIR 1999 SC 3029. The court followed *R.C. Chandiok v Chuni Lai Sabharwal, (1970) 3 SCC 140.*

formed by him, other than terms the performance of which has been prevented or waived by the defendant.

***Explanation.*—For the purposes of clause (c),—**

***(i)* where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;**

***(it)* the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.**

Ready and Willing [CI. (c)]

Clause *(ii)* of the Explanation makes it necessary for a party claiming specific performance to aver and prove that he has been all the time ready and willing to perform his pan of the contract.[428] Continuous readiness and willingness to perform his part of the contract on the part of the plaintiff is a condition precedent for the grant of the relief. Where the plaintiff was found to be dabbling in real estate transactions without means to purchase the property and failed to pay the consideration money within the time given to him by the trial court, it was held that he was not ready and willing to perform his part.[429] Where a contract for sale of a house stipulated making of part-payment of purchase price within a specified period so as to enable the owner who was residing in the house to purchase a suitable residence by utilising the amount, it was held that the part-payment must be made within a reasonable time and failure to do so would seriously affect the proposed vendor's right to acquire an accommodation and show that the proposed vendee was nc: ready and willing to perform his part of the contract. The court said that the grant of i decree for specific performance in the circumstances would amount to an instrument e: oppression giving an unfair advantage to the proposed vendee which the court should tak; care to avoid.[430]

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428 *Gajanan Jaikishan Joshi* v *Prabliakar Mohanlal Kalwar,* (1990) 1 SCC 166; *Sukhbir Singh* v *Brij F-.* (1997) 2 SCC 200, the fact that the party was present in the Sub-Registrar's office with necessary funds v _ held to be a proof of the party's readiness and willingness. The plea that the vendee did not show readines and willingness can be taken by vendor only and not by the subsequent buyer. *Jugraj Singh* v *Labh Sin:'.* (1995) 2 SCC 31: AIR 1995 SC 945. *T. Mohan* v *Kannammal,* (2002) 10 SCC 82, the vendor parted v. possession in favour of the purchaser even before the expiry of the period, the requirement of being re- and willing lost its significance. The finding of the High Court was held lo be justified that the purchase satisfied the legal requirement of being ready and willing. *N.P. Thirugnanam* v *R. Jagan Mohan Rao,* (1995) 5 SCC 115.

430 *P.R. Deb and Associates* v *Sunanda Roy,* (1996) 4 SCC 423: AIR 1996 SC 1504. The court followed C *Rani* v *Kamal Rani,* (1993) 1 SCC 519: AIR 1993 SC 1742; *Sunil D. Chedda* v *Suresh Bansilal Sethi, '.* Supp (1) SCC 231: AIR 1992 SC 1200. injunction for restraining alienation of property pending suit. Supreme Court relied on this decision and held that the expression 'representatives in interest' would inc! transferees and assignees from the contract party in whose favour the right exists. An implied prohibitioe such a transaction could not be inferred under S. 15(6) unless the document itself clearly indicated sir restriction. The court said that the fact that the document mentioned only parties and their legal heirs an; assignees or transferees would not mean that the right of repurchase available to the benefit of the ori

In a suit, for specific performance of a contract for sale of land, the readiness and willingness of plaintiff to perform his part of the contract is to be ascertained from his conduct and attending circumstances. Where the plaintiff neither had sufficient funds to pay the consideration amount nor was he acting promptly within the stipulated time where time was the essence of the contract, it was held that he was neither ready nor willing to perform his part of the contract. Hence he was not entitled to a decree for specific performance of the contract.[89] Where the vendee sent a legal notice rescinding the contract and filed a suit for refund of advance paid and that was decreed by the trial court, his application for revision and for specific performance was dismissed. The court said that it would not lie in his mouth to say that he was ready and willing to go ahead with performance from his side.[90]

A person who makes himself a party to an illegal contract cannot enforce his rights under this section.[91]

Where one of the terms of an agreement for sale was that the appellants would withdraw their suit for specific performance and the suit was not withdrawn, it was held that the appellants-plaintiffs could not be said to be ready and willing to perform their part of the agreement. The finding in the impugned judgment that the condition regarding withdrawal of the suit was a condition precedent, was also correct. As the appellants did not withdraw the suit they could not be said to be ready and willing to perform their part of the agreement. For this reason also the claim for specific performance could not have been enforced.[92]

Averment as to readiness and willingness in a plaint has been held to be sufficient if the plaint, read as a whole, clearly indicates that the plaintiff was always and is still ready and willing to fulfil his part of the obligations. Such averment is not a mathematical formula capable of being expressed only in certain specific words or terms.[93] The Court said:

contracting party was not assignable. The assignee was accordingly allowed to claim specific performance. *Shyam Singli* v *Daiyao Singh*, (2003) 12 SCC 160: AIR 2004 SC 348.

89 *His Holiness Acharya Swcimi Ganesh Dassji* v *Sita Ram Thapar*, (1996) 4 SCC 526: AIR 1996 SC 2095: *Jagdish Singh* v *Natthu Singh*, (1992) 1 SCC 647: AIR 1992 SC 1604. on the question of "ready and willing".

90 *Pukhraj D. Jain* v *G. Gopalakrishna*, (2004) 7 SCC 251: AIR 2004 SC 3504.

91 *I.T.C. Ltd v George Joseph Fernandes, (1989) 2 SCC 1: AIR 1989 SC 839.*

Bishandayal and Sons v *State of Orissa*, (2001) 1 SCC 555: AIR 2001 SC 544; *Ram Kumar Agarwal* v *Tha- war Das*, (1999) 7 SCC 303, a person who falsely claimed to have paid a part of the money cannot be said to be ready and willing. *Syed Dastagir* v *T.R. Gopalakrishna Setty*, (1999) 6 SCC 337: AIR 1999 SC 3029, deposit of money in court without court order cannot go against the person seeking relief. 93 *Motilal Jain* v *Ramdasi Devi*, (2000) 6 SCC 420: AIR 2000 SC 2408; *Ajaib Singh* v *Tulsi Devi*, (2000) 6 SCC 566: AIR 2000 SC 2493, default in payment of instalment, readiness and willingness not proved. *A. Abdul Rasliid Khan* v *P.A.K.A. Shahul Hamid*, (2000) 10 SCC 636, acting in accordance with the terms of the contract, no delay and, therefore, ready and willing. *Boramma* v *Krishna Gowda*, (2000) 9 SCC 214, concurrent finding of fact by three lower courts as to readiness and willingness. *Manjunath Anandappa* v *Tammanasa*, (2003) 10 SCC 390: AIR 2003 SC 1391, plaintiff neither made his averment of being ready and willing to pay the price, rfor asked the defendant to execute the sale deed tendering the price but serving a bare notice, and that too on power of attorney holder whose power was known to the plaintiff to have

"An averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale.

In the instant case, a perusal of the plaint does clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. The appellant-plaintiff had parted with two-thirds of the consideration at the time of execution of the agreement for sale. There is no reason why he would not pay the balance of one-third consideration to have the property conveyed in his favour."[94]

The judgment of the High Court was set aside and the judgment and decree of the trial court were restored.

Where the plaintiff showed that he was ready and willing to pay the purchase price and continued to be so, the failure to plead that he had money in the bank and had not withdrawn it, was immaterial because this was a matter of evidence and had not to be pleaded.[95]

When the purchaser had not sent any communication to the vendor regarding his readiness and willingness, had paid only an insignificant amount as advance, had not obtained permission from Ceiling Authorities, had taken no steps towards the valuation of the superstructure on the land as required under the sale agreement, neither led evidence nor entered the witness box in support of his willingness, the Supreme Court held that the High Court had rightly upheld the dismissal of his suit for specific performance.[96]

been revoked, the same was also not registered and he was also not competent to execute, the sale deed held, requirement of section not satisfied. *M.S. Madhusoodhanan* v *Kerala Kaumudi (P) Ltd*, (2004) 9 SCC 204: AIR 2004 SC 909, agreement between members of a private company for transfer of shares on the death of a member, suit filed within 10 months of the death of the widowed mother, could not be said to be delayed. *Rameshwar Prasad* v *Basanti Lai*, (2008) 5 SCC 676, there was averment in the plaint that the plaintiff was ready and willing to do his part, the court said that this could not have been ruled out by the fact that there was no specific averment to pay interest as contemplated in the agreement.

94 *Deendayal* v *Harjot Kanwar*, AIR 2003 Raj 202, the vendor postponed the purchaser's request for execution of sale deed by saying that her husband was not well, he filed the suit just after one month from the date of refusal, the court said that the purchaser was ready and willing to complete the transaction. The second purchaser was not found to be in a state of bona fides. *Manohar Lai* v *Maya*, (2003) 9 SCC 478: AIR 2003 SC 2362, the purchaser paid only a paltry sum by way of earnest money, not allowed relief of specific performance, allowed costs up to the High Court to the extent of success.

95 *Rakha Singh v Babu Singh, AIR 2002 P&H 270.*

96 *Pushparani S. Sundaram* v *Pauline Manomani James*, (2002) 9 SCC 582. *P. Purushottam Reddy* v *Pratap Steels Ltd*, (2002) 2 SCC 686: AIR 2002 SC 771, in a suit for specific performance, the High Court decided it without considering in accordance with the law laid down by the Constitution Bench of the Supreme Court is *Chand Rani* v *Kamal Rani*, (1993) 1 SCC 519: AIR 1993 SC 1742, this was held to be not proper.

The making of a conditional offer for payment of the stipulated amount does not fulfil the requirement of law contained in Forms 47 and 48 of Appendix A to the Civil Procedure Code.[431] Depositing of any amount in the court at the appellate stage would not meet the requirement of S. 16(c).[432] Where the land under sale was mortgaged to the bank and the buyer had agreed to pay back the loan and redeem the mortgage but he did nothing in that direction nor showed any inclination to do so, rather he was appropriating the usufruct of the land to himself, the Supreme Court held that he was not ready and willing to perform his part.[433]

Default of first buyer available as defence to subsequent buyer

The fact that the buyer defaulted with payment and was, therefore, not ready and willing to perform, which is a defence available to the seller, would also be available to the second buyer. An appeal being a continuation of the proceedings the subsequent purchaser was allowed to take that defence.[434]

Selling or letting property without title [S. 17]

A person who contracts to sell or let out immovable property with knowledge that he has no right to do so cannot ask for specific enforcement in his favour. This will be so even if he honestly believed that he had the title but is not able to give at the time of performance a title free from reasonable doubt. The same principle is applicable to sale or letting of movable property also. Section 17 is as follows:

17. Contract to sell or let property by one who has no title, not specifically enforceable.—(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall not apply, as far as may be, to contracts for the sale or hire of movable property.

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431 *Umabai* v *Nilkantha Dhondiba*, (2005) 6 SCC 243: (2005) 4 Mah LJ 306, the mere statement in the plaint or in the written statement of being ready and willing is not sufficient in itself. The entire set of attending circumstances has to be examined to ascertain the real position. The onus to this lies on the plaintiff even though not required by the defendant to do so.

432 *Ibid*, raising of the plea of specific performance of the contract for reconveyance and the alternative plea of cancellation of the debt or a decree for accounting, inconsistent, not permissible. *R.K. Parvatharaj Gupta* v *K. C. Jayadeva Reddy*, (2006) 2 SCC 428: (2006) 3 Mah LJ.
Ram Awadh v *Achhaibar Dubey'*, (2000) 2 SCC 428: AIR 2000 SC 860.

Where performance not possible without variation [S. 18]

Where the contract is in writing and, as against the party seeking specific performance, the other party sets up the defence of variation, then in the following cases specific performance cannot be awarded:

(a) where by reason of fraud, mistake of fact or misrepresentation, the written contract is different from what the parties agreed to, or does not contain all the terms on the basis of which they entered into the contract;

(.b) where the object of the parties was to produce a certain legal result which the contract, as framed, is not calculated to produce;

(c) where the parties have varied the terms of the contract subsequent to its execution.

The provisions of Section 18 are as follows:

18. Non-enforcement except with variation.—Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, with the variation so set up, in the following cases, namely—

(.a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;

(.b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;

(c) where the parties have, subsequently to the execution of the contract, varied its terms.

Where a part of the property was inalienable on account of being excess land under a ceiling legislation and another part was inalienable because of acquisition by the State, it was held that the buyer could not seek specific performance of such a contract in respect of the remaining portion of the property only. The court said that such a situation was not covered by Section 18.[101]

The word "court" includes an "arbitrator". Only because Section 20 confers discretion on courts to grant specific performance it does not mean that the parties cannot agree that the discretion may be exercised by a forum of their choice.[102]

[101] *K. Narendra* v *Riviera Apartments (P) Ltd,* (1999) 5 SCC 77: AIR 1999 SC 2309.

[102] *Olympus Superstructures (P) Ltd v Meena Vijay Khetan, (1999) 5 SCC 651: AIR 1999 SC 2102.*

Relief against parties, legal representatives or subsequent transferee [S. 19]

Section 19 provides that the relief of specific performance can be obtained against the following parties:

1. **against either party to the contract;**
2. **against any other person who claims title arising subsequently to the contract, but not against a transferee for value who paid for the property in good faith and without notice of the original contract;**
3. **against any person claiming under a prior title which was known to the plaintiff, where the title was such that it could have been displaced by the defendant;**
4. **against a new company which arises out of the amalgamation of the transferor company;**
5. **against a company whose promoters entered into a contract for the purposes of the company before its incorporation, provided that the contract is warranted by the terms of the incorporation of the company.**

The section is cast in the following terms:

19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Parties claiming title under original owner

Subsequent bona fide buyer

Under Section 19*(b)* of the Specific Relief Act, 1963, a specific performance of a contract can be enforced not only against either party thereto but against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of original contract. Further, Section 91 of the Indian Trusts Act, 1882 lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which a specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. In a case defendants 4 to 7 had notice of the contract between the plaintiff and Defendant 1 and they were not bona fide purchasers, therefore, the High Court was quite justified in passing a decree against them as well.[435]

In the case of a bona fide purchaser in good faith for value without notice of the original contract between persons in actual possession and owner of the property, it was held by the Supreme Court that in order to establish his bona fides such purchaser must show that he had made appropriate enquiries.[436] The Court said:

> **"Section *19(b)* of the Specific Relief Act, 1963 protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of an exception to the general rule. Hence, the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of ths Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty."**

"A transferee for value, who has paid his money in good faith and without notice of th; original contract, is excluded from the purview of clause *(b)* of Section 19 of the Specifi, Relief Act providing for specific performance against "any other person claiming unde him by a title arising subsequently to the contract". In order to fall within the exclude class, a transferee must show that:

(a) he has purchased for value the property (which is the subject-matter of the su for specific performance of the contract);

(b) he has paid his money to the vendor in good faith; and

(c) he had no notice of the earlier contract for sale (specific performance of whi. is sought to be enforced against him).

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435 *Vasantha Viswanathan* v *V.K. Elayalwar,* (2001) 8 SCC 133. For another authority see *Jagan Nath* v *Jagc Rai,* (1998) 5 SCC 537: AIR 1998 SC 2028.

R.K. Mohd. Ubaidullah v *Hajee C. Abdul Wahab,* (2000) 6 SCC 402. *Nathan* v *Nekhu Ram,* AIR 2004 20, no enquiries made by the second buyer to satisfy herself, she also refused to step into the witness b Suit of the first buyer was decreed. There was no laxity on his part.

The said provision is based on the principle of English law which fixes priority between a legal right and an equitable right. This principle is embodied in Section 19*(b)* of the Specific Relief Act.[105]

Where these requirements were not satisfied, by the subsequent buyer, the court said that specific performance could be granted against the subsequent transferee. He could be directed to reconvey the property to the original buyer or the sale to the subsequent buyer may be set aside, the property revested in the original seller who may then transfer it to the first buyer. The second buyer may also be ordered to pay compensation to the first buyer.[106]

"Notice" may be (?) actual, *(it)* constructive, or *(Hi)* imputed. Under Section 3, Transfer of Property Act and *Explanation II* thereof, a statutory presumption of "notice" arises against any person who acquires any immovable property or any share or interest therein of the title, if any, of the person who is for the time being in actual possession thereof.

The principle of constructive notice of any title, which a tenant in actual possession may have, was laid down by Lord Eldon in *Daniels* v *Davison.*

"In the present case, the purchasers have acquired a legal right under the sale deed. The right of the tenant under it, if it is true and valid, though earlier in time, is only an equitable right and it does not affect the purchasers if they are bona fide purchasers for valuable consideration without notice of that equitable right."[107]

Where the first purchaser was a tenant in possession, but did not comply with the agreement for one year and nine months, his contention that the second purchaser, in order to establish his *bona fides,* should have enquired from him as to the nature of his possession, the court said that it was not necessary to make any inquiry from the pension in possession.[108]

Where there are unnatural circumstances which may put the purchaser on his guard, an inquiry from the person actually in possession may become necessary in order for the second buyer to establish his *bona fides.* In this case the price of the land was less than

105 *Rajan* v *Yunuskutty,* AIR 2002 Ker 339, oral agreement the plaintiff filed a piece of paper on which some amount and date were written in support of the alleged oral agreement. The owner executed a sale deed in favour of another person, who was not aware of the pendency of the suit. He was protected by S. 19. Plaintiff not allowed any relief. *Aslian Devi* v *Phulwasi Devi,* (2003) 12 SCC 219: AIR 2004 SC 511, objection allowed to execution of *ex parte* decree by a third party purchasers who claimed that he was in possession of the vacant land under a registered sale deed; their names were also mutated in Municipal records, they would be dispossessed by delivery of possession to the decree-holder. The fact that they were physically there when the property was handed over to the decree was held to be immaterial. *Ranganatha Gounder* v *Sahadeva Gounder,* AIR 2004 Mad 520, a subsequent buyer to whom the property was handed over under registered sale deed and who was not aware of the earlier agreement acquired good title. The buyer under that agreement did not pay the balance money for long and did not object to the subsequent sale except after *2½* years.

106 *Rajendra Kantilal Dalai* v *Bombay Builders Co (P)Ltd,* AIR 2002 Bom 408 .The court referred to the following authorities: *Durga Prasad* v *Deep Chand,* AIR 1954 SC 75, alternative modes of relief explained; *Kali Charan* v *Janak Deo,* AIR 1932 All 694, cancellation of the subsequent sale followed by necessary orders. *Ram Niwas* v *Bano,* (2000) 6 SCC 685: AIR 2000 SC 2921.

Vijay Bhadur v Surendra Kumar, AIR 2003 MP 117.

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2/3rd of the price for which the land had been agreed to be sold earlier. The second purchaser did not seem to have any intention of making enquiry about the encumbrance. The matter of the land must have become a talk of the village because the first purchaser was put into possession and subsequently dispossessed. The second purchaser could not have been ignorant about all that. The burden of proof was on him to show that he was a bona fide purchaser for value and without notice.[437]

Acquiring title during pendency of suit

Where a person purchasers a property which had already been sold earlier and a suit about that sale is pending, he does not have the right to say that he is a *bona fide* buyer for value. Such transfer is hit by the principle of *lis pendense.*[na]

Discretion and powers of court [S. 20]

20. Discretion as to decreeing specific performance.—(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion no: to decree specific performance—

> where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contrac: was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;
>
> where the defendant entered into the contract under circumstances whic'r though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed : constitute an unfair advantage within the meaning of clause *(a)* or hardship within the meaning of clause (b).

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***Explanation* 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.**

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Discretion

Section 20 of the Specific Relief Act further lists certain circumstances in which the court may at its discretion refuse specific enforcement. The section opens with the remark that the jurisdiction to decree specific performance is discretionary and the court is not bound to give such relief merely because it is lawful to do so. The section, however, immediately adds that such discretion shall not be arbitrarily exercised. It has to be exercised on sound and reasonable basis. Its exercise shall be guided by judicial principles and shall be open to correction by a court of appeal."[1] A person seeking equitable relief should come with clean hands. Where the plaintiff's case was based on certain false and incorrect facts, the relief of specific performance was not granted to him."[2] Specific recovery of property was granted where the buyer was all the time ready and willing to perform his part of the contract and had filed a suit for specific performance and yet the property was sold to another person who was not a bona fide buyer.[438] Where the vendor alleged that the land was mortgaged to a bank and was, therefore, not transferable, but there was a concurrent finding of the courts below that the mortgage stood discharged on repayment of the loan, the bar to transfer ended, the court held that the purchaser was entitled to seek specific performance of the agreement with him.[439]

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[438] *Pirthi* v *Jati Ram*, (1996) 5 SCC 457.

[r*] *hdrapal v Sham Shankar Lai, AIR 2002 All 243.*

Where the owner of the property in question agreed to sell it subject to approval under an applicable ceiling legislation but the same was rejected and the authorities permitted transfer in favour of a co-operative society, it was held that the society having had no notice of the earlier transfer, it obtained a good title in good faith for a valuable consid

eration. The first buyer was not entitled to any relief except that of refund of advance amount.[115]

The Supreme Court has restated the factors which have to be kept in mind in exercising the discretionary power."[6]

(1) Whether the plaintiff was ready and willing to perform his part of the contract in terms of S. 16;

(2) Whether it was a case for exercise of discretion by the court for decreeing specific performance under S. 16;

(3) Whether there were laches on the part of the plaintiff in approaching the court.

In some cases it will be substantive question of law as to whether discretion is to be exercised or not.

No discretion was exercised in favour of a person to whom lease of two properties was promised and of which possession having been given of one, he made illegal reconstruction and, therefore, possession of the other was not given. In such circumstances also there was no question of awarding him any compensation.[117]

Buyer with notice of previous sale

A sale agreement was made with the plaintiff for discharging family debts. Possession was handed over on the date of the agreement. Subsequent to this a sale deed was executed in favour of a third party in respect of the same property. The latter was made aware of the first agreement. The court held that it could not be said that the third party acted in good faith. The plaintiff also produced the mortgage deed and the fact of payment for redemption of the mortgage was endorsed on it. The third party did not produce any such discharged mortgage bond. The court accordingly allowed the plaintiff to enforce the agreement against the third party buyer also.[118]

"Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court.

115 *F.mani Krishna Rao* v *Vijaya Chitra Films*, AIR 2003 (NOC) AP 142: 2003 AIHC 334; *Sargunam* v. *Chidambaram*, (2005) 1 SCC 162, manner of exercising discretion explained. *K.G. Arumugham* v *K.A. Chinnappan*, (2005) 2 SCC 793, role of discretion explained.

116 *Rajesliwari* v *Puran Indoria*, (2005) 7 SCC 60; *K.G. Arumugham* v *K.A. Chinnappan*, (2005) 2 SCC 793. the purchasers by their default and long lapse of time allowed third-party rights to set in rendering specific performance in their favour to be inequitable and unjust.

117 *Subhadra Rani Pal Choudhary* v *Sheirly Weigal Nain*, (2005) 5 SCC 230: AIR 2005 SC 3011; *Surinder Singh* v *Kapoor Singh*, (2005) 5 SCC 142, the court has to see in whose favour equity lies.
Jammula Rama Rao v *Meria Krishnaveni*, AIR 2003 NOC 134 (AP): 2003 AIHC 106; *Sargunam* \ *Chidambaram*, (2005) 1 SCC 162: AIR 2005 SC 1420, the second buyer had notice of the first sale, not allowed specific relief.

The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and the appellate court seriously flawed in its decision. Therefore, it is held that the respondent is not entitled to a decree of specific performance of the contract.""[9]

Discretion should be exercised in accordance with justice, equity, good conscience and fairness to both the parties.[120] Where in suit for specific performance filed by the respondent in 1970, alternative relief of Rs 12,000 as damages was also claimed, and the defendant-appellant was then prepared to pay Rs 10 lakhs as alternative relief, it was held that the decree for specific performance at this distance of time would be unrealistic and unfair. Hence, an alternative relief of payment of Rs 10 lakhs was ordered.[121]

Sub-section (2) then enumerates situations in which the court can properly at its discretion refuse to order specific performance.

1. Unfair Contracts

The court may refuse specific performance where a contract gives an unfair advantage to the plaintiff over the defendant. The unfairness of the contract may appear from the terms of the contract, from the conduct of the parties at the time of entering into the contract, or other surrounding circumstances. It is not necessary that the contract should be voidable. It is enough if it is exploitative. An ordinary example would be a case where a signature is obtained under a state of utter surprise or drunkenness.[122] Where a person contracted to purchase a leasehold estate, the seller suppressing information that the landlord had served notice for repair of a dilapidated portion, specific performance was denied to the seller although the suppression was not sufficient in itself to allow rescission to the buyer.[123] Inadequacy of consideration may not be sufficient in itself unless it is

119 *A.C. Arulappan v Ahalya Naik, (2001) 6 SCC 600.*

120 *Ameer Mohammed* v *Barkat Ali,* AIR 2002 Raj 406, discretion to be based on sound and reasonable judicial principles and not to be exercised arbitrarily. On facts, however, the oral agreement could not be proved. *Sardar Singh* v *Krishna Devi*, (1994) 4 SCC 18: AIR 1995 SC 491: AIR 1994 SCW 4729, role of discretion explained. *K. Narendra* v *Riviera Apartments (P) Ltd,* (1999) 5 SCC 77: AIR 1999 SC 2309: AIR 1999 SCW 2378, contract became frustrated because of repeated rejection of necessary permissions and approvals. *Manjunath Anandappa* v *Tammanasa,* (2003) 10 SCC 390: AIR 2003 SC 1391 suit filed six years after date of agreement to sell and that too when the suitor came to know that the land had been sold to someone else, though time was not of the essence, he should have approached the seller and the court within a reasonable time, having regard to his conduct, discretionary relief was refused to him.

121 *Nahar Singh* v *Harnak Singh,* (1996) 6 SCC 699. *Arjun Paradeepak* v *G. Vani,* AIR 2003 AP 468 (NOC), the seller was always ready and willing, buyer was guilty of laches, he never treated time to be an essential factor, he also suffered no loss because there was no price rise, the seller allowed to enforce the sale against the buyer. *Puslipagiri Mull* v *Indiramma,* AIR 2003 AP 379, the plaintiff paid only the advance money and sought specific relief and also prayed for any other relief, the court allowed refund of money with ***6%*** interest. *Shamsu Suhara Beevi* v G. *Alex,* (2004) 8 SCC 569, award of damages along with specific performance in discretion of court.

122 *Walters* v *Morgan,* (1861) 4 LT 758 a person induced to sell property which he had just purchased and not being able to know its real value; *Mallins* v *Free Man,* (1837) 6 LJ Ch 133, drunkenness. [23] *Beyfus* v *Lodge,* (1925) Ch 350.

shocking and it appears that the defendant has taken advantage of his superior bargaining position.[440]

The conduct of the person claiming specific relief also has an important bearing upon the discretion of the court. Specific relief has been refused on this ground to persons who induced others to enter into contracts with them by holding out oral assurances which they did not fulfil though such assurances may not be expressed in the contract.[441] **A person purchased another man's right to certain property but the sale could not be completed because of the death of the seller before the execution of the sale deed. Subsequently the purchaser acquiesced in the widow of the seller disposing of the same property to another person. Subsequently still, the original purchaser disposed of his rights under the contract to another person who instituted the present proceedings to specifically recover the property. The Supreme Court did not favour him with a decree of specific performance. The original buyer had lost or waived his rights by virtue of his acquiescence. The transferee of his rights had no better rights than the letter's rights. Thus he was only entitled to recover the advance-money.**[442]

Contingent contracts.—In an agreement for sale of land, the condition was that the sale deed would be executed after the seller obtained permission for use of the land as village land. It was held that the contract was not contingent. It was specifically enforceable. The suit filed within three years after obtaining permission was not time-barred.[443]

The seller cannot sue for the price unless he obtains the necessary permissions first.[444]

According to a decision of the Supreme Court subsequent events can also be taken into account in exercising discretion under the section. [445] **The court said:**

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[440] *Falcke* v *Gray*, (1859) 29 LJ Ch 28: 112 RR 493; 5. *Rangaraju Naidu* v *S. Thiruvarakkarasu*, 1995 Supp (2) SCC 680: AIR 1995 SC 1769; *S.V.R. Mudaliar* v *Rajabu F. Buhari*, (1995) 4 SCC 15: AIR 1995 SC 1607. inequitable conduct in assigning rights under the contract; *Jai Narain Parasrampuria* v *Pushpa Devi Saraf.* (2006) 7 SCC 756, inadequacy of consideration is not in itself a ground for refusing specific relief.

[441] *Handley Page Ltd* v *Commrs. of Customs and Excise*, (1970) 2 Lloyd's Rep 459, specific relief was resorted to in order to escape a set-off; *Lamare* v *Dixon*, (1873) 6 HL 414, oral promise to induce contract. *Surya Narain Upadhyaya* v *Ram Roop Pandey*, 1995 Supp (4) SCC 542: AIR 1994 SC 105, a failure to make up the deficiency in court fee, an indication of inability to pay consideration.

[442] *Parakunnan Veetill Joseph's Son Matliew v Nedumbara Kuruvila's Son, 1987 Supp SCC 340: AIR 1987 SC 2328.*

[443] *Rojasara Ramjibhai* v *Jani Narottamdas Lallubhai*, (1986) 3 SCC 300: AIR 1986 SC 1912: 1986 2 SCR 447.

[444] *Nathulai* v *Phoolchand*, (1969) 3 SCC 120: AIR 1970 SC 546: (1970) 2 SCR 85. *Chandnee Widya Vat Madden* v C. *L. Katial*, AIR 1964 SC 978: (1964) 2 SCR 495; *Ramesh Chandra Cltandiok* v *Chuni La. Sabharwal*, (1970) 3 SCC 140: AIR 1971 SC 1238, the court has jurisdiction to order the vendor to apply for permission within a certain time and effect the transfer after such permission. *M. V. Shankar Bhat* v *Clauc-: Pinto*, (2003) 4 SCC 86: AIR 2004 SC 636: (2003) 1 CLT 270, an agreement to sell immovable property obtained under a will subject to ratification by coheirs, held not an enforceable agreement.
M. Meenakshi v Metadin Agarwal, (2006) 7 SCC 470.

Hence, where the agreement to sell land stipulated that it was subject to grant of permission by the competent authority under the Urban Land (Ceiling and Regulation) Act, 1976 and the authority refused to grant such permission, it was held that such order of the competent authority should have been necessarily taken into consideration to decide as to whether to exercise the discretionary jurisdiction to direct specific performance of the agreement or not. Till the order of the competent authority stood, decree for specific performance could not be granted.

Contracts Incomplete.—Where in an agreement for sale of flats, there was no consensus between the parties as to the price payable, the court said specific performance could not be ordered. The builder was directed to refund the amount received from the purchaser and thereafter he was to vacate the flats. The court also said that the discretion in the grant of specific performance has to be exercised on sound judicial principles and not arbitrarily. The plaintiff must prove beyond doubt the existence of a valid and enforceable contract.[130]

2. Hardship

Specific enforcement is refused where it would cause considerable hardship to the defendant which he did not foresee, whereas non-performance would cause no such hardship to the plaintiff. Specific enforcement was not granted where the buyer of land for farming purposes found it to be landlocked from all sides without any right of way;[131] where the cost of performance to the defendant was wholly out of proportion to the benefits to the plaintiff;[132] and where it involved litigation with uncertain results to enable the defendant to perform.[133]

Ordinarily, the fact that the performance would cause severe hardship to the defendant has to be considered on the basis of facts existing at the time of the contract. And where the plaintiff has caused the hardship by his subsequent conduct, that would also be taken :nto account. The explanation gives effect to this principle. Where the grant of specific elief would have resulted in a special hardship to the defendants who had already built ostly structures on the land in question, it was held by the Supreme Court that Section -0(2)(£>) should be invoked even though the plaintiffs were ready and willing to perform e contract and it were the defendants who committed breaches of the contract. Accord- gly, instead of executing the sale deed in favour of the plaintiffs, the defendants were irected to pay to the plaintiffs the specified present value of the land in instalments.[134] e jurisdiction under Section 20 of the Specific Relief Act, 1963 to decree specific per- ormance is discretionary and the court is not bound to grant such relief merely because

Mirahul Enterprises v *Vijayct Srivastava,* AIR 2003 Del 15. *Manohar Lai* v *Maya,* (2003) 9 SCC 478: AIR 2003 SC 2362, the contention of the seller lady that her thumb impression was taken on same blank paper, the court said that it could not be brushed aside, refund of consideration allowed. *' Denne* v *Light,* (1857) 26 LJ Ch 459. *Morris* v *Redland Bricks Ltd,* 1979 AC 652. *Wroth* v *Tyler,* (1974) Ch 30.

Damacherla Anjaneyulu v Damcherla Venkata Seshaiah, 1987 Supp SCC 75: AIR 1987 SC 1641.

it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee, while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.[446]

Where the purchasers had purchased the property some 25 years before the case reached the Supreme Court and had spent huge sums of money on improvements, it was held that decreeing the suit in favour of the opposite party would have meant hardship to the purchasers. Therefore, compensation was awarded in favour of the opposite party.[447]

Price Escalation.—"Where the court is considering whether or not to grant a decree for specific performance for the first time, the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. But in this case, the decree for specific performance has already been passed by the trial court and affirmed by the first appellate court. The only question before the Supreme Court was whether the High Court in second appeal was correct in reversing the decree. Consequently the principle enunciated in *K.S. Vidyanadam* will not apply."[448]

In another case, the Supreme Court observed:

> **"The grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principles of justice, equity and good conscience.**
>
> **The court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered.**
>
> **In view of the clear finding of the High Court that the appellant tried to wriggle out of the contract between the parties bccause of escalation in prices of real estate properties, the respondent is held entitled to get a decree as he has not taken any undue or unfair advantage over the appellant. It will be inequitable and unjust at this point of**

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[446] *K. Narendra* v *Riviera Apartments (P) Ltd*, (1999) 5 SCC 77: AIR 1999 SC 2309. *A. Maria Anledena* v A *G Balkis Bee*, (2002) 9 SCC 597: AIR 2002 SC 2385: plea of hardship not raised in the written statement, raise; for the first time before the Appellate Court, concurrent finding of Lower Courts of the plaintiff being read> and willing, no interference in the decree of specific performance.

[447] *V. Muthusami* v *Angammal*, (2002) 3 SCC 316: AIR 2002 SC 1279.

[448] *V. Pechimuthu* v *Gowarammal*, (2001) 7 SCC 617: AIR 2001 SC 2446. The decision in *K.S. Vidyanadam* v *Vairavan*, (1997) 3 SCC 1 was distinguished on facts. *Gobind Ram* v *Gian Chand*, (2000) 7 SCC 548: AIR 2000 SC 3106: AIR 2000 SCW 3468, further sum directed to be paid for securing order of performance.

time to deny the decree to the respondent after two courts below have decided in favour of the respondent.'"[38]

3. Inequitable, Unconscionable

Where the circumstances of a contract are such that, though they do not make the contract voidable, they definitely render specific enforcement inequitable, the contract is one-sided, an imposition by one upon the other, the parties are not on equal footing, are some of the circumstances which the court keeps in mind in considering whether an order of specific enforcement would give rise to inequitable results. One of the illustrations appended to Section 22 of the repealed Act of 1877 affords an example. *A* contracts with *B* to buy from *B's* manufactory and not elsewhere all the goods of a certain class used by him in his trade. The court cannot compel *B* to supply the goods but if he does not supply them, *A* may be ruined, unless he is allowed to buy them elsewhere. *B* cannot specifically enforce the contract against A.[139]

"The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

From the terms and conditions adumbrated in the second agreement it is clear that the respondent had been trying to take unfair advantage of the appellant and that the circumstances in which this agreement was executed was within a short period of termination of the first contract by the respondent, make it highly probable that the appellant might not have readily agreed to this contract.

There are other circumstances also to hold that the plaintiff-respondent had not approached the court with clean hands. It is clear that she had been trying to get possession of the house even before execution of the sale deed, for which she had apparently colluded with the tenant. Moreover, the appellant in this case was clearly in impecunious

138 *Gobind Ram* v *Gian Chand,* (2000) 7 SCC 548. The court *relied* on *Parakunnan Veetill Joseph's Son Matlim>* v *Nedumbara Kuruvila's Son,* 1987 Supp SCC 340 and distinguished *Damacherla Anjaneyulu* v *Damcherla Venkata Seshaiah,* 1987 Supp SCC 75. *Nirmala Anand* v *Advent Corpn P Ltd,* (2002) 5 SCC 481: AIR 2002 SC 3396, decree for delivery of the flat at escalated price. Specific relief not refused because there was a possibility of renewal of lease and revalidation of building plan. The court said that there was no general rule that the plaintiff must necessarily be denied the benefit of price increase. While balancing equities, the court must bear in mind as to who was'the defaulting party.

Based on *Hills* v *Croll,* (1845) 2 Ph 60: 78 RR 23.

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circumstances and so many loans were outstanding against him. He had executed the first agreement to pay off these debts and in order to raise some funds. From the first agreement it is clear that the parties were not very serious about the sale of the house. The fact that after a few months the respondent resiled from the agreement and sought repayment of the money also proves this fact. The appellant had voluntarily retired from service. Admittedly, he had no other house to stay in after retirement. The respondent-plaintiff had tried to take unfair advantage of the defendant and throughout the course of the transaction she had not been fair.

The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and the appellate court seriously flawed in its decision. Therefore, it is held that the respondent is not entitled to a decree of specific performance of the contract."[449]

Where the true object of an agreement (construction of houses under Section 21 of the Urban Land Ceiling Act for weaker sections of society in this case) could not be fulfilled (as a result of changes in the master plan in this case), it would be inequitable to enforce specific performance of the agreement. Harm to the reputation of the plaintiff was irrelevant.

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[449] *A.C. Arulappcin* v *Ahalya Naik*, (2001) 6 SCC 600. *AkbarAli* v *Vinod Khanna*, (2005) 9 SCC 367: AIR 2 SC 3940, in the absence of plea of inadequate price raised, or an issue framed, or evidence led on the p< in the written statement not to hold that the agreement to sell was unconscionable.

"Grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The court is not bound to grant such relief merely because it is lawful to do so. Discretion is to be exercised on sound and settled judicial principles. One of the grounds on which the court may decline to decree specific performance is where it would be inequitable to enforce specific performance. The present is clearly such a case. It would be wholly inequitable to enforce specific performance for *(i)* residential houses for weaker sections of society cannot be constructed in view of the existing master plan and, thus, no benefit can be given to the said section of society; *(ii)* in an; case, it is extremely difficult, if not impossible, to continuously supervise and monito the construction and thereafter allotment of such houses; *(Hi)* the decree is likely to re suit in an uncalled-for bonanza to the plaintiff; *(iv)* patent illegality of the order of th Competent Authority dated 20-6-1998; (v) absence of law or any authority to determir excess vacant land after construction of 4356 dwelling units; and *(vi)* agreement does m contemplate the transfer of nearly 600 acres of land in favour of the plaintiff for constru tion of 4356 units for which land required is about 65 acres. The object of the Act was prevent concentration of urban land in the hands of a few and also to prevent speculate and profiteering therein. The object of Section 21 is to benefit weaker sections of socie

and not the owners. If none of these objects can be achieved, which is the factual position, it would be inequitable to still maintain decree for specific performance."[141]

***Agreement opposed to public policy.*—The court may not exercise discretion in favour of the claimant where the agreement is opposed to public policy. On the facts of the case, however, the court found that there was nothing against public policy. There was readiness and willingness. The power of attorney acting for the company was doing so within its limits. The company had clearly resolved to sell its property.[142]**

Plaintiff to come with clean hands

Where a party instituted different proceedings in different forums within a short span of time, it was held that such a party who abuses the process of courts could not be said to be possessed of clean hands and is, therefore, not entitled to equitable relief under the Act.[143]

Where the value of the property was much more than was mentioned in the agreement to sell, the plaintiff was in possession as a tenant and stopped paying rent since the date of the agreement, the court said that the mere fact of the agreement did not confer ownership on the plaintiff. He was not entitled to the equitable relief of specific performance.[144] Where the claimant was not able to prove that the sale deed was validly executed by the vendor and the vendor proved that his signature was taken on a blank paper, and on this basis as combined with other defects in the document, the court said that the refusal of the relief of specific performance was justified.

The right to specific performance of a buyer of property was not defeated by the fact that he added the names of two independent persons as marginal witnesses to the sale deed.[145]

The relief is discretionary. The *bona fides* of the person claiming this relief should be above-board. Lack of *bona fides* in any of the pleadings, be it as to the contents of the agreement, factum of payment, etc, disentitles the party from claiming relief even if the transaction is within the framework of law in other respects. The purchaser in this case paid a small amount and took possession at the time of the agreement. He did not pay anything further up to 8 years and claimed specific performance only by way of counterclaim to the owner's suit for recovering his possession. He did not even pay the court fee for his counter-claim saying that he did not have the means to pay. This showed that he

141 *Her Highness Maharani Shantidevi P. Gaikwad v Savjibhai Haribhai Patel, (2001) 5 SCC 101: AIR 2001 SC 1462.*

142 *Indian Financial Assn of Seventh Day Adventists v M.A. Unneerikutty, (2006) 6 SCC 351: (2006) 4 KLT 520.*

143 *Mahabir Prasad Jain* v *Ganga Singh*, (1999) 8 SCC 274. *Lalit Kumar Jain* v *Jaipur Traders Corpn (P) Ltd*, (2002) 5 SCC 383, the plaintiff who approaches the court with unclean hands is not entitled to any relief in equity.

144 *Shiddappa Adiveppa Jadi* v *Ramanna*, AIR 2002 Kant 416. *P. Purushottam Reddy* v *Pratap Steels Ltd*, AIR 2003 AP 141, the vendee was making false pleas, not clean hands, not entitled to equitable relief.

145 *Ram Khilona* v *Sardar*, (2002) 6 SCC 375: AIR 2002 SC 2548.

had no means to pay the balance price. His conduct was not fair. He was not entitled to the equitable relief.[146]

4. *Substantial Performance by one Side*

Where a party to a contract has already substantially performed his part of it, it would be highly inequitable to him if the other is not compellable to perform his part. Sub-section 3 accordingly provides that the court may properly exercise the discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance. The old Act contained the following illustration on this point:

> **A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.[147]**

Where the father borrowed amount from the plaintiff to meet a family necessity and agreed to sell the land to the plaintiff on his failure to pay back the amount, and all this was proved by clear evidence, specific enforcement against the father and one son who was living in the family was allowed. One son had already gone out of the family and, therefore, no relief could be allowed against him.[148]

5. *Mutuality of Remedy*

Sub-section (4) declares that the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. It had been a common belief in this field "that the court will not order specific performance at the suit of one party unless it could do so at the suit of the other".[149] The Privy Council had laid down in *Mir Sarwarjan* v *Fakhruddin Md. Chow- dhuiy*[150], that a contract of purchase of land on behalf of a minor was not specifically enforceable at the instance of the minor because it could not have been enforced against him. Their Lordships said that as the minor was not bound by the contract, there was no mutuality and that consequently the minor could not obtain specific enforcement of the contract. But beginning with the case of *Srikakulam Subramanyam* v *Kurra Subha Rao*[151]. the Privy Council allowed specific enforcement even in cases where there was no mutual equality. Thus the doctrine of mutuality ceased to have any force. In English law also the

146 *B. R. Koteswara* v C. *Rameswuri,* AIR 2002 (NOC) AP 42: 2002 AIHC 2973; *Mohammadia Coop Building Societies Ltd* v *Lakshmi Srinivasa Coop Building Society Ltd,* (2008) 7 SCC 310, the transaction was not in conformity with the Wakf Act, 1954 and Rules framed under it, documents were also of doubtful nature society not entitled to discretionary remedy, plaintiffs conduct plays an important role, he has to approach the court with clean hands.

147 Based on *Storer* v *G.W. Rly Co,* (1842) 2 Y&CCC 48: 60 RR 23.

148 *Noti China Subba Reddy* v *Pulavarthi Rama Rao, AIR 2003 AP 49.*

149 CHUTY ON CONTRACTS, p 1659 (24th Edn, 1977).

150 (1912) 39 Cal 232 PC: 39 IA 1.

151 AIR 1948 PC 95: (1948)75 IA 115: 1949 Mad 141.

requirement of mutuality has been subjected to such a large number of exceptions that it has been observed in CHITTY: "the number and importance of these exceptions has given rise to a doubt as to the existence of the requirement of mutuality."[450] The provisions of Section 12 are sufficient in themselves to rid the law of the requirement of mutuality. That section has been further supported by this sub-section which quite clearly says that the court should not decline specific relief only because of lack of mutuality.

It is also necessary that the plaintiff should have either done his part or should be ready and willing to do his part. In the case of a transfer of property, the Supreme Court observed that a transferee of immovable property can claim specific performance of the contract only by showing his performance or willingness to perform his part of the contract.[451] Accordingly, where the court in granting relief under Section 16 paid no attention to the side of the seller and confined its findings to the purchaser's side, this was described by the Supreme Court as a serious error.[452] In this case the plaintiff said that he had deposited the requisite amount in a bank account and though he did not produce the passbook of his own accord no adverse inference could be drawn against him because neither the defendant nor the court had called upon him to produce the passbook. The concurrent finding of the trial court and High Court was described by the Supreme Court as contrary to the evidence and palpably unreasonable. The court did not hesitate to set aside the finding and decreed the plaintiff's suit for specific performance. The court said that the only inference that could reasonably be drawn was that the defendant wanted to defeat the claim of the plaintiff and wanted to wriggle out of the obligation undertaken by him. In another case, the High Court had refused to grant the relief of specific performance on the ground that it would be unjust to do so in view of passage of time resulting in escalation of prices and the Supreme Court did not agree with this view of the matter. The court went by the facts that the whole of the price had been paid long ago and the premises were in the possession of the purchaser in part-performance of the agreement. The case was remanded to the High Court for decision on merits.[453]

Specific performance was not decreed where the parties were under a mutual mistake as to the identity of the land agreed to be sold. The purchaser did not cooperate with the transferor in sorting out the area to be transferred. The transferor had done some construction work on the land. He offered the other area to the purchaser which the latter did not accept. The purchaser could not get any order of directing the transferor to transfer the land to him.[454]

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[450] CHITTY ON CONTRACTS 1659 (24th Edn, 1977).

[451] *Jawahar Lai Wadhwa v Haripada Chakroborty, (1989) 1 SCC 76: AIR 1989 SC 606.*

[452] *Indira Kaur* v *Sheo Lai Kapoor,* (1988) 2 SCC 488: AIR 1988 SC 1074.

[453] *Ajaib Singh* v *Gurbax Singh,* (1988) 1 SCC 143. Another decision emphasising the equitable and discretionary nature of the relief. *Om Prakash* v *Amarjit Singh,* 1988 Supp SCC 780. *Ishari Lai* v *Solma,* AIR 2002 HP 175, the agreement for sale of land became specifically enforceable on the statutory restrictions on transfer casing to exist. *Hardeo Rai* v *S,akuntala Devi,* (2008) 7 SCC 46, defence on the part of the vendor that the property was not yet partitioned failed, because factual position was otherwise.
General Sales Ltd v Jagdish Rana, AIR 2003 HP 90.

Protecting interest of vendor

In respect of an agreement to purchase immovable property, it was proved that the purchaser had been in possession for several years and had also been enjoying the usufruct of the property. The court accordingly ordered maintenance of status quo; but directed the purchaser to deposit in the trial court a fixed amount annually in order to protect the interest of the vendor. The suit may then be finally disposed of in favour of the transferee.[455]

Nature of jurisdiction under the Act

The nature of jurisdiction under the Act has been held to be legal and equitable. This observation of the Supreme Court occurred in a case in which a person entered into a contract of sale of land. His sons, who were already major, opposed the suit for specific performance saying that they were joint-owners and they were neither consulted nor even informed of the transaction. But the vendee stated before the court orally that one of the sons had participated in negotiations. The Supreme Court did not believe the sons to say that they had no knowledge of things when negotiations for sale and execution of documents took place, they being not children at the time. There was no equity in their favour because even after the suit they did not approach the Authorities under the UP Consolidation of Holdings Act, 1950 for having their names recorded as joint owners. Such authorities had exclusive jurisdiction for that purpose.[456]

Limitation

The contract for transfer of property stipulated a time-period for payment of full consideration and registration of sale deed. The transferee made only part payment and that too after expiry of the stipulated date, but the transferor accepted it without stipulating any further date. The court said that limitation would start from the date of refusal by the vendor in response to the notice by the vendee of specific enforcement and not from the date stipulated in the agreement.[457]

Pre-emptive orders under Tax measures

Where there is a pre-emptive order under a taxing measure about some property, it has the effect of vesting the property in the Government. Such an order does not become set aside by the filing of a civil suit. Relief about the sale of such property cannot be granted automatically. So long as the order remains in force, no title can be conveyed. The Act applies to transfers by acts of parties and not to vesting of rights under statutory operations.[458]

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[455] *Sukkha Singh v Mahal Singh, AIR 2003 Raj 21.*

[456] *Narender Singh* v *Jai Bhagwan,* (2005) 9 SCC 157: AIR 2005 SC 582: 2005 All LJ 289.

[457] *Dutta Seethamalakshamma v Yanamadala Balaramaiah, AIR 2003 AP 430.*

Deepak Prakash v *Jayanta Kumar Base,* AIR 2003 Cal 153. *Mohan J. Pawar* v *Arjuna N Dighade,* AIR 2004 Bom 406, purchased property (fields) in the name of wife (*benami*), wife died, the purchaser husband and his daughter became owners, Benami Transactions (Prohibition) Act, 1988 came into force, but its provision

Power of court to award compensation [S. 21]

21. Power to award compensation in certain cases.—(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

***Explanation.*—The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.**

Every party seeking the relief of specific performance is allowed by this Section to claim compensation for the breach of the contract. Such relief may be claimed either in addition to specific performance or in substitution of it. If the court is of opinion that specific performance ought not to be ordered, the court may award compensation if a valid contract and its breach are established. Should the court find that specific performance by itself would not be sufficient relief, it may, in addition, award compensation also to meet the ends of justice. Compensation would be assessed in accordance with the principles stated in Section 73 of the Contract Act.[161] Even where the contract has become incapa- :Ie of specific enforcement, the court can exercise the power under this section to award compensation. In a case where reconveyance was refused, the court on ordering the same,

in S. 4(1) was not attracted. Husband sold the property, the same was specifically enforced at the instance of the buyer.

See Remedies under the Contract Act, Sections 73 and 74. *Dutla Seetliamalialakslvnamma* v *Yanamadala Balaramaiah*, AIR 2003 AP 430, the vendee made part payment and that too after expiry of the fixed period of time, he also made a false-claim that possession had been delivered to him and filed suit after keeping silent for 17 years, there was no *bona fides*, no willingness, no right to compensation.

observed as follows: "When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. Where the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables the award of compensation in lieu and substitution of specific performance." The court continued: "So far as the proviso to sub-section (5) of Section 21 is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17, Order 6, CPC. The fact that sub-section (4), in turn, invokes Section 73 of the Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction."

The measure of compensation is by the standards of Section 73 of the Indian Contract Act. Dealing with the facts, the court said:

> **"In the present case assuming that the respondent had not actually sought the amendment of plaint for compensation in lieu of specific performance, the amendment was hereby permitted so that complete justice could be done. The quantum of compensation is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages, subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award. Accordingly, there will be a decree awarding to the respondent compensation in lieu and substitution of one for specific performance which, but for the acquisition, the respondent would have been entitled to the quantum and the measure of the compensation being the entire amount of compensation determined for the acquisition of the suit properties together with all the solatium, accrued interest and all other payments under the law authorising the acquisition, less a sum of Rs. 1,50,000 which was to go to the appellant towards his services, time and amounts spent in pursuing the claims for compensation as well as the consideration stipulated for reconveyance.'"[62]**

It is necessary that the plaintiff should have asked for the relief of compensation. The court may, however, allow the plaint to be amended at any stage to enable the plaintiff to claim compensation.[459]

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[459] *Jhandoo v Ramesh Chandra, AIR 1971 All 189.*

Where, for example, a buyer of land is allowed to recover it specifically and it takes him about a year to get the relief, the court may award compensation for the loss of time.[164]

Order for delivery of goods

The court can issue a direction for delivery of goods despite there being an alternative plea for damages. On the facts of this particular case'[65]**, the court said:**

> **"In case of non-delivery of goods, where there was an alternative plea for damages, court may not direct delivery of the goods (Units of UTI) after their purchase from open market along with benefit of rights issue. Instead the court can compensate the plaintiff with return of the money paid by him with interest and award of reasonable damages."**

An agreement was entered into for sale of units of UTI by the appellant to the respondent. Payments by way of consideration for purchase of the units were made by the respondent to the appellant and banker's receipt was issued by the appellant in respect of the said transaction. But units were not delivered by the appellant. By a letter dated 1-7-1992 the respondent claimed compensation for breach of contract treating the same to have taken place on 30-5-1992 and on that basis it claimed difference in price between the rate that was paid and the rate of UTI as on 30-5-1992. Since no amount was paid by the appellant, a suit was filed by the respondent claiming delivery of the units in respect of which payments had been made. An alternative prayer was also made for payment of a certain amount as damages plus further interest @ 17.5% p.a. on the said amount till the date of payment. The Special Court constituted under the Special Court Act of 1992 granted relief of specific performance requiring the appellant to buy the units for which payment had been made and also to purchase and sell to the respondent the units representing the right issue which the respondent was deprived of availing because of the nondelivery of the units. Costs of Rs 27,87,000 were also awarded. Disposing of the appeal, the Supreme Court said:

> **"The appellant admits that the respondent, to whom delivery of the units was not made, would be entitled to the refund of the money plus damages thereon calculated in accordance with the principles contained in Section 73 of the Indian Contract Act, 1872. Considering the fact that there was an alternative plea for damages, on the facts of the present case a decree for specific performance in the manner in which it was passed was probably not appropriate especially when the respondent could be compensated with the return of money and award of reasonable damages."**

164 *K. Narendra* v *Riviera Apartments (P) Ltd*, (1999) 5 SCC 77: AIR 1999 SC 2309, Agreement, on facts having become incapable of performance, compensation equal to the amount of price already received by the vendor, directed to be paid to the vendee by the vendor in addition to the refund of the amount received. Interest directed to be paid on the amount of compensation from the date of decision and on the refundable amount, from the date the vendor had received the same. *Harjeet Singh* v *Amrik Singh*, (2005) 12 SCC 270, no compensation was allowed to a person who had not been ready and willing to do his part. 6 *State Bank ofSaurashtra* v *P.N.B.*, (2001) 5 SCC 751: AIR 2001 SC 2412: (2001) 105 Comp Cas 852.

The right to sue for compensation is lost where the suit for specific performance is dismissed in whole or in part, but other rights, if any, will survive. This is the effect of Section 24.

24. Bar of suit for compensation for breach after dismissal of suit for specific performance.—The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach.

Relief of possession, partition, etc. [S. 22]

Where the relief sought is for the transfer of immovable property, the court may also grant, if so prayed by the party, relief by way of possession, partition and separate possession. The court may also grant any other relief, such as refund of earnest money or deposit paid in case specific performance is refused. Where the party has not made any such prayer in the original plaint, the court may permit amendment of the plaint.[166]

22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for— *(a)* possession, or partition and separate possession, of the property, in addition to such performance; or (.b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

(2) No relief under clause *(a)* or clause *(b)* of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause *(b)* of sub-section (1) shall be without prejudice to its powers to award compensation under Section 21.

Relief for possession has to be pleaded

Relief of possession can be granted only if it is specifically prayed for.

Sub-section (1) of Section 22 of the Specific Relief Act, 1963 is an enabling provision. A plaintiff in a suit for specific performance may ask for further reliefs mentioned in clauses *(a)* and (*b*) thereof. Clause *(a)* contains reliefs of possession and partition and separate possession of the property, in addition'to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject- matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.

In the instant case the suit is for specific performance of the agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed, as such it cannot be treated as a "suit for land". It is not possible to accept the contention that in the present case the suit is for acquisition of title to the land and is a "suit for land". In its true sense, a suit simpliciter for specific performance of a contract for sale of land is a suit for enforcement of the terms of a contract. The title to the land as such is not the subject-matter of the suit.[460]

Where the property in question was transferred by a co-sharer whose share was very small and it was not possible to direct specific performance of the entire property as it could not be divided into small shares, it was held that exercise of discretion by the trial court in not decreeing the suit even to the extent of the selling co-sharer's share was proper and was not to be interfered with.[461]

Liquidation of damages no bar [S. 23]

Where the parties to the contract have fixed the amount of compensation which would be payable in the event of default, this would not constitute any bar to the relief of specific performance. The court may examine the circumstances of the case. If they show that compensation was fixed in order to secure performance and not to allow the defaulting party an option to pay compensation, the court may allow specific performance. Where, on facts, the plaintiff-respondent was found ready, willing and able to perform his part of the agreement for the sale of orchard, it was held that such plaintiff was entitled to specific performance despite the existence of a penalty clause providing for payment of Rs 10,000 by the party violating the terms and conditions of agreement. The Division Bench of the High Court rightly dismissed the appeal of the appellant-Defendant 1 vendor.[462] The court cannot, however, in the same decree order the payment of the fixed amount also.

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[460] *Adcon Electronics (P) Ltd v Daulat, (2001) 7 SCC 698.*

[461] *Khanderan Subbarao Nadagir v Hulagawa, AIR 2003 Kant 354.*

Manzoor Ahmed Magray v Gliulam Hassan Aram, (1999) 7 SCC 703; M.L. Devender Singh v Syed Khaja, (1973) 2 SCC 515; Prakash'Chandra v Angadlul, (1979) 4 SCC 393; Kartar Singh v Harjinder Singh, (1990) 3 SCC 517, relied on.

Alternative relief provided in contract

Where the agreement (for sale of agricultural land) itself providing for contingencies of (i) seller refusing to sell and *(ii)* purchaser refusing to buy by stipulating the return of earnest money plus another sum in either circumstance, it was held, that on facts, there was no obligation on the seller to complete the sale transaction and the contract could not be specifically enforced. The High Court erred in upholding the decree of specific performance awarded by the first appellate court.[170]

Enforcement of arbitral awards and direction to execute settlements

Section 25 of the Act provides that the provisions of this chapter *(i.e.* Chapter II) shall apply to awards to which the Arbitration Act, 1940 does not apply and to directions in a will or codicil to execute particular settlement.

RESCISSION OF CONTRACTS

The rescission of contract necessarily constitutes a bar to its performance by either of the party to it (Fry: Chapter XXIV). The grounds for bringing a suit for rescission have been given in Sections 27 and 28 of the Specific Relief Act, 1963:

27. When rescission may be adjudged or refused.—(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:—

(a) **where the contract is voidable or terminable by the plaintiff.**

(b) **where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.**

(2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract—

(a) **where the plaintiff has expressly or impliedly ratified the contract; or**

(b) **where, owing to the change of circumstances which have taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or**

(c) **where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or**

(d) **where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.**

Dadarao v *Ramrao,* (1999) 8 SCC 416.

***Explanation.*—In this section "contract", in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.**

The relief of rescission comes handy to a person who has become the victim of an imposition by means of a contract. This burden of a contract has been imposed upon him by means of a fraud or illegality or something equivalent which makes the contract either void or voidable. He may ask the court that the contract should be declared as not binding upon him. This is rescission, that is, getting rid of a contract. Section 27 accordingly provides that the court may allow the relief of rescission in the following cases:

(1) Where the contract is voidable or terminable by the plaintiff;

(2) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame.

The relief of rescission is available subject to very important limits. This is so because every voidable contract is valid as long as it is not avoided. If the relief of rescission is not quickly obtained, circumstances may so seriously change that it would then not be desirable to put an end to the contract. Sub-section (2) accordingly provides that the right of rescission is not available in the following cases:

1. *Affirmation*

The plaintiff loses the right of rescission when on becoming aware of his right he chooses to ratify the contract. Once the contract is affirmed it cannot afterwards be avoided. Affirmation may be express or implied. An express affirmation takes place when the right to rescind is openly waived. An implied affirmation takes place when the party having the right to rescind is instead enjoying the benefits of the contract.

2. *Where restitution not possible*

The right of rescission is also lost where the position of the parties has been altered to such an extent that they cannot be put back to their original status. Where one party has already resold the goods or consumed them, restoration of the *status quo ante* becomes impossible.

The transferee obtained possession of the property in part performance of the contract. The court said that possession over property was to be protected even if the period of limitation for bringing a suit for specific performance had expired. The transferee was required to fulfil the necessary conditions in order to defend and protect his possession. The Limitation Act does not extinguish defences. It only bars the remedy.[171]

3. *Intervention of third parties*

Where the rights of third parties have intervened, rescission cannot be allowed to the prejudice of such rights. Where, for example, a person has obtained goods by fraud and,

[1] *Shrimant Shamrao Suryavanshi v Pralhad Bhairoba Suryavanshi, (2002) 3 SCC 676: AIR 2002 SC 960.*

before the seller is able to catch him, he transfers the goods to a *bona fide* buyer, the deceived seller would not now be allowed to get rid of the sale on account of the fraud,

4. Severance

Rescission is not allowed where the plaintiff is seeking rescission of only a part of the contract and that part is not severable from the rest of the contract.

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—(1)
Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract, either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

(a) **shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and**

(b) **may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.**

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

(a) **the execution of a proper conveyance or lease by the vendor or lessor;**

(b) **the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.**

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

Section 28 enables the court to put an inbuilt remedy of rescission in a decree of specific performance. Where a decree of specific performance has been passed in respect of a contract for the sale or lease of immovable property, but the party to whom such relief has been granted does not pay the price within the time delimited, the seller may ask the court for rescission. The court will direct the purchaser or lessee, if he has already taken over possession, to restore it to the seller and also to pay him rent for the period during which he enjoyed the benefits of possession. Where justice so requires (he court may order refund of the earnest money, if any, paid by the vendee or lessee. Where, on the other hand, the vendee or lessee has deposited the money as directed by the court, he may be allowed any relief as may seem just to the court in the circumstances.[463]

Alternative prayer for rescission in suit for specific performance [S. 29]

As provided by Section 29 of the Specific Relief Act, 1963, the plaintiff may in a suit for specific performance make a prayer that if such relief cannot be granted, the contract may be rescinded. He has to make delivery of the instrument for being cancelled.

But the converse is not true. So, the prayer for the rescission of the contract or, in the alternative, for a decree of specific performance is not permissible.

Extension of time

Where the court, while ordering specific performance in favour of the plaintiff, directed him to pay the balance amount within a specified date and that, on his failure to do so, his case would be dismissed, it was held on his failure to do so, that the court could grant him extension of time.[464]

Contract not automatically extinguished on decree of specific performance

The contract between the parties is not extinguished on passing of decree of specific performance. The court does not lose its jurisdiction, nor does it become *functus officio.* The decree of specific performance is in the nature of a preliminary decree. The suit is deemed to be pending even after the grant of such decree. The court retains its control over the entire matter even after the decree. Section 28 itself is indicative of such a consequence. The court has power to enlarge time in favour of the decree holder to enable him to pay the amount or to perform the conditions mentioned in the decree. There was no default clause in the decree in the sense that if the conditions were not satisfied within a

[463] Relief was allowed even where the deposit was late hut it was made during the pendency of the appeal. The court retains control over the matter even after the passing of the decree, *Ramankutty Guptaii* v *Avaru,* (1994) 2 SCC 642: AIR 1994 SC 1699. *V.S. Pakmiduimy Chettiar Firm* v C. *Alagappan,* (1999) 4 SCC 702: AIR 1999 SC 918, application to the execution court for extension of time. The court explained the factors which have to be taken into account in dealing with such applications.

[464] *Valsala Shankar Bansole v. Shri Sambhaji Nanasaheb Khandare, AIR 2003 Bom 57.*

certain amount, it would become avoided. The decree holder had, during the course of the proceedings stretching over 24 years, paid the entire premium amount and large sums in respect of accrued rents. It could not be said that he, being the lessee, intended to abandon the agreement. He was directed to pay the balance amount within 30 days on which the lessor was to execute the lease deed.[465]

Rescission and equity

Section 30 lays down that the court may require parties rescinding to do equity. It provides:

30. Court may require parties rescinding to do equity.—On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

It is a maxim of law that "he who seeks equity must do equity" in the transaction in respect of which relief is sought. So while decreeing rescission the Court might direct not only payment of compensation to the defendant but also restoration of any benefit received by the plaintiff under the contract.

A party seeking specific relief may at the same time ask that if specific performance cannot be allowed, the contract may be ordered to be rescinded. If the court refuses one relief, it may order the other.

The Supreme Court has been of the opinion that while dealing with an application under Section 28(1) for rescission of contract in a case in which the relief of specific performance has been earlier allowed, the court does not cease to have jurisdiction over the matter. The court retains control over the decree even after the decree has been passed. It is open to the court to exercise power under Section 28(1) either for extension of time or for rescinding the contract.[466]

Where the purchaser deposited the money in the court as directed by the court, he was not allowed to withdraw it without first applying to the court for a direction to the vendor to execute the sale deed, because until then it could not be said that the vendor had failed to comply with the order of the court.[467]

The party at whose instance the contract is cancelled may be asked by the court to restore the benefits, if any, received under the contract to the extent to which justice requires.

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[465] *Kumar Dhirendra Mullick v Tivali Park Apartments (P) Ltd, (2005) 9 SCC 262.*

[466] *Ramankutty Guptan* v *Avara,* (1994) 2 SCC 642: AIR 1994 SC 1699.

[467] *M. Mohammad Aslant v CNA Gowthaman, AIR 2003 Mad 248.*

Section 26 of the Specific Relief Act, 1963 provides remedy for rectification of instruments. The term 'instrument' has been defined in Section 2, clause (14) of the Indian Stamp Act (II of 1899), Accordingly, 'instrument' includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded.

A suit, therefore, lies for the rectification of a will, a decree and also for the rectification of an award-decree on the ground of fraud.

The word 'instrument', however, does not include 'Articles of Association'.[177]

Section 26 of the Specific Relief Act, 1963 runs thus:

26. When instrument may be rectified.—(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [not being the articles of association of a company to which the Companies Act, 1956 (1 of 1956), applies] does not express their real intention, then—

(a) either party or his representative-in-interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

CIT v *Kamla Town Trust*, (1996) 7 SCC 349: AIR 1996 SC 620, power to order rectification of trust deed; rectification was ordered to declare that the trust was a charitable one.

In the matter of rectification, the true question, is what was the intention of the parti at the time of its execution and not what the parties intentionally omitted.[468] The plaint must establish that the alleged intention to which he desires the document to be ma conformable, continued concurrently in the minds of all parties down to the time of execution.[469] For, if the parties after an agreement changed their minds and it is tb changed intention that is embodied in the instrument, there is no ground for rectificati What is done on purpose, is obviously not done by mistake.[470]

Essentials to be proved

(1) That there was a mutual mistake or fraud, and

(2) that the instrument on that account did not truly express the intention of the ; ties.[471]

Mistake

The mistake to form a ground for the relief of rectification must be mutual and unilateral. A mistake on one side may be a ground of defence or a ground for rescindi contract, but not for correcting or rectifying an instrument. The mistake may be eith fact or of law although the court of equity will not generally grant relief against a mi: of law, except where the mistake results in an inequitable result.[472]

The principle of granting relief by way of rectification is that where a contra finally made fails to express or embody the agreement between the parties as origi made, it can be had rectified so as to bring it in accord with the intention of the p< Thus where the final draft mentioned the price in weight when in fact it was agreed in count and riot risk was mentioned in an insurance cover by mistake, the court all rectification. The court said that the matter came within Section 26 of the Specific Act of 1963 which provides that an instrument can be rectified if through fraud or tual mistake of the parties, the contract does not express their real intention.[473]

CANCELLATION OF INSTRUMENTS [SS. 31-33]

Sections 31 to 33 of the Specific Relief Act, 1963 provide for the cancellatior struments. They are reproduced below:

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[468] *Laxman v Ganpat, 2 NLR 4.*

[469] *Ibid.*

[470] *Ibid.*

[471] *Siddique & Co v Utoonial & Assudamal Co, AIR 1946 PC 42.*

[472] *Nawab Begum v Creel, 27 All 678.*

New India Rubber Works (P) Ltd v *Oriental Fire and General Insurance Co,* (1969) 1 Comp LJ *State of Kamataka* v *K.K. Mohandas,* (2007) 6 SCC 484, rectification of written contract, in the : plea of mutual mistake, or fraud, such relief not permissible.

31. When cancellation may be ordered.—(1) Any person against whom a written instrument is voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Who can seek cancellation

A sale deed was executed in respect of an ancestral property. The transferor's sons challenged it and sought a declaration that the sale was null and void. There was nothing to show their ages and whether they had birth-right in the property. They were not allowed to challenge it on the ground of the competence of the transferor. The suit was also time-barred because it could be filed only within 3 years of the cause of action whereas 13 years had already passed.[184]

In a case for cancellation of a sale deed on the ground that the deed was void, it was held that the suit could be filed in a civil court by the recorded tenure holder, executant of the deed or his successor. The suit filed by a third party was not maintainable.[185]

A sale deed which was got executed by practising a fraud on the transferor who was also not of sound mind, was held liable to be quashed and not to be specifically enforced.[186]

32. What instruments may be partially cancelled.—Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—(1) On adjudging the cancellation of an instrument, the court may require the party to

[184] *Davawali* v *Madan Lai Verma,* AIR 2003 All 276, Articles 58 and 59 of the Limitation Act, 1963.

[185] *Kishori Prasad* v *llird Addl Distt Judge,* AIR 2003 All 58. *Lalit Kumar Jain* v *Jaipur Traders Corpn (P) Ltd,* (2002) 5 SCC 383, unexplained delay in filing the suit after the exchange of notices, vendee remained in possession of the mill and used it for the long period of 30 years. In the circumstances of the case, the Supreme Court directed transfer of the mill to the vendee subject to his paying 40 lakh rupees in addition to the balance amount. *Hameed* v *Kanhaiya,* AIR 2004 All 405, the plaintiff was able to prove that he was the son at the owner of (he property on whom fraud was committed. He was allowed to sue. *Prem Singh* v *Birbal.* (2006) 5 SCC 353: (2006) 2 KLT 863: (2006) 5 Mah LJ 441, a document which is void *ab initio* and, therefore, a nullity, a decree for its setting aside need not be passed. The deed in this case was void because it purported to convey the interest of a minor.

Cluicko v Mahadevan, (2007) 7 SCC 363.

whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the grounds—

(a) **that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;**

(b) **that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under Section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.**

The relief provided in Section 33 of the Specific Relief Act is based on the principle of protective or preventive justice. This section applies to instruments executed by the plaintiff as well as to other instruments which he seeks to have adjudged void or voidable.[187] It is not necessary that the plaintiff must be a party to a contract; he can maintain the suit under this section if the instrument is against his interest.

The conditions precedent to the applicability of this section are—

(a) the instrument should be void or voidable against the plaintiff;

(b) there is a reasonable apprehension of a serious injury;[188]

(c) that the case is fit for the exercise of the court's discretion to grant the prayer.

Void

An agreement not enforceable by law is said to be void [Section 2(8) of Indian Contract Act], A contract is void—

(0 where the consideration or object or an agreement is forbidden by law, or

(ii) is of such a nature that, if permitted, it would defeat the provisions of any law, or

(iii) is fraudulent, or

(iv) involves or implies injury to the person or property of another, or,

(v) the court regards it is immoral or opposed to public policy (Section 23, Indian Contract Act).

187 *Surajket v Chandra Mai, AIR 1934 All 1071.* [188] *Teka Dula v Bai Jivi, 39 BLR 1072.*

It will also be noted that an agreement in restraint of marriage of any person other than a minor[189], or by which anyone is restrained from exercising a lawful profession, trade or business[190] or legal proceedings, or agreements of unmeaning or of wagering nature and an agreement without consideration as a general rule[191] are void. A contract by a minor is void.[192]

Voidable

An agreement which is enforceable by law, at the option of one or more parties thereto, but not at the option of the other or others, is a voidable contract.[193]

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party, whose consent was so caused.[194]

A contract induced by undue influence is voidable at the option of the party whose consent was so caused.[195]

Reasonable apprehension

The relief provided under Section 31 of the Specific Relief Act is based upon protective justice and upon the idea of *'quia time "* (for fear) and, therefore, where there is no apprehension of injury to the plaintiff, no suit can be instituted.[196] Reasonable apprehension is to be determined with reference to the circumstances of each case which the court has to deal with.

Requirements of ground of relief

(1) The relief under Section 31 of Specific Relief Act cannot be claimed as a matter of right; the court will act upon the principle of the exercise of sound discretion, having due regard to the conduct of the parties.[197]

(2) Where the parties are in *pari delicto* and fraud is alleged as the ground for cancellation, the court may refuse the relief to the plaintiff, as he is equally to blame as is defendant.[198]

Section 26, Indian Contract Act.
Section 28, *ibid.*
Section 25, *ibid.*
Mohri Bibi v Dharamdas, 30 Cal 539.
Section 2(i), Indian Contract Act.
Section 19, *ibid.*
Section 19-A, *ibid.*
Chaganlal v Dharamdas, 7 Bom 607.
Valley v Dallubhoy, 25 Bom JO.
Bindeshwari v Lekhraj, 20 CWN 760.

(3) No relief can be granted under Section 31 of the Specific Relief Act where there is a question of mere inadequacy of consideration.[199]

(4) No suit for the cancellation of a will can be instituted during a testator's lifetime.

Partial cancellation

Section 32 of the Specific Relief Act will be applicable only when rights and obligations under an instrument are distinct and separable.[200]

Compensation

The plea of compensation must be taken in the first court.[201]

Limitation

Article 59 of the Indian Limitation Act, 1963 prescribes a period of 3 years for a suit for cancellation of an instrument computable from the date when the fact entitling the plaintiff to have the instrument cancelled first becomes known to him.

The provisions have been frequently used by the courts in rescuing minors from the burden of contracts made by them. One of the outstanding cases is the decision of the Privy Council in *Mohoribibi* v *Dharmodas Ghese,*[202] A minor, declaring himself to be of full age, mortgaged his two houses as against a loan, a part of which was paid to him in cash. He then applied to the court for cancellation of the mortgage. The court had to cancel the mortgage because it was in fact void. The moneylender pleaded for refund of his money. The provisions do authorise courts to require a minor to restore the benefits obtained or make compensation, but only to the extent to which justice so requires. In the present case their Lordships said that justice did not require any relief in favour of the lender because he was reckless in his dealings with the minor.

The provisions quite clearly contemplated that the court could ask only that person to make compensation who was seeking the relief of cancellation. In a case before the Lahore High Court[203] relief was sought by a person against a minor who had taken the price in advance of the land which he purported to sell but refused to complete the sale. It was powerfully contended that the provisions would permit relief only against a person who himself seeks cancellation and not against one who came to the court as a defendant. But the court ordered the minor to refund the money. As against it, the Allahabad High Court refused to ask the minor, who was a defendant in the court, to refund the mortgage money.[204] When the Specific Relief Act was re-enacted in 1963, in terms of the proposals

[199] *Kelam* v *Polavampur,* 191 Cal 746.
[200] *Klmb Singh v Julian Lai. 12 CPCR 13.*
[201] *Gokul* v *Karam,* 8 PC 782.
[202] 30 IA 114: 30 Cal 539(1903).
[203] *Khan Gul* v *Lakha Singh,* ILR (1928) 9 Lah 701: AIR 1928 Lah 609.
Ajudhia Prasad v Cliandan Lai, AIR 1937 All 610 FB.

of the Law Commission, Section 33 which provided for the relief of restitution on the cancellation of a contract contained provisions to cover both situations, namely, whether the person seeking relief is the plaintiff or the defendant. The provisions can be presented in terms of the following propositions:

(1) Where a void or voidable contract has been cancelled at the instance of a party thereto, the court may require him to restore such benefits as he has received under the contract and to make any compensation to the other party which justice may require.

(2) Where a defendant successfully resists any suit on the ground that the contract, by reason of his being incompetent, is void against him, he may be required to restore the benefits, if any, obtained by him under the contract, but only to the extent to which he or his estate has benefited thereby.

DECLARATORY DECREES

Sections 34 and 35 lay down the law relating to declaratory decrees. A declaratory decree is a decree declaratory of a right which is doubtful or which requires to be cleared. The object of declaratory decrees is to prevent future litigation by removing the existing cause of the controversy. In other words, if a cloud is cast upon the title or legal character of the plaintiff, he is entitled to seek the aid of the court to dispel it.

Section 34 of the Specific Relief Act lays down the circumstances under which a declaratory decree may be passed. It provides:

34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

***Explanation.*—A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.**

Section 34 of the Specific Relief Act does not sanction every kind of declaration but only a declaration that the plaintiff is entitled to any legal character or to any property.[2"5] It is not a matter of absolute right to obtain a declaratory decree and it is discretionary for the court to grant or refuse to grant it.

AIR 1910 Guj 145.

It is essential for a decree under Section 34, Specific Relief Act, that the plaintiff must be entitled to any legal character to any right to property. 'Legal character' is a position recognised by law,[474] and a person's legal character is made up of the attributes which law attaches to him in his individual and personal capacity and the phrase is synonymous with the word 'status' ,[475] It includes the right of franchise and the right of election.[476] It may be observed that the words 'legal character' and 'to any right as to any property' are separated by the disjunctive 'or' and, therefore, the plaintiff can maintain a suit for a mere declaration, if he can show that he is entitled to any legal character, even though he cannot lay an immediate claim to any property.

(i) Essentials to be set up for relief under Section 34

(1) That the plaintiff is entitled to a legal character at the time of the suit, or to any right as to any property.[477]

(2) Defendant has denied these or he is interested in denying that character or right of the plaintiff, and

(3) The plaintiff is not in a position to ask for relief consequential upon the declaration.

If these conditions are satisfied, the plaintiff need not ask for any further relief than a mere declaration. But the court shall not make any such declaration if he, being able to seek further relief than a mere declaration of title, omits to do so.[478]

(ii) Frame of plaint

The plaint must disclose—

(1) the title or right claimed by the plaintiff,

(2) the circumstances in which the cloud was cast over the same or the same was denied or threatened,

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474 *Hira Lai* v *Gulab,* 10 CPCR 1; *Ram Das* v *Salim Ahmed,* (1998)9 SCC 719, weakness in defendant's claim for title to the property cannot establish plaintiff's title. Plaintiff not entitled to get declaration of title if such title could not be established by him by leading convincing evidence. High Court failed to consider the specific finding made by the lower appellate court that the plaintiff had failed to establish its title.

475 *Ram Krishna v Narayan, 27 MLJ 639.*

476 *Sat Narain Gurwala v Hanuman Prasad, 224 1C 322.*

477 *Padmini Chandrasekharan* v *R. Rajagopal Reddy,* (1996) 8 SCC 632, entitlement to property on family partition. *Sowrashtra Vipra Sabha* v *Namakkal Municipality,* (1996) 11 SCC 584, title perfected by formalities. *Prabhakar Adsule* v *State of M.P.,* (2004) 11 SCC 249: AIR 2004 SC 3557, suit for restraining interference in possession, but title to the property not made out. No relief allowed. *Karnataka Board of Waqf* v *Govt of India,* (2004) 10 SCC 779, proof of title has to be offered.

478 *Man Kunwar Asram* v *Badlu Mukandi,* AIR 1957 MP 211. *Dalip Singh* v *Sikh Gurdwara Prabhandak Committee,* (2003) 10 SCC 352: AIR 2004 SC 137, claim that the property was that of the vendor from whom it was purchased because there was no Notification under S. 10(3) of the Sikh Gurdwara Act, 1925 that it belonged to SGPC, but it was included in the List under S. 7(3). Failure to produce the Notification under S. 10(3), no conclusion that the property did not belong to SGPC.

(3) the prayer.[2]"

The right to any property, mentioned in this section, must be a right actually existing at the date of the suit, though the enjoyment itself may be deferred, e.g., a right of the reversioner. But when the plaintiff had no vested or contingent right to any property but only a faint hope of being selected as a shebait after the death of the existing shebait, he could not maintain a suit for declaration.[212] In *Qabool Singh* v *Board of Revenue*™, it was held that the plaintiff must show subsisting right not only on the date of the suit but also on the date of decree.

The defendant should be a person who actually denies or is interested to deny the plaintiff's title, status, right to any property; even the lease denied by a person or the agent of a person who is interested to deny invests the plaintiff with a cause of action for a declaratory suit under Section 34, Specific Relief Act,[214] but a mere apprehension existing in the mind of the plaintiff does not give him any right to bring a suit for declaration.[215] A suit for declaration will not lie in the following cases:

(1) for a declaration that the plaintiff did not infringe the defendant's trade mark.[216] Negative declaration will not be allowed;

(2) for a declaration that a disposition made by the father of the plaintiff in a will is invalid and that the property is ancestral and that the plaintiff is entitled to a share in it. This suit would be barred by the proviso of Section 42, Specific Relief Act, because the plaintiff can claim further relief or partition;[217]

(3) for a declaration, during the lifetime of the testator, that the will is invalid. The reason is that the will is revokable and no property is transferred during the lifetime of the testator;[218]

211 *State* v *Gudge*, Pat (HC) 262. *Soma Devi* v *Guin Devi*, AIR 2003 HP 158, a prayer for declaration of genuineness of signature on a document rejected because of a long delay in seeking the declaration and also because of lack of *bona fides*. *Ramchandran* v *Angamuthu Ammal*, AIR 2004 NOC 469 (Mad), no proof that there was continuous and uninterrupted possession for 12 years. *Venkataramana* v *Annayya Hedge*, AIR 2004 Kant 433, claimant failed to prove that there was permissive possession, decree on account of adverse possession affirmed.

212 *Satrohan* v *Gursaran*, AIR 1929 AH 904. *T. Seslia Reddy* v *Managing Committee, Jama Masjid*, the party claiming title over property under registered sale deed proved that the property was not a part of the wakf property, entitled to declaration of title, possession and consequential relief of permanent injunction. AIR 1973 All 158. *Kumari Devi* v *Noor Md. Mian*, AIR 2002 Pat 132, deed of sale which the defendant claimed in his favour was shown to be forged bccause its date was after the death of the executant. The court said that the burden of proving genuineness was on the claimant which he could not discharge. *Nankhar Singh* v *Qaddir Bux*, 1251 Cal 14.

Jagtu Mai v *Laxman Das*, 157 IC 523; *Ramchandra Sakharam Mahajan* v *Damodar Trimbak Tanksale*, (2007) 6 SCC 737, the suit was for recovery of possession on the strength of title. The defendant also set up rival title, but because of weakness of his evidence he was not able to establish it. The plaintiff was not entitled to claim relief on the weakness of the defence evidence. He has to establish his own case by his own evidence. The question of title was also not to be decided by survey records alone. The court emphasised the need for appointment of Commission to get the property identified and demarcated. 111IC 176.

Suryanarayananmurti v Tammanna, 25' Mad 504.

Rambhajan Kanwar v Gurcharan Kunwar, 27 All 15.

(4) for a declaration that the plaintiff is a purchaser under an unregistered deed of sale;[219]

(5) no declaratory suit lies to set aside a succession certificate granted under Act XXVII of I860;[220]

(6) no one can ask for a declaration of a non-existent right, as of succession, i.e., the chance or possibility of acquiring a right in the future;

(7) a suit by a student against a University for a declaration that he has passed an examination;[221]

(8) a declaration tending to affect the free flow of capital and commercial operations would be unjust.[222]

(iii) Further relief where plaintiff entitled to it (Proviso)

All that the proviso to Section 34 of the Specific Relief Act forbids is a suit for mere declaration without further relief if the plaintiff can sue for further relief. The term 'further relief' means 'the relief to which the plaintiff is necessarily entitled on the basis of declaration of the title'. This is done in order to avoid multiplicity of suits. Further, relief must be in relation to the legal character or right to such character or the right which the defendant denies or is interested in denying. It must also be relief appropriate to, and consequent on the right asserted.[479]

For example, where A claims that he is entitled to half portion of the house in the occupation of B, he must pray in his suit:—

(0 that a declaration be made that A is entitled to half portion of the house and;

***(ii)* that the defendant be asked to deliver the half portion of the house to A. This is consequential relief.[480]**

[219] 10 WR 51 (FB). *See also* Section 53-A of Transfer of Property Act, 1882.

[220] 22 WR 312. The new Act is the Indian Succession Act, 1925.

[221] *Ramugrah v Banaras Hindu University, 47 IA 434.*

[222] *American Express Bank Ltd v Calcutta Steel Co, (1993)2SCC 199, 213.*

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[479] *Joy Narayan Sen Ukil v Srikanta Roy, 26 CWN 206.*

[480] *Rajasthan Blmvan Trust* v *Pradlya Devi,* AIR 2003 (NOC) Jhar 352: 2003 AIHC 2272, the defendant in violation of an agreement with the plaintiff sold the property to another by registered deed. The plainliff sought a mere declaration that the sale deed was void and did not seek a decree for specific performance in his favour, seeking a declaratory relief without seeking the main relief was held to be self defeating. *Muni- lakshmamma* v *Vijendra Rao,* AIR 2003 (NOC) Kant 376: ILR (2003) 1 Kant 637, a blank declaration thai all previous proceedings by the plaintiff be regarded as void, not allowable. *Ramesh Chand Ardawatiya \ Anil Panjwani,* (2003) 7 SCC 350: AIR 2003 SC 2508, suit under agreement to buy against trespasser, relief of declaration of title, restoration of possession and injunction sought, the suit could not be dismissed fa- omission to seek further relief because no further relief could be sought against a trespasser, the suit was proceeding *ex parte,* the buyer was put in possession under an agreement to sell to him, his possession had to be protected against the trespasser, but he was not entitled to a declaration that he was the owner of tb: property. *Gangaram Rambhau Zite* v *Chinddliu Degadu Tikone,* AIR 2003 Bom 1, dispute over lane betweei two houses, the party claiming possession and declaration could not prove. The court said that the description

In *Ram Saran* v *Ganga Devi*[225], the defendant was in possession of some of the suit properties and the plaintiffs in their suit did not ask for the possession of those properties. They merely prayed for a declaration that they were the owners of the suit properties. It was held that the suit was not maintainable and was hit by Section 42 of the Act of 1877 (now Section 34 of the Specific Relief Act, 1963).

A declaration was sought in respect of a property which was in the possession of a charitable trust. The property was purchased by the adoptive mother of the plaintiff in his name and given over to the trust under a valid trust deed. The plaintiff was minor at the time. He himself was a party to the trust deed and convenor of the trust. There was no evidence to show that he had let out the property to the trust. Documentary evidence showed that the trust was in possession of the property and was paying in respect of it property tax, electricity, water charges, etc. It was held that in the circumstances the plaintiff was not entitled to the relief of declaration of title.[226]

Declaration of rights or status is one at the discretion of the court under Section 34 of the Specific Relief Act, 1963. Equally, the grant or refusal of the relief of declaration and injunction under the provision of that Act is discretionary. The plaintiff cannot claim the relief as of right. It has to be granted according to sound principles of law and *ex debito justitiae.* The court cannot convert itself into an instrument of injustice or vehicle of oppression. While exercising its discretionary power, the court must keep in its mind the well-settled principles of justice and fair play and the discretion would be exercised keeping in view the ends of justice since justice is the hallmark and it cannot be administered in vacuum. Grant of declaration and injunction relating to commercial transactions tend

of the house property in certified copy of the house maps was conclusive and clinching evidence and that showed that the plaintiff did not own and possess the lane, as it was included in the area of the defendant. Plaintiff's case rejected.

225 (1973) 2 SCC 60: AIR 1972 SC 2685. *Shlv Charan* v *Sukli Ram*, AIR 2003 P&H 251 (NOC): (2003) 2 Rec Cri R 149, acquisition of ownership by the plaintiff under gift deed not disputed, the defendant claimed permanent lease and ownership, the lease had expired, but the defendant continued in possession even after expiry both under the original owner and the plaintiff. It was held that the plaintiff was entitled to declaration of ownership and possession. *Manmohan Singh* v *Joginder Kaur*, AIR 2003 Del 261 (NOC), suit for declaration of ownership not allowed because the suitor had only unregistered will without any letters of administration. The fact that probate was not necessary in Delhi was said to be immaterial.

226 *Pradeep Kumar* v *Mahaveer Pershad*, AIR 2003 AP 107. *Heirs Kantilal Purshottamdas Patel* v *Dahiben Jagdish Rathod*, AIR 2003 Guj 82, the suit was filed by the widow of the deceased on the ground that the sale of the ancestral property was without legal necessity. She was herself one of the witnesses to the registered sale deed, which contained clear recitals about legal necessity. No suit filed for 4 years for setting aside the sale. The bank account into which the sale consideration was deposited was being operated by her after her husband's death. The court said that the sale deed was valid and effective. *N.S. Ranuinalhan* v *N. Krishna- moortliy Iyer*, AIR 2003 Mad 78, the plaintiff claimed ownership over the property by virtue of a partition decree passed in an earlier proceeding. The defendants did not produce anything to prove their title over the property. They rather admitted the plaintiff's ownership and possession. The plaintiff was held entitled to the declaration. The defendant could not take advantage of the fact that the measurement of the property was different from that shown under the earlier suit for partition. *Ramavtar* v *Ramgopal*, AIR 2003 MP 29, record showed that the defendant was in possession of the portion under dispute even before the plaintiff purchased the land. The report of the local commissioner was also in favour of the defendant. Plaintiff's suit dismissed.

to aid dishonesty and perfidy. Conversely, refusal to grant relief generally encourages candour in business behaviour, facilitates free flow of capital, prompt compliance with covenants, sustained growth of commerce and above all inculcates respect for the effi cacy of judicial adjudication. Before granting or refusing to grant relief of declaration o injunction or both the court must weigh pros and cons in each case, consider the facts am circumstances in their proper perspective and exercise discretion with circumspection t further the ends of justice. In this backdrop of fact situation it was held in a case that th relief of declaration granted was unjust and illegal as it tended to impede the free flow c capital, thwarted the growth of mercantile business and deflected the course of justice.[2]

Questioning sale deed on ground of fraud

The document containing the sale deed was questioned on the ground of fraud allegi to have been practised by the purchaser. But fraud was not proved. The transaction w< therefore, not void. The transaction could have repudiated in accordance with the tin- limit prescribed by Article 59 of the Limitation Act, 1963.[481]

Parties who are bound by declaration

35. Effect of declaration.—A declaration made under this Chapter is bind, only on the parties to the suit, persons claiming through them respectively, and wh any of the parties are trustees, on the persons for whom, if in existence at the date the declaration such parties would be trustees.

Section 35 lays down that a declaration made under this chapter *(i.e.* Chapter VI of Act) is binding only:

(i) on the parties to the suit,

(ii) on persons claiming through them respectively, *e.g.* reversioners, widows sons etc., and

(Hi) where any of the parties are trustees, on the persons for whom, if in exist at the date of the declaration such parties would be trustees.

For example, A, a Hindu, in a suit to which *B,* his alleged wife, and her mothe defendants, seeks a declaration that his marriage was duly solemnised and an ord< the restitution of conjugal rights. The court makes the declaration and order. *C* clai

228 *Mathuri Bewa v Prafulla Routray, AIR 2003 Ori 136.*

that *B* is his wife, then sues A for the recovery of *B*. The declaration made in the former suit is not binding upon C.

***(iv) Limitation.*—The governing Articles in the Indian Limitation Act, 1963 are Articles 56, 57 and 58.**

Amendment of plaint and limitation

A suit for declaration was filed within limitation. The plaintiff subsequently became aware of the fact that he had failed to include his money claim. An amendment of the plaints was allowed. It was held that the entire claim as such must be deemed to have been filed within time.[229]

INJUNCTIONS

The term 'injunction' has been the subject of various attempts at a definition. It has been defined by Joyce as "An order remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party informed."

In Burney "injunction has been defined to be a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another is restrained from continuing or commencing such wrongful act."

Both of these definitions are expressive more of what is called a prohibitory injunction that mandatory injunction. The definition which clearly includes both is the one given by Lord Halsbury. According to him 'An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing'.

Injunction acts *in personam.* It does not run with the property. For example A, the plaintiff, secures an injunction against *B* forbidding him to erect a wall. A sells the property to C. The sale does carry the injunction with the property.

An injunction may be issued for and against individuals, public bodies or even the State. Disobedience of an injunction is punishable as contempt of court.

There are three characteristics of an injunction: (0 it is

a judicial process,

the relief obtained thereby is a restraint or prevention, and

the act prevented or restrained is wrongful.

Nelson suggests that "the nature of discretion and the rules for its guidance, in the case of Indian Courts are the same as in England".

Under English Law:

(1) if the injury to the plaintiff's legal rights is small; and

Ex-Servicemen Security Bureau v T.N. Electricity Board, AIR 2003 Mad 19.

(2) is one which is capable of being estimated in money; and
(3) is one which can be adequately compensated by a small money payment; and
(4) the case is one, in which it would be oppressive to the defendant to grant an injunction,

then damages in substitution for an injunction may be given.

In India some of these points have been incorporated into rules of jurisdiction by being enacted as sections of the Specific Relief Act, 1963.

They may be stated as below:

An injunction will not be issued—

(i) where damages are the appropriate remedy,

(ii) where injunction is not the appropriate relief,

(iii) where the plaintiff is not entitled to an injunction on account of his conduct,

(iv) where the contract cannot be specifically enforced,

(v) where the injunction would operate inequitably.

Kinds of injunction

36. **Preventive relief how granted.**—Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Injunctions are either temporary (interlocutory) or perpetual. They are defined in Section 37, Specific Relief Act, which reads—

37. **Temporary and perpetual injunctions.**—(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Temporary injunctions

The procedure for granting temporary injunction is governed by the rules laid down in Order XXXIX, Rules 1 and 2, Civil Procedure Code[230] which reads as under:

For Ihe U.P. amendment of Order XXXIX. Rules 1 and 2, *see* Section 13 of the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976. *Stale of Havana* v *State of Punjab*, (2004) 12 SCC 673, applicability and basic distinctions explained.

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Cases in which temporary injunction may be granted

A temporary injunction may be granted in the following cases:

1. *For protection of interest in property* This category will

cover the following cases:

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(,b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.[482]

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. *Injunction to restrain repetition or continuance of breach*

(1) In any suit for restraining the defendant from committing a breach of contract or other injury, of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit.

Discretionary relief

It should be noted that grant of injunction is discretionary with the court. Section 36 of the Specific Relief Act, 1963 expressly lays down that "Preventive relief is granted *at the discretion of the court* by injunction, temporary or perpetual"[483]. Therefore the court will grant temporary injunction if the following conditions are satisfied:

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482 *Volition Investments (P) Ltd* v *Madhuri Jitendra*, AIR 2003 Bom 360, sale of premises which were in possession of tenants, full payment was to be made by the buyer without waiting for consent letters from tenants to vacate, presumption that time was not of essence. Even in the absence of such letters the memorandum of understanding for transfer of premises did not end. The buyer was entitled to injunction to prevent the seller from transferring the property to any other person.

Ravi Singhal v *Manali Singhal*, (2001) 8 SCC 1, in an application for interim relief in respect of a settlement, the court said that it is at the.discretion of the court to grant interim relief and exercise of discretion should not be perverse or irrational.

(0 The plaintiff must establish a *prima facie* case. He is not required to make out a clear title but he must establish that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the injunction is finally disposed of.

(ii) **An irreparable injury would result if the injunction were refused and that there is no other remedy open to the applicant by which he could protect himself from the consequences of the apprehended injury.**

(iii) **The conduct of the plaintiff has not been blameworthy.**

(iv) **The balance of convenience requires that the injunction should be granted.**[233]

Interim Injunction when perpetual injunction is prayed for

In a suit for specific performance of an agreement to buy land, there was no prayer for a decree of perpetual injunction restraining the defendant from transferring the suit land by way of sale to some other person etc., till the disposal of the suit. But he prayed for an interim injunction which was not allowed.[234] **The court followed its own earlier ruling in which it was said:**[235] **"It is also a settled principle that in a suit where there is no permanent injunction sought for, in the final analysis, ordinarily a temporary injunction cannot be granted. The principles that govern the grant of a perpetual injunction would govern the grant of a temporary injunction also."**[236]

Disobedience or breach of injunction

Section 94(c) and Rule 2-A of Order 39 of the Civil Procedure Code (Act V of 1908) provide for the consequences of disobedience or breach of injunction. Section 94(c) provides:

> **In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed . . . grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.**

And Rule 2-A of Order 39 provides:

"Rule 2-A. Consequence of disobedience or breach of injunction.—(1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or

[233] *Zaheer Khan* v *Percept D 'Mark (India) (P) Ltd,* AIR 2004 Bom 362, restrictive covenant in contract in the nature of restraint of trade, order to enforce not issued.

[234] *Ishwarbhai v Bhanushali Hiralal Mohanlal Nanda, AIR 2002 Gui 328.*

[235] *Gujarat Electricity Board v Mahesh Kumar & Co, (1982) 2 Gui LR 479: AIR 1982 Gui 289.*

[236] The court cited the following cases as explaining when an appellate court should interfere in the exercise of discretion by the lower court: *Laxmikant* V *Patel* v *Chetanbhai Shah,* (2002) 3 SCC 65: AIR 2002 SC 275: AIR 2001 SCW 4989; *Wander Ltd* v *Antox India (P) Ltd,* 1990 Supp SCC 727; *N.R. Dongre* v *Whirlpool Corpn,* (1996) 5 SCC 714: AIR 1996 SCW 3514.

proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto".

The above provisions provide for the penalty of either arrest or attachment of property of the person who has committed disobedience or breach of the injunction. But the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year. If the disobedience or breach continues, the property attached may be sold and out of the proceeds the Court may award such compensation as it thinks fit to the injured party.

Perpetual injunctions

Section 37(2) lays down that a permanent injunction can be granted only by a decree at the hearing and upon the merits of the suit. In other words for obtaining a permanent injunction, a regular suit is required to be filed in which the right claimed by the plaintiff is examined on merits and finally the injunction is granted by means of the decree. A permanent injunction therefore finally decides the rights of parties whereas a temporary injunction does not do so. A permanent injunction forbids the defendant from asserting a right or committing an act which would be contrary to the rights of the plaintiff.

Section 38 of the Specific Relief Act states the circumstances in which a permanent injunction can be granted. It provides:

38. Perpetual injunction when granted.—(1) Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely—

- ***(a)*** **where the defendant is trustee of the property for the plaintiff;**
- ***(b)*** **where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;**

(c) where the invasion is such that compensation in money would not afford adequate relief;

(id) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Requirements for applicability

The conditions prerequisite to the applicability of this section are—

there must be a legal right express or implied in favour of the applicant;

such a right must be violated or there should be a threatened invasion;[237]

such a right should be an existing one;

the case should be fit for the exercise of court's discretion.[238] Where the inconvenience likely to result from granting injunction is greater than that which is likely to arise from withholding it, the injunction should not be granted[239];

it should not fall within the sphere of the restraining provisions contained in, or referred to, in Section 41 of the Specific Relief Act.[240]

The word 'obligation' in Section 38(1) has been used in a wide sense and it may arise from:

(0 Contract,

***(it)* Trust,**

***(Hi)* Tort,[241]**

(iv) Any other legal obligation.

237 *Parkasho Devi* v *Tarsem Lai,* AIR 2003 P&H 245. suit by plaintiff for injunction restraining the defendant from interfering with plaintiff's possession. Entries in revenue records were in plaintiff's favour. Subsequent entries which came into being without notice to the possessor (the plaintiff) and without following Financial Commissioner's instructions could not sustain the defendant's claim to possession. Injunction granted. *Mud- danna* v *Pantlianagere Group Panchayat,* (2003) 10 SCC 349, the Panchayat could not remove the person in possession because the title to the land was in dispute. The Panchayat should have followed the normal procedure under the Panchyat Act.

238 *Gur* v *Bhag,* 96 PR 1911: 11 IC 213.

239 *Ibid.*

240 *Attar Singh Balram Singh* v *Kishan Das Prabhu Das,* ILR 18 Lah 345. An injunction is not allowed where the suit is an abuse of the proccss of court, *Suiya Nalli Singh* v *Khedu Singh,* 1994 Supp (3) SCC 561.

241 In a case before the Supreme Court an injunction was prayed for directing the Municipal Corporation, not to issue a licencc for running or operating a "bhatti" (baking oven) for a bakery. The Court said:

"Insofar as the Municipal Corporation is concerned, the dismissal of the suit against it by the trial court was not challenged by the plaintiffs by filing an appeal. Grant of licence is a statutory function to be discharged by the Municipal Corporation. The licence having already been issued by the Municipal Corporation to appellant-Defendant 1, the trial court rightly observed that the plaintiffs were at liberty to approach the Municipal Corporation and seek cancellation of licence or pray for withholding the renewal thereof by making out a case for the grant of such relief within the framework of the legal provisions governing the grant and renewal of such licence. In the event of the plaintiffs being illegally or unreasonably denied relief by the Municipal Corporation, they would be at liberty to pursue the remedy of appeal or approach the superior authorities within the framework of the Punjab Municipal Corporation Act or such other remedy as may be

Section 38 expressly states that where such obligation arises from a contract, the court shall be guided by the principles and rules given in connection with the specific performance of contracts. Thus a permanent injunction will be granted to prevent breach of contract only in those cases where the contract is capable of specific performance. It is again made clear by the language of Section 41(e) which says that an injunction will not be granted to prevent breach of a contract which is not capable of specific performance. Section 42, however, says that where a contract comprising of a positive agreement to do a certain act is coupled with a negative agreement not to do a certain act, whether expressly or impliedly, the fact that that positive part is not capable of specific performance will not preclude the court from enforcing the negative part of the agreement by means of an injunction, provided that the plaintiff performs his part of the contract. For example, *A* contracts to sing at *B's* theatre for one year and not to sing elsewhere.[242]

The essence of the section is that where a contract contains both affirmative and negative agreements and although it may be beyond the powers of the Court to compel specific performance of the affirmative part, a party may be restrained from committing a breach of the negative part, provided that the plaintiff has performed his part of the contract.

The conditions essential to the applicability of this section are—

(1) the contract must contain two agreements, that is, (i) an affirmative agreement to do a certain act, and *(ii)* a negative agreement (express or implied) not to do a certain act and the negative part must be capable of being separated from the rest of the contract; and

(2) the applicant must have fully carried out his part of the contract.

The court is not bound to grant an injunction in every case. An injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.[243]

Again, where the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the court may grant permanent injunction in the following cases:

***(i)* Where the defendant is a trustee of the property for the plaintiff. For example, in the course of A's employment as an advocate, certain papers belonging to his client *B,* came into his possession. *A* threatens to make these papers public**

available to them in accordance with law. *Kuldip Singli* v *Subhash ChanderJain,* (2000) 4 SCC 50: AIR 2000 SC 1410.

242 *Ramesh Kumar* v *Chaman Lai,* AIR 2003 Del 202, the property in question belonged to the purported seller and his sister, the seller by misrepresenting his exclusive right received advance, buyer could not get any right, he was allowed refund of his earnest money and compensation for his loss.

243 *Gujarat Bottling Co Ltd* v *Coca Cola Co,* (1995) 5 SCC 545: (1995) 84 Comp Cas 618. *Panchu Pradhan* v *Ramachandra Sethi,* AIR 2003 NOC (Ori), suit for declaration of sale deed to be null and void, declaration made appealed against, order of restoration of possession not passed because a temple had already been constructed on the land and the deity installed. The court said that the suit about the land was maintainable, the decree for permanent injunctio'rf was to be set aside. *Mohd Abdullah* v *Zainab Begum,* AIR 2004 AP 474, judgment based on misinterpretation of documentary evidence and ignoring material evidence, set aside.

or communicate their contents to a stranger. *B* may sue for an injunction to restrain *A* from so doing. A legal practitioner is under an obligation in the nature of trust not to disclose secrets of his clients.[244]

***(ii)* Where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion:**

For example, *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and C, who carry on business in the neighbourhood. *B* and C may sue for an injunction to restrain *A* from polluting the air.

***(Hi)* Where the invasion is such that compensation in terms of money will not afford adequate relief, for example, *A*, a professor of law, delivers lectures to his students, the lectures being his own literary composition, he does not communicate such lectures to the whole world. These lectures are the property of the professor and not of the students. A is entitled to restrain the students from publishing the notes without his consent.**

***(iv)* Where it is necessary to prevent a multiplicity of judicial proceedings.**

An injunction cannot be issued in favour of a trespasser against the true owner.[245] Where the plaintiff fails to establish his legal right to the property or his legal right to continue in possession, he could not be granted perpetual injunction against the owner or the manager of the property.[246] The fact that a trespasser has established his possession and, therefore, cannot be thrown out except by court orders does not entitle him to an injunction.[247]

Where two persons were in joint possession and enjoyment of property, one of them was not allowed to seek a mandatory injunction to exclude the other from the property and leave it for exclusive enjoyment of the plaintiff. The title to the property was in dispute. The court would have to determine the title to the property first after giving opportunity to both parties. The plaintiff was not entitled to final relief merely on the basis of possession.[248]

[244] 5. *Ganapathy* v *Kunjanvnal,* AIR 2004 Mad 436 (NOC): 2004 AIHC 2611, property belonged to *Samadhay- am* of the village, handed over to village carpenter, after his death to successor carpenter, injunction issued in his favour for uninterrupted possession and use. *Manjoor Ali* v *Kishmat Ali,* AIR 2004 All 394, sale deed, not acted upon by mutation, etc, no basis of rights.

[245] *Kishan Lai v Radhey Shy am, AIR 2002 All 271.*

[246] *Municipal Board v Abdul Hammeed, 1981 All LJ 376.*

[247] *Ram. Rattan v State of[U.P.. (1977) 1 SCC 188: AIR 1977 SC 619; Krishna Ram Mahale v Shobha Venkat Rao, (1989) 4 SCC 131: AIR 1989 SC2097; Yar Mohammad v Lakshmi Das, AIR 1989 All 1.*

[248] *Venkataswamy* v *A. Narayana.* AIR 2002 Kant 326. *Ttppanna* v *Ghanashyam,* AIR 2004 Kant 446, party wall and windows existing since several decades, right protected by permanent injunction. *K. Doddanagow- da* v ^ *Ramachandra Reddy,* AIR 2004 Kant 449, open land in front of the house in use as access since times immemorial, protected by permanent injunction against a person trying to raise a construction there.

Injunction to restrain possession

If an issue relating to a flaw in the title of the person in possession is not raised, the parties to the suit or those claiming under them would be estopped from challenging the flawed title in any future suit based on title. The title to the suit property in this case was flawed for not being in writing or registered. The person who claimed a permanent title to restrain his possession had not challenged his title on that basis. Accordingly, when he sold the suit property to a third person, the latter was also estopped from challenging the flawed title on the ground of non-registration in the suit filed for declaration of title and possession. The court said that the unregistered title of the allottee from a Cooperative Housing Society is better than the claim based on an unregistered relinquishment of ownership of the suit property.[249]

The grant of discretionary relief, such as an injunction, is equitable in nature. It must be granted, inter alia, on consideration of equity and justice. The appellant who was himself guilty of inequitable conduct could not claim such relief. He obtained possession under the order of an Authority which had no jurisdiction. The respondent deserved in equity to be put back into possession so as to restore the *status quo ante.* The order of restoration deserved no interference.[250]

Refusal of injunctive relief

Section 41 lays down the circumstances when perpetual injunction will be refused by the court. In other words, Section 41 lays down the defences that can be raised against the prayer for grant of an injunction. It provides:

41. Injunction when refused.—An injunction cannot be granted—

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(ib) to restrain any person from instituting or prosecuting any proceeding in court not subordinate to that from which the injunction is sought;[251]

(c) **to restrain any person from applying to any legislative body;**

(d) **to restrain any person from instituting or prosecuting any proceeding in a criminal matter;**

249 *Annaimuthu Thevar* v *Alagammal,* (2005) 6 SCC 202; *Maria Colaco* v *Alba Flora Herminda D'Souza,* (2008) 5 SCC 268, plaintiff was in possession of property after owner's death, the defendant assumed control and started construction, on protest by the plaintiff, the defendant stopped the construction for some time. This showed that the defendant was not sure of his title or rights, grant of injunction restraining defendant was not improper.

250 *Kanchusthabam Satyanarayana v Namuduri Atchutaramayya, (2005) i 1 SCC 109: AIR 2005 SC 2010.*

251 *State Batik of India* v *Madhumita Construction (P) Ltd,* AIR 2003 Cal 7, the expression "court" does not include the Debts Recovery Tribunal either for purposes of appeal or revision. The High Court cannot stay further proceedings pending before the Tribunal in the exercise of the power under S. 9, CPC or clause 12 of the Letters Patent.

(e) to prevent the breach of a contract the performance of which would not be specifically enforced;

(/) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiescenced;

(,h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;[252]

(0 when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;[253]

(/) when the plaintiff has no personal interest in the matter.[254]

In a suit by a coparcener for a permanent injunction for restraining the *Karta* or manager of the joint Hindu Family from transferring the joint family property in pursuance of a sale agreement with a third party, it was held that such an injunction could not be granted. The court said that though in the case of waste or ouster an injunction may be granted against the manager but a blanket injunction restraining permanently from alienating the family property, even in the case of legal necessity, cannot be granted. The court further said that Section 38 of the Act has to be read with Section 41. As the coparcener has an adequate remedy to impeach the alienation under the family law, he cannot, in view of Section *41(h)* move the court for an injunction restraining the *Karta* from alienating the coparcenary property.[255]

253 Thus where a wrong can be compounded in money, compensation will be an equally efficacious relief. But in such a case also if the defendant is an insolvent or pauper, a decree for damages would be a mere mockery and therefore the court may grant injunction.

254 This clause incorporates the maxim: "He who comes to equity must come with clean hands." For example, where an article name as 'Mexican Balm' is said to be consisting of rare medicinal qualities, but which really is nothing but an ordinary ointment, the vendor's description being dishonest no injunction can be issued to restrain another dealer from selling a similar article under the same name in order to misguide the people. *Premji Rataney Shah* v *Union of India.* (1994) 5 SCC 547, at p. 550, no injunction can be issued in favour of a trespasser or a person who gained unlawful possession as against the true owner. *M.S. Madhusoodhanan* v *Kerala Kaumudi (P) Ltd*, (2004) 9 SCC 204: AIR 2004 SC 911, application for permanent injunction against obstruction to peaceful enjoyment of office premises, suit filed 2 years after the obstruction began. Refusal of injunction was held to be improper. The right to enjoyment of property could not be taken to be extinguished by inaction for 2 years.

255 *Brahmin Nijog* v *Badu Nijog*, AIR 2003 Ori 64, one group was acting as *sevakas*, another group was performing pooja and collected offerings, another group collected be/a leaves and flowers and handed them over for performance of puja. All the groups were, therefore, held to have personal interest in the matters of the temple. A case was filed by one group and the temple for an injunction against introduction of ticket system.

Sunil Kumar v *Ram Parkash.* (1988) 2 SCC 77: AIR 1988 SC 576: (1988) 1 HLR 573, overruling *Shiv Kumar Moolchand Arora* v *Mool Chand*, AIR 1972 P&H 147 and approving *Jujhar Singh* v *Giany Talok Singh*, AIR 1987 P&H 14.

Restraint on person or property outside jurisdiction

The court which passed a decree has power to restrain a person from handing over property in his possession to the judgment debtor (suit property) along with the title documents and keeping them in safe custody. Such an order is in the nature of a freezing order, or mareva injunction, an order akin to an Anton Filler order. Such an order can be passed if the property or the person concerned is outside the jurisdiction of the court.[256]

Order for rescuing arbitration process

Where one of the parties was attempting to sabotage the arbitration process, the court emphasised its role in providing underlying support. The power to grant an injunction by way of a specific relief is covered by the 1963 Act. Specific relief is one of the types of relief available for preventing breach of an obligation.[257]

Mandatory Injunctions

39. Mandatory injunctions.—When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

The injunction which commands the defendant to do something is termed as 'Mandatory Injunction'. Salmond defines mandatory injunction as "an order requiring the defendant to do a positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfilment of the legal obligations, for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights' ,[258]

Section 39 of the Specific Relief Act, 1963, reads: "When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

When a mandatory injunction is granted under this section, two elements have to be taken into consideration: In the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation; in the second place, the requisite acts must be such as the Court is capable of enforcing.[259] These acts may assume a variety of forms, e.g. pulling down of a building as in Illustration *(a)* above, the pulling down of eaves as in Illustration (b), the destruction of written communications and letters as in Illustrations (c) and (d), destruction of copies produced by piracy of copyright and of trade

[256] *Mohit Bhargava v Bharat Bhushan Bhargava, (2007) 4 SCC 795.*

Adhunik Steels Ltd v Orissa Manganese and Minerals (P) Ltd, (2007) 7 SCC 125.

[258] Salmond, THE LAW OF TORTS, 186-(13th Edn, 1961, changed in later editions).

Lakshi v *Tara,* (1904) 31 Cal 944, 949; *Khazan Singh* v *Ralla Ram,* AIR 1937 Lah 839.

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marks improperly used by the defendant as in Illustrations (v) and (w) of former Section 54, set out under Section 38 above, and Illustration *(g)* above.

Mandatory injunction, however, will not be granted in the following cases:

***(i)* Where compensation in terms of money would be an adequate relief to the plaintiff.**

***(ii)* Where the balance of convenience is in favour of the defendant.**

(Hi) Where the plaintiff is guilty of allowing the obstructions to be completed before coming to the court, i.e. where plaintiff has shown acquiescence in the acts of the defendant.

(iv) Where it is desired to create a new state of things. Mandatory injunction, as is clear, is granted to restore *status quo.* It cannot be granted to create a new state of things. Thus, it was held by the Allahabad High Court in *Sheo Nath* v *Alt*[260], that where the defendant constructed a structure which interfered with the privacy of the plaintiff's house, he could not be ordered to erect a wall on the roof, so as to prevent a view of the plaintiff's house from the roof.

In a dispute between a brother and his sister, the background was that the sister constructed a house adjacent to that of her brother and the brother actively participated in the construction activity and also allowed her to take the support of his wall. He never objected. Two years later, he changed his mood and claimed removal or demolition of the construction. The trial court refused to order demolition but granted an order against further construction. Such order was held to be proper. The order of the appellate court for demolition by resorting to the Easements Act, 1882 was held to be not proper since an easementary right was never claimed.[261]

Damages in lieu of or in addition to Injunction [S. 40]

40. Damages in lieu of, or in addition to, injunction.—(1) The plaintiff in a suil for perpetual injunction under Section 38, or mandatory injunction under Section 39. may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff ha; claimed such relief in his plaint:

Provided that where no such damages have been claimed in the plaint, the cour shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on sue! terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favou of the plaintiff shall bar his right to sue for damages for such breach.

[260] 80 All 70.

[261] *Dhaniya Bai* v *Jiwan,* AIR 2003 MP 71.

This section provides that the plaintiff in a suit for perpetual injunction under Section 38, or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for, such injunction, and the court may, if it thinks fit, award such damages. The plaintiff has specifically to include in his plaint a claim for damages also. If he has not done so, he may seek permission of the court for the amendment of his pleadings. But where a suit, in which damages were not claimed, is dismissed, a subsequent separate suit for damages would not lie. The court can award damages in lieu of injunction where the injury is threatened though not yet caused. The House of Lords in *Leeds, Industrial Coop Society Ltd* v *Black*[262], laid down that damages could be allowed to a person whose tenement is sure to suffer loss of his right to light when a planned building structure comes up. Where, for example, a person happened to raise his building to encroach upon the land of his neighbour up to three inches, the court allowed the neighbour compensation instead of an order for demolition of the building.[263] Damages have also been allowed under this principle where information delivered in confidence was put to use.[264]

262 1924 AC 851: (1924) All ER Rep 259. Non-compliance is an offence of a perpetual nature. *Jai Dayal* v *Krishan Lai Garg*, (1996) 11 SCC 588.

263 *Tilokchand* v *Dhundiraj*, AIR 1957 Nag 2, of the same kind; *Armstrong* v *Sheppard & Short Ltd*, (1959) 2 All ER 651 CA.

Eraser v Thames Television Ltd, (1983) 2 All ER 101 HL.

31 *Harris* v *Nickerson*, (1873) LR 8 QB 286.

49 ||971] 1 All ER 686 CA: [1971] 2 QB 163.

50 *See* the decision of the Supreme Court in *B. V. Nagaraju* v *Oriental Insurance Co Ltd.* (1996) 4 SCC 674: AIR 1996 SC 2054, explaining fundamental breach.

81 118791 LR 4 Ex Div 26 CA.

84 (1840) 2 Beav 334.

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95 *Delhi Development Authority v Ravindra Mohan Agarwal, (1999) 3 SCC 172: AIR 1999 SC 1256.*

95 A tender which does not comply wilh the specified requirements of tendering is liable lo be rejected, *N.O. Shetty* v *K.S.R.T. Corpn,* AIR 1992 Kant 94.

97 1LR (1899) 24 Bom 97.

Chatturbhuj Vithaldas v *Moreshwar Parashram,* AIR 1934 SC 230. See *Secy, of State for India* v *Bhciskar Krishnaji Samani,* ILR (1925) 49 Bom 759: AIR 1925 Bom 485, where certain rules, prohibiting withdrawal of tenders framed under the provisions of the Indian Forest Act were held not to be *ultra vires. Kisan Salikari Chini Mills Ltd* v *Vardan Linkers,* AIR 2008 SC 2160, tenderers for molasses from sugar mills were required to be actual users and also to deposit earnest money with the mills, the tenderer in this case did not satisfy these requirements, hence not qualified, even so the authority permitted him to take molasses in terms of the tender, cancellation of the order by the court was justified.

100 *State of Maharashtra v A.P. Paper Mills Ltd, (2006) 4 SCC 209: AIR 2006 SC 1788.*

54 (1877) 2 Bom 362.

64 (1860) 9 CB (NS) 159: 142 ER 62: 127 RR 604.

23 (1891) 18 IA 144; *Roshan Lai* v *Kartar Chand,* AIR 2002 HP 131, gift of property by an eighty-five year old donor cancelling a will made a long time ago, no influence shown, no unconscionableness in the transaction, the facts that the donor was of 85 years, he cancelled a will, witnesses were not from his village, the donee was not proved to be his legally adopted son, were held to be no symptoms of undue influence. *M. Ran- gasamy* v *Rengammal,* (2003) 7 SCC 683: AIR 2003 SC 3120, presumption of undue influence only because of near relationship has been held to be not permissible.

67 [1964] 1 A11 ER 290: [1965] 1 QB 525 CA.

73 (1857) 27 LJ Ex 117: 157 ER 232.

74 (1878) 3 AC 459: 38 LT 573.

75 [1919] 2 KB 243.

72 1959 Ch 198: [1958] 2 WLR 858: [1958] 2 All ER 65.

84 ILR (1885) 11 Cal 545.

85 AIR 1967 SC 1098: (1967) 2 SCR 378; Followed in *Rajan G R V v Tube Investment of India Ltd,* (1995) 1 LW 274 (TN) and *R. Babu* v *TTK LIG Ltd,* (2004) 2 CTC 684 (TN), so as to hold that such injunctions are allowable.

140 AIR 1959 SC 781: 1959 Supp (2) SCR 406: (1959) 2 SCA 342.

147 *N.V.P. Pandian v M.M. Roy, AIR 1979 Mad 42.*

6 (1872) LR 7 Exch 111.

9 (1843) 6 Mail & G 593: 64 RR 810 (Ex Ch): 12 LJ Ex 477; *ONGC Ltd* v *Assn of Natural Gas Consuming Industries,* (2004) 5 SCC 253: AIR 2004 SC 2327, ONGC increased its supply price, GAIL had to demand more from consumers, held justified. On accumulated arrears simple interest was allowed.

" *Kapur Chand Godha v Mir Nawab Himayalikhan Azamjah, AIR 1963 SC 250, 254: (1963) 2 SCR 168, 179.*

14 See *Rama Shanker Singh* v *Shyamlata Devi,* AIR 1970 SC 716: (1969) 2 SCR 360, contribution between lessees. The court cannot say that its judgment should be enforced against one joint promisor in the first instance and against other "thereafter. *Mukund Das Raja Bhagwan Das and Sons* v *Slate Bank of Hyderabad,* (1970) 2 SCC 766: AIR 1971 SC 449: (1971) 2 SCR 136. *Hemma Pharma* v *Dawood Shoes P Ltd,* (2003) 3 BomCR781 (Bom).ifoneof several persons liable makes payment, it does not give a fresh peri od of limitation against other persons who were jointly and severally liable with him.

23 (1969) 3 SCC 120: AIR 1970 SC 546: (1970) 2 SCR 854; *Manager, United India Ins Co Ltd* v *Abbisetti Venkatarao,* AIR 2008 AP 8, cheque for vehicle insurance came back dishonoured, but insured not informed

45 (1922) 15 IA 9: 25 Bom LR 537: AIR 1923 PC 54.

63 1945 AC 221: [1945] 1 All ER 252.

64 [1922] 2 AC 180: [1922] All ER Rep 1 HL.

67 (1971) 2 SCC 288: AIR 1971 SC 1756.

68 AIR 1960J&K91.

™ [1916] 2 AC 397 at p. 408.

71 *British Movietones Ltd v London and Distt Cinemas Ltd, [1951] 1 KB 190.*

72 Privy Council 1935 AC 524.

76 1959 SCR 379: AIR 1958 SC 560.

80 (1904) 73 LJKB 401 : (1904) 1 KB 493 CA.

98 AIR 1963 SC 250: (1963) 2 SCR 168.

" Similarly, in *Hari Chand Madan Gopal* v *State of Punjab,* (1973) 1 SCC 204 : AIR 1973 SC 381 the Supreme Court held that the Government having decided to recover only 40%, could not subsequently sue for full payment.

102 (1973) 2 SCC 303 : AIR 1972 SC 2440; *Saipem SPA* v *Jindal Drilling & Industries Ltd,* (2003) 6 Bom CR 347, the contract for supply of a rigging machine provided that parties could waive their rights in writing. The contract period was extendable under a clause for covering a period of breakdown, if any. The period

Pearl Mill Co v Ivy Tannery Co, [1919] 1 KB 78.

112 (1970) 1 SCC 56: (1970) 2 SCR 455.

261

116 (1760) 2 Burr 1005 at p. 1012: [1558-1774] All ER Rep 581.

118 [1942] 2 All ER 122 HL: 1943 AC 32.

[157] (1853) 2 E & B 678: 95 RR 747: 118 ER 922: 22 LJ QB 455.

[158](1872) LR7Exch 111.

[161] 1962 AC 413: [1961] 3 All ER 1178: [1962] 2 WLR 17 HL. *Aslhing* v *L.S. John*, (1984) 1 SCC 205.

[163] *Juggilal Kamlapal* V *Pratapmal Rameshwar*, (1978) 1 SCC 69. See also *Bhagat Ram Batrav Union of India*. (1976) 2 SCC 416, where an auction bidder who failed to take the goods was allowed to claim no interest in them when they were resold at a considerable profit.

[65] *Oil & Natural Gas Corpn Ltd* v *Saw Pipes Ltd*, AIR 2003 SCW 3041 at p. 3073: (2003) 5 SCC 705: AIR 2003 SC 2629, breach of contract and loss must be proved.

[166] (1854) 9 Exch 341.

[169] (1876) 1 BD 274.

[173] [1898] 21 Mad 172.

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Union of India v Steel Stock Holders' Syndicate, (1976) 3 SCC 108: AIR 1976 SC 879.

[185] *Murlidhar Chironjilal v Harishchandra Dwarkadas. AIR 1962 SC 366: (1962) 1 SCR 653.*

[186] (1848) 18 LJ Ex 202.

[187] (1875) LR 10 QB 111.

[188] (1881) 7 QBD 591 CA.

[189]*Naughton* v *O'Callagham*, (1990) 3 All ER 191 QBD; *Council of Scientific & Industrial Research* v *Goodman Drug House P Ltd*, AIR 2007 Utt 58, a Scientific Institute contracted to provide a process within 5 months but could not do so even up to five years, huge expenditure involved. Arbitrator allowed compensation of 90 lakh rupees. The court refused to interfere.

[190] AIR 1971 Del 120; *Prem Lata* v *MCD*, AIR 2003 Del 211, alleged delay in supply, but no loss shown to have been caused. Claim for damages not allowed. *Maharashtra SEB* v *Sterlite Industries (India)*, (2002) 1 Bom CR 415, arbitrator's finding that damages could not.be awarded under S. 73 not disturbed by the court.

[191] [1957] 1 All ER 809: [1957] 2 QB 117 CA.

Modi Entertainment Network v *WSG Cricket Pt Ltd*, (2002) 3 Bom CR 634 (Bom), spillover of signals which was natural into the territory of other licensed broadcasters did not constitute breach of contract. In spite of

[215] See *Rodocanachi* v *Milburn*, (1886) 18 QBD 67 and *William Bros* v *Aguis*, 1914 AC 510; *Seth Thawarclas Pherumal* v *Union of India*, AIR 1955 SC 468: (1955) 2 SCR 48; *Koteswar Vittal Kamath* v *K. Rangappa Baliga & Co*, (1969) 1 SCC 255: (1969) 3 SCR 40: AIR 1969 SC 504; *Sotiros Shipping Inc* v *Sameret Sol- liolt*, [1981] Com LR 201. a contract for sale of ship, the seller defaulted but offered alternative ship which the buyer refused to accept, held, the buyer had failed to reasonably mitigate his loss. *Bhupesh Metals and Chemicals Ltd* v *Indian Iron & Steel Co Ltd*, AIR 1989 Cal 108, where on the failure to supply zinc dross, the buyer was allowed compensation on the basis of the difference between the market rate and contract rate.

[217] [1962] Lloyd's Rep 238.

[230] 1 9 1 5 AC 79: [1914-15] All ER Rep 739 HL.

[263] AIR 1962 SC 1810: (1963) 3 SCR 183.

[1] (1704)91 ER 27: 1 Salk 27.

[7] (1895) 19 ILR Bom 697. In England also it has been held that in such cases the guarantor should be helc liable as an indemnifier, *Yeoman Credit Ltd* v *Latter*. [1961] 2 All ER 294: [1961] 1 WLR 828 CA.

[8] AIR 1940 Oudh 346.

[13] [1912] 2 KB 72.

[69] [1891] 2 Ch 48.

Bank ofChittor v Narsimbulu, AIR 1966 AP 163.

[36] ILR (1928) 52 Bom 37: AIR 1928 Bom 5.

void.

[1] *Per* SMSHELAT, J of the Supreme Court in *Lallan Prasad* v *Rahmat Ali*, AIR 1967 SC 1322 atp. 1325: (1967)

[33] AIR 1956 SC 575: 1956 SCR 483.

[1] *Mahesh Chandra Basu v R.K. Bhattacharjee, (1908) 12 Cal WN 28 at p. 32.*

[11]

Leicestershire C.C. v *Michael Faraday*, [1941] 2 KB 205, valuers not agents.

" AIR 1967 SC 181.

[24] (1812) KB 15: 13 RR 364: 15 East 38.

[39] [1948] 2 KB 23 at p. 36.

[43] [1895] 2 QB 84.

[84] AIR 1957 MB 20 at p. 22.

[118]

[127] (1710) Bull NP 42: Willes 400, 405-406.

[131] (1882) 9 QBD 623.

[153]

LaBanque Jacques-Cartier v *La Banqued d'Epargne,* (1887) 13 App Cas 111. *Slate ofU.P.* v *Murari Bros Ltd.* (1971) 2 SCC 449: AIR 1971 SC 2210. No ratification of a Government contract made in c vention of Article 299(1) of the Constitution.

28 Based on *Falcke* v *Gray,* (1859) 29 LJ Ch 28: 112 RR 493.

Devinder Singh v Mansha Singh ,AIR 2003 P&H 166.

Cecan International (P) Ltd v Ashok Surana, AIR 2003 Cal 263; Guruswamy Nadar v P. Lakshmi Ammal. (2008) 5 SCC 796, two days after filing of suit the property in question was transferred to another pers:-. held the new buyer not entitled to the benefit of the contract because of the pending suit.

111 *Kallathil Sreedharan* v *Komath Pandyala Prasanna,* (1996) 6 SCC 218, impecuniosity of the party to pay for the part of the joint family property which came to her in excess of share, advance paid, ordered to be refunded and specific recovery not granted. *V. Pechimuthu* v *Gowarammal,* (2001) 7 SCC 617: AIR 2001 SC 2446, wrong exercise of discretion.

112 *Lourdu Man David v Louis Chinnaya Arogiaswamy, (1996) 5 SCC 589: AIR 1996 SC 2814.*

162 *Jag dish Singh* v *Natthu Singh,* (1992) 1 SCC 647: AIR 1992 SC 1604.

227 *Thakamma Mathew* v *M. Azamathulla Khan,* 1993 Supp (4) SCC 492: AIR 1993 SC 1120; *J. Daula* v *Delhi Golf Club Ltd,* AIR 2002 Del 501, declaration that the plaintiff was entitled to the membei the club was not granted. The fact that some others were admitted wrongly would not by itself entitle admission to membership. Article 14 of the Constitution was not applicable to the club. *Gangadliar B Surendra Barik,* AIR 2003 Ori 322 (NOC): (2003) 1 Ori LR 51, proceeding under S. 145, CrPC, po; taken over by receiver from the wrongdoer. On the basis of such possession, the wrongdoer was not suit for declaration under the section002E