# PART I

# GENERAL PRINCIPLES

(Ss. 1-75)

# 1

# *Agreement, Contract and Proposal*

## The Indian Contract Act, 1872

[Act 9 of 1872][1]

[*25th April, 1872*]

**Preamble.**—Whereas it is expedient to define and amend certain parts of the law relating to contracts; it is hereby enacted as follows:—

*Preliminary*

**1. Short title.**—This Act may be called the Indian Contract Act, 1872.

**Extent and commencement.**—It extends to [2](the whole of India) [3](except the State of Jammu and Kashmir); and it shall come into force on the first day of September, 1872.

[4][* * *] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor

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1. For the Statement of Objects and Reasons for the Bill which was based on a report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated 6th July, 1856, *see* Gaz. of India, 1867, Extra., p 34; for the Report of the Select Committee, see *ibid.*, Extra., dated 28th March, 1872; for discussions in Council, see *ibid.*, 1867, Supplement, p 1064; *ibid.*, 1871, p 313 and *ibid.*, 1872, p 527.

   The chapters and sections of the Transfer of Property Act, 1882 (IV of 1882), which relate to contracts are, in places in which that Act is in force, to be taken as part of Act IX of 1872—*see* Act IV of 1882, Section 4.

   This Act has been extended to Berar by the Berar Laws Act, 1941 (IV of 1941), to Dadra and Nagar Haveli by Reg. 6 of 1963, S. 2 and Sch. I, to Goa, Daman and Diu by Reg. 11 of 1963, S. 3 and Sch., to Laccadive, Minicoy and Amindivi Islands by Reg. 8, 1965, S. 3 and Sch., to Pondicherry by Act 26 of 1968, S. 3 and Sch. and has been declared to be in force in—

   the Santhal Parganas—*see* the Santhal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (III of 1899), Section 3.

   Panth Piploda—*see* the Panth Piploda Laws Regulation, 1929 (I of 1929), Section 2.

   It has been declared by notification under Section 3(*a*) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in—

   the Tarai of the Province of Agra—*see* Gaz. of India, 1876, Part I, p 505;

   the Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—*see* Gaz. of India, 1881, Part I, p 504.

   The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—*see* Calcutta Gaz., 1899, Part I, p 44.

   It has been amended in C.P. by C.P. Act I of 1915 and in C.P. and Berar by C.P. Berar Act 15 of 1938.

2. *Subs.* by A.O. 1950 for "all the Provinces of India".
3. *Subs.* by Section 3 and Schedule of Act 3 of 1951 for "except Part 'B' States".
4. The words "the enactments mentioned in the Schedule hereto are *repealed* to the extent specified in the third column thereof; but" were *repealed* by Section 3 and Schedule II of the Repealing and Amending Act, 1914 (X of 1914).

any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

DEFINITION OF CONTRACT

The term "contract" is defined in Section 2(*h*) of the Indian Contract Act, 1872, as follows:

An agreement enforceable by law is a contract;

Thus for the formation of a contract there must be—

(1) an agreement, and

(2) the agreement should be enforceable by law.

**Agreement**

"Agreement" is defined as "every promise and every set of promises forming the consideration for each other".[5] And a promise is defined as an accepted proposal. Section 2(*b*) says: "A proposal, when accepted, becomes a promise." This is another way of saying that an agreement is an accepted proposal. The process of definitions comes down to this: A contract is an agreement; an agreement is a promise and a promise is an accepted proposal. Thus every agreement, in its ultimate analysis, is the result of a proposal from one side and its acceptance by the other.[6]

*When Agreement becomes Contract*

An agreement is regarded as a contract when it is enforceable by law.[7] In other words, an agreement that the law will enforce is a contract. The conditions of enforceability are stated in Section 10. According to this section, an agreement is a contract when it is made for some consideration, between parties who are competent, with their free consent and for a lawful object. Section 10 is as follows:

**10. What agreements are contracts.**—All agreements are contracts if they are made by the free consent of parties competent to

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5. Section 2(*e*).

6. An arrangement for sale of goods which imposed no obligations on the part of the purchaser and was not even signed by him was held to be no agreement. It must have been a mere understanding. There being no mutuality, the purchaser could not ask for the remedy of specific enforcement under S. 15, Specific Relief Act, 1963, *S.M. Gopal Chetty* v *Raman*, AIR 1998 Mad 169. Every agreement has not to be in writing. It must be bilateral, *Tarsem Singh* v *Sukhminder Singh*, (1998) 3 SCC 471: AIR 1998 SC 1400: (1998) 3 SCR 471. Writing is necessary only when prescribed by law, *Chairman-cum-Managing Director, T.N. Tea Plantation Corpn Ltd* v *Srinivasa Transport*, AIR 1999 Mad 111; *Gujarat State Fertiliser Co Ltd* v *H J Baker & Bros*, AIR 1999 Guj 209, at p 210, contract can arise through correspondence or telephonic talk, here it came into existence through tender notice. The person whose tender was approved did not make requisite deposits or sign the agreement, earnest money refunded and approval cancelled, nothing wrong; there was still no contract in existence, *Conrad Dias* v *Joseph Dias*, (1995) 3 Bom CR 218, oral agreement between father and son for tenancy.

7. Section 2(*h*). *Mohta Alloy & Steel Works* v *Mohta Finance & Leasing Co Ltd*, (1987) AIHC 1327 Delhi, a lease agreement between two bodies corporate was signed by one only representing both sides because he was a director in both the legal entities. Held to be valid. *K. Basavarajappa* v *Tax Recovery Commr*, (1996) 11 SCC 632, an agreement to sell does not create any right or interests in the property under sale. *R. Rangaraj* v *Legal Representative*, (2000) AIHC 2206 (Kant), agreement signed by the very party who had to sell the land, valid for specific enforcement.

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 [8][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.

Every contract is an agreement, but every agreement is not a contract. An agreement becomes 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.[9]

**Contract as civil obligation**

The law of contract confines itself to the enforcement of voluntarily created civil obligations. It does not cover the whole range of civil obligations. There are many obligations of civil nature, like those imposed by law or created by the acceptance of a trust, whose violation may be actionable under the law of torts or of trusts, but they are outside the field of contract.[10] The law of contract is also not able to take care of the whole range of agreements. Many agreements remain outside its purview because they do not fulfil the requirements of a contract. In addition, there are some agreements which literally satisfy the requirements of a contract, such as proposal, acceptance, consideration, etc., but which do not catch its spirit and they are not enforced because it does not sound to be reasonable to do so. They are excluded under the legal device that the parties must not have intended legal consequences.[11]

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8. *Subs.* by S. 3 and Schedule of Act 3 of 1951 for the words "Part A States, and Part C States" which have been *substituted* by the A.O. 1950 for "the Provinces".

9. Once an enforceable agreement comes into being it remains enforceable even if the goods which were to be delivered under it were brought late and they were also accepted by the other party. See *Jain Mills and Electrical Stores* v *State of Orissa*, AIR 1992 Ori 117. A Collector can be authorised only by statute to recover any dues as arrears of land revenue. Such authority cannot be given under an agreement. Power so given by Zila Parishad was held to be against law, *Mahesh Chandra* v *Zila Panchayat*, AIR 1997 All 248. A *statutory contract* means a contract of the contents of which some portion is filled under a statute. For example, S. 43-A(2) of the Electricity Supply Act, 1948 fills into a power purchase agreement the terms relating to determination of tariff. *Indian Thermal Power Ltd* v *State of MP*, (2000) 3 SCC 379: AIR 2000 SC 1005. The fact that a contract is for construction of a public utility and is awarded by a statutory body does not necessarily make it a statutory contract. *Kerala State Electricity Board* v *Kurien E. Kalathil*, AIR 2000 SC 2573. An agreement with a Public Development Authority is an ordinary commercial contract, *Ghaziabad Development Authority* v *Union of India*, (2000) 6 SCC 113: AIR 2000 SC 2003: (2000) All LJ 1456.

10. *Sharad Vaidya* v *Paulo Joel*, (1993) 2 Bom CR 296, medical services rendered without any direct professional relationship with the patient did not come within purview of services under a contract.

11. *See* Intention to Contract, *infra*. According to a decision of the Supreme Court a contract involving transfer of property between joint owners under which one joint owner offers his interest to others is valid. *LIC* v *India Automobiles & Co*, (1990) 4 SCC 286.

## PROPOSAL OR OFFER

A proposal and its acceptance is the universally acknowledged process for the making of an agreement.[12] 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 called the promisor or "offeror", the person to whom it is made is called the proposee or "offeree" and when he accepts it, he is called a "promisee".[13] In the terminology of Section 2(*c*) "the person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee".[14] In view of the above definition, a proposal is in the first place an expression of the offeror's willingness to do or to abstain from doing something. Secondly, it should be 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 the act of communicating it to the other party. 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.

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12. *See* for example, *Thawardas Pherumal* v *Union of India*, (1955) 2 SCR 48: AIR 1955 SC 468: 2 Mad LJ 23, where it was observed that a person cannot be bound by his offer which is never accepted and the parties intended that the contract should be reduced to writing; *Fort Gloster Industries* v *Sethia Mercantile*, (1968) 3 SCR 450: AIR 1968 SC 1308, evidence of terms and conditions of a contract can be collected from the bye-laws of an association which are applicable to the transaction in question; *Andhra Sugars* v *State of AP*, (1968) 1 SCR 705: AIR 1968 SC 599, compulsory contracts in terms of a statute also included; *N. Satyanathan* v *K. Subramanyan*, (1955) 2 SCR 83: AIR 1955 SC 459, contract between an individual and postal authority; *Hind Tobacco and Cigarette Co* v *Union of India*, (1973) 2 SCC 360: AIR 1973 SC 751, contract involving sales tax.

13. Although there is some difference between "proposal" as defined in Section 2(*a*) and "offer" as the word is used in English law, but we shall assume, for the purpose of this discussion, the words to be synonymous. For the distinction *see* Pollock and Mulla's INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 9th edn (1972) by J.L. Kapur, pp. 19-20 (p. 21 of 10th edn 1986).

14. See *Gorakhram Sadhuram* v *Laxmibai*, AIR 1953 SC 443, 446 where the Supreme Court observed that promisee must be the one who had demanded certain articles and whose demand was accepted.

Thus, a proposal may be communicated in any way which has the effect of laying before the offeree the willingness to do or abstain.[15] It may, for example, be done by words of mouth, or by writing, or even by conduct.

*Implied Proposals*

A man frequently expresses his desire to do something or to get something done by his actions. "Words are not the only medium of expression. Conduct may often convey as clearly as words a promise, or an assent to a proposed promise."[16] An offer and acceptance need not always be formal, nor does the law of contract or of sale of goods require that consent to a contract must be in writing. Offer and acceptance can be spelt out from the conduct of the parties which covers not only their acts but also omissions.[17] An offer which is expressed by conduct is called an "implied offer" and the one which is expressed by words, written or spoken, is called an "express offer". An acceptance may likewise be made expressly or impliedly. Section 9 declares:

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

A bid at an auction is an implied offer to buy. Similarly, stepping into an omnibus[18] and consuming eatables at a self-service restaurant, both create implied promises to pay for the benefits enjoyed. An illustration of a contract arising impliedly from conduct is *Upton Rural District Council* v *Powell*:[19]

> A fire broke out in the defendant's farm. He believed that he was entitled to the free services of Upton Fire Brigade and, therefore, summoned it. The Brigade put out the fire. It then turned out that the defendant's farm was not within free service zone of the Upton, which therefore, claimed compensation for the services. The court said: "The truth of the matter is that the defendant wanted the services of Upton; he asked for the services of Upton and Upton, in response to that request, provided the services. Hence the services were rendered on an implied promise to pay for them."[20]

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15. It is now settled law that a contract can come into existence between the parties by exchange of letters. *Ram Kishore Singhal* v *Executive Engineer*, ILR (1991) 1 Delhi 275. *Followed* in *State Bank of India* v *Aditya Finance & Leasing Co P Ltd*, AIR 1999 Delhi 18 at 21, here a lease contract was inferred from correspondence and the minutes of the meeting between the parties. *Sumitra Kawlra* v *D D A*, (1996) AIHC 4373 Delhi, an allotment of flats, on whatever basis, like by lot or otherwise, becomes effective from the date of communication to the allottee. If there is anything wrong in the process of allotment that can be questioned under writ jurisdiction.
16. *Restatement*, CONTRACTS, American Law Institute, Section 21.
17. *Coffee Board* v *Commr of Commercial Taxes*, (1988) 3 SCC 263: AIR 1988 SC 1487: (1988) 70 STC 162.
18. *Wilkie* v *London Passenger Transport Board*, (1947) 1 All ER 258.
19. (1942) 1 All ER 220.
20. *Per* Lord GREENE MR at p 221. But no implied agreement was deemed to result where the parties to a loan transaction involving foreign currency were required by the rules of that currency to observe certain conditions. *Swiss Bank Corpn* v *Lloyd's Bank Ltd*, (1981) 2 WLR 893.

Similarly, 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;[21] 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;[22] 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.[23] This last mentioned case shows that in order to ascertain whether an agreement has arisen, regard must be had to the totality of the circumstances in which the parties contracted and not merely to the formalities of offer and acceptance. Sometimes a sequence of events may exhibit an agreement, though offer and acceptance are indiscernable. Explaining how this process operated in this case, Lord ESHER MR said:

> A certain number of gentlemen formed themselves into a committee and proposed to give prizes for matches and they promulgated certain rules and said: "If you want to sail in any of our matches for our prize, you cannot do so unless you submit yourselves to the conditions which we have thus laid down."

This should be contrasted with a case in which a member of a Jockey Club sought to recover damages from his club for causing him loss of earnings by refusing him a racing licence on medical grounds. He based his contention on the contractual duty of the club of carrying out its licensing functions with care. The claim was struck out. The Jockey Club was a domestic tribunal and no contractual duty could be implied in respect of its functioning. The only obligation in such cases is to act fairly.[24]

Section 9 was applied by the Supreme Court in a case[25] 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. "The defendants by their clear conduct of accepting the goods and never repudiating any of the numerous letters and telegrams of the plaintiff demanding the money from them, clearly showed that a direct contract which in law is called an implied contract by conduct was brought about between them." In another matter before the Supreme Court the facts were:[26] A contract was signed between an Indian and a Yugoslavian party. One of the terms provided for arbitration by the International Chamber of Commerce in Paris. Immediately thereafter the Indian party cabled and also wrote his objection about the arbitration clause. The other party made no reply to it, but

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21. *Steven* v *Bromley & Son*, (1919) 2 KB 722. *See* also *Dinshaw & Dinshaw* v *Indoswe Engineers P Ltd*, (1995) 3 Bom CR 548, the contractor having used *B* class pipes instead of *C* class, was allowed to recover the price for the material actually used. *Lubrizol (India) Ltd* v *Lubrizol Corpn, USA*, (1998) 2 Bom CR 210, the expression "landed costs" was held impliedly to include the customs and other duties.
22. *Haridas Ranchordas* v *Mercantile Bank of India*, (1920) 47 IA 17.
23. *Clarke* v *Earl of Dunraven (The Satanita)*, (1897) AC 59.
24. *Wright* v *Jockey Club*, The Times, June 16, 1995. The court followed *R.* v *Disciplinary Committee of the Jockey Club, ex p. Aga Khan*, (1993) Current Law Year Book 33; noted in (1995) Current Law Year Book 177.
25. *Haji Mohd Ishaq* v *Mohd Iqbal*, (1978) 2 SCC 493, 500.
26. *Ramji Dayawala & Sons* v *Invest Import*, (1981) 1 SCC 80.

permitted the work to go on. A dispute having arisen, it was held that the arbitration clause had become deleted from the contract by an implied agreement. A suit could lie in a court of law. In another case of the same kind,[27] a harbour authority offered to an operator berthing facilities for his operations. Correspondence between the two followed with a view to operating a service from there to another port. Subsequently, the port authorities attempted to withdraw their facilities. The operator was allowed to recover damages for breach of contract. The correspondence had already given rise to an implied agreement that the pro-offered facilities had been accepted. Where the parties conducted their business transactions on the basis of a clause in their agreement, it was held that that clause became embedded into their contract and they would not be heard to say that the clause was intended to be only a general term.[28]

Failure on the part of a hirer under a hire-purchase agreement to keep up the payment of instalments would enable the financier to resume possession of the material delivered under the contract even if the contract contains no term to that effect. Such right is the result of a legal implication.[29]

No implied contract to pay higher price was deemed to have arisen where the Government, being bound under a contract to supply material at fixed prices, supplied it at enhanced rate and someone on behalf of the contractor happened to accept the material.[30] In a contract for supply of specified quantity every month by the Government fo a dealer, the court said that, because the date of supply was not prescribed, no term could be implied that supply should be made in the first week of the month. Supply made in the last week of the month was held to be not a breach of contract.[31]

*Communication When Complete*

According to Section 4:

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

Obviously, therefore, "an offer cannot be accepted unless and until it has been brought to the knowledge of the person to whom it is made."[32] This principle

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27. *Thovensen Car Ferries* v *Weymouth Borough Council*, (1972) Lloyd's Rep 614.
28. *A.B.C. Laminart P Ltd* v *A.P. Agencies*, (1989) 2 SCC 163: AIR 1989 SC 1239: (1989) 44 Taxman 442. In *Tatung Electronic (S) Pte. Ltd* v *Binatone International Ltd*, (1991) 3 CLJ 2339 Singapore HC, the legal requirement of 45% local content in televisions to be imported into UK was held to have become an implied term of the contract.
29. *K.A. Mathai* v *Kora Bibbikutty*, (1996) 7 SCC 212. An unconditional acknowledgement of liability with nothing said to the contrary amounts to an implied promise to pay, *R. Kumar and Co* v *Chemicals Unlimited*, AIR 2001 Bom 116. Accordingly, a summary suit for recovery of the admitted amounts was allowed under O. 37, R. 2, CPC.
30. *State* v *Pioneer Construction Co*, AIR 1978 AP 281.
31. *State of Kerala* v *K.D. Thomas*, (1996) AIHC 1339 Ker; *National Properties Ltd* v *Bata India Ltd*, AIR 2001 Cal 177, in an understanding for formulating a lease arrived at by exchange of correspondence between the parties showing no date of commencement, one of the conditions was that draft lease for plaintiff's approval would be necessary. No such draft was ever prepared and the plaintiff had nothing to approve. Held, there was no concluded contract even by implication.
32. *See* Sutton and Shannon ON CONTRACT.

enabled the Allahabad High Court in *Lalman* v *Gauri Datt*[33] to deal with a matter involving a very crucial question on this point.

> Defendant's nephew absconded from home. He sent his servant in search of the boy. When the servant had left, the defendant by handbills offered to pay Rs 501 to anybody discovering the boy. The servant came to know of this offer only when he had already traced the missing child. He, however, brought an action to recover the reward. But his action failed.

Explaining the principle, BANERJI J said: "In my opinion a suit like the present can only be founded on a contract. In order to constitute a contract, there must be an acceptance of an offer and there can be no acceptance unless there is knowledge of the offer."[34]

When this case was decided, the English law on the point was uncertain.[35] But the principle that there can be no acceptance without knowledge of offer had already been adopted in the United States.[36] For example, as early as 1868, a judge remarked: "How there can be consent or assent to that of which the party has never heard"?[37] The principle has been carried a little further in an Australian case[38] where it was held that even if the acceptor had once known of the offer but had completely forgotten about it at the time of acceptance, he would be in no better position than a person who had not heard of the offer at all. One of the judges gave the following interesting illustration:

> 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.

The facts of the case were

> The Australian Government had offered a reward of £ 1,000 to anyone giving information about certain murderers. The offer further added that if the information was given by an accomplice, not being himself the murderer, he would also be entitled to a free pardon. The plaintiff, being an accomplice, saw the offer and having been so much excited by the hope of pardon, that he gave the information to save himself, completely forgetting the reward. He could not recover the reward.

Where information was given about the murderers of her husband by a woman, not so much for reward, but to assuage her feelings, she was allowed to recover.[39] Where an offer has been accepted with knowledge of the reward, the fact that the informer was influenced by motives other than the reward will be immaterial.

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33. (1913) 11 All LJ 489.
34. *Ibid.* at p 492.
35. The uncertainty was due to the opinions expressed in *Neville* v *Kelly*, 12 CBNS 740· 32 LJ (CP) 118 and *Gibbons* v *Proctor*, (1891) 64 LT 594.
36. See *Fitch* v *Snedkar*, (1868) 38 NY 248.
37. *Ibid.*, 249.
38. *R.* v *Clarke*, (1927) 40 CLR 227.
39. *See* the decision of the court of King's Bench in *Williams* v *Carwardine*, (1833) 2 LJKB 101.

## INTENTION TO CONTRACT

There is no provision in the Indian Contract Act requiring that an offer or its acceptance should be made with the intention of creating legal relation. But in English law it is a settled principle that "to create a contract there must be a common intention of the parties to enter into legal obligations".[40] It was pointed out in an early case that "contracts must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatsoever".[41] "It is not every loose conversation that is to be turned into a contract, although the parties may seem to agree."[42] The case of *Balfour* v *Balfour*[43] has become well known as an illustration of this principle:

> The defendant and his wife were enjoying leave in England. When the defendant was due to return to Ceylon, where he was employed, his wife was advised, by reason of her health, to remain in England. The defendant agreed to send her an amount of £ 30 a month for the probable expenses of maintenance. He did send the amount for some time, but differences afterwards arose which resulted in their separation and the allowance fell into arrears. The wife's action to recover the arrears was dismissed.

Lord ATKIN explained the principle thus: "There are agreements between parties which do not result in contract within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. Nobody would suggest in ordinary circumstances that these arrangements result in what we know as contracts, and one of the most usual forms of agreement which does not constitute a contract appears to be the arrangements which are made between husband and wife. These arrangements do not result in contracts at all, even though there may be what would constitute consideration for the agreement. They are not contracts because parties did not intend that they shall be attended by legal consequences."[44]

The intention of the parties is naturally to be ascertained from the terms of the agreement and the surrounding circumstances. It is for the court in each case to find out whether the parties must have intended to enter into legal obligations. "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."[45]

### Family and social matters

This does not, however, mean that in family or social matters there cannot be a legally binding contract.[46] All that the law requires is that the parties must intend

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40. ATKIN J at p 293 in *Rose & Frank Co* v *J.R. Crompton & Bros*, (1923) 2 KB 261.
41. *Darlymple* v *Darlymple*, (1811) 161 ER 665, *Per* Lord STOWELL.
42. Costigan, CASES ON CONTRACTS. 32 (3rd edn).
43. (1919) 2 KB 571.
44. At pp. 578-9.
45. *Per* BANKES LJ at p 282 in *Rose* v *Crompton*, (1923) 2 KB 261: (1925) AC 445.
46. For example, the Supreme Court has observed in *Chandrakant Manilal Shah* v *CIT*, (1992) 1 SCC 76: AIR 1992 SC 66 that a contract of any kind including that of partnership between the undivided members of a Hindu family is quite possible.

legal consequences. *McGregor* v *McGregor*[47] is an early illustration of a binding engagement between a husband and wife. Here a husband and wife withdrew their complaints under an agreement by which the husband promised to pay her an allowance and she to refrain from pledging his credit, the agreement was held to be a binding contract.[48] An agreement between relatives to share a house has been held to be binding.[49]

The "principle applies to dealings between other relations, such as father and son and daughter and mother". These words occur in the judgment of DANCKWERTS LJ in *Jones* v *Padavatton*:[50]

> A divorced woman was living in Washington with her son where she was employed as an assistant accountant in the Indian Embassy on attractive terms. Her mother was in Trinidad and wished her daughter to be near her. She was particularly attached to the grandson. The mother persuaded her daughter, much against her will, to leave service, to take legal education in England and finally to come back to Trinidad as a practising lawyer. The mother undertook to foot the expenses. Subsequently, the mother bought a house in England, part of which was allowed to the daughter and rest tenanted out. For five long years the daughter could not complete her education. She also remarried in the meantime. Differences arose between them and the mother stopped payments and also commenced proceedings to evict the daughter.

DANCKWERTS LJ allowed the mother's appeal. His Lordship said: "There is no doubt that this case is a most difficult one, but... is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements." SALMON LJ also allowed the mother's appeal, but on a different ground. He felt that acting on her mother's promise, the daughter had left an attractive service and gone to another country for education and the mother could not in these circumstances get out of the promise at her sweet will and leave the daughter in that condition. The engagement, therefore, did result in a contract, but the agreement could last only for a period reasonably sufficient for the daughter to complete her education and the period of five years was more than sufficient for the purpose. She could not have expected her mother to support her, her son and husband in perpetuity.[51]

The mere opening of a joint banking account between a man and his wife[52] or the man promising to buy her a car in an effort to improve their strained matrimonial relationship has been held to be a purely domestic arrangement not resulting in any legal relationship.[53]

**Objectivity, not subjectivity, test of contractual 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

47. (1888) 21 QBD 424.
48. *See* also *Pearce* v *Merriman*, (1904) 1 KB 80.
49. *Parker* v *Clark*, (1960) 1 WLR 286.
50. (1969) 2 All ER 616: (1969) 1 WLR 328.
51. *Ibid.* at p 620.
52. *See* at p 623, *supra*.
53. *Spellman* v *Spellman*, (1961) 1 WLR 921.

circumstances, their intention to be. Thus, where three ladies, two of them being mother and daughter and the third a paying guest, together made entries into a crossword puzzle in the name of the mother, the expenses being met by one or other without any rules. The entry was successful one week and the mother refused to share 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.[54] Following these principles the Supreme Court observed on the facts of a case:

> Here, one partner has lent a large sum of money to the other to be utilised as capital in the partnership venture. The transaction is in the context of a commercial venture. The presumption is that legal obligations are intended. The onus is on the parties asserting the absence of legal obligations and the test is not subjective, but is an objective one. Where, as here, the tax implications of large financial obligations are sought to be put an end to, the burden is heavy on the assessee to establish that what would be the incidents of the transaction if the ordinary incidents were excluded from contemplation by the parties.[55]

The court cited the following passage from an English case:[56]

> In deciding whether or not there was any contract in relation to a certain transaction, or whether or not sufficient notice of a certain term was given, the law applies an objective and not a subjective test.... In the absence of such evidence, how can the court assume, that the master did not intend to enter into a contract.

The results of cases on this subject are bound to be variable, for the matter wholly depends upon the fact whether the conduct of the parties in the surrounding circumstances affords evidence of objective intention. For example, in *Merritt* v *Merritt*[57] an agreement to transfer to the wife the beneficial ownership of the matrimonial home made at the time of separation was held to be binding. But in *Gould* v *Gould*[58] an agreement similarly made was held to be not binding as the husband undertook to pay only as long as he had the means to pay. Uncertainty of these words showed that no legal relations were contemplated.[59]

### Business matters

In an agreement to provide loan facilities to a company's subsidiary, the company gave to the lender assurances of providing security by giving them two "letters of comfort", they being commercial papers, were held sufficient to create the responsibility of providing security. Taking into account the nature of the

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54. *Simpkins* v *Pays*, (1955) 3 All ER 10; (1955) 1 WLR 975.
55. *CWT* v *Abdul Hussain Mulla Mohd Ali*, (1988) 3 SCC 562, *per* VENKATACHALIAH J at p 568 citing and relying upon CHITTY ON CONTRACTS (Vol 1, para 123, 25th edn).
56. *Bahamas Oil Refining Co* v *Kristiansands Tankrederie A/S*, (1978) 1 Lloyds Reports 211. The court also cited the following passage from *Edwards* v *Skyways*, (1964) 1 WLR 349, 359; (1964) 1 All ER 494: "In the present case, the subject-matter of the agreement is business relations, not social or domestic matters. There was a meeting of minds—an intention to agree. There was admittedly consideration for the defendant company's promise. In a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one."
57. (1970) 1 WLR 211; noted, (1970) 86 LQR 436-437.
58. The Times, June 20, 1969. Criticised (1970) JBL 113.
59. This result has been criticised. *See* Ingram, *Intention to Crate Legal Relations*, (1970) JBL 181; P.L. Bradbury, *Contractual Intent*, 120 New LJ 828.

promise, the court held "A letter of comfort from a parent company to a lender stating that it was the policy of the parent company to ensure that its subsidiary was 'at all times in a position to meet its liabilities' in respect of a loan made by the lender to the subsidiary did not have contractual effect if it was merely a statement of present fact regarding the parent company's intentions and was not a contractual promise as to the parent company's future conduct. On the facts, the relevant para of the letters of comfort was in terms a statement of present fact and not a promise as to future conduct and in the context in which the letters were written was not intended to be anything other than a representation of fact giving rise to no more than a moral responsibility on the part of the defendants to meet *M's* debt."[60] An investment in a partnership firm was taken by the Supreme Court to be of commercial nature putting the onus on the party asserting that he did not intend to be a legal partner to prove that fact.[61]

Even in business matters many parties intend to rely on each other's "good faith and honour", and not on the courts. For example, in *Rose & Frank Co* v *J.R. Crompton*:[62]

> 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 lawcourts 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 fall short of legal obligations, and rest on obligations of either honour or self-interest or perhaps both."[63]

In another case, coupons were invited from persons generally showing certain entries and the correct entries were to be rewarded. There was a clause on the back of every coupon that the transaction would not give rise to any legal relationship, or be legally enforceable, but binding in honour only. No action was allowed either about the receipt of a coupon or the correctness of its particulars.[64]

A winner at a football pool sued for his winning, but was not allowed to recover because the pool was subject to a condition that it was not legally enforceable.[65] The

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60. *Kleinwart Benson* v *Malaysia Mining Corpn*, (1988) 4 All ER 714, going by the presumption of legal consequences in all commercial matters.
61. *CWT* v *Abdul Hussain Mulla Mohd Ali*, (1988) 3 SCC 562, 568.
62. (1923) 2 KB 261: (1925) AC 445.
63. At p 293. *See* also *Appleson* v *Littlewood Ltd*, (1939) 1 All ER 464 and *Jones* v *Vernon's Pools Ltd*, (1938) 2 All ER 626, in both of which a clause providing that no legal relations should arise, was held to exclude all litigation. For a criticism of this English rule *see* Tuck, (1943) 21 Canadian Bar Rev 123.
64. *Jones* v *Vernon's Pools Ltd*, (1938) 2 All ER 626.
65. *Appleson* v *Littlewood Ltd*, (1939) 1 All ER 464 and *Jones* v *Vernon's Pools Ltd*, (1938) 2 All ER 626.

practice whereby workmen go to their place of business in a motor car or on the motor cycle of a fellow workman upon the terms of making contribution to the cost of transport has been held not to result in a contract.[66] Stating the reasons UPJOHN LJ said: "The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other to be carried to work." In a subsequent case it was pointed out that such an agreement should be held binding at least to the extent so as to enable the vehicle owner to recover the promised contribution from the other party.[67] Lord CROSS OF CHELSEA did not think it necessary that there should be positive evidence of intention to contract. He gave an illustration:

> If I get into a taxi and ask the driver to drive me to the Victoria Station it is extremely unlikely that either of us directs his mind to the question whether we are entering into a contract. We enter into a contract not because we form any intention to enter into one but because if our minds were directed to the point we should as reasonable people both agree that we were in fact entering into one.[68]

**Supreme Court's view of requirement of "intention"**

The Supreme Court has expressed its reservation about the need of this separate requirement of "intention to contract" under the Contract Act. Going by the criticism which is already there in the West, the court found that it was a necessity of those systems where consideration was not a requisite of enforceability. Thus it is still an open question whether the requirement of "intention to contract" is applicable under the Indian Contract Act in the way in which it has been developed in England.[69]

But earlier to this, a limited recognition of the applicability of this principle in India could be inferred from the decision of the Supreme Court in *Banwari Lal* v *Sukhdarshan Dayal*.[70] In an auction sale of plots of land, a loudspeaker was spelling out the terms, etc., of the sale, one of the statements being that a plot of certain dimensions would be reserved for Dharamshala (public inn). Subsequently that plot was also sold for private purposes. The purchasers sought to restrain this. CHANDRACHUD J (afterwards CJ) said:[71]

> Microphones... have not yet acquired notoriety as carriers of binding representations. Promises held out over loudspeakers are often claptraps of politics. In the instant case, the announcement was, if at all, a puffing up of property put up for sale.

In a subsequent case[72] on the subject, the Supreme Court noted the general proposition that in addition to the existence of an agreement and the presence of

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66. *Coward* v *Motor Insurers' Bureau*, (1963) 1 QB 259: (1962) 2 WLR 663: (1962) 1 All ER 531.
67. *Albert* v *Motor Insurers' Bureau*, (1971) 3 WLR 291: (1971) 2 All ER 1345 HL.
68. *See* also *Buckpitt* v *Oates*, (1968) 1 All ER 1145.
69. *CWT* v *Abdul Hussein*, (1988) 3 SCC 562, 569.
70. (1973) 1 SCC 294.
71. At p 295.
72. *CWT* v *Abdul Hussain Mulla Mohd Ali*, (1988) 3 SCC 562 at p 569.

consideration there is also the third contractual element in the form of intention of the parties to create legal relations, and also noted that this proposition, though accepted in English law, has not passed unchallenged. The court then cited the following passage from Cheshire and Fifoot's LAW OF CONTRACT:[73]

> ...the criticism of it made by Professor Williston demands attention, not only as emanating from a distinguished American jurist, but as illuminating the whole subject. In his opinion, the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the 19th century and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract.

Thus it is still an open question whether the requirement of contractual intention would be applicable within the framework of the Indian Act.[74]

## GENERAL OFFERS

It was suggested in the old case of *Weeks* v *Tybald*[75] that an offer must be made to a definite person. That case arose out of the defendant's affirmation to the public that he would give £ 100 to him that should marry his daughter with his consent. The plaintiff alleged that he did so and sued the defendant. Rejecting the action, the court said: "It is not averred nor declared to whom the words were spoken." The difficulty suggested was that if an offer of this kind addressed to several persons could be accepted, the offeror would find himself bound in innumerable contracts. This was, however, soon overruled. The modern position is that an offer may be made to the world at large. But the contract is not made with all the world. Contract is made only with that person who comes forward and performs the conditions of the proposal. The principle is thus stated in Anson: "An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person."[76] An offer of this kind has already been seen in *Lalman* v *Gauri Dutt* which was addressed to the public generally.[77] Another authority is *Carlill* v *Carbolic Smoke Ball Co.*[78]

> 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 with the Alliance Bank showing our sincerity in the matter". The plaintiff used the smoke balls according to the directions but she nevertheless subsequently suffered from influenza. She was held entitled to recover the promised reward.

It was contended by the defendants that there was no intention to enter into legal relations as it was simply a puffing advertisement; that the offer was not made to any one person in particular and that the plaintiff had not communicated her intention to accept. The first argument was easily disposed of by BOWEN LJ by saying: "Was it intended that the £ 100 should, if the conditions were fulfilled, be

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73. 97 (10th edn).
74. The court decided the case under S. 37 of the Act.
75. (1605) 75 ER 982.
76. Anson's LAW OF CONTRACT, 40 (23rd edn by A.G. Guest, 1971).
77. (1913) 11 All LJ 489. Although in that case no contract could arise as the plaintiff had done the job without knowledge of the proposal.
78. (1893) 1 QB 256.

paid? The advertisement says that £ 1,000 is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that £ 100 would be paid was intended to be a mere puff."

His Lordship also exposed the fallacy of the argument that an offer could not be made to the world at large, when he said: "Why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the conditions, and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement."

**Proposals acceptable by conduct**

His Lordship also pointed out that in cases like this communication of acceptance is not necessary. "As notification of acceptance is required for the benefit of the person who makes the offer, he may dispense with notice to himself if he thinks it desirable to do so... 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. In the advertisement cases it seems to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition.... 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?"[79]

Section 8 of the 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.

The principle of the section was followed by YEARS CJ of the Allahabad High Court in *Har Bhajan Lal* v *Harcharan Lal*[80] and applied to a situation where the terms of a general offer were substantially though not literally complied with.

> A young boy ran away from his father's home. The father eventually issued a pamphlet, offering a reward in these terms: "Anybody who finds trace of the boy and brings him home, will get Rs 500." The plaintiff was at the Dharamshala of a railway station, there he saw a boy, overheard part of a conversation, realized that the boy was the missing boy and promptly took him to the Railway Police Station and sent a telegram to the boy's father that he had found his son. It was held that the handbill was an offer open to the whole world and capable of acceptance by any person who fulfilled the condition, and that the plaintiff substantially performed the condition and was entitled to the amount offered.

A Privy Council decision[81] is still another illustration of an offer which is accepted by acting upon its terms. Upon the marriage of the appellant, her aunt, a

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79. At pp. 269-70.
80. AIR 1925 All 539.
81. *Malraju Lakshmi Venhayyamma* v *Venkata Narasimha Appa Rao*, (1916) 43 IA 138.

wealthy Hindu widow with whom she had resided since childhood, promised that if the appellant and her husband would reside with her she would purchase immovable property for the appellant. The appellant and her husband accordingly resided with the aunt. She did purchase some property but in her own name. This caused dissatisfaction to the appellant who with her husband ceased to reside with the aunt. The aunt wrote to the appellant that the property had been purchased for the appellant and would be transferred to her upon the writer's death. The appellant and her husband thereafter resided with the aunt until her death. This was held to be a sufficient acceptance of the promise contained in the aunt's letter:

> The Board is of the opinion accordingly that there was here a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made.[82]

It has been observed in a decision of the Patna High Court[83] that "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".[84]

**General offer of continuing nature**

Where a general offer is of continuing nature, as it was, for example, in the *Smoke Ball case*, it will be open for acceptance to any number of persons until it is retracted. But where an offer requires some information as to 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 got 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." 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 waited for 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, but 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 *Facey*[85] has the merit of explaining the distinction.

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82. *See* at p 146. *See* also *Hindusthan Cooperative Insurance Society* v *Shyam Sunder*, AIR 1952 Cal 691.
83. *State of Bihar* v *Bengal C&P Works*, AIR 1954 Pat 14.
84. *See* judgment of RAMASWAMI J who cited the opinion of BOWEN LJ in the *Smoke Ball case* and Lord BLACKBURN in *Brogden* v *Metropolitan Rly Co*, (1877) 2 AC 666. See BOWEN, LJ in *Carlill* v *Carbolic Smoke Ball Co*, supra note 77. An agreement to sell something to another in the shape of a proposal to sell is a unilateral agreement. It does not require signature of both parties. *Mohd Mohar Ali* v *Mohd Mamud Ali*, AIR 1998 Gau 92.
85. (1893) AC 552.

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: "Lowest 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 plot of land 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, and gave only 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. "Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the person making the inquiry."

The principle of this case has been followed by the Supreme Court in *McPherson* v *Appana*.[86]

The plaintiff offered to purchase a lodge owned by the defendants for Rs 6000. He wrote the defendant's agent asking whether his offer had been accepted and saying that he was prepared to accept any higher price if found reasonable. The agent replied: "Won't accept less than rupees ten thousand". The plaintiff accepted this and brought a suit for specific performance. It was held that the defendant did not make any offer or counter-offer in his cable but was merely inviting offers. There was no assent to the plaintiff's offer to buy at Rs 10,000 and, therefore, no concluded contract.[87]

As distinguished from it where the proposee, in response to a proposal to purchase his land, asked for a higher price and also some advance with acceptance, it was held that the proposer accepting the same along with an advance payment amounted to a contract, although the letter of acceptance came back being refused.[88]

### 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."[89] For the same reason the display of goods in a shop with price chits attached is not an offer even if

86. AIR 1951 SC 184: 1951 SCR 161.
87. *Followed* in *Badri Prasad* v *State of MP*, AIR 1970 SC 706. *See* also *Matan Hells Bros* v *Mahabir Ind*, AIR 1970 Pat 91.
88. *Byomkesh* v *Nani Gopal*, AIR 1987 Cal 92.
89. *Grainger & Son* v *Gough*, (1896) AC 325, 334.

there is a "self-service" system in the shop. This was so held in *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists Ltd.*[90] Lord GODDARD CJ said: "It would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that person can insist on buying any article by saying 'I accept your offer'.... In most bookshops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said: 'I want to buy this book' and the shopkeeper says 'yes'. That would not prevent the shopkeeper, seeing the book picked up, saying, 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer.' Therefore, I am of opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy, and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price."[91]

A banker's catalogue of charges is also not an offer.[92] A railway timetable is in the same category.[93]

Where a shopkeeper was convicted of offering for sale a flick-knife contrary to the Restriction of Offensive Weapons Act, 1959 [S. 1(1)] (UK) which he had displayed in his shop window, it was held that it was in no sense an offer for sale the acceptance of which could constitute a contract.[94]

**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.[95] 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.[96] 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

90. (1952) 2 QB 795 *affirmed*, (1953) 1 QB 401: (1953) 1 All ER 482 (CA).
91. At p 802.
92. *State Aided Bank of Travancore* v *Dhirt Ram*, AIR 1942 PC 6.
93. There is no direct authority for this, but this seems to be the most likely conclusion. Railway Timetables 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 for cancelling a train.
94. *Fisher* v *Bell*, (1960) 3 All ER 731.
95. *Harris* v *Nickerson*, (1873) LR 8 QB 286. *See* also *Union of India* v *Gangadharan Mohandas*, (1997) 2 Cal LJ 221, cancellation of auction after due consideration, no bidder can claim anything under the doctrine of legitimate expectations.
96. *Spencer* v *Harding*, (1870) 5 CP 561: 39 LJCP 332: 23 LJ 237.

bid.[1] 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,[2] provided there is otherwise nothing against him.

**Definiteness of proposal**

A classified advertisement to the effect: "cocks and hens 25s. each" has been held to be not an offer to sell.[3] 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.[4]

**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.[5]

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1. *State of UP* v *Vijay Bahadur Singh*, (1982) 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. In a contract between the Government and a public corporation, in case of any dispute as to the terms of the contract, the proper course would be to resort to arbitration or institution of a suit and not writ petition, *State of UP* v *Bridge and Roof Co India Ltd*, (1996) 6 SCC 22. An invitation for tenders required that tenders should be submitted with documents of verificatory nature. It was held that such documents could be submitted even afterwards. Tender should not be disqualified for that reason alone. *Mukul Kumar* v *Divisional Railway Manager, S.R.*, AIR 1995 All 72. Strict compliance with ancillary or subsidiary conditions of tender not necessary. Such requirements can be complied with afterwards, *Jyoti Krishna Engineers* v *State Bank of Hyderabad*, AIR 1993 AP 327.
2. *Desai & Co* v *Hindustan Petroleum Co*, 1984 Guj LH 864 (Guj). A provisionally accepted bid, refusal of confirmation for the purpose of knocking down the property to a person who had not participated in the auction and who was not eligible at the time of auction, held, not proper, *Shamshad Quraishi* v *Zila Parishad, Mau*, AIR 1996 All 8. The highest bidder cannot compel authorities to enter into contract with him. The authorities may decide not to go further with the matter, *Gajendra Singh* v *Nagarpalika Nigam*, AIR 1996 MP 10.
3. *Partridge* v *Crittenden*, (1968) 2 All ER 421: (1968) 1 WLR 1204.
4. *Clifton* v *Palumbo*, (1944) 2 All ER 497. *See* also *Bigg* v *Boyd Gibbins Ltd*, (1971) 2 All ER 183: (1971) 1 WLR 913.
5. *Esso Petroleum Co Ltd* v *Commrs of Customs & Excise*, (1976) 1 WLR 1: (1976) 1 All ER 117.

# 2
# *Acceptance*

## DEFINITION

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 ACCEPTANCE

### External manifestation or overt act

The definition clearly requires that the assent should be signified. It may be signified or expressed by an act or omission by which the party accepting intends to communicate his assent or which has the effect of communicating it.[1] 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 (afterwards CJ):[2]

> 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. An illustration of acceptance by conduct is the decision of the House of Lords in *Brogden* v *Metropolitan Railway Co.*[3]

> *B* had been supplying coal to a railway company without any formal agreement. *B* suggested that a formal agreement should be drawn up. The agents of both the parties met and drew up a draft agreement. It had some blanks when it was sent to *B* for his approval. He filled up the blanks including the name of an arbitrator and then returned it to the company. The agent of the company put the draft in his drawer and it remained there without final approval having been signified. *B* kept up his supply of coals but on the new terms and also received payment on the new terms. A dispute having arisen *B* refused to be bound by the agreement.

The conduct of the company's agent in keeping the agreement in his drawer was an evidence of the fact that he had mentally accepted it. But he had not

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1. *See* Section 3.
2. In *Bhagwandas* v *Girdharilal*, (1966) 1 SCR 656: AIR 1966 SC 543.
3. (1877) 2 App Cas 666, HL.

expressed his mental determination and retention of the agreement was not a sufficient acceptance. But the subsequent conduct of the parties in supplying and accepting coal on the basis of proposed agreement was a conduct that evidenced or manifested their intention. The final acceptance "was clearly given", said Lord CAIRNS LC "when the company commenced a course of dealing which is referable only to the contract and when that course of dealing was accepted and acted upon by *B* in the supply of coals".

Where a contract was required by law to be signed by the parties and the contract was on two papers, one map plan signed by both parties and the other a letter signed by one but not the other, the court said that no contract resulted. The letter was addressed to the party not signing but quite obviously his name was there. This did not amount to signature because signature means that the signer must write his own name with his own hand.[4] In another case on signature requirement, there was offer and acceptance by exchange of letters. That was held to be not sufficient to make a signed contract. The statute recognised the practice under which contracts are exchanged. But that practice is a process by which contracts are exchanged by the parties or their solicitors and each contract signed by one party is exchanged for an identical contract signed by the other party manually or otherwise.[5]

*Acceptance by Conduct*

Another common example of acceptance by conduct is an action in terms of the offer. All cases of general offers, which are a kind of unilateral contract, demand some act in return for the promise to pay.[6] 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 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.[7] A Canadian court has gone as far as to hold that, where an offer was made for the sale of a part of a land and lease of the other part subject to the condition that the offeree obtained planning permission and the offeree obtained permission within nine months, a valid contract arose, though no communication of acceptance had been made during the period of 9 months.[8] "The offeror had indicated a particular mode of acceptance and, therefore, by doing the act, the

4. *Firstpost Homes Ltd* v *Johnson*, (1995) 4 All ER 355 under the Law of Property (Miscellaneous Provisions) Act, 1989.
5. *Commission for New Towns* v *Cooper (GB) Ltd*, (1995) 2 All ER 929. Where a proposal for supply of imported goods was already accepted by a telex message before the receipt of a standard form contract, it was held that the contract was already concluded and it was immaterial that the duly signed standard form was not returned, *Cotton Corpn of India Ltd* v *Alagappa Cotton Mills*, AIR 2001 Bom 429: (2001) 3 Mah LJ 415; *Ashok Thaper* v *Vijaya Bank*, 1999 AIHC 2678 (All), offer of premises to a bank which had not gone beyond the limit of being considered, no agreement.
6. *Carlill* v *Carbolic Smoke Ball Co*, (1893) 1 QB 256. More fully considered in connection with general offers under Chapter 1.
7. *Gaddar Mal* v *Tata Industrial Bank*, ILR (1927) 29 All 674: AIR 1927 All 407.
8. *Calgary Hardwood & Veneer Ltd* v *C.N.R. Co*, (1977) 4 WLR 18 (Alta SC).

offeree had accepted the offer and did not have to notify the offeror in advance of its intention to accept."[9]

The position in India is the same. This appears from the decision of the Calcutta High Court in *Hindustan Cooperative Insurance Society* v *Shyam Sunder.*[10] After an oral understanding to insure and the completion of the medical examination, the company informed the proposer that if he submitted the proposal form and deposited the half-yearly premium, his proposal would be accepted. He accordingly submitted a cheque and the proposal. The company cashed the cheque but had not yet replied to him their acceptance of the proposal that the proposer died. The question was whether by cashing the cheque the company had accepted the proposal without there being the formal acceptance. HARRIS CJ referred to the English authorities and said:

> Mere mental assent to an offer does not conclude a contract either under the Indian Contract Act or in English Law. The offeror may, however, indicate the mode of communicating acceptance either expressly or by implication both in India and English Law. In the case before us it is clear from the facts that the deceased indicated clearly the mode of acceptance of his proposal. The deceased indicated clearly that if the appellant accepted his proposal the cheque should be appropriated towards the first premium and that such appropriation would conclude the bargain. The cheque was received on that implied understanding.[11]

Where, on the other hand, the insurer had received the proposal form along with the first premium and it was still awaiting acceptance when the proposer died, no liability to pay arose. It was immaterial that the groundwork for acceptance was under preparation and the agent had assured that the proposal would be accepted.[12] Acceptance is complete only when communicated to the offeror. Mere silence after receipt and retention of premium cannot be construed as acceptance.[13] The court followed the decision in *General Assurance Society* v *Chandmull Jain*[14] where it was observed that a contract is formed when the insurer accepts the premium and retains it. The decision further says that in the case of the assured, a positive act on his part by which he recognises or seeks to enforce the policy amounts to an affirmation of it.

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9. Nicholas Rafferty, *Recent Developments in the Law of Contract*, (1978) 24 McGill LJ at p 239.
10. AIR 1952 Cal 691. *See* further *Century Spinning and Mfg Co* v *Ulhasnagar M.C.*, (1970) 1 SCC 582: (1970) 3 SCR 854: AIR 1971 SC 1021, where a person acted on a representation held out by the State.
11. Reported, Ponnuswami and Puri, CASES AND MATERIALS ON CONRACTS, 34 (1974), where the desirability of the decision is questioned in the note on page 39. This should be contrasted with *Life Insurance Corpn of India* v *Brazinha D'Souza*, AIR 1995 Bom 223, a proposal was received with premium amount which was kept in suspense for compliance of formalities. This did not amount to acceptance of the proposal. No contract arose immediately. *Life Insurance Corpn of India* v *Prasanna Devaraj*, AIR 1995 Ker 88, acceptance of cheque of premium, proposer died before consideration of the proposal by authorities, no contract.
12. *Life Insurance Corpn* v *Raja Vasireddy*, (1984) 2 SCC 719. Where the cheque issued for payment of first premium was dishonoured, the insurer was not liable to pay any claim laid by the insured himself and not by a third party, *National Insurance Co Ltd* v *Seema Malhotra*, AIR 2001 SC 1197.
13. *LIC of India* v *Annamma*, (1999) 3 Ker LT 142.
14. AIR 1966 SC 1644.

Whether expressly or impliedly, the fact remains that acceptance signified. In the words of BOWEN LJ[15]

> One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law . . . to make a contract.

**Communication to offeror himself**

Further, acceptance must be communicated to the offeror himself. A communication to any other person is as ineffectual as if no communication has been made. To take, for example, *Felthouse* v *Bindley*:[16]

> 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, 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 the horse, but he had not communicated his intention to the uncle." The case is also an authority for two further propositions. One of them is that the acceptance of an offer made should be communicated to the offeror himself or to the person he has authorised to receive the acceptance. A communication to a stranger, like the auctioneer in this case, will not do.

*Offer cannot Impose Burden of Refusal*

Secondly, 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 same shall be deemed to have been accepted. "It is not open to an offeror to stipulate against an unwilling offeree that the latter's silence will be regarded as equivalent to acceptance. He cannot force him to take a positive course of action under penalty of being contractually bound if he does not."[17]

**Communication by acceptor himself**

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. In *Powell* v *Lee*:[18]

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15. Note 3 above.
16. (1863) 7 LT 835. *See* also the decision of the Supreme Court in *Viswesardas Gokuldas* v *B K. Narayan Singh*, (1969) 1 SCC 547: (1969) 3 SCR 581, where it has been held that the filing of a suit and the service of a plaint cannot take the place of a formal acceptance; that is not a usual method of communicating acceptance. *Joshi* v *State of Maharashtra*, (1996) 1 SCC 669: AIR 1996 SC 981, landowner offered his land to the Government at a certain rate. The engineer concerned referred the matter to the Collector for acquisition. Held, no contract on the basis of the landowner's proposal.
17. C.J. Muller, *Felthouse* v *Bindley Revisited*, (1972) 35 Mod LR 489, at 490.
18. (1908) 24 TLR 606. An agreement between the Executive Director (Commercial) of the State Electricity Board without the authority of the Board was held to be not binding on the

> 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.[19] Then, 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.[20] Again, the offeror may have acquiesced in a certain conduct on the part of the acceptor as equivalent to acceptance.[21] In such a case also no formal communication of acceptance is necessary.[22] Referring to the requirement of communication in *Carlill* v *Carbolic Smoke Ball Co*,[23] BOWEN LJ observed as follows:

> But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, he may dispense with notice to himself . . . and there can be no doubt that where the [offeror] expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to follow the indicated method of acceptance; and if the person making the offer 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.

But there is this further gloss to be placed upon this principle that an offer can dispense with notification of acceptance only in cases of unilateral contracts as opposed to bilateral contracts. In a unilateral contract the offer demands an action, e.g., a reward for swimming across a river. The other party has only to perform the act and not to give a promise in return. Where the other party has to promise or undertake to do something, the requirement of the notification of his acceptance should not be allowed to be dispensed with. If, for example, in *Felthouse* v *Bindley*[24] the nephew, without having replied to the uncle's letter, had asked his uncle to take away the horse and pay the price, the position of the uncle would have been curious, for, while the uncle could hardly have denied the promise, the nephew could always say at his convenience whether by not communicating his acceptance

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Board, *Jindal Strips Ltd* v *MPSEB*, AIR 1998 MP 122.

19. See *State of Bihar* v *Bengal C&P Works*, AIR 1954 Pat 14.
20. *See*, for example, *Carlill* v *Carbolic Smoke Ball Co*, (1893) 1 QB 256 and *Harbhajanlal* v *Harcharanlal*, AIR 1925 All 539.
21. *Malraju Lakshmi Venkayyamma* v *Venkata Narasimha Appa Rao*, (1916) XLIII IA 138, already discussed.
22. For a further study of such contracts, *see* George P. Costigan, Jr., *Implied in Fact Contracts and Mutual Assent*, 33 Har L. Rev, 376 (1920).
23. (1893) 1 QB 256.
24. (1862) 142 ER 1037.

he had accepted the offer or not. It is for this reason that the law has in such case always insisted upon an *overt act* (external manifestation) of acceptance than a mere mental determination. In a case of this kind before DENNING LJ,[25] a clause in the contract provided that the contract would be binding only when the other party put his signature upon it. His Lordship said:

> Signing without notification is not enough. It would be deplorable if it were. The plaintiffs would be able to keep the form in their office unsigned, and then play fast and loose as they pleased. The defendant would not know whether or not there was a contract.... Just as mental acceptance is not enough, nor is internal acceptance within the plaintiff's office.

In another case of the same kind,[26] a motor-cyclist was convicted for being with his motor cycle on a public road without third-party insurance. His insurance had expired, but his company had sent him a temporary cover note. He had not accepted this and, therefore, at the relevant date there was no contract, though the temporary risk note was still in force. Lord PARKER, however, suggested that if he had taken out his motor cycle in reliance upon the temporary risk note that would have been sufficient acceptance by conduct without communication.[27] Even this result would create the difficulty that while he could have saved his skin by showing the unaccepted temporary cover, he could always deny his liability to the company to pay the premium.[28]

## Mode of Communication

### *Acceptance Should be Made in Prescribed Manner*

Acceptance has to be made in the manner prescribed or indicated by the offeror. An acceptance given in any other manner may not be effective, particularly where the offeror clearly insists that the acceptance shall be made in the prescribed manner. An American case illustrates this:[29]

> *A* offered to buy flour from *B* requesting that 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[30] and Cheshire and Fifoot[31], 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 Chamber that a reply sent by some other method equally expeditious would constitute a valid acceptance".[32]

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25. *Robophone Facilities* v *Blank*, (1966) 3 All ER 128.
26. *Taylor* v *Allon*, (1965) 1 All ER 557: (1966) 1 QB 304: (1965) 2 WLR 598.
27. At p 559.
28. All such cases have been examined by C.J. Muller, *Felthouse* v *Bindley Revisited*, (1972) 35 Mod LR 489.
29. *Eliason* v *Henshaw*, (1819) 4 Wheaton 225.
30. Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499, 515-16.
31. Cheshire and Fifoot, LAW OF CONTRACT, 40 (8th edn, 1972).
32. Cheshire and Fifoot, LAW OF CONTRACT, 40 (8th edn, 1972). The cases cited are: *Tinn* v

Where the notice to exercise an option to purchase a building land was required to be sent by registered or recorded delivery post but it was sent by ordinary post and received within time, the court was of the opinion that the letter amounted to binding contract even though it was sent by ordinary post.[33]

This Anglo-American rule has, however, not been strictly followed in the Indian Contract Act. Section 7 deals with this matter.

**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.

*Effect of Departure from Prescribed Manner*

The section no doubt requires that acceptance should be made in the manner prescribed in 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 he fails to do so, the contract is clinched on him and he becomes bound by the acceptance. The section thus marks a visible departure from the English law and should, therefore, "be read without reference to the English law on the subject".[34]

English law is also now coming partly in line with Section 7. The Uniform Law on the Formation of Contracts for the International Sale of Goods, appended to the Uniform Laws on International Sales Act, 1967, now contains the following provisions:[35]

1. An acceptance containing additions, limitations, or other modifications shall be rejection of the offer and shall constitute a counter-offer.
2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance.

It has been held by the Calcutta High Court[36] that where an offeror requires that the acceptance should be sent to a particular person, it "has to be read in a

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*Hoffmann & Co*, (1873) 29 LT 271; *Manchester Diocesan Council for Education* v *Commercial and General Investments Ltd*, (1969) 3 All ER 1593: (1970) 1 WLR 241.

33. *Yates Building Company Ltd* v *R.J. Pedleyn & Sons (York) Ltd*, (1975) 237 EG 183.

34. *Per* ASHWORTH J in *Gaddar Mal* v *Tata Industrial Bank*, (1927) 49 All 674, 677: AIR 1927 All 407. It has been held by the Supreme Court in *Viswesardas* v *B.K.N. Singh*, (1969) 1 SCC 547: (1969) 3 SCR 581: AIR 1969 SC 1157 that a suit or a plaint are not the usual method of communicating acceptance.

35. Article 7.

36. *Surendra Nath* v *Kedarnath*, AIR 1936 Cal 87. The Supreme Court has held in *Viswesardas Gokuldas* v *B.K. Narayan Singh*, (1969) 1 SCC 547, 549-50 that the filing of a suit cannot take the place of a formal acceptance.

reasonable and in a sensible manner" and there was no violation of Section 7 when the offeree, instead of writing to the particular person, met him personally to communicate his acceptance. The defendant was bound by the acceptance.

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

*Where no Manner Prescribed: Reasonable and Usual*

Where no mode of acceptance is prescribed, acceptance must "be expressed in some usual and reasonable manner". Mail is, of course, a very reasonable manner in such cases. In England the rule is that where an offer is received through post, acceptance may also be communicated by post.[37] But in India, in view of the language of Section 7, post may be used as a mode of communication in all cases where it is reasonable, except when the offer requires a particular form of communication.

**When contract concluded**

When the parties are at a distance and are contracting through post or by messengers, the question arises when is the contract concluded? Does the contract arise when the acceptance is posted or when it is received. The question first arose in England in *Adams* v *Lindsell*:[38]

> 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 5. On that evening the plaintiffs wrote an answer agreeing to accept the wool. This was received by the defendants on September 9. The defendants waited for the acceptance up to September 8 and not having received it, sold the wool to other parties on that date. They were sued for breach of contract.

It was contended on their behalf that till the plaintiffs' 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 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* (endlessly).

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 Ins Co* v *Grant*:[39]

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37. This appears from judgments in cases like *Household Fire Insurance Co* v *Grant*, (1879) LR 4 Exch Div; *Dunlop* v *Higgins*, (1848) 1 HLC 381; *Henthorn* v *Fraser*, (1892) 2 Ch 27.
38. (1818) 106 ER 250 Court of King's Bench.
39. (1879) LR 4 Ex Div 26 (CA). *See* also *Dunlop* v *Higgins*, (1848) 1 HLC 381, where an acceptance letter posted in due time was delayed by one day as the slippery state of roads from frost prevented the mail bag from reaching the station before the departure of the train, nevertheless the defendants were held to be bound.

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 the 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 offeror 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.[40] 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."[41]

"It may be taken as now settled that, where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted, even though it never reaches its destination."[42]

"The Indian Contract Act, in Section 4 adopts a rather peculiar modification of the rule."[43] 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.

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40. Quoting Lord BLACKBURN in *Brogden* v *Director of Metropolitan Rly Co*, 2 App Cas 666.
41. There was a strong dissenting judgment by BRAMWELL LJ. According to him if the communication of acceptance is complete at the time of posting, the same should be true of all communications sent through post. "Suppose," he said, "a man has paid a tailor by cheque, and posts a letter containing a cheque to his tailor, which never reaches, is the tailor paid?.... The question then is, is posting a letter which is never received a communication to the person addressed?" His Lordship answered by saying "that it is not a communication".
Many other problems illustrating the absurdity of the rule appear in the judgment of his Lordship. *See*, for example, the opinion of Lord BRAMWELL in *British & American Telegraph Co* v *Colson*, (1871) LR 6 Ex 108, where the defendant was held to be not bound by a letter of acceptance which was lost in the course of post. His Lordship said: "If a man proposed marriage and the woman was to consult her friends and let him know, would it be enough if she wrote and posted a letter which never reached him?" For other arguments against the rule, *see* Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499, 510.
42. *Byrne* v *Van Tienhoven*, (1880) 5 CPD 344, 348. *See also* the speech of Lord HERSCHELL in *Henthorn* v *Fraser*, (1892) 2 Ch 27, where his Lordship said at p 33: "I should prefer to state the rule thus: where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."
43. Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499, 505.

Thus the provision makes no difference in the position of the offeror. The offeror becomes bound when a properly addressed and adequately stamped letter of acceptance is posted. This aspect was emphasised by the Allahabad High Court in *Ramdas Chakarbarti* v *Cotton Ginning Co Ltd.*[44]

> A letter of allotment of shares was claimed to have been posted by a company, but the applicant denied to have received it.

The High Court said: "It follows from this (Sections 4 and 5) that a notice of allotment, which is the acceptance of the offer to purchase shares, is communicated to the allottee when it is despatched, and from that moment there is a complete contract for him. Whether or not he receives the letter is absolutely immaterial."[45] However, the company failed to furnish any evidence of the posting of the notice of allotment.

The contract is concluded at the place from where the proposal is accepted and communication of acceptance is despatched, i.e., the address at which the proposal was sent. The court at that place would have jurisdiction to entertain a cause of action under the contract.[46]

### *Difference between English and Indian Laws*

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 irrevocably bound.[47] 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.[48]

The peculiarity of this rule is that after an acceptance is posted and before it comes to the knowledge of the offeror, only one party, that is, the offeror, is bound. The acceptor still has the right to recede from the contract by revoking his acceptance. A contract, on the other hand, means an agreement which binds both the parties to it.[49]

### *When Parties in Direct Communication*

This rule, that the communication of an acceptance is complete as against the proposer when the letter is posted, is probably intended to apply only when the parties

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44. (1887) 9 All 366. *See* also *J.K. Enterprises* v *State of MP*, AIR 1997 MP 68, communication of acceptance complete when letter posted to the address given by the offerer.
45. *See* the judgment of the court at p 377; *see* also *Byomkesh* v *Nani Gopal*, AIR 1987 Cal 93, a letter of acceptance duly posted by the acceptor was held effective though the other party refused to receive it and it came back undelivered.
46. *Oil and Natural Gas Commission* v *Modern Construction & Co*, (1997) 3 Guj LR 1855; *Progressive Constructions Ltd* v *Bharat Hydro-Power Corpn*, AIR 1996 Delhi 92; *State of Orissa* v *Prathibha Prakash Bhavan*, AIR 1995 Ori 62.
47. This is the opinion of distinguished writers like Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 22nd edn by A.G. Guest, pp. 50-51. There is, however, no direct authority on the point. *See* also Cheshire & Fifoot, LAW OF CONTRACT, 6th edn, p 43, and the Scots case of *Dunmore (Countess)* v *Alexander*, cited there in which the offeree was allowed to withdraw his acceptance.
48. Section 5, which provides that "an acceptance may be revoked at any time before the communication of its acceptance is complete as against the acceptor, but not afterwards".
49. This anomaly was pointed out by the Madras High Court in *Kamisetti Subbiah* v *Katha Venkataswami*, (1903) ILR 27 Mad 355, 359.

are at a distance and they communicate by post. In England also its operation has been confined only to cases where the post is used, and the illustration (*b*),[50] appended to Section 4 also supposes communication by post. "Where, however, the parties are in each other's presence or, 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*.[51] DENNING LJ observed as follows:

> Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says.... Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that moment.

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 the contract was made in Holland or in England. The Court of Appeal held that telex is a method of instantaneous communication and "the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offerer; and the contract is made at the place where the acceptance is received."[52]

Where, however, the proposal and acceptance are made by letters, the contract is made at the place where the letter of acceptance is posted. It has been observed by the Supreme Court that "authorities in India[53] exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offerer".[54] Thus where a premium due on a life insurance policy was sent by money order, it was held that the policy had revived from the date of the money order and not from the date of its receipt by the

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50. *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*.

51. (1955) 2 All ER 493: (1955) 2 QB 327: (1955) 3 WLR 48.

52. This has now been affirmed by the House of Lords in *Brinkbon Ltd* v *Stahag Stahl W.G.*, (1982) 2 WLR 264 HL, the contract was held to be made in Vienna where acceptance was received.

53. For authorities *see*: *Kamisetti Subbaih* v *Katha Venkataswami*, (1903) 27 Mad 355; *Manila* v *Vankatachlapathy*, 1944 ILR Mad 95; *Mylappa Chettiar* v *Aga Mirza Mohd Shirazee*, (1919) 37 MLJ 712; *National Insurance Co Ltd* v *Seethamal*, (1933) 65 MLJ 455: AIR 1933 Mad 764; *Bengal Insurance & Real Property Co Ltd* v *Velayammal*, ILR 1937 Mad 940: AIR 1937 Mad 571; *Ahmad Bux* v *Fazal Karim*, ILR 1940 Mad 195: AIR 1940 Mad 195: AIR 1940 Mad 49; *Pachaiammal* v *Hindustan Coop Insurance Society*, ILR 1941 Mad 109: AIR 1941 Mad 270. In *Sepulchre Bros* v *Sait Khushal Das*, AIR 1942 Mad 13, the Madras High Court held that although an acceptance by post is complete when the letter is posted, it is a continuing act until it reaches the person to whom it is communicated and thus can be taken to be made also at the place where it is received. But this opinion has not been followed. *See* also *Baroda Oil Cakes Traders* v *Parshottam*, AIR 1954 Bom 491.

54. SHAH J in *Bhagwandas* v *Girdharilal*, (1966) 1 SCR 656: AIR 1966 SC 543.

company. The assured having died in the meantime, his widow recovered the proceeds.[55]

Whatever merit this rule may have from the point of view of the assured or the offeree, it certainly makes the position of the offeror miserable. The current feeling, therefore, is that even in reference to postal communications the principle of consensus or "meeting of minds" should be adhered to and there should be no contract till the acceptance is received. Thus in *Holwell Securities* v *Hughes*[56] an option to purchase land was exercisable by notice, it was held that the mere posting of the notice which was never delivered was not a valid exercise of the option.

*Supreme Court Approval of Entores Case*

The principle of the *Entores* case has been endorsed by the Supreme Court in *Bhagwandas Goverdhandas Kedia* v *Girdharilal Parshottamdas & Co.*[57] In this case, the plaintiffs made an offer from Ahmedabad to the defendants at Khamgaon to purchase certain goods and the defendants accepted the offer. The question was whether the conversation resulted in a contract at Khamgaon or at Ahmedabad. A majority of the judges (HIDAYATULLAH J [afterwards C J]) (dissenting) preferred to follow the English rule as laid down in the *Entores case* and saw no reason for extending the post office rule to telephonic communications. SHAH J (afterwards C J) felt that "Section 4 does not imply that the contract is made *qua* the proposer at one place and *qua* the acceptor at another place. The contract becomes complete... when the acceptance of offer is intimated to the offerer." But, he continued to say, that the draftsman of the Indian Contract Act could not have envisaged use of telephone because it had not yet been invented and, therefore, the words of the section should be confined to communications by post.

HIDAYATULLAH J (afterwards C J) was, on the other hand, convinced that though "the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated", the language of Section 4 is flexible enough to cover telephonic communications. The courts should not completely ignore the language of the Act. When the words of acceptance are spoken into the telephone, they are put into the course of transmission to the offerer so as to be beyond the power of the acceptor. The acceptor cannot recall them. The communication being instantaneous the contract immediately arises.

## ABSOLUTE AND UNQUALIFIED

Section 7 provides:

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 vitiates the acceptance unless it is agreed to by the person from whom the offer comes. In other words, an acceptance with a variation is no acceptance; it is simply a counter-

55. *Hairoon Bibi* v *United India Life Insurance Co*, AIR 1947 Mad 122. The learned judge cited *Baroda Oil Cakes Traders case*, (1954) Bom 1137: AIR 1954 Bom 491.
56. (1973) 1 WLR 757: (1973) 2 All ER 476.
57. AIR 1966 SC 543: (1966) 1 SCR 656.

l, which must be accepted by the original promisor before a contract is
' The facts of the case in which this statement occurs were as follows:

> Before accepting an offer the plaintiff introduced certains terms like 'Free Bombay Harbour and interest', which were not there in the original offer. This, the defendant refused to accept. Subsequently the plaintiff communicated his acceptance of the original offer, but the defendant did not assent to this. Plaintiff's action for breach of contract was dismissed.

Sir JENKINS CJ said: "Unless there is an absolute and unqualified acceptance, the stage of negotiations has not yet passed, and no legal obligation is imposed." The plaintiff's first acceptance with new terms was in fact a counter offer which implied the rejection of the original offer. A counter offer puts an end to the original offer and it cannot be revived by subsequent acceptance. In another case:[59]

> *A* offered by a letter to sell certain claims to *B* at a specified rate. *B* in turn offered to buy at a little less rate which *A* did not accept, but he did not withdraw his original offer. Then *B* accepted the rate as originally offered. This also *A* did not accept and *B* sued him for breach of contract. It was held that *B* by his counter-offer to buy at a reduced rate impliedly rejected *A's* original offer and there was no contract.

The court relied upon *Hyde* v *Wrench*.[60] In this case 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. Holding that the defendant was not bound by any such acceptance, the court said: "The defendant offered to sell it for £ 1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract, instead of that, the plaintiff made an offer of his own, to purchase the property for £ 950 and thereby rejected the offer previously made by the defendant. It was not afterwards competent for him to revive the proposal of the defendant, by rendering an acceptance of it, and that, therefore, there exists no obligation of any sort between the parties."[61]

Where the proposal carried an acceptance slip with certain conditions and said that the acceptance should be signed on the slip and not in any other manner and the offeree accepted by means of a separate letter without signing the slip, it was held that the acceptance was good because the offeror had to protest against such acceptance and he having not done so the conditions on the slip became waived.[62]

### 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

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58. *Per* Sir JENKINS CJ in *Haji Mohamed Haji Jiva* v *E. Spinner*, (1900) 24 Bom 510, 523. *Badan Lahkar* v *State of Assam*, (1996) AIHC 4632 Gau, once a tender is accepted on its terms, any revision of the accepted rates after completion of the job is not permissible.
59. *Nihal Chand* v *Amar Nath*, AIR 1926 Lah 625.
60. (1840) 3 Beav 334.
61. For other illustrations see *Murlidhar* v *Paresh*, AIR 1947 Cal 14 and *Badrilal* v *Municipal Council of Indore*, (1973) 2 SCC 388: AIR 1973 SC 510.
62. *Compagnie de Commerce et Commission, SARL* v *Parkinson Stove Company Ltd*, (1953) 2 Lloyd's Rep 487.

is another kind of counter-proposal and does not bind the offeror unless he agrees to the qualified acceptance. Thus, in a case:[63]

> An application for certain shares in a company was made on the condition that the applicant would be appointed cashier in a new branch of the company. The company allotted him some shares without fulfilling the condition and claimed the share money.

It was held "that the petitoner's application for 100 shares was conditional and that he had no intention to become a member of the company when he applied for the shares until he was appointed a cashier in the branch office".[64]

**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.[65] An inquiry about the technical details of a proposal is not a counter-proposal. On acceptance of the proposal, the contract will be created on the basis of the terms and conditions of the original proposal including arbitration clause.[66]

**Some instances**

In a Karnataka case[67] a Government company drew out a scheme for procuring machinery on hire-purchase basis for small-scale firms. A firm requested the company to arrange for the supply of a machine of a particular maker. The company requested the maker to supply the machine to the firm along with agreement forms for signature. The firm received the machine but did not sign the forms. Even so it was held that a complete agreement had already arisen between the parties.

In another case,[68] an offeror asked the offeree to attend to everything else afterwards and send him 15 to 20 bags of areca nuts at once. The offeree wrote back that he would send the goods within 15 to 20 days. The offeror did not reply and ultimately about a month and a half later the offeree sent the goods. The court held that there was no absolute or unqualified acceptance within the meaning of Section 7(1). It was an order for immediate supply and the offeree by asking for 15 or 20 days' time had made a counter-proposal. This destroyed the original offer.[69] Where

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63. *Ramanbhai* v *Ghasiram*, ILR (1918) 42 Bom 595.
64. For another such case see *Mutual Bank of India Ltd* v *Sohan Singh*, AIR 1936 Lah 790. A person by accepting a part of the offer cannot say that a contract has been made and that the dispute should relate only to the unaccepted part of the offer. *General Ass. Soc. Ltd* v *LIC*, (1964) 2 SCR 125: AIR 1964 SC 892: (1964) 34 Comp Cas 10.
65. *UPSEB* v *Goel Electric Stores*, AIR 1977 All 494. *See* also *Stevenson, Jaques & Co* v *McLean*, (1880) 5 QBD 346. In this case a person received a proposal to sell him steel on stated prices. He inquired from the seller as follows: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." It was held that this was an inquiry and not a counter-proposal. He had not lost the right to accept the proposal.
66. *Fair Air Engineers P Ltd* v *N. K. Modi*, (1996) 6 SCC 385.
67. *Shri Ram Metal Works* v *N.S.I. Corpn*, AIR 1977 Kant 24. The court quoted extensively from English authorities.
68. *Perala Krishanayyam Chettiar* v *Paimanathan Chettiar*, AIR 1917 Mad 63.
69. The court cited *Haji Mohd Haji Jiva* v *Spinner*, (1900) 24 Bom 51.

a tender was accepted subject to a new stipulation that the contractor would have to provide supervisory staff as required by the Mines Act (35 of 1952), the acceptance was of no effect.[70]

Similarly, where a person asked to supply goods, accepted the offer, but subject to the payment of an advance, it was held that the demand for an advance was a new term and also an uncertain term because the amount was not specified and, therefore, prevented the contract from arising.[71] The court distinguished this case from another case where after receiving a counterproposal, the offeror rejected it and repeated his original offer which was then accepted by the offeree, a contract was deemed to have arisen.[72] Where a landowner, on receiving a proposal, wrote back to the proposer to know whether he would offer a higher price and, if so, whether he would send some advance, and the latter accepted it by sending some advance, a contract arose leaving no chance for revocation.[73]

A person expressed a desire to purchase the Council house in which he was living. The Council sent him a letter which said "I refer to your request for details of the cost of buying your Council house. The Corporation may be prepared to sell the house to you at the purchase price of £ 2180". He sent in an application and stated that he wished to buy the house. The issue before the House of Lords was whether the Council's letter amounted to an offer. It was held that this letter was not a contractual offer capable of being converted into a legally enforceable open contract by applicant's written acceptance of it.[74]

A written contract was executed between the parties for telecasting 65 episodes of a TV serial. Prior to this there was an oral approval by Doordarshan Authorities of the proposal to telecast 500 episodes. That approval was held to be only a part of the continuing negotiations. It could not have any effect because the parties subsequently bound themselves by a definite written contract.[75]

### Acceptance with condition subsequent

If an acceptance carries a condition subsequent, it may not have the effect of a counter-proposal. Thus, where an acceptance said: "terms accepted, remit cash down Rs 25,000 by February 5, otherwise acceptance subject to withdrawal", this

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70. *Chhotey Lal Gupta* v *Union of India*, AIR 1987 All 329.
71. *Mooljı Jaitha & Co* v *Seth Kirodhimal*, AIR 1961 Ker 21. *See* also *Ankapalee Coop Agricultural and Industrial Society Ltd* v *R. Palaniappan*, (1991) 2 Mad LJ 452, where a proposal to sell goods made by telegram did not specify any time and the acceptance by telegram spoke of an advance amount being sent but nothing was in fact sent, it was held that no agreement arose.
72. *Pacific Minerals Ltd* v *Singhbhum Mining Syndicate*, AIR 1938 Cal 343.
73. *Byomkesh* v *Nani Gopal*, AIR 1987 Cal 92.
74. *Gibson* v *Manchester City Council*, (1979) 1 All ER 972. *See* also *Rickmers Verwaltung GmbH* v *I.O.C. Ltd*, (1999) 1 SCC 1: AIR 1999 SC 504, draft charter-party agreement executed between parties, but terms of letters of credit and performance guarantees could not be agreed upon. There was no concluded contract, arbitration clause could not acquire binding force. *Rajasthan State Electricity Board* v *Dayal Wood Works*, (1998) 2 Andh LD 599, security deposit made with tender. The tenderer's letter indicated terms and conditions of supply. Purchase orders issued by the Board contained additional terms and conditions which the tenderer did not accept. Held, no contract, security deposit refundable, *Rameshwar Swaroop* v *Saroj Tyagi*, (1998) 7 SCC 456, vendee of a cantonment premises, not allowed to escape responsibility of buying under his agreement on the ground that the cantonment required an undertaking that he would not resist resumption proceedings, not oppressive.
75. *Raj Chowdhury* v *Union of India*, AIR 2000 Cal 232.

was not a counter-proposal, but an acceptance with a warning that if the money was not sent the contract would be deemed to have been broken.[76] In another case, after invitation for and submission of tender, there were some negotiations between the parties. Acceptance was communicated to the tenderer by FAX stating that "a regular purchase order follows". The court said that this concluded the contract. The requirements of signatures of parties and collaborators and furnishing of bank guarantees for due performance were subsequent conditions. They were not like a conditional acceptance or a counter-proposal. Communication of collaborators' approval was not necessary because the main tenderer was acting on their behalf.[77]

**Acceptance of counter proposal**

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".[78] Thus in *Hargopal* v *People's Bank of Northern India*:[79]

> An application for shares was made conditional on an undertaking by the bank that the applicant would be appointed a permanent director of the local branch. The shares were allotted to him without fulfilling the condition. The applicant accepted the position as shareholder by accepting dividends, filing a suit to recover it and by pledging his shares.

It was, therefore, held, "that he could not contend that the allotment was void on the ground of non-fulfilment of the condition as he had by his conduct waived the condition".

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

> An offer to sell a machine contained a price variation clause whereby it was a condition of acceptance that goods would be charged at prices ruling at the date of delivery. The offeree placed an order for the machine in their form which did not contain any variation clause and which had a tear-off acknowledgement slip. The proposers signed and returned the slip. The machine was ready for delivery by September but the buyers could not accept it until November. The sellers invoked the price variation clause. The court did not permit it. The buyer's order was not an acceptance, but a counter-proposal, which the sellers accepted and that carried no price variation clause.[80]

Where tenders are invited subject to a deposit, it is open to the party inviting them to waive the requirement and an acceptance given to a tender without deposit would be binding on the tenderer.[81]

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76. *S.D. Katherine Stiffles* v *M.P. Carr Mackertich*, 164 IC 732. A letter of intent does not amount to a proposal or its acceptance. *Hermann Suerken GmbH & Co* v *Selco (Shipyard Pte) Ltd*, (1991) 3 CLJ 2289 Singapore HC.
77. *D. Wren International Ltd* v *Engineers India Ltd*, AIR 1996 Cal 424.
78. *Bhagwandas* v *Shri Dial*, 1913 Punj Rec. No. 92, p 325.
79. AIR 1935 Lah 691. *See* also *Jawahar Lal Burman* v *Union of India*, AIR 1962 SC 378: (1962) 3 SCR 769.
80. *Butler Machine Tool Co Ltd* v *Ex-Cell-O Corpn (England) Ltd*, (1979) 1 WLR 401, CA.
81. *Bismi Abdullah & Sons* v *Regional Manager, F.C.I.*, AIR 1987 Ker 56. But see *Zodiac Electricals Ltd* v *Union of India*, (1986) 3 SCC 522: AIR 1986 SC 1918 where the Government insisted upon security deposit in its renewed communication, the acceptance by

**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.[82] Meanwhile the offeror is at liberty to cancel his offer. The decision of the Punjab High Court in *Union of India* v *S. Narain Singh*[83] is an illustration in point. The court 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.[84]

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.[85] "Such a prohibition against withdrawal does not have the force of law unless there is some consideration to bind him down to the condition." In another case:[86]

> A bid at an auction was accepted *kutcha pucca* and was referred to the owner of the goods for approval and sanction. The bidder was allowed to revoke his bid before the approval came in.

When a provisional acceptance is subsequently confirmed, the fact should be notified to 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 office is not enough. Even if the bidder comes to know of that fact of his own, that will not do.[87] The Madras High Court, however, held in two cases,[88] that confirmation need not be notified. The court said: "The communication of acceptance twice, that is, once when the conditional acceptance is made and again when the condition is fulfilled is unnecessary." In Pollock and Mulla,[89] "it is submitted that these two cases were wrongly decided".

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the contractor of the renewed proposal without making the security deposit was held to be not an unqualified acceptance.

82. See *New India Assurance Co Ltd* v *Haryana Roadways*, AIR 1997 P&H 257, Roadways Corporation's proposal for getting its buses insured sent along with a certain amount which was accepted provisionally subject to approval by higher authorities. No such approval could take place. Premium amount refunded. No contract.

83. AIR 1953 Punj 274. The auctioneer is not bound to accept the highest bid. *See* in connection with Government contracts, (1982) 2 SCC 365. *High Way Farms* v *Chinta Ram*, 2000 AIHC 2666 (Delhi), a receipt containing a clause that "further sum would be paid at the time of agreement." The court said that such a receipt could not be termed as a document of agreement to sell.

84. The court cited the following two decisions of the Madras High Court as authorities in point: *Somasundaram Pillai* v *Government of Madras*, AIR 1947 Mad 366 and *Muthu Pillai* v *Secretary of State*, AIR 1923 Mad 582.

85. This was held by the Madras High Court in *Somasundaram Pillai* v *Government of Madras*, AIR 1947 Mad 366.

86. *Mackenzie Lyall & Co* v *Chamrao Singh & Co*, ILR (1889) 16 Cal 702.

87. *Delhi Development Authority* v *Ravindra Mohan Agarwal*, (1999) 3 SCC 172: AIR 1999 SC 1256.

88. *Rajanagaram Village Cooperative Society* v *P. Veerasami Mudaley*, AIR 1951 Mad 322; *Chettibobu Adenna* v *G. Jaggarayadu*, 28 MLJ 617: AIR 1916 Mad 75.

89. Pollock & Mulla, INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 76 (9th edn by J.L. Kapur 1972).

Where an offer for the sale of immovable property was accepted "subject to the condition that the title adduced should be to the satisfaction of the purchaser's solicitors", it was held that the offeror "must prove either that the solicitors did approve of the title or that there was such a title tendered as made it unreasonable not to approve of it".[90] Similarly, in *Koylash Chunder Doss* v *Tariney Churn Singhee*:[91]

> The defendant accepted to buy the plaintiff's house for a specified price and called him to come to the attorney's house with title deeds and receive the earnest money. They met at the attorney's office in the absence of the attorney and no inspection of title deeds or payment of the earnest money, therefore, could take place.

CUNNINGHAM J observed: "If there be a distinct offer on one side, and a distinct acceptance on the other, a contract arises notwithstanding that the parties may have recorded their intention that it shall be put into a more formal shape by a solicitor. But, on the other hand, if on the true construction of the correspondence and evidence it appears to have been the intention of the parties that they are not to be bound till the agreement has been put into more formal shape and approved by them, then the parties ought not to be bound till the formal document has been executed." Applying this test to the facts of the present case the learned judge concluded that "both the parties having treated the payment of earnest money as an element in the contract, the contract could not be completed till the amount of earnest money had been ascertained".[92]

**Provisional or tentative arrangements**

Thus, 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*[93] the parties entered into an agreement for a lease "subject to the preparation and approval of a 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. Similarly, an agreement for the sale of a house stated that it is "subject to contract". The seller wrote to the buyer that he has signed the final agreement and would be glad to exchange it with the part of the contract which was to be signed by the buyer. The buyer thereupon sent the part signed by him but the seller changed his mind and refused to send his part in exchange. Lord GREENE MR held, for the Court of Appeal, that the agreement was subject to the parts being exchanged and, therefore, neither party was bound till the exchange actually took place.[94] His Lordship distinguished the case from his own decision in *Branca* v

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90. *Treacher & Co Ltd* v *Mohomedally Adamji Peerbhoy*, ILR (1911) 35 Bom 110. *See* also *Sree Gopal* v *Ram Charan*, (1882) 8 Cal 856.
91. (1884) 10 Cal 588.
92. *See* the judgment at p 597. The Court *relied* on the following authorities: *Ridgway* v *Wharton*, 6 HL 238; *Rossiter* v *Miller*, LR 3 AC 1124; *Bannewell* v *Jenkins*, LR 8 Ch D 70; *Crossley* v *Maycock*, LR 8 Eq 180.
93. (1877) 47 LJ Ch 139: 7 Ch D 29.
94. *Ecclas* v *Bryani & Pollack*, (1947) 2 All ER 865: (1948) Ch 93 CA; *see* also *Kollipara Sriramulu* v *T. Awathanarayana*, (1968) 3 SCR 397: AIR 1968 SC 1028: (1969) 1 MLJ 6; *Union of India* v *Kishori Lal Gupta*, (1960) 1 SCR 493: AIR 1959 SC 1362; *Jiwan Lal* v *Brij Mohan Mehra*, (1972) 2 SCC 757: AIR 1973 SC 559, where the purchaser paid earnest

*Cobarro*.[95] An 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.

The parties can make a contract with retrospective effect. The parties can say, "This contract is to be treated as applying, not only to our future relations, but also to what has been done by us in the past since the date of the tender in the anticipation of the making of this contract."[96]

### Acceptance and withdrawal of tenders

A tender is in the same category as a quotation of prices. It is not an offer.[97] 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 Wadia & Co*.[98]

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money, the balance being payable on registration of the deed, binding contract. *Lakhanlal* v *State of Orissa*, (1976) 4 SCC 660, provisional approval of highest bid does not bind the Government; *Urmila & Co P Ltd* v *J.M. Baxi & Co*, AIR 1986 Del 336, two tenders for heavy transport work, the Deptt. asked them to undertake the work together. They agreed and applied for joint allotment, but the work allotted to one only. The other claimed. Held, provisional, not final contract; but in *Asia Foundations and Constructions Ltd, in re*, AIR 1986 Guj 186, there was an initial joint tender which was accepted and that constituted the contract of partnership.

95. (1947) 2 All ER 101: (1947) KB 854 CA. *See* also the decision of the Supreme Court in *Badri Prasad* v *State of MP*, (1969) 2 SCR 380: AIR 1970 SC 706 and also *Rickmers Verwaltung GmbH* v *Indian Oil Corpn Ltd*, (1999) 1 SCC 1, arrangements could not go even up to the stage of letters of credit, no contract and, therefore, the arbitration clause could not be availed of.

96. *Trollope & Colls Ltd* v *Atomic Power Constructions Ltd*, (1962) 3 All ER 1035.

97. A tender which does not comply with the specified requirements is open to rejection. *N.O. Shetty* v *K.S.R.T. Corpn*, AIR 1992 Kant 94, security deposit in the form of guarantee required for submitting a tender not complied with. Rejection of the tender upheld, following *G.J. Fernandez* v *State of Karnataka*, (1990) 2 SCC 488: AIR 1990 SC 958, distinguishing *Yadav case*, AIR 1984 Bom 351 where the requirement as to earnest money was relaxed in favour of all tenderers. *Sat Prakash* v *State of MP*, 1984 MPLJ 318, a tenderer not pemitted to complain that hand pumps to be installed were required to be approved by UNICEF; *Jayantilal R. Agrawal* v *Gujarat Electricity Board*, Special Civil Application No. 1984 of 1988, a tenderer cannot complain of the requirement of security money as a condition of allotment. *P. Sreerama Reddy* v *Rajahmundry Municipality*, (1996) AIHC 2305 AP, publication of tenders in violation of Municipal Rules, namely, non-publication in at least one local newspaper and the failure to give 15 days' time for submission, tender set aside. *Cambatta Aviation Ltd* v *Cochin International Airport Ltd*, AIR 1999 Ker 368, on the meaning and concept of a public tender. The requirements that tenderers must submit their tenders within a certain time on the last date, with bank guarantees with forfeiture clause, list of equipments, and statements of audited accounts, were held not to detract it from its being public tender.

98. ILR (1899) 24 Bom 97. *C. Jayasree* v *Commissioner*, AIR 1994 AP 312, no contract till a tender is accepted. The tender inviting authority can cancel the tender before that. The tender provided that the corporation would accept a tender if the tenderer was willing to pay the entire bid amount within sixty days. The tenderer accepted this requirement in his tender, but even so the corporation could cancel the tender.

The defendants signed an agreement which, among other terms, provided: "The undersigned have this day made a contract with Messrs Homee 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."[1]

Where purchase orders were issued in terms of an arrangement of supply but there was an option in the purchase order itself for the tenderer to refuse to supply, it was held that no concluded contract was made and therefore the contractor was entitled to refund of his security deposit.[2]

In reference to a tender the Supreme Court of India 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".[3] 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.[4] But once an order is placed that will have to be complied with. The order

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1. *See* the judgment of the court at pp. 102-103. The court relied upon the following authorities: *Offord* v *Davies*, (1862) CB (NS) 748: 31 LJ (CP) 319, *Great N.R. Co* v *Witham*, LR (1873) 9 CP 16; *Jagdish Prasad Kesharwani* v *Fertilizer Corpn of India*, (1981) 29 Bihar LJ Rep. 241, orders already issued on the basis of accepted tenders have to be complied with. *Kalyanji Vithaldas & Sons* v *State of MP*, (1996) 10 SCC 762, revocation should reach before the order of acceptance is out of the hands of the other party. A revocation after receiving an order is of no effect. Overruling *Shiv Saran Lal* v *State of MP*, AIR 1980 MP 93: 1980 MPLJ 218. *K. Soosaiathinam* v *Divisional Engineer National Highway Circle*, AIR 1995 Mad 90, the last date for submission of tenders was declared to be a holiday, date became extended to the next working day automatically.

2. *Rajasthan State Electricity Board* v *Dayal Wood Works*, AIR 1998 AP 381. Where one of the conditions of a tender was that after communication of acceptance, the tenderer must sign agreement papers, it was held that without such signature there was no concluded contract, *Lotus Constructions* v *Govt of AP*, AIR 1997 AP 200. Where the auction carried the stipulation that the acceptance of bid would be communicated through letter of intent and that would conclude the contract, held, contract arose on such communication in spite of the failure of the parties to sign formal papers because of differences in making some changes, *Progressive Constructions Ltd* v *Bharat Hydro Power Corpn*, AIR 1996 Delhi 92.

3. *Chaturbhuj Vithaldas* v *Moreshwar Prashram*, AIR 1954 SC 236: 1954 SCR 817. *See* also *Kundanlal* v *Secretary of State*, (1904) Punj Rec No. 72, p 223. *See* also *Punjab SEB* v *Abnash Textile Trading Co*, AIR 1986 P&H 323, supply orders issued on the basis of an approved tender, contract concluded.

4. *Rajendra Kumar Verma* v *State of MP*, AIR 1972 MP 131. Where a tenderer communicated well in advance that he would not accept the work order unless certain changes in his tender document were permitted, it was held that no binding contract arose by accepting the tender without permitting the tenderer to introduce his modifications. *Arvind Coal & Construction Co* v *Damodar Valley Corpn*, AIR 1992 Pat 14. *Suraj Besan and Rice Mills* v *Food Corpn of India*, AIR 1988 Delhi 224, communication of acceptance after revocation; *Shyam Biri Works* v *UP Forest Corpn*, AIR 1990 All 205; *Executive Engineer, Sundargarh* v *Mohan*

converts the tender into a contract: A tender which was filed along with a bank guarantee had to be accepted by the Authority within a certain time. The Authority asked the contractor for extension of time. The tenderer did not agree. The Authority then informed him that the contract was likely to be awarded to him. It was held that this did not amount to an acceptance of the tender. The bank guarantee was not absolute. An injunction against its encashment was granted.[5] Where a tenderer had revised his tendered rates before acceptance of his tender, but even so the Authority accepted his tender at the original tendered rates, it was held that no contract had arisen and, therefore, encashment of the bank guarantee was stayed.[6]

If you say to another, "If you will go to York, I will give you £ 100," that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive £ 100. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform.[7]

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.[8] The Alberta Court of Appeal has gone a step further by holding that a term in the tender against withdrawal would be equally effective.

> A construction contractor submitted a tender which stipulated that once the tender was opened, it would become irrevocable until such time as the contract had been signed by the successful tenderer. His tender was found to be the lowest, but prior to the award of the contract, he notified a clerical error resulting in a substantial underestimate. He offered to do the work for the tender as corrected (still the lowest tender). This was refused. The contract was awarded to the next lowest tenderer and he was sued for the difference between the two on the basis of the uncorrected tender.

He was held liable. The terms on which tenders were invited became a part of the offer and there was no obligation to accept the revised tender.[9]

Just as the tenderer has the right to revoke his tender as to future orders, so also the acceptor of the tender has a right to refuse to place any orders whatsoever. This appears from *Secretary of State* v *Madho Ram*.[10]

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*Prasad Sahu*, AIR 1990 Ori 26, right of revocation before acceptance. *Atma Singh* v *NTPC Ltd*, (1988) 2 Andh LT 421, right of withdrawal of tender even where the tender carried the condition that the tenderer would not withdraw the tender for 60 days. *Krishnaveni Constructions* v *Executive Engr., Panchayat Raj, Darsi*, AIR 1995 AP 362, a stipulation that the tender would not be drawn for a certain period does not bind unless there is consideration for the promise not to withdraw.

5. *Kilburn Engineering Ltd* v *ONGC Ltd*, AIR 2000 Bom 405.
6. *Oil & Natural Gas Commission* v *Balaram Cements Ltd*, AIR 2001 Guj 287.
7. BRETT J in *Great Northern Rly* v *Witham*, (1873) 9 CP 16: 43 LJCP 1: 29 LT 471.
8. See *Secretary of State for India* v *Bhaskar 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*.
9. *Calgary* v *Northern Construction Co*, (1987) 3 Construction Law Reporter 179 Alberta CA.
10. ILR (1928) 10 Lah 493.

A tender for the supply of certain goods at specified prices was accepted by the military authorities, but no requisition was issued during the period of the tender.

The court said: "The military authorities were not bound, by their acceptance of the tender, to purchase any or all of the said goods needed by them, from the plaintiff in the absence of a covenant to that effect. They were free to accept the offer or not as they would think fit and they could buy the goods from any other source without any reference to him."[11] In other words, the party accepting a tender can always say: "We do not intend to give any further orders under this document and against such refusal there can be no remedy at all."[12]

It has been pointed out by the Supreme Court in *Union of India* v *Maddala Thattiah*[13] that a clause in a tender authorising the party inviting tenders to terminate the contract at any time for future supplies does not destroy the very basis of the contract and the clause is valid.

A tender should be completed and submitted as required by its terms: Where signing of the tender document in full was one of the *requirements*, yet the tenderer did not sign it in full and only initialed it. Rejection of the tender was held to be not improper.[14] A tender contained instructions to bidders to state against each work item unit rates in Indian currency and in US Dollars or Japanese Yen. The tenderer stated 50% of the unit rates in Indian currency and 50% in foreign currency. This was held to be not *a clerical or mechanical error*. The tender was not allowed to be corrected. Errors in item rates were also not allowed to be rectified. Tender's request that errors should be ignored and his tender should be taken on the whole was ignored.[15]

### *No Obligation to Accept Lowest Tender*

A party inviting tenders is not bound to accept any tender, nor it is bound to accept the lowest tender. But where the party is a Government or any of its agencies, it should not arbitrarily pick and choose. It should have some rules and those rules must require reasons for departure from the normal principle to be recorded in writing. Accordingly, where an authority ignored the claim of the lowest tenderer because of his bad history and awarded the contract to the next lowest tenderer, the court did not interfere in the decision of the authority.[16] Explaining the principles

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11. See also *Kundan Lal* v *Secretary of State*, AIR 1939 Oudh 249.
12. See *Denton* v *G.N. Rly Co*; *Burtenon* v *G.N. Rly Co*, (1856) 5 E&B 860 and *Percival Ltd* v *London County Council Asylum & Mental Deficiency Committee*, (1918) 87 LJKB 677. Acceptance of bid money even though it was a part of the sale consideration was not an acceptance of the tender on final basis, *Veera Property Development P Ltd* v *T N Slum Clearance Board*, AIR 1999 Mad 304.
13. (1964) 3 SCR 774: AIR 1966 SC 1724.
14. *R.N. Ghosh* v *State of Tripura*, AIR 2000 Gau 114.
15. *R. Rajaram* v *State*, 1999 AIHC 2585, the tenderer failed to deposit earnest money as required in the tender, he alleged oral promise giving him extended time for the deposit but failed to substantiate it, cancellation of the contract and forfeiture of the deposit were held to be justified.
16. *N. Kunhraman* v *Municipal Council*, (1992) 1 Ker LJ 191. *See* also *Suriya Das* v *Assam State Fisheries Devp Corpn Ltd*, (1995) AIHC 3617 Gau, lowest tenderer ignored because he had not complied with the terms and conditions of the contract on an earlier occasion. To the same effect, *P.S. Constructions* v *State of Goa*, (1997) 1 Bom CR 163. *Y. Konda Reddy* v *State of AP*, AIR 1997 AP 121, refusal to accept lowest tender supported by good reasons, allegation of mala fides was on vague facts, *State of UP* v *Raj Narain*, (1975) 4 SCC 428, the

which public authorities have to observe the court found it to be settled law that a public authority cannot act arbitrarily even in the matter of awarding contracts or distributing largesse. There ought to be a public element in all its decisions and it must conform to the mandate of Article 14 and observe tenets of equality and fair action.[17] The court said that the acceptance of a higher tender does not *ipso facto* make the acceptance illegal. A sixteen member elected council had taken the decision in accordance with the rules. The court continued:

> "Even if two views are possible, there will be no justification for interference unless the view adopted by the Authority is so grossly unreasonable or tainted by other vitiating circumstances.
>
> The view does not become unreasonable, merely because another view would arise on the facts. The process of judicial review is not in the nature of an appeal against the decision. Only the decision-making process, is under review. Neither the view of the Municipality on facts, nor its assessment of future events based on past performance, can be labelled unreasonable. As observed by Lord HAILSHAM, two reasonable persons can perfectly reasonably come to opposite conclusions on the same facts, without forfeiting their title to be regarded as reasonable men. Unless the decision is so unreasonable that no reasonable person would come to it, it does not merit interference. As observed by the Court of Appeal in the *Tamside case*:[18]
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> > 'No one can be properly labelled as being unreasonable, unless he is not only wrong, but so unreasonably wrong that no reasonable person could sensibly take that view'.
>
> It is also useful to refer to the observations of SCARMAN LJ in *Nottinghamshire County Council* v *Secretary of State*:[19]

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authority ought to have recorded reasons for rejecting the tender which quoted the lowest price. *Followed* in *Sharavathy Petro-Chemicals P Ltd* v *T.N.E.B.*, (1993) 2 Mad LJ 647. In a tender for supply of drugs the decision to accept was to be that of the Minister of Commerce who reviewed the decision to accept the lowest tender, there was no mala fide and review was due to recommendation of the tender advisory committee, upheld, *Nestor Pharmaceuticals P Ltd* v *Union of India*, AIR 1995 Delhi 260. After negotiations with the lowest tenderer and others, Government preferred a Government undertaking under a statutory right of preference, no interference, *Babu Ram Gupta* v *Mahanagar Telephone Nigam Ltd*, AIR 1995 Delhi 223. *Red Rose Cooperative Labour and Construction Ltd* v *State of Punjab*, AIR 1999 P&H 244, a tender was issued twice for the same items. No body was awarded after the initial tender. The quotations in response to the second tender showed that the petitioner had quoted lowest rates in the first tender in respect of 12 items. On that basis he was not allowed to claim award of contract in respect of those items.

17. Citing following authorities: *R.D. Shetty* v *International Airports Authority*, (1979) 3 SCC 489: AIR 1979 SC 1628; *Harminder Singh Arora* v *Union of India*, (1986) 3 SCC 247; *Dwarkadas Marfatia & Sons* v *Board of Trustees of Port of Bombay*, (1989) 3 SCC 293; *G.B. Mahajan* v *Jalgaon M.C.*, (1991) 3 SCC 91. *B. Jaya Babu* v *Regional Manager, APSRTC*, AIR 1996 AP 30, rejection of the tenders of the existing contractor for running canteens at bus-stops because he was in arrears of huge amount of rent and licence fee and had also dragged the corporation into too much litigation, was held to be proper.

18. (1976) 3 All ER 665. *Pradeep Timber Co* v *Himachal Pradesh State Forest Corpn.* (1984) Sim LC 245, cancellation of an auction so as to defeat the highest bidder and which had no other justification, cancellation quashed.

19. (1986) 1 All ER 199. *See* also *Malu Khan* v *State of Rajasthan*, (1989) 1 Raj LR 890 where the highest bidder was ignored and the allotment of the liquor licence was being negotiated with a person who had not submitted the bid but who was offering more than the next highest bid, it was held that the next highest bidder should have been given opportunity to appear in negotiations.

'Unreasonableness must prima facie show that the official behaved absurdly or must have taken leave of his senses'.

The decision of the Municipal Council must be tested on the touchstone of these principles. The decision is not under appeal and the tenability of another view will be no ground to stamp the decision with vice. As already noticed, the past performance of the petitioner-contractor, and the reports made by competent Authorities were considered and decision taken by an elected body of sixteen persons, after deliberation. The decision is not unreasonable."

Another case of this kind was before the Kerala High Court in *Cambatta Aviation Ltd* v *Cochin International Airport Ltd*[20] The evaluation authority considered all the aspects and found the appellant to be the most competent tenderer to be awarded the contract. The Board of directors selected another tenderer (the respondent). This decision was taken by the Board even before taking decision on the soundness of the other tenderers. The minutes of the Board meeting did not give any reason as to why the Board decided to invite the respondent. The respondent was then persuaded to make a matching offer with that of the appellant. The court declared that the Board of directors adopted a procedure which was clearly violative of the principles of natural justice. The award was accordingly held to be arbitrary and illegal.[21]

*Liability for Failure to Consider Tender*

A valid tender must be opened and duly considered by the inviting authority, otherwise it would be unfairness. In a case of this kind where a valid tender was not considered, the Court of Appeal observed:[22]

"In certain circumstances an invitation to tender can give rise to binding contractual obligations on the part of the invitor to consider tenders which conformed with the conditions of tender. Since, in this case, tenders had been solicited by the Council from selected parties, and since the Council's invitation to tender prescribed a clear, orderly and familiar procedure, which included draft contract conditions available for inspection but not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and an absolute deadline, it was to be implied that if an invitee submitted a conforming tender before the deadline he would be entitled as a matter of contractual right to have his tender opened and considered along with any other tenders that were considered. Damages were to be assessed in respect of the Council's failure in accordance with its Standing Orders."

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20. AIR 1999 Ker 368.
21. Still another similar ruling is in *Lanco Constructions Ltd* v *Govt of AP*, AIR 1999 AP 371, it was a tender for a World Bank Project. The lowest tender was rejected by the Government without giving any reasons. The World Bank also noted that the rejection of the lowest bid was without any convincing reasons and, therefore, not fair and reasonable. The decision was liable to be set aside because it was based upon incorrect information.
22. *Blackpool and Fylde Aero Club Ltd* v *Blackpool Borough Council*, (1990) 3 All ER 25 CA. *Vijay Kumar Ajai Kumar* v *Steel Authority of India Ltd*, AIR 1993 All 182, tenders for management of materials and port, restricting the tender to handling stockyard for the purpose of testing their experience, held, not wrong, *New Horizons Ltd* v *Union of India*, (1997) 89 Comp Cas 849, disqualification of a company tenderer on the ground that it had no requisite experience was held to be wrongful, the shareholders enjoyed the requisite experience.

*Refund of Earnest Money*

Where the opening and acceptance of tenders was postponed because of a High Court order. it was held that the tenderer was entitled to withdraw his tender and he, having effectively withdrawn it, was entitled to refund of his earnest money. The retention of the money by the department after revocation was unreasonable. An order for refund could be granted with interest.[23] Where the earnest money of a tenderer was forfeited before acceptance of the tender and conclusion of the contract and the dispute between the parties was also not related with the contract, a *writ petition* challenging the forfeiture was held to be maintainable.[24]

*Non-compliance with Requirements*

A tender-inviting authority made it clear to the tenderers that only one brand of pump sets would be accepted. They gave even the last-minute opportunity before opening the tenders to enable the tenderers to change their quotations accordingly. The tenderer to whom the contract was awarded refused to comply with the supply order. The authority cancelled the contract and the order. The authority was held to be within its right to do so. Its action could not be regarded as arbitrary.[25]

It has been held that a tender inviting quotations for disposal of trees should mention the approximate value of the trees. It could be assessed by the tenderers and on that basis they could quote their figures.[26]

## 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 the 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

(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.

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23. *Aditya Mass Communications P Ltd* v *APSRTC*, AIR 1998 AP 125.
24. *Food Corpn of India* v *Sujit Roy*, AIR 2000 Gau 61.
25. *Vijay Fire Protection Systems Ltd* v *Visakhapatnam Port Trust*, (1997) 3 Andh WR 261. The court added that the whole arrangement being contractual and part of private law and not a part of statutory or public law, the matter could not be raked up in a writ petition under Article 226 of the Constitution. *Dipak Handling Agency* v *Minerals & Metals Trading Corpn Ltd*, (1997) 84 Cal LT 560, where a tender required that a labour licence under the Contract Labour (Regulation & Abolition) Act, 1970 should be filed along with the tender, it was held that more time should have been given to the tenderer to comply with the requirement and non-consideration of his tender only because the licence was not filed was not proper.
26. *K.M. Pareeth Labha* v *Kerala Livestock Development Board Ltd*, AIR 1994 Ker 286.

**1. Notice of revocation**

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". It has already been seen that 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 and makes it out of his power. A revocation is effective only when it is brought to the mind of the person to whom the offer is made. This was laid down in *Henthorn* v *Fraser*.[27]

> 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.

Explaining the principle, Lord HERSCHELL observed: "If the acceptance by the plaintiff of the defendant's offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn."[28]

Thus the communication of revocation should reach the offeree before the acceptance is out of his power. An illustration to Section 5 explains the matter. *A* proposes by 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.[29]

The provisions relating to communication of proposal, acceptance and revocation are to be found in Sections 4 and 5. These sections are as follows:

**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;

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27. (1892) 2 Ch 27. To the same effect, *Manchester Diocesan Council for Education* v *Commercial and General Investment Ltd*, (1970) 1 WLR 2041.
28. *See* also *Byrne & Co* v *Van Tienhoven & Co*, (1880) 5 CPD 344.
29. *See* also *Nutakki Sesharatanam* v *Sub-Collector*, (1992) 1 SCC 114: AIR 1992 SC 131, landowner offering land for acquisition if lump sum price was paid. He withdrew his offer before the Acquisition Officer prepared his award of acceptance. Held, withdrawal good.

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.

**5. 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.

Where an offeror gives the offeree an option to accept within a fixed period, he may withdraw it even before the expiry of that period. The decision of the Madras High Court in *Alfred Schonlank* v *Muthunayna Chetti*[30] 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 it is clear that in the absence of consideration for the promise to keep the offer open for a time, the promise is mere *nudum pactum*."[31]

Notice of revocation shall be deemed to have been served when it reaches the offeree's address. A notice for the withdrawal of a ship from the charterers' services was sent by telex and was received by the plaintiff's telex machine during normal business hours, but the plaintiff read the message the next day. He was, however, held bound by the notice when his machine received it.[32] The court said:

> If a notice arrives at the address of a person to be notified, at such a time and by such a means of communication that it would in the natural course of business come to the attention of that person on its arrival, that person cannot rely on some failure of himself or his servants to act in a normal businesslike manner in respect of taking cognizance of the communication, so as to postpone the effective time of the notice until some later time when it in fact came to his attention.

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30. (1892) 2 Mad LJ 57.
31. *See* the judgment of the court at p 60. The English Law Revision Committee has suggested in its 6th interim report that a promise to keep an offer open, even if without consideration, should be enforceable. *Dharampal* v *State of Haryana*, (1988) 2 Punj LR 342, appointment ordered but cancelled subsequently before communication, no appointment.
32. *Tenax Steamship Co Ltd* v *Owners of the Motor Vessel Brimnes (The Brimnes)*, [1974] 3 All ER 88, CA.

Where the question was whether the notice for withdrawal of a ship under a charterer-party for default in payment of hire was effective when it was recorded on the telex machine of the charterer or on the opening of the office on the next working day when the message was actually read, the court upheld the decision of the arbitral tribunal that the message was deemed to have been delivered when it was read on the machine on the next working day.[33]

*Acceptance of Proposal for Voluntary Retirement*

An employee first proposed to take voluntary retirement and then requested that his resignation be kept in abeyance. The Government accepted the resignation. The court said that the mere assertion without any proof or affidavit that the retraction was served on the Government before acceptance could not be accepted. The court further said that a request for keeping the proposal in abeyance was not the same thing as withdrawing it.[34]

*Agreement to keep Offer open for Specified Period*

Where the agreement to keep the offer open for a certain period of time is for some consideration, the offeror cannot cancel it before the expiry of that period. The owner of a house agreed, in consideration of the sum of one pound, to give the plaintiff an option to purchase the house for ten thousand pounds within a stated period. He was not allowed to revoke the proposal within that time. One pound was a sufficient consideration because it was valuable. The effect was that the offer was irrevocable for the specified period of time and the offeree could accept it notwithstanding the purported revocation.[35]

*Communication of Revocation from Offerer Himself*

It is, of course, necessary that the communication of revocation should be from the offeror or from his duly authorised agent. But it has been held in England in *Dickinson* v *Dodds*[36] that it is enough if the offeree knows reliably that the offer has been withdrawn. The facts were:

The defendant signed and delivered to the plaintiff an offer to sell a property at a price fixed and added a postscript saying: "This offer to be left open until Friday 9 o' clock, a.m., 12th June." A day before the expiry of this period the plaintiff was informed by a third person that the property had already been sold to another. However, the plaintiff, before 9 a.m. of 12th June, found the defendant entering a railway carriage and handed him the notice of acceptance.

The court held "that the document amounted only to an offer, which might be withdrawn at any time before acceptance, and that a sale to a third person which came to the knowledge of the person to whom the offer was made was an effectual withdrawal of the offer". JAMES LJ added: "In this case, beyond all question, the

33. *Schelde Delta Shipping B V* v *Astarte Shipping Ltd, (The Panela)* (1995) 2 Lloyd's Rep 249, telex message was recorded by the machine at about 11 p.m. on a Friday, Saturday and Sunday being holidays the message was received at the opening hours on Monday. *J.K. Enterprises* v *State of MP*, AIR 1997 MP 68 communication of revocation sent to a wrong fax number, ineffective.
34. *Shashikalah Parashar (Dr)* v *State of Goa*, (1998) 2 Bom CR 427.
35. *Mountford* v *Scott*, (1975) 1 All ER 198.
36. (1876) 2 Ch D 463.

plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer'.[37]

It is suggested in Pollock and Mulla, that this rule will not be applicable in India for the simple reason that Section 6(1) requires in so many words that the notice of revocation should be "by the proposer to the other party."[38]

*Revocation of General Offers*

Where 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. In an American case, the announcement through newspapers of a reward for reporting certain criminals was withdrawn by a subsequent notification. But a person who was working on the track of the criminals detected and reported them. He was absolutely unaware of the revocation. He could not recover. "It was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer."[39]

*Superseding Proposal by Fresh Proposal*

Where, before acceptance, a proposal is renewed in some parts of it and not in its entirety as proposed earlier (proposal to sell salvage claims in respect of 9 vessels, superseded by a subsequent proposal to sell only 4) and the letter purports to supersede the earlier communication, such proposal is no longer available for acceptance. The acceptance can be only of the renewed part. The allotment of the rest of the work to another buyer would give him a good right.[40]

*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".[41] In a Madras case:[42]

> The appellant made a bid at an auction (the highest bid that was made) but before the property was knocked down, he discovered that the property was subject to a mortgage and retracted his bid. But even so the auctioneer knocked down the property to him. The owner of the property sued him.

The court held that "the plaintiff's bid was no more than an offer and he was entitled to withdraw the same before it was accepted by the property being knocked down to him by the auctioneer".[43]

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37. At p 472.
38. INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 8th edn by Setalvad and Gooderson, p 49 (1957).
39. *Shuey* v *United States, U.S. Supreme Court*, (1875) 92 US 73. The burden is on the proposer to prove his revocation failing which he becomes bound and liable for breach. *Skarsm Ramanathan* v *NTC Ltd*, AIR 1985 Ker 262.
40. *Banque Paribas* v *Citibank NA*, (1989) 1 Malaysian LJ 329 CA (Singapore).
41. *Per* BEST J in *Agra Bank* v *Hamlyn*, (1890) 14 Mad 235, 236.
42. *Joravarmal Champalal* v *Jeygopaldas Ghanshamdas*, (1922) 43 Mad LJ 132: AIR 1922 Mad 486.
43. The Court cited following authorities: *Payne* v *Cave*, (1789) 3 Term Rep 148; *Jones* v *Nanney*, (1824) 13 Price's Rep 76: 147 ER 925; *Warlow* v *Harrison*, (1859) 29 LJ (QB) 141 LT 211; *Raja of Bobbili* v [illegible] (1917) 1 LR 42 Mad 776. *See* also *Agra Bank*

In a subsequent case,[44] the same High Court extended this principle to cases where a bid has been provisionally accepted and is subject to confirmation by higher officers. The bidder can withdraw before any such confirmation takes place. This principle has been endorsed by the Supreme Court in *Union of India* v *Bhimsen Walaiti Ram*.[45]

> 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 re-auction 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 resale. Resale realised much less than the original bid and the question of bidder's liability to pay the shortfall arose.

The 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 question arises that when the bidder by not making the deposit had committed a default, where was the necessity of any final confirmation, which, even if given, would have meant nothing. If the Supreme Court equated the default in making the deposit with a formal revocation, then it would not have been necessary to say that if the confirmation had been given the respondent would have been liable, for if the bid had been withdrawn by the default, its confirmation would have made no difference.

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. This has been further pointed out by the Supreme Court in *Haridwar Singh* v *Bagun Sumbrui*.[46] A forest was knocked down to a bidder below the

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v *Hamlyn*, (1890) 14 Mad 235 where BEST J applied the rule to court auctions as well. He said: "A bidding at an auction is a mere offer which may be retracted before the hammer is down. Such is the rule with regard to auctions in general, and the same must be held applicable also to court auctions, in the absence of any law or rule to the contrary."; *State of Punjab* v *Kishan Lal*, (1991-2) PLR 283 where the provisional acceptance was not approved for a long period and the bidder withdrew his bid and he was allowed 6% interest on his earnest money.

44. *Somasundaram Pillai* v *Provincial Government of Madras*, AIR 1947 Mad 366. *Followed* in *State of Kerala* v *A.R.A.S.Armughamswamy Nadar & Co*, (1964) Ker LT 203; *Abdul Rahim* v *Union of India*, AIR 1968 Pat 433; *State of MP* v *G. Dass*, AIR 1973 SC 1164, when deposit is a condition precedent for the acceptance of a tender, the acceptance cannot be treated as valid without the condition being satisfied; *State of UP* v *Kishori Lal*, AIR 1980 SC 680, the highest bidder, though he affixed his signature in the bid sheet in token of his acceptance, did not deposit one-sixth of the bid amount as was required. It was held that no contract resulted. The court distinguished *Tellicherry Municipal Council* v *V.P. Samsu*, (1985) ILR 1 Ker 615, because in this case the bid was accepted by the Municipality by a resolution and communicated to the bidder. *Gayadhir Das* v *Collector, Balasore*, (1991) 71 Cut LT 415, withdrawal of bid before approval.

45. (1969) 3 SCC 146: (1970) 2 SCR 594. *Followed* in *Muthu Mohd Rawther* v *Pathanamthitta Municipality*, (1991) 2 Ker LT 514, final acceptance was useless where the highest bidder had not paid one-fourth of the sale amount as security. The highest bidder can withdraw before final confirmation takes place.

46. (1973) 3 SCC 889: (1972) 3 SCR 629: AIR 1972 SC 1242.

minimum price. Its confirmation was still in the process that the bidder agreed to pay the minimum. The department accepted this and telegraphed its acceptance to the forest officer for onward transmission to the bidder. The forest officer never received the telegram. Meanwhile another person offered a still higher price. The department accepted this and informed the forest officer, who received this communication and passed it on to the new bidder. It was held that no contract had been made on the earlier bid. Whatever acceptance had taken place that was still within the department and not communicated to the bidder.[47]

The auctioneer can provide the manner in which bids can be revoked. In a case before the Supreme Court,[48] one of the auction rules provided that "telegraphic bids or telegraphic instructions regarding bidding will not be considered. The defendant had made his bid by filling a bid form at the spot. Subsequently, before the results were announced, he sent a telegram revoking his bid. But the Board accepted his bid. On his refusal to perform, he was held liable for breach. The Supreme Court felt that the words "telegraphic instructions regarding bidding" were wide enough to include all kinds of instructions about bids, including their revocation.

**2. Lapse of time**

An offer lapses on the expiry of the time, if any, fixed for acceptance.[49] 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 an offer was to last until the end of March and the offeree sent a telegram accepting the offer on 28th March which was received by the offeror on 30th March, it was held that the option was duly exercised.[50]

Where an application for admission to an institution had to be filed within the prescribed time by sending it either by registered post or in person and the candidate sent it by registered post some four days before the last date but it reached after the expiry of time, it was held that the application was too late.[51] A majority of two judges were of the view that where delivery can be made in a mode at the option of the sender, the agency through whom delivery is made acts as the agent of the sender, whereas if the delivery is made in a mode prescribed by the addressee, the agency acts as the agent of the addressee. In the first case, delivery to the agency is not delivery to the addressee, but in the later case it is. The dissenting judge was of

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47. A bidder is bound by the bargain made if he has participated in the auction with full knowledge, *State of Punjab* v *Dial Chand*, (1983) 2 SCC 503: AIR 1983 SC 743 where the bidder did not deposit 25% of the money, as required by the rules, no contract arose even when his bid was accepted, *State of MP* v *Gobardhandas*, (1973) 1 SCC 668: AIR 1973 SC 1164.
48. *M. Lachia Setty & Sons Ltd* v *Coffee Board*, (1980) 4 SCC 636.
49. A lease terminates on the expiry of its term. It would require for a fresh term. The lessee's remaining in possession does not revive the lien by itself. *Dhondu Undru Choudhary* v *Ganpat Lal Shankar Lal*, 1991 Supp (1) SCC 513: AIR 1991 SC 1037.
50. *Bruner* v *Moore*, (1904) 1 Ch 305.
51. *R. Vinoth Kumar* v *Secretary, Kilpauk Medical College, Madras*, (1995) 2 Mad LJ 158.

the view that if the candidate selected one of the two modes prescribed by the addressee, the prescribed agency, i.e., post office, would be the agent of the addressee.

Where no time for acceptance is prescribed, the offer has to be accepted within a reasonable time. What is 'reasonable time' will depend upon the facts and circumstances of each case.[52] The definition of "a reasonable period" is a question of fact depending on the surrounding circumstances in which the agreement was made. Where the subject-matter of the contract is an article, like gold, the prices of which rapidly fluctuate in the market, very short period will be regarded as reasonable, but not so in reference to land. An offer for sale of shares allowed a month in which to accept, but both parties agreed that a reasonable period for acceptance was an implied term. The offeree felt that he could not make an informed decision within one-month time and argued that a reasonable period in this context would be one that would allow an informed decision as to whether the acceptance was in their best financial interest. The court did not agree with this contention. The offer was made at an uncertain time. Yet the offeree wanted that he should be allowed to accept after the uncertainties were over. This would be unusual in this type of commercial agreement.[53]

### 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. Where a salt lake was offered by way of lease on deposit of a sum of money within a specified period, and the intended lessee did not deposit the amount for 3 long years, it was held that this entailed cancellation of the allotment.[54]

### 4. By death or insanity of offerer

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.

In England it was felt at one time that an offer terminates at once on the death of the offeror, whether or not the fact has come to the notice of the offeree. MELISH LJ suggested *(obiter)* in *Dickinson* v *Dodds*[55] that an offer cannot be accepted after the death of the offeror. But in an earlier case,[56] where a creditor continued to act on a guarantee without knowledge of the surety's death, the court pointed out that an offer is not necessarily terminated with the death of the offeror. It may remain open until the offeree comes to know of death.

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52. *See* further, *Ramsgate Victoria Hotel Co* v *Montefoire*, (1866) LR 1 Ex Ch 109, an offer for shares in June accepted in Nov, held, too late; *Loving* v *City of Boston*, (1841) 7 Metcalf 409, an advertisement for information in May accepted in Jan., held, too late. *Shree Jaya Mahal Coop Housing Society Ltd* v *Zenith Chemical Works P Ltd*, AIR 1992 Bom 211, membership of a Society with tenancy rights for shops offered, response after six months, held too late.
53. *Barings* v *Internationale Nederladen Group N V*, (1995) Current Law Year Book 183.
54. *State of WB* v *Mahendra Chandra Das*, (1990) 2 Cal LJ 1.
55. (1876) 2 Ch D 463, 475.
56. *Bradbury* v *Morgan*, (1862) 1 H and C 249: 31 LJ Ex 462: 7 LT 104.

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There is no provision in the Act about the effect of the death of an offeree. But as an offer can be accepted only by an offeree and not by any other person, it should not be capable of being accepted by the offeree's executor also.[57]

## REVOCATION OF ACCEPTANCE

According to English law an acceptance once made is irrevocable. In the words of Anson: "Acceptance is to offer what a lighted match is to a train of gunpowder. Both do something which cannot be undone."[58] This rule is obviously confined in its operation only to postal acceptance. It is suggested in Anson that in other cases "an acceptance can be revoked at any time before acceptance is complete, provided, of course, that the revocation itself is communicated before the acceptance arrives".[59]

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:

> 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 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*.[60]

> 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 together.

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."

## STANDARD FORM CONTRACTS

### Exploitation of weaker party

The law of contract has in recent times to face a problem which is assuming new and wide dimensions. The problem has arisen out of the modern "large-scale

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57. *See*, for example, *Reynolds* v *Atherton*, (1921) 125 LT 690, 695-6 and the Canadian case of *In re Irvine*, (1928) 3 DLR 268.
58. THE LAW OF CONTRACT, at p 50 (23rd edn 1972 by A.G. Guest).
59. *Ibid.*
60. (1830) 9 Shaw 190: (1830) 9 Court of Sessions 190.

and widespread" practice of concluding contracts in standardised forms.[61] The Life Insurance Corporation of India, for example, has to issue thousands of insurance covers every day.[62] Similarly, the railway administration of India has to make innumerable contracts of carriage. It would be difficult for such large-scale organisations to draw up a separate contract with every individual. They, therefore, keep 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 and, therefore, his only function is to accept the offer whether he likes its terms or not. "He cannot alter those terms or even discuss them; they are there for him to take or leave. He therefore does not undertake the laborious and profitless task of discovering what the terms are."[63] Lord DENNING MR pointed out in *Thornton* v *Shoe Lane Parking Ltd*:[64]

> No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

This gives a unique opportunity to the giant company to exploit the weakness of the individual by imposing upon him terms which often look like a kind of private legislation and which may go to the extent of exempting the company from all liability under the contract. "The battle against abuse has fallen to the courts." The courts have found it very difficult to come to the rescue of the weaker party particularly 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*[65]

> 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."[66] The result would have been different if the plaintiff had not signed.

Such contracts have been variously described. "Contracts of Adhesion", which means that the individual has no choice "but to accept; he does not negotiate, but merely adheres";[67] "compulsory contracts", they being a kind of imposition;[68] and

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61. *See* A.J. Kerr, *Imposed Terms in Standard Form Contracts*, (1981) 98 SALJ 15.
62. See *LIC of India* v *Consumer Education and Research Centre*, (1995) 5 SCC 482: AIR 1995 SC 1811: (1995) 84 Comp Cas 168.
63. To what extent they have corroded freedom of contract, *see* F. Kessler, *Contract of Adhesion—Some Thoughts About Freedom of Contract*, 43 Columbia LR 629 (1943).
64. (1971) 1 All ER 686 CA.
65. (1934) All ER Rep 16: (1934) 2 KB 394.
66. *See* the judgment of SCRUTTON LJ. *See* also S.S. Singhvi, *Some Reflections on the Problem of Adhesion Contracts*, AIR (1979) 22 Journal Section.
67. Anson's LAW OF CONTRACT, 142 (23rd edn by A.G. Guest, 1971).
68. Linhoff, *Scope of Compulsory Contracts Proper*, (1943) 43 Col LR 586.

"private legislation", they being a kind of code of bye-laws on the basis of which the individual can enjoy the services offered.[69]

**Protective devices**

The individual, therefore, deserves to be protected against the possibility of exploitation inherent in such contracts. Following are some of the modes of protection which have been evolved by the courts.[70]

**1. Reasonable notice**

In the first place, 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*.[71]

> The plaintiff bought a steamer ticket on the face of which were these words only: "Dublin to Whitehaven"; on the back were printed certain conditions one of which excluded the liability of the company for loss, injury or delay to the passenger or his luggage. The plaintiff had not seen the back of the ticket, nor was there any indication on the face about the conditions on the back. The plaintiff's luggage was lost in the shipwreck caused by the fault of the company's servants. He was held entitled to recover his loss from the company in spite of the exemption clauses.

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". The result would have been otherwise if words like *"For conditions see back "* had been printed on the face of the ticket to draw the passengers' attention to the place where the conditions were printed. The principle would, therefore, seem to be that where a written document is presented to a party for acceptance, a reasonably sufficient notice must be given to him of the presence of terms and conditions. Notice will be regarded as sufficient if it will "convey to the minds of people in general that the ticket contains conditions". This was clearly recognised in the subsequent case of *Parker* v *South Eastern Rail Co.*[72]

> The plaintiff deposited his bag at the cloakroom at a railway station and received a ticket. On the face of the ticket were printed, among other things, the words, "see back" and on the back there was a notice that "the company will not be responsible for any package exceeding the value of £ 10". A notice to the same effect was also hung up in the cloakroom. The plaintiff's bag was lost and he claimed the full value of his bag which was more than £ 10. The company relied upon the exemption clause. The plaintiff contended that although he

69. Lord Denning, ROAD TO JUSTICE, 93.
70. Following learned articles on the subject are suggested for study: *Freedom of Contract and Adhesion Contracts*, (1965) 14 International and Comparative Law Quarterly 173; Gower, *Exemption Clauses—Contractual and Tortious Liability*, (1954) 17 MLR 155; Sales, *Standard Form Contracts*, (1953) 16 MLR 318; *Contract Clauses in Fine Print*, (1950) 63 Harv LR 494; Kesler, *Adhesion Contracts*, (1943) 43 Col LR 329; Reynolds, *Warranty, Condition and Fundamental Terms*, (1963) 79 LQR 534; Linhoff, *The Scope of Compulsory Contracts Proper*, (1943) 43 Col LR 586; Chin Nyuk Yin, EXCLUDING LIABILITY IN CONTRACTS, 1985.
71. (1875) 32 LT 709: (1875) 2 HL SC App 470.
72. (1877) 2 CPD 416: (1874-80) All ER Rep 166.

knew there was some writing on the ticket, he did not see what it was as he thought that the ticket was a mere receipt for the money paid by him.

MELLISH LJ pointed out that if the plaintiff "knew there was writing on the ticket, but he did not know or believe that the writing contained conditions, nevertheless he would be bound", for there was reasonable notice that the writing contained conditions.

Where, on the other hand, 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[73] and where in another case, the words on a ticket, "For conditions see back", were obliterated by the date stamp,[74] it was held in either case that no proper notice of the terms had been given.

The principle has been cited with approval by the Calcutta High Court in two cases[75] and was applied by the Calcutta High Court in *Mackillican* v *Compagnie Des Messageries Maritimes De France*.[76]

The plaintiff accepted a steamer ticket containing conditions printed in the French language. He claimed that he was not bound by them, being unable to read French.

Rejecting this contention, GARTH CJ said: "Although he may not understand French, he was a man of business contracting with a French company, whose tickets he knew very well were written in the French language. He had ample time and means to get the tickets explained and translated to him before he went on board; and it very plainly disclosed upon the face of it that the conditions endorsed were those upon which the defendants agreed to carry him."[77] "Similarly, it has been held that where reasonably sufficient notice of existence of the terms is given, it would be no defence to say that the plaintiff was illiterate or otherwise unable to read."[78]

*Difference between Contractual Documents and Receipts, etc.*

In the application of this principle the courts have had to distinguish between two kinds of documents, namely, contractual documents and mere receipts and vouchers. Emphasising this distinction in *Parker* v *South Eastern Railway Co.*[79] MELLISH LJ said: "I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where it would be quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread. For instance, if a

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73. *Richardson, Spence & Co* v *Routree*, (1894) AC 217.
74. *Sugar* v *London Midland & Scottish Railway Co*, (1941) 1 All ER 172. For a comment on this case *see* Turpin: *Contract and Imposed Terms*, (1956) 73 South African Law Journal, 144 at p 154. A consignment note signed neither by the consignor nor consignee and containing a clause on the back excluding the jurisdiction of all the courts except one was held not binding. There was no proper notification. *Road Transport Corpn* v *Kirloskar Bros*, AIR 1981 Bom 299. A lottery ticket containing at the back small print as to jurisdiction, held, not binding, *Special Secy, Govt of Rajasthan* v *Venkataramma Seshiyer*, AIR 1984 AP 5.
75. *Madras Railway Co* v *Govinda Rau*, (1898) 21 Mad 172, 174; *Sheikh Dawood* v *S.I. Rly Co Ltd*, ILR 1945 Mad 194, 178.
76. ILR (1880) 6 Cal 227.
77. At p 234.
78. *Thompson* v *London, Midland & Scottish Rly Co*, (1930) 1 KB 41. For a criticism of the decision *see* Winfield, *Some Aspects of Offer and Acceptance*, (1939) 55 LQR 499, 518.
79. (1877) 2 CPD 416.

person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading and that he did not know that it contained the terms of the contract of carriage." 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 is supposed to contain conditions. But where the paper is not supposed to express the conditions of the contract, it will be regarded as a mere voucher etc., and extra care will have to be taken to communicate its terms than mere warning on the face. A good illustration is *Chapelton* v *Barry Urban District Council*:[80]

> The plaintiff went on to a beach and hired two chairs from a pile of deck chairs belonging to the defendant Council. He received two tickets from the attendant, glanced at them, and slipped them into his pocket. While he was sitting on one of the chairs, he had the misfortune to go through the canvas with the result that he suffered injury. Tickets carried the words: "The Council will not be liable for any accident or damage arising from hire of chairs." He said that he had no idea that there were any conditions on these tickets and that he did not know anything about what was on the back of them. The Council was held liable for his injury.

SLESSER LJ said: "In my opinion, this ticket is no more than a receipt, and is quite different from a railway ticket which contains upon it the terms upon which a railway company agrees to carry the passenger." The object of the ticket was that the person taking it might have evidence that he had paid the hire and the term printed on it was no part of the contract.

In such cases, Lord DENNING MR pictorially remarked in *Thornton* v *Shoe Lane Parking Ltd*:[81] "In order to give sufficient notice, it would need to be printed in red ink with a red hand pointing to it, or something equally startling." If this is not done, the condition would not form part of the contract. The facts of the case were:

> The plaintiff parked his car in an automatic car park. A notice at the entrance stated: "Cars parked at the owner's risk". The plaintiff slipped the money into a machine which brought forth a ticket. The barrier at the gate was then automatically raised and the plaintiff parked in his car. He looked at the ticket to see the time of parking, and noticed some other words, but did not pay further attention to them. These words drew the attention of the customer to a poster inside the garage which displayed the conditions one of which excluded liability for any injury to the car or customer. While taking back his car, the plaintiff was injured, for which he brought an action and the defendants sought the protection of the exemption clause.

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80. (1940) 1 KB 532; (1940) 1 All ER 356, CA.
81. (1971) 1 All ER 686, CA.

But they were held liable. "The exempting condition is so wide and so destructive of rights that the court should not hold any man bound by it unless it is drawn to his attention in the most explicit way."[82]

A lorry load of whisky was delivered to warehouse-keepers under a delivery note which stated that they would be liable for any loss of the goods. The warehouse-keepers stamped the delivery note on receiving the goods and this carried a condition limiting their liability to £ 800 per ton. The goods were lost by theft and the question arose as to whose terms governed the contract. The court said that the warehouse-keepers' conditions were incorporated into the contract and not those of the owner and therefore the liability was limited to £ 800 per ton subject to further reduction for the bottles which were recovered after the theft.[83]

The mere existence of a clause in a consignment note restricting jurisdiction to one court only was held to be not capable of binding the other party. The term, being too serious, required special notification.[84] The court cited the following passage from CHITTY ON CONTRACTS:[85]

> "The document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions. Thus a cheque-book,[86] a ticket for a deck-chair,[87] a ticket handed to a person at a public bath house,[88] and a parking-ticket issued by an automatic machine[89] have been held to be cases where it would be quite reasonable that the party receiving it should assume that the writing contained no conditions and should be put in his pocket unread."

Lord DENNING MR in *George Mitchell* v *Finney Lock Seeds*[90] observed:

> "The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiations with the farmers."

Exhibited notices can become a part of the contract if they are displayed so prominently as to bring them home to the other party before or at the time of contracting. Thus, where a receipt issued for a deposit showed that it was subject to the conditions exhibited on the premises and the notices were displayed in prominent places in the premises, that was held to be a reasonably sufficient notice.[91]

### *Contract Signed by Acceptor*

Where a written contract is signed by the party accepting, he becomes bound by all its terms, whether he has read it or not. "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is

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82. *Per* Lord DENNING MR.
83. *British Road Services Ltd* v *Arthur V. Crutchley & Co Ltd*, (1968) 1 All ER 811.
84. *Road Transport Organisation of India* v *Barnai Powerloom Weavers' Cooperative Society Ltd*, (1997) 84 Cal LT 174.
85. 313, para 677, Vol II (24th edn, 1977).
86. *Burnett* v *West Minster Bank*, (1966) 1 QB 742.
87. *Chapelton* v *Barry UDC*, (1940) 1 KB 532.
88. *Taylor* v *Glasgow Corpn*, (1952) SC 440 (Scotland).
89. *Thornton* v *Shoe Lane Parking Ltd*, (1971) 2 QB 163.
90. (1983) 1 All ER 108.
91. *Watkins* v *Rymill*, (1883) 10 QBD 178.

proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents."[92]

This principle was laid down in *L' Estrange* v *Graucob Ltd*[93] and has already been noted. But even in cases like this, the affected party can be protected by the doctrine of fundamental breach or by finding that the terms are unreasonable or that there was misrepresentation about them. The former two modes of protection will be noted subsequently, the effect of misrepresentation may be illustrated here. The leading authority is *Curtis* v *Chemical Cleaning & Dyeing Co.*[94]

> The plaintiff delivered a white satin wedding dress to the defendants for cleaning. On being asked to sign a receipt, she inquired 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. Lord DENNING MR said: "In those circumstances by failing to draw the attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to beads and sequins, and that it did not extend to the material of which the dress was made," and this was sufficient to disentitle them from relying on the exemption clause.

In a Canadian case,[95] 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.

> A person parked his car in a garage. The attendant told him not to lock the car. He told the attendant that there were valuable articles in the car. The attendant told him that he would lock it after moving it to the proper place. The briefcase containing valuables was stolen. Though the garage owner had excluded liability for the loss of the contents of a car, he was held liable. The attendants in such cases get an apparent authority to give assurances about the safety of the vehicles and garage users could rely on the assurance.[96]

The modern development in this connection is reflected by the American RESTATEMENTS OF CONTRACTS.[97] The rule stated is that when the other party has reason to believe that the party manifesting written assent would not do so if he knew

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92. *Per* MELLISH LJ in *Parker* v *South Eastern Railway Co*, (1872) 2 CPD 416. This statement was relied upon by SUBRAMANIA AYYAR J of the Madras High Court in deciding *Madras Rly Co* v *Govinda Rau*, (1898) 21 Mad 172, 174. *Gautam Construction and Fisheries Ltd* v *National Bank for Agricultural and Rural Development*, (2000) 6 SCC 519, arbitrators and courts must adhere to contract terms. The court did not approve interference in rates for construction and the interest rate.
93. (1934) 2 KB 394.
94. (1951) 1 KB 805: (1951) 1 All ER 631.
95. *Chau* v *Van Pelt*, (1977) 74 DLR (3d) 244 (BCSC).
96. *Mendelsohn* v *Normand Ltd*, (1970) 1 QB 177; *J. Evans & Sons* v *Andrea Merzario Ltd*, (1976) 1 WLR 1078, repugnancy between oral statement and printed terms, the former prevailed.
97. Section 11, Part B.

that the writing contained a particular term; the term is not a part of the agreement. "Reason to believe" may be inferred from the fact that the term is bizarre or oppressive, or from the fact that it eliminates the dominant purpose of the transaction. An application of this principle is exemplified by *Tilden Rent-A-Car* v *Clendenning*.[1] The plaintiff signed a motor car insurance document which carried a warning on the face that no liability would arise if the provisions were not observed. On the back there were terms in fine and faint print one of which was that there would be no liability if the driver had taken any drink. The driver who caused the accident testified that though he had consumed some alcohol, he was not intoxicated and was capable of controlling the vehicle. Holding the company to be liable, the court said that a signature can be relied on as manifesting assent to a document when it is reasonable for the party relying on the signed document to believe that the signer really did assent to its contents. Hence the plaintiff was not bound by unusual and onerous printed terms which were not drawn to his attention.

*Notice of Unusual Terms*

Another example is *Interphoto Library* v *Stifleto Visual Programmes*.[2] The defendants, an advertising agency, required photographs for a 1950's presentation. The plaintiffs dispatched 47 transparencies with a delivery note which stated that the same were to be returned in 14 days and that a holding fee of £ 5 per day for each transparency would be charged if they were not so returned. The defendants did not use the transparencies, put them to one side and forgot about them for a further two weeks. To their utter and considerable consternation an invoice arrived for £ 3,783 holding fee. The court said that where a condition is particularly onerous or unusual, the party seeking to enforce it has to show that a clear, fair and reasonable effort was made to bring it to the attention of the other party. The condition, in this case, was unreasonable and extortionate and had not been sufficiently brought to the defendant's attention, it did not form part of the contract.

In another case,[3] the party was sent two apparently similar documents for counter-signature, and one for return to the sender had additional clauses on the reverse side which were written in a foreign language and to which the other party's attention had not been drawn in any way. That party was held to be not bound by those terms even though he signed and returned those documents.

These cases show the importance of the remark of DENNING LJ in *Spruling (J.) Ltd* v *Bradshaw*[4] to the effect that:

> "The more startling a clause is, the greater the notice which must be given of it. Some clauses would need to be printed in red ink with a red hand pointing to it before the notice could be held to be sufficient."

The court attached equal importance to the view of the matter as expressed by MEGAW LJ in *Thornton* v *Shoe Lane Parking*:[5]

> When a particular condition relied on involves a sort of restriction which is not usual in that class of contracts, a defendant must show that his intention to

1. (1978) 83 DLR (3d) 400 Ont CA.
2. (1988) 1 All ER 348 CA.
3. *Harvey* v *Ventilatorenfabrik Oeledge*, Financial Times, Nov. 11, 1988 CA.
4. (1956) 1 WLR 461.
5. (1971) 2 QB 163, 172.

attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required depends upon the nature of the restrictive condition.

In addition to this the courts are also under the statutory duty to consider reasonableness of the clause in the light of the circumstances which were known or which should have been known at the time of contracting.[6]

**2. Notice should be contemporaneous with contract**

Secondly, 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 in 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.[7]

Where the making of a contract is symbolised by the issue of a ticket by an automatic machine, the question arises whether the notice printed on the ticket has been given contemporaneously with the contract or subsequent to it. This aspect of the matter was considered by Lord DENNING MR in *Thornton* v *Shoe Lane Parking Ltd.*[8] In the case of tickets issued by clerks the theory is that the company makes the offer of the ticket and the customer by paying for the ticket without objection accepts it with all its terms. He has a chance of rejecting the ticket. But where the ticket is issued by an automatic machine, the customer cannot refuse it. He cannot get back his money. He is committed beyond recall at the very moment when he puts his money into the machine. The installation of the machine as ready to receive the money is an offer and the conduct of the customer in putting his money into the slot is an acceptance. The contract is then made. The terms of the offer are contained in the notice placed on or near the machine. The customer is bound by those terms if they are sufficiently brought to his notice beforehand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made. The ticket is no more than a mere voucher or receipt for the money. Applying these principles to the facts, his Lordship said:

> In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying '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.

Thus it is the duty of the party relying on an exclusion clause to make it clear to the other at the time of the contract that the same is incorporated into the contract.

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6. The duty is under the Unfair Contract Terms Act, 1977 (English). *See* Elizabeth MacDonald, *The Duty to Give Notice of Unusual Contractual Terms*, 1988 JBL 375.
7. *Olley* v *Marlborough Court Ltd*, (1949) 1 KB 532: (1949) 1 All ER 127, CA.
8. (1971) 1 All ER 686.

> A vehicle was offered for sale at an auction; the auction conditions, advertised by posters in the auction room, excluded all rights of buyer to return the vehicle or claim damages. The vehicle failed to reach the reserve price. The auction ended. It was then bought by a person by private negotiation. The vehicle broke down almost immediately. The buyer returned it and stopped the payment of the cheque for the price. The seller sued him for the price.

The court delivered a judgment for the buyer. The vehicle was not of merchantable quality. It was purchased at a private sale where the seller did not point out to the buyer that the auction conditions would be applicable.

### 3. Theory of fundamental breach

The third method is the doctrine of fundamental breach. It is a method of controlling 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". The rule has been thus stated by Lord DENNING LJ:[9]

> These exempting clauses are now a days all held to be subject to the overriding proviso that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it. Just as a party who is guilty of a radical breach is disentitled from insisting on the further performance by the other, so too he is disentitled from relying on an exempting clause.

An easy illustration is to be found in cases where goods different from those contracted are delivered. For example, a car was sold on "as is" basis and without any warranty or guarantee whatever. Even so the seller was held liable when five days later the engine of the car blew up . It was not a 'car' which was delivered. Hence the contract was fundamentally broken.[10] If the car had shown any other defect which a used car is to everybody's knowledge likely to develop, such as, for example, a transmission problem, it would not have been regarded as a fundamental breach.[11]

#### *'Core' of Contract*

What constitutes fundamental breach? "Every contract contains a 'core'[12] 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."[13] This may be illustrated with the facts of *Davies* v *Collins*:[14]

> The plaintiff entrusted to a dyer and cleaner a uniform for cleaning. On the docket given to him when he handed over the uniform were the following

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9. *J. Spurling Ltd* v *Bradshaw*, ( 956) 1 WLR 461, 465.
10. *Findlay* v *Couldwell*, (1976) 69 DLR (39) 320, Canada.
11. *Peters* v *Parkway Mercury Sales Ltd*, (1975) 10 NBR (2d) 703 (SC App Div).
12. *Per* Lord GREENE MR in *Alderslade* v *Hendon Laundry Ltd*, (1954) KB 189, 193.
13. *See* A.G. Guest, *Fundamental Breach of Contract*, (1961) 77 LQR 98, 99. *See also* L.W. Melville, *The Core of a Contract*, (1956) 19 MLR 26; L.J. Montrose, *Some Problems about Fundamental Terms*, (1964) Camb LJ 60, 64.
14. (1945) 1 All ER 247.

clauses: "Whilst every care is exercised in cleaning and dyeing garments, all orders are accepted at owner's risk entirely and we are unable to hold ourselves responsible for damage, shrinkage, colour or defects developed in necessary handling. The proprietor's liability for loss is limited to an amount not exceeding ten times the cost of cleaning." The defendant sent the uniform to be cleaned by a sub-contractor and it was never returned. The plaintiff claimed the full value of the uniform.

It was held that the mere fact of the particular limitation clause in the contract was sufficient to exclude any right to sub-contract the performance of the substance of the contract. Limitation clauses of this kind do not apply where the goods are lost not within the four corners of the contract but while something was being done which was outside the terms of the contract altogether, or when loss takes place in the course of some operation which was never contemplated by the contract at all.[15] In *Alderslade* v *Hendon Laundry Ltd*[16] 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.

Another illustration of fundamental breach is *Alexander* v *Railway Executive.*[17]

On depositing his luggage at the parcel office of a railway station, paying ordinary rates, the plaintiff received a ticket containing conditions one of which exempted the defendants from liability for misdelivery or loss of any article exceeding £ 5 in value unless a special charge for the same was paid. The defendants allowed the plaintiff's friend to take away the luggage and in an action by the plaintiff relied on the above exemption clause.

But it was held that "an essential part of the executive's duty was to take care of the deposited goods; that they had committed a fundamental breach of the contract in allowing an unauthorised person to have access to the goods and to take them away and, therefore, they could not rely on the exemption clause to shield them from liability."

*Departure from Main Purpose*

In the following two cases, however, the bailees were held not liable as the court did not find any fundamental departure from the main purport of the contract. One of them is *Giband* v *Great Eastern Railway.*[18] Here a cycle deposited at a station of the defendant-railway company was not in fact taken to the cloakroom, but was left in the booking hall itself and from there it was stolen, the company was held to be protected by the clause in the ticket which exempted the company from liability. The Court of Appeal could find no fundamental breach as it was no part of the contract that the cycle should be necessarily stored in the cloakroom.

The other case is *Hollins* v *J. Davey Ltd*[19] The plaintiff's car was garaged at the defendants' garage. One of the conditions of the contract exempted the defendant from loss or misdelivery. One of the plaintiff's former servants called at the garage and successfully persuaded the attendant to deliver the car to him telling him that he

15. *See* the judgment of Lord GREENE MR at p 249.
16. (1945) 1 KB 189, CA.
17. (1951) 2 KB 882: (1951) 2 All ER 442.
18. (1921) 2 KB 426, CA.
19. (1963) 1 QB 844: (1963) 1 All ER 370: (1963) 2 WLR 201.

had been authorised by the plaintiff. The defendants were held not liable. The attendant made the innocent mistake in believing in the holding out by the servant. But if the attendant had delivered the car to a complete stranger, there would have been fundamental breach.

*Rule of Construction*

The results of these cases have been variable because it seems that the theory of fundamental breach is not an independent rule of law, but is only a rule of construction. A rule of law operates irrespective of the parties' intentions. But a rule of construction is one of the methods of ascertaining the parties' intention. This approach was "most clearly and accurately" enunciated by PEARSON LJ in *U.G.S. Finance Ltd* v *National Mortgage Bank of Greece, S.A.*[20] His Lordship said:

> As to the question of 'fundamental breach', . . there is a rule of construction that normally an exception or exclusion clause or a similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the courts on the parties willy-nilly in disregard to their contractual intention. On the contrary, it is a rule of construction based on the presumed intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties reasonably must have intended it to have. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exception clauses drawn in extravagantly wide terms, which would have produced absurd results if applied literally.

This passage was cited with approval by the House of Lords in *Suisse Atlantique Societe D'Armement S.A.* v *N.V. Rotterdamsche Kolen Centrale.*[21]

> The defendants chartered the plaintiff's ship for carriage of coal from the United States to Europe for two years. The contract set out the rates of loading and also provided that in case of any delay in loading the defendants would have to pay demurrage at the rate of one thousand dollars a day. The defendants caused delays for which the plaintiffs claimed that the contract was repudiated but nevertheless, without prejudice to their rights, allowed the defendants to use the ship. At the end of the term they claimed damages for the delays in excess of the demurrage clause.

The House of Lords held that there was no fundamental breach. The defendants were guilty of conduct which entitled the plaintiffs to repudiate the contract, but they, in fact, affirmed it. The contract remained in force including the demurrage clause. Moreover, the demurrage clause was not an exception or limiting clause; it only stipulated liability for breach of contract and, therefore, the principle of fundamental breach was not applicable. But even so their Lordships explained *(obiter)* the meaning of fundamental breach or a breach going to the root of the contract. "These expressions", observed Lord WILBERFORCE, "are used in the cases to denote two quite different things, namely: (*i*) a performance totally different from that which the contract contemplates, (*ii*) a breach of contract more serious than one

20. (1964) 1 Lloyds Rep 446, 453.
21. (1966) 2 All ER 61 HL; (1967) AC 361.

which would entitle the other party merely to damages and which (at least) would entitle him to refuse performance or further performance of the contract."[22]

His Lordship then explained that if fundamental or total breach means a departure from the contract, the question will arise how great a departure and if it means supply of a different thing, the question will be how different? And added: "No formula will solve this type of question, and one must look individually at the nature of the contract, the character of the breach and its effect on future performance and expectation and make a judicial estimation of the final result."[23]

These observations of the House of Lords on the question of fundamental breach being in the nature of *obiter dicta*, it left the Court of Appeal free to reconsider the question. This opportunity came in *Harbutt's "Plasticine" Ltd* v *Wayne Tank & Pump Co Ltd.*[24]

> The defendants agreed with the plaintiff to design and install equipment for storing and dispensing stearine in a molten state at their factory. The defendants specified durapipe, a form of plastic pipe. In fact this was wholly unsuitable for the purpose. It burst at the very first testing leading to a fire which destroyed the factory. The defendants had limited their liability under the contract for any accident, etc., to £ 2,330. The plaintiff's loss was much greater.

The Court of Appeal held that the defendants were guilty of fundamental breach and, therefore, they could not avail of the limitation clause and were liable for the cost of reinstating the factory. The court pointed out that one must look not merely at the quality of the breach but also at its results. If the result of breach is the total destruction of the subject-matter of the contract (factory in this case) then the contract is automatically at an end along with all its exception clauses. Lord DENNING MR considered the effect of the decision of the House of Lords in the *Suisse Atlantique* case[25] and their Lordships' emphasis upon the rule of construction, and remarked:[26]

> So, in the name of construction, we get back to the principle that, when a company inserts in printed conditions an exception clause purporting to exempt them from all and every breach, that is not readily to be construed or considered as exempting them from liability for a fundamental breach; for the good reason that it is only intended to avail them when they are carrying out the contract in substance; and not when they are breaching it in a manner which goes to the very root of the contract.[27]

The contract between the *Suisse Atlantique* case and this case is that in each the defendant had limited his liability under the contract, that is, in *Suisse Atlantique*, case liability for delay was £ 1,000 a day and in this case £ 2,330 for any accidental damage. In the former the delay did not operate as a fundamental breach, but in the

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22. At p 91.
23. At p 92.
24. (1970) 1 All ER 225.
25. (1967) 1 AC 361.
26. (1970) 1 All ER at pp. 235-236; *see* Malcolm Clark, *Fundamental Breach is Dead! Long Live... The Rule Against Absurdity*, 1984 Camb LJ 32.
27. For an appreciation of this decision *see* Professor Brian Coote, *The Effect of Discharge by Breach on Exception Clauses*, (1970) Camb LJ 221.

latter the supply of unsuitable material destroyed the very substratum of the contract.

That these two cases were not contradictory, but reconcilable, further appears from the judgment of DONALDSON J in *Kenyon Son & Craven Ltd* v *Barter Hoare & Co Ltd.*[28]

> The plaintiff stored in the defendant's warehouse 250 tons of groundnuts packed in bags. The warehouse was suitable for the purpose and was otherwise also structurally sound. The defendants had excluded their liability for any loss or damage unless it was due to the wilful neglect or default of the company or its own servants. The warehouse was not, however, rat-proof and the groundnuts were badly damaged by rats.

DONALDSON J referred to three categories of cases in which the rule of fundamental breach has been applied as stated by Lord WILBERFORCE in the *Suisse Atlantique* case. They are: *(i)* Supply of a different article; *(ii)* Hire-purchase cases; and *(iii)* Marine cases relating to deviation. The learned judge then stated that the Court of Appeal considered the *Harbutt's "Plasticine"* case as one of deviation from the main purpose of the contract: "The breach found consisted of the design, supply and the creation of a system or installation that was wholly unsuitable for its purpose."

Coming to the facts of the present case, the learned judge found that the case did not fall in any of Lord WILBERFORCE'S categories. He said: "Had the defendants stored these nuts in the open or in an area which was prohibited by the contract or had they even stored them in a warehouse which was structurally or by reason of its other contents so unsuited to such storage as to destroy the whole contractual substratum of the contract, then none of the defendant's conditions would have applied. That was not, however, the position. The warehouse itself, although not perfect and therefore requiring special vigilance against infiltration by rats, was not unsuitable and the other goods stored there caused no damage to the nuts.[29]

It has been laid down by the Court of Appeal[30] 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 bailor 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. Lord DENNING went to the extent of saying that limitation clauses should not be given effect to in contracts in standard forms where there is inequality of bargaining power.

In a contract of carriage entered into on standard conditions of the forwarding trade, the parties orally agreed that the goods would be carried under the deck of the ship and not on the deck. The goods were by mistake put on the deck and lost. The cargo-owner was allowed to recover his loss notwithstanding the exemption clause

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28. (1971) 2 All ER 708: (1971) 1 WLR 519.
29. *Shivaraj Vasant Bhagwat* v *Shevanta D. Indulkar*, (1997) 2 Bom CR 384, overloading an insured vehicle was a mere irregularity and not a fundamental breach so as to enable the insurer to get rid of his liability.
30. *Levison* v *Patent Steam Carpet Cleaning*, (1977) 3 All ER 498, CA.

in the standard form limiting the carrier's liability, because the oral promise was to be treated as overriding the printed conditions.[31]

A contract for hire-purchase of a motor cycle stated that the motor cycle was subject to no conditions or warranties whatsoever, express or implied. The machine was defective. It was returned for remedying the faults. It was delivered again to the buyer but all the faults were not rectified. Ultimately there was breakdown of the chain damaging also some other parts. The buyer finally rejected the machine and sought refund of the hire instalments he had already paid. He succeeded. The supply of a defective machine was a fundamental breach. This cancelled out all the exemption clauses. There was no affirmation of the contract on the buyer's part simply by asking for and accepting repairs.[32]

Fundamental breach was also inferred where the plaintiff's factory was burnt down by a security guard who had been provided by the defendants to protect the factory against fire. The defendants were held liable despite a number of exemption clauses. The limit of £ 25,000 as stated in the contract was held to be not applicable.[33]

### *Definition of Breach in Unfair Contract Terms Act*

The theory of fundamental breach has now found statutory recognition to some extent in the (English) Unfair Contract Terms Act, 1977. The Act says that a party who commits breach of his contract cannot take the advantage of any clause in the contract which either excludes or limits his liability. Further, if there is any provision in the contract to the effect that "no performance" or "substantially different performance"will be taken as equivalent to performance, that will be of no avail. Thus the term "breach" will include a performance which is substantially different from that contemplated by the contract.

### *Resort to 'Fundamental Breach' no longer necessary*

The effect of the provision is that it is no longer necessary for the courts to resort to "fundamental breach". The same result can be attained by resorting to the test of reasonableness under S. 11 of the Unfair Contract Terms Act, 1977 (English). This approach was in evidence in the decision of the House of Lords in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd.*[34]

> The plaintiffs, who were farmers, ordered a quantity of seeds from seed merchants. It was known to the sellers that the seed should be for winter white cabbage fit for human consumption. The supply was on standard terms which limited liability in case of defective goods to replacement or refund of price. The seeds grew into unusable weeds and not fit for human consumption.

The defendants were not allowed to claim the protection of the exemption clause and were held liable for the plaintiffs' loss. The plaintiffs had based their claim on fundamental breach and requirement of reasonableness. But their Lordships preferred to go by the statutory ground.[35]

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31. *J. Evans & Son (Portsmouth) Ltd* v *Andrea Merzario Ltd*, (1976) 2 All ER 930.
32. *Farnworth Finance Facilities Ltd* v *Attryde*, (1970) 2 All ER 774.
33. *Photo Production* v *Securicor Transport*, (1978) 1 WLR 856 CA.
34. (1983) 3 WLR 163 HL.
35. Followed in *Phillips Products Ltd* v *Hylands*, (1987) 2 All ER 620 CA, for details of the case *see* under heading Unfair Contract Terms Act, *infra*.

Where as a result of the breach, the injured party rescinds the contract, all the exemption clauses will fall with it. But if he treats the contract as still subsisting and wants only to be compensated, it will be a matter of construction whether the type of breach which has occurred will be covered by the exemption clause or not.

> An electrical equipment was supplied under a contract to the plaintiff to be used by him for producing chemicals. The machine turned out to be defective so that it could not operate at full capacity. It was set right two-and-a-half months later and then it functioned, to its full capacity. The plaintiff sued for the loss of earnings for the two-and-a-half months' period.[36]

He had to face a formidable exemption clause by which the supplier had undertaken the responsibility for repair but no responsibility for consequential damage. But even so the defendant was held liable. The court said that by supplying an equipment which suffered from an error in design, the supplier had done something which was essentially different from what was contemplated by the parties. The plaintiff was entitled to repudiate the contract and was, therefore, entitled to compensation in lieu of repudiation. The court construed the exemption clause as confined only to cases requiring repair and not to be extensive enough to cover errors in design also.

A term in a sale of potato seeds excluded all liability unless the buyer gave notice of any defects within three days of delivery has been held to be unreasonable. In such cases the defect is likely to be discovered only when the seed has been planted and it comes out. The other term which restricted the seller's liability to contract price was found to be reasonable because it was there with the approval, and as a common practice, of the whole trade.[37]

**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. An illustration of this principle of construction is afforded by *Lee (John) & Sons (Grantham) Ltd* v *Railway Executive*:[38]

> Goods stored in a railway warehouse let to a tenant were damaged by fire and the tenant brought an action against the railway executive alleging that the accident was due to their negligence because a spark ejected from their railway engine had caused the fire. The defendants set up a clause in the tenancy agreement which exempted them for loss of or damage to property however caused (whether by act or neglect of the company or their servants or agents or not) which "but for the tenancy hereby created would not have arisen".

The company was nevertheless held liable. The court was of opinion that the words "but for the tenancy hereby created" were confined to liabilities which arose by reason of the relationship of landlord and tenant.

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36. *Canso Chemicals Ltd* v *Canadian Westinghouse Co*, (1974) 54 DLR (3d) 517 (NSSC App. Div). For an example of limitation clauses which would apply even when there has been a total failure to perform see *Aisla Craig Fishing Co Ltd* v *Malvern Fishing Co*, (1983) 1 All ER 101 HL.
37. *R.W. Green Ltd* v *Code Bros Farmers*, (1978) 1 Lloyd's Rep 602.
38. (1949) 2 All ER 581.

Another illustration of strict interpretation is *Akerib* v *Booth*:[39]

> By a written agreement the defendants let to the plaintiffs a few rooms on the second and third floors of their premises for office and store purposes. They retained in their possession a water-closet on the fourth floor. The agreement provided that the plaintiffs would exclusively employ the defendants in making up and packing all the goods brought by them for business on the premises and that the defendants would not in any circumstances be responsible for damage caused by water, insects, vermin or fungi to any goods. Owing to the negligence of the defendants or their servants water escaped from the closet and caused damage to the plaintiffs' goods.

It was held that the exception clause must be limited to the purpose of the contract. The purpose was to exempt the defendants from liability to goods that came to their possession for packing or making up, etc. The exemption clause must be confined to this and was not to apply to any other goods and accordingly the defendants were liable.

*Contra proferentem*

Where the words used in an exclusion clause are capable of two constructions, a wider construction and a limited construction, then the limited construction would be preferred, for the rule of law is that "every exception clause is to be interpreted, in case of ambiguity, *contra proferentem*".[40] This means that "if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it . . . ."[41] These principles were applied by the Court of Appeal in *Hollier* v *Rambler Motors AMC Ltd.*[42]

> *H* inquired of *R* over telephone whether *R* could repair his car. *R* told *H* to bring the car and that it would be repaired in due course. On three or four occasions during the last five years *R* had carried out servicing for *H*. On each occasion *R* was required to sign an invoice which described the work and mentioned the charge and gave warning below the customer's signature that "the company is not responsible for damage caused by fire to the customer's car on the premises". On this occasion the customer did not sign any such invoice and this time his car was destroyed by a fire which occurred due to *R's* negligence. *R* was held liable.

The Court of Appeal had to face two formidable questions, namely, whether the signature on the previous occasions amounted to a notice of the term for this occasion also and, secondly, if it did, whether negligent fire was within the scope of the exclusion clause. In reference to the first question SALMON LJ had to consider two earlier House of Lords' decisions. One of them is *Henry Kendall & Sons* v *William Lillico & Sons Ltd.*[43] In this case during the past three years three or four times in every month goods were supplied on oral orders followed by signature on

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39. (1961) 1 All ER 380: (1961) 1 WLR 367.
40. *See* Professor Brian Coote, *Breach and Exception Clauses*, (1970) Camb LJ at p 238.
41. Cheshire and Fifoot, THE LAW OF CONTRACT, 129 (8th edn, 1972).
42. (1972) 1 All ER 399. It was held in *Archdale & Co Ltd* v *Comservices Ltd*, (1954) 1 All ER 210 CA that this doctrine would apply only when the parties leave their intention in doubt. But when the parties have clearly expressed what their intention is, there is no necessity to refer to the principle. In this case insurance against fire during the execution of the works was made by the contract a responsibility of the owner, he was not allowed to hold the contractor liable even when the fire was due to the contractor's negligence.
43. (1968) 3 WLR 110 HL.

sold notes which excluded liability for latent defects. It was held that this practice was a sufficient notice of the terms. Distinguishing this case from the present the court said that that was a typical case where a consistent course of dealing between the parties made it imperative for the court to read into the contract the terms printed on the sold notes, whereas in the present case there had been only three or four dealings during the past five years. This was not sufficient to establish a course of dealing. Moreover, the dealing was not consistent as on this occasion the customer was not required to sign any invoice.

The other case is *McCutcheon* v *David McBrayne Ltd.*[44] In this case *M* had asked his brother-in-law to have a car shipped from the Isle of Islay to the mainland. *M* had personally consigned goods on four previous occasions and each time he signed what was called a "risk" note. The risk note made it plain that the company was accepting the goods on its ship on the condition that they would not be responsible for any damage by negligence that the goods might suffer during the course of the voyage. The ship sank through negligence and the car was lost. *M's* brother-in-law had also consigned goods on several previous occasions. Sometimes he signed a risk note and sometimes not. On this occasion no such note was presented to him for signature. The House of Lords held that there was no previous course of dealing from which the term of inclusion could be implied into the contract which had been made on behalf of *M* by his brother-in-law.

After considering the case, SALMON LJ concluded : "If it was impossible to rely on a course of dealing in the *McCutcheon case*, still less would it be possible to do so in this case, when the so-called course of dealing consisted only of three or four transactions in the course of five years."

This should have been sufficient to dispose of the case. But SALMON LJ went further to examine that supposing that the clause had become a part of the contract, would it have covered fire by negligence. "It is well-settled that a clause excluding liability for negligence should make its meaning plain on the face of it to an ordinary literate and sensible person. . . . The defendant should not be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think that he would have redress . . . for any damage which he might suffer by the negligence of that person."[45]

A car insurance policy excluded liability for "Loss, damage, and/or liability caused or arising while any such car is conveying any load in excess of that for which it was constructed." At the time of the accident under which the car became a total loss there were six persons in the five-seater car. The court said that any doubt about the use of the word "load" would be construed in favour of the assured. The clause should have been spelled out in terms of specified weight. The court also gave this advice that if any insurance company wishes to put forward a policy which would be inapplicable when an extra passenger is carried, they should print that provision in red ink so that the assured would have it drawn to his particular attention.[46]

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44. (1964) 1 All ER 430: (1964) 1 WLR 125, HL. *See* also *IIMK Ansari & Co* v *Union of India*, (1983) 4 SCC 417: AIR 1984 SC 29, on interpretation of the terms of a contract.
45. *See* also *Union of India* v *Gosalia Shipping Ltd*, (1978) 3 SCC 23 on interpretation of a charter-party contract.
46. *Houghton* v *Trafalgar Ins Co Ltd*, (1953) 2 All ER 1409 CA.

Cotton threads delivered under a contract were found to be 6% shorter than they should have been and the seller sought to get rid of the liability for short delivery by sheltering himself under the exemption clause which said that the goods actually delivered would be taken to be in accordance with the contract in all respects unless the sellers were informed within 14 days of delivery of something wrong. The buyers discovered the shortage when they put the threads to actual use and that was much later than 14 days. The court did not permit the seller to use his clause for creating this phenomenon that goods not delivered should be taken to have been delivered. There was no warrant for an implication to the effect that non-delivery in length or small measure was included in the objections which should, within the time-limit, be made to goods delivered.[47]

*Interpretation of Price Review and Escalation Clauses*

In a case before the Supreme Court[48] a clause in a contract for supply of electricity provided:

> "The rate of supply as determined in Clause 17 shall be reviewed every fifth year provided the component of the cost of generation out of the total cost varies by 25% or more."

The consumer contended that this was a price escalation clause and would permit increase from the base price only according to a rise in the cost of production. The Supreme Court did not accept this. Explaining the distinction between an "escalation" clause and a "price review" clause, A.K. SEN J said:[49]

> An escalation clause, according to its accepted legal connotation means a clause which takes care of the rise and fall of prices in the market, whereas the right to review confers the power to revise the rate of supply. The word 'review' necessarily implies the power of the Board to have a second look and to so adjust from time to time its charges so as to carry on its operation under the Act without sustaining a loss.

The court referred to Butterworth's ENCYCLOPAEDIA OF FORMS AND PRECEDENTS,[50] Hudson's BUILDING AND ENGINEERING CONTRACTS,[51] Keating's BUILDING CONTRACTS[52] and Black's LAW DICTIONARY,[53] which portray different forms of "rise and fall" or escalator clauses in building and commercial contracts. The court cited the following passage from AMERICAN JURISPRUDENCE.[54]

> In some contracts there is what is known as an escalator or fluctuation clause which is defined as one in which the contract fixes a base price but contains a provision that in the event of specified cost increase, the seller or

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47. *Beck & Co* v *Szymanowski & Co*, 1923 AC 43 HL. Though the terms have to be strictly construed, that construction must not be a strained one. Limitation of liability for any lapse in security services was stated in the contract to be £ 1,000. The provision being clear, recovery for the actual loss which was much greater was not allowed, *Allsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd*, (1963) 1 All ER 101 HL.
48. *Delhi Cloth and General Mills* v *Rajasthan State Electricity Board*, (1986) 2 SCC 431. *See* also *Shiv Pal Karan* v *State*, AIR 1988 All 268, revision of housing prices.
49. At p 455.
50. 148 (Vol 3, 4th edn).
51. 10th edn.
52. 498 (4th edn).
53. 639 (4th edn).
54. 786 (2nd edn, Vol 17).

contractor may raise the price up to a fixed percentage of the base and such escalator clauses are generally held to be sufficiently definite for enforcement.

The court also cited the following passage from CORPUS JURIS SECUNDUM:[55]

> [A] contract giving one of the parties the right to vary the price is not unenforceable for lack of mutuality where the right is not an unlimited one, as where its exercise is subject to express or implied limitation, such as that the variation must be in proportion to some objectively determined base, or must be reasonable, and this rule has been applied to contracts containing so-called 'escalator' clauses.

Where under a housing scheme, the price to be charged is made expressly variable, the allottees cannot claim any estoppel against variation nor seek refund on the ground of any proposed, but reasonable, variation.[56]

The Supreme Court held that the power to vary terms relating to quantum of work cannot be unlimited. Any clause giving absolute power to one party to modify the contract terms would 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 to 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 under the contract, it may not exclude liability in tort. Thus in *White* v *John Warwick & Co Ltd*:[58]

> 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.

It was held that although the clause exempted the defendants (even if they were negligent) from their liability in contract, it did not exempt them from liability in negligence.[59]

It is, however, open to the parties to exclude liability even for negligence by express words or necessary implication. For example, in *Ruther* v *Palmer*[60] a car was given to the defendants for sale under a contract which provided that while on trial the cars 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.

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55. 406 (Vol 17).
56. *Shiv Pal Karan* v *State*, AIR 1988 All 268.
57. *National Fertilisers* v *Puran Chand Nangia*, (2000) 8 SCC 343.
58. (1953) 1 WLR 1285.
59. Besides these, the courts have tried other ways of controlling the undesirable consequences of exemption clauses. This is indeed the only way to protect the individual and make up for the growing loss of individual liberty of contract. For a summary of such techniques, *see* Gower, *Exemption Clauses: Contractual and Tortious Liability*, (1959) 17 MLR 155. For an assessment of the need and propriety of such contracts *see* Bowes Egan, *Standard Contracts*, 1968 JBL 204; G.H. Treitel, *Exclusion Clauses, Possible Reforms*, (1967) JBL 209 and 334.
60. (1922) 2 KB 87: (1922) All ER Rep 367.

*Liability for Negligence*

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,[61] 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 *Manuswami*.[62] 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 court observed :

> Certainly the conditions printed on the reverse of a bill may govern or modify any simple contract... subject to the obligation on the part of the businessman to perform the process properly and to return the article safe and intact. But, if a condition is imposed which is in flagrant infringement of the law relating to negligence... the court will not enforce such a term which is not in the interest of public, and which is not in accordance with public policy. And there is certainly justification for the observation that this (enforcement of the condition) may well be putting a premium upon the abstraction of clothes, which may be committed by an employee of the firm, intent on private gain, though the firm itself may be blameless with regard to the actual loss.[63]

Explaining the justification for not enforcing unreasonable terms in *Lee (John) & Sons (Grantham) Ltd* v *Railway Executive*,[64] Lord DENNING LJ remarked:

> There is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused.

The importance of this vigilance was amply demonstrated by his Lordship in *Levison* v *Patent Steam Carpet Cleaning Co.*[65]

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61. (1967) 1 AC 361, 432.
62. AIR 1966 Mad 13.
63. *Per* ANANTANARAYANAN, Offg. C.J. at pp. 13-14. *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. Deboo* v *M.V. Hindlekar*, AIR 1995 Bom 68, laundry receipt contained printed condition restricting liability for loss or damage to 20 times laundering charges or half the value of the garment, whichever was less. The condition was held to be unreasonable.
64. (1949) 2 All ER 581, 584. *See* also the decision of the Calcutta High Court in *Indian Airlines* v *Madhuri Chowdhuri*, AIR 1965 Cal 252.
65. (1977) 3 All ER 498, CA.

A carpet was delivered to a cleaning company under the signature of the carpet-owner. Immediately above the space for signature the form stated that the undersigned agreed to the terms and conditions set out above. One of the clauses fixed the value of the carpet at £ 40 and another stated that the goods had been accepted at the owner's risk and the customers should insure their goods. The carpet was never returned and the cleaners informed the customer that it had been stolen. The customer recovered the full value of the carpet from his insurer and the latter claimed £ 900 from the cleaners.

The clause which fixed the liability at £ 40 was regarded as unreasonable and, therefore, the cleaners were required to pay the full value of the carpet. Not to have returned the carpet also amounted to a fundamental breach. Lord DENNING reiterated that an exemption or limitation clause should not be given effect to if it was unreasonable or if it would be unreasonable to apply it in the circumstances of the case. The cleaners knew that the carpet was worth a lot of money and it would be most unreasonable to limit liability to £ 40. It was equally unreasonable to impose a term on the customers that their goods were accepted only at their risk.

It is not reasonable to exclude liability for breach of a term which is fundamental to the contract.

A photocopying machine was taken on lease. The machine was supposed to contain a particular feature. The machine which was actually supplied did not have that feature. The lease excluded liability for representations, if any, made about the machine.

It was held that the exclusion clause was unreasonable. It became overridden by the representations made by the copier salesman.[66]

*Statutory Definition of Reasonableness*

The principle of excluding unreasonable clauses has now found statutory recognition in the (English) Unfair Contract Terms Act, 1977. The Act provides that in respect of any loss caused by the breach of contract, any restricting or excluding clause shall be void unless it satisfies the requirement of reasonableness. A term will be regarded as reasonable if it is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made".[67]

A local authority entered into a contract with a supplier for purchase of computer software designed to administer the collection of community charge

66. *Lease Management Services* v *Purnell Secretarial Services*, (1994) Tr LR 337 CA.

67. In the American Restatement [Second edn, S. 211 (Part 3)] the modern doctrine is thus stated: Where the other party has reason to believe that the party manifesting such (written) assent would not do so if he knew that the writing contained a particular term, the term is not a part of the agreement. Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, (1983) 96 Harv LR 1174; J.H. Baker, *From Sanctity of Contract to Reasonable Expectation*, CURRENT LEGAL PROBLEMS, 1979 where it is said that judges are to impose reasonableness. Whatever is not reasonable is not law. If the parties have agreed to something unreasonable they should be treated as if they have not agreed and they should be released. This brings in the doctrine of reasonable expectation. *Policing Unfairness in Contracts*, (1984) 47 Mod LR 523 in Reuben Hassen's *The Special Nature of the Insurance Contract*.

according to population. The software contained an error which led to wrong count and, therefore, loss of revenue. The supplier company had limited its liability under the standard terms to £ 100,000. The court allowed the authority to recover its whole loss of revenue and not merely the amount under the limitation clause, which was held to be unreasonable. The supplier was a substantial company with ample resources to meet any liability and was insured under a worldwide policy for fifty million pounds. There were a very few companies who could meet the authority's requirements and, therefore, the supplier was in a very strong bargaining position. The supplier company failed to adduce any evidence as to why the limit of £ 100,000 was justified. It was irrelevant to the defendant company's liability that the authority had made up its loss by increasing the community charge the following year.[68]

*Removal Simpliciter Clauses in Contracts 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 to be unreasonable.[69] The Supreme Court has gone further still by laying down that in all its affairs, including economic and contractual matters, 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 reasonable selection of the party, including the selection of a Government District Counsel, on whom benefits of a Government contract are going to be conferred.[70]

*Compromise of existing Contract*

The purpose of the Unfair Contract Terms Act, 1977 (English) is to invalidate exemption clauses in the strict sense, its clauses in a contract which modify prospective liability. The Act does not affect retrospective compromises of existing claims. Section 10 of the Act on its true construction does not apply to a contract to settle disputes which have arisen concerning the performance of an earlier contract. Furthermore, Section 10 does not apply where parties to both contracts (namely, the earlier contract and agreement of its accord and satisfaction) are the same. Thus a compromise would not be bad in law even if some of the clauses of the contract were unreasonable either generally or within the meaning of the English Act.[71]

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68. *St Albans City and District Council* v *International Computers*, (1995) FSR 686. *See also* to the same effect, *Salvage Association* v *Cap Financial Services*, (1995) FSR 654, where also the computers with accounting software contained numerous errors causing huge losses and, therefore, the limit of £ 25,000 upon liability was held to be unreasonable. In the meantime the defendant company had also increased its limit upon liability to £ 100,000.
69. *Central Inland Water Transport Corpn* v *B.N. Ganguly*, (1986) 3 SCC 156.
70. *Shrilekha Vidyarthi* v *State of UP*, (1991) 1 SCC 212. Relying upon its own earlier decisions in *Dwarkadas Marfatia & Sons* v *Board of Trustees of the Port of Bombay*, the State has to show fairness in evicting its tenants; *Mahabir Auto Stores* v *IOC*, (1990) 3 SCC 752, terminating the agency of a distributor without proper opportunity to enable him to come under the new policy. The court also relied upon Wade's ADMINISTRATIVE LAW and JUDICIAL REVIEW AND CONTRACTUAL POWER OF PUBLIC AUTHORITIES, (1990) 106 LQR 277-292.
71. *Tudor Grange Holdings Ltd* v *Citibank NA*, (1991) 4 All ER 1 Ch D. (*See also* Notes under the heading "Consent Decrees" under comments on S. 74).

## 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.[72] 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 would 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 two 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*[73], the abovementioned 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 of contract, but independently of it".[74]

Just as a third party is not affected by the terms of a contract, so also a third party cannot claim the advantage of them. If, for example, a sea-line company exempts itself from any liability to its passengers for the negligence of its employees, a passenger injured by the negligence of an employee will nevertheless be entitled to sue the negligent employee.[75] In another case, a shipping company limited its liability to a fixed amount for any loss of or damage to goods. The stevedores in England agreed with the company to handle cargo 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 held not entitled to the protection of the limiting clause.[76]

Looking at this state of the law transport companies began to draft their exclusion clauses so as to provide that neither they nor their employees would incur any liability. In two such cases, in both of which two free pass-holders of a bus company were injured, one through the negligence of the driver and the other of the conductor, they were allowed to proceed against the negligent employees, in the one case because the free pass was a licence and not a contract and the driver was not a party to it[77] and in the other because it was a contract and was void under Section 151 of the (English) Road Traffic Act, 1960.[78]

The only way of conferring the benefit of exception clauses upon employees or sub-contractors, etc., seems to be the principle of vicarious immunity or implied contract as suggested by the House of Lords in *Elder, Dempster & Co* v *Paterson Zochonis & Co.*[79] In this case the plaintiff contracted with a charterer and the latter

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72. The doctrine of privity of contract is more fully discussed in the third chapter.
73. (1941) 2 KB 343.
74. At p 379.
75. So held in *Adler* v *Dickson*, (1955) 1 QB 158: (1954) 1 All ER 21.
76. *Scruttons Ltd* v *Midland Silicones Ltd*, (1962) AC 446: (1962) 1 All ER 1, HL.
77. *Genys* v *Mathews*, (1965) 3 All ER 24: (1966) 1 WLR 758.
78. *Gore* v *Van de Lann*, (1967) 2 QB 31: (1967) 1 All ER 360.
79. (1924) AC 522. *See* further, Professor B. Coote, *Exception Clauses and Those to Whom They are Addressed*, (1973) Camb LJ 14, 104.

hired a ship from the shipowner for carriage of oil casks. The bill of lading as drawn between the plaintiff and charterer exempted both the charterer and ship-owner from consequences of bad stowage. The oil was lost in circumstances covered by the exception clause. The plaintiff sued both of them, but they were held liable, either because the bill of lading became an implied contract between the plaintiff and shipowner or because the shipowner was acting as an agent of the charterer. A different result followed where the exclusion clause not merely protected the carrier, but also his agents and contractors and the stevedores contracted to unload the ship as 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.[80] 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. Another case of the same kind is *Norwich City Council* v *Harvey*.[81]

> A contract for the erection of a building contained a provision that the building owner was to bear the risk of loss or damage caused to the building by fire. A sub-contractor had contracted with the contractor on that basis. The court said that it would not be just and reasonable to exclude the sub-contractor from the protection of that provision in the main contract if the building was damaged by fire as the result of the negligence of the sub-contractor, even though there was no privity of contract between him and the building owner. In such circumstances there was not such a close and direct relationship between the building owner and the sub-contractor for the latter to owe a duty of care to the former. It followed that the sub-contractors were entitled to the benefit of the exemption from liability under the main contract in respect of the claim brought against them by the building owners in respect of their employees' negligence.

Where a person is entitled to the benefits of a contract he would have to accept its burdens also.[82]

In conclusion, the following statement of Lord REID in the *Suisse Atlantique* case may be cited:[83]

> Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them and, if he did read them, he would probably not understand them. If he did understand and object to any of them, he would generally be told that he could take it or leave it. If he then went to another supplier, the result would be the same. Freedom to contract must strictly imply some choice or room for bargaining.
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> At the other extreme is the case where the parties are bargaining on terms of equality and a stringent exemption clause is accepted for a *quid pro quo* or other good reason; but this rule appears to treat all cases alike. There is no indication in

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80. *New Zealand Shipping Co* v *A.M. Satterthwaite & Co*, (1974) 1 All ER 1015.
81. (1989) 1 All ER 1180.
82. *Pyme & Co* v *Scindia Navigation Co*, (1954) 2 QB 402. Where it was held that a person who accepts the benefit of a contract shall have to take its burdens also.
83. (1967) 1 AC 406. The Parliament has partly dealt with this problem in the (English) Unfair Contract Terms Act, 1977.

the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable, or whether it was freely agreed to by the customer. It does not seem to be satisfactory that the decision must always go one way if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people, and it appears to me that its solution should be left to Parliament.

**Unfair Contract Terms Act, 1977 (English)**

The (English) Unfair Contract Terms Act, 1977, which came into force on February 1, 1978, improves or affects some of the principles established by the courts in reference to business contracts. The Act tries to improve the situation by completely overruling certain types of exemption clauses and subjecting all of them to the test of reasonableness.

The Act provides, for the first time, a statutory definition of the term "negligence" which is applicable both to tort and breach of contract cases. In the terms of the definition, negligence means:

(*a*) breach of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(*b*) breach of any common law duty to take reasonable care or exercise reasonable skill (but not a stricter duty); or

(*c*) breach of the duty of care imposed by the Occupiers' Liability Act, 1957.

The second important effect of the Act is that any clause in a contract which excludes or restricts liability for death or personal injury resulting from negligence shall be absolutely void.

The third noteworthy provision of the Act is that in regard to other types of loss, not being death or physical injury, any restricting or excluding clause shall also be void unless it satisfies the requirement of reasonableness. The test will be deemed to be satisfied if the term is "a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". It means that reasonableness depends upon the unfairness of the terms in the light of the circumstances which ought to have been either known or to be in the contemplation of the parties. A chartered surveyor who gave a negligent mortgage valuation of a bungalow upon which the plaintiff relied in purchasing the property was held liable in spite of a clause excluding his liability in the matter. The clause was found to be not reasonable in the circumstances.[84]

The fourth important provision of the Act is concerned with the protection of the consumer and those who have been subjected to a standard form contract. The Act says that a person who deals with a consumer on his own standard terms, will not be allowed to claim the protection of any clauses restricting or excluding liability if he

84. *Daviel* v *Parry*, (1980) 20 Estate Gazette 92: 1988 CLY 435. A similar advice by a local authority under exclusion of liability protected the authority because it was not the professional business of the authority. *Harries* v *Wyre Forest Distt. Council*, 1988 CYL 2433.

himself commits breach; nor can he claim substantially different performance as equivalent to performance. He can, however, take advantage of such terms if they are reasonable.

The fifth important part of the Act extends the scope of the Supply of Goods (Implied Terms) Act, 1973. This Act does not permit in reference to consumer sales the liability for breach of implied conditions and warranties to be excluded. This will now apply to all contracts under which possession of or property in goods passes from one person to another, for example, contracts of renting or leasing of appliances. In non-consumer contracts the exception clauses will be subjected to the test of reasonableness.[85]

> A plant hire company, hired an excavator to the plaintiff together with the first defendant, a driver, for use in building work consisting of an extension to the plaintiff's factory. A condition was that the drivers were to be regarded for all purposes as the servants or agents of the hirer who alone will be liable for the consequences of the operation by them. An accident occurred as a result of the driver's negligence, causing considerable damage to the plaintiff's factory.

Going by the substance and effect of the term, rather than by its form, the court held that the term had the effect of excluding the common law duty in tort. It had the effect of excluding liability which fell within the purview of the Act and was,

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85. For further study *see* (1978) JBL 1; (1977) JBL 260-262; Brian Coote: *Unfair Contract Terms Act*, 1977, (1978) 41 MLR 312; *Unfair Contract Terms in Civil Law Systems*, (1980) 4 Canadian Business Law Journal, 429; (1981) 98 SALJ 70; Edward H. Hondius, *New Control Systems*, (1978) 26 Am. Journal of Comparative Law, 525, 526. Peter Arsonstam, CONSUMER PROTECTION, FREEDOM OF CONTRACT AND THE LAW, (Juta & Co, South Africa). The author finds that many firms which dominate a particular market abuse their economic power by means of oppressive standard contracts. Courts have often expressed their unwillingness to delve into the problem of contractual morality and unfairness. The author regrets that our judges have not been prepared to formulate a general theory of contractual conscionability which could govern all instances of the abuse of bargaining power; *Unfair Contract Terms in Civil Law Systems*, (1980) 4 Can Bus Law Journal 429; (1981) 98 SALJ 70, where it is observed that sentiment on the sanctity of contract has undergone a sea-change. The decline of *laissez faire* and the concomitant growth of State intervention in the economy, the strongly felt need to protect the poor and the ignorant from exploitation by the rich and shrewd operators, the emergence and spread of the standard form contract, all these have combined to erode the *pacta sunt servanda* principle. Today all western legal systems have a multiplicity of protective laws, ranging from anti-monopoly legislation to consumer protection laws, from rent control to legislation regulating sales on instalments; Edward H. Hondius, *Unfair Contract Terms: New Control System*, (1978) 26 American Journal of Comparative Law 525, 526; A.J. Kerr, *Terms in Standard Form Contract*, (1981) 98 SALJ 15; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, (1983) 96 Harv LR 1174. For the concept of "dealing as a consumer" see *R & B Customs Brokers Co Ltd* v *United Dominions Trust Ltd*, (1988) 1 WLR 321 CA, here a company purchasing a motor car for the use of its director was held to be dealing as consumer so that the exclusion of merchantability was not binding on the parties. *Rasbora Ltd* v *JCL Marine Ltd*, (1977) 1 Lloyd's Rep 645, the same conclusion was reached with reference to the term "a consumer sale" in its application to purchase of a boat by a company for the private use of the owner of the whole of the issued share capital of the company. *Chester Grosvenor Hotel Co Ltd* v *Alfred McAlpine Management Ltd*, (1991) 56 Build LR 115 QB, the meaning of a standard form of contract and dealing on the other's written standard terms of business, *Smith* v *Eric S. Bush*, (1989) 2 All ER 514 HL, Their Lordships considered the question whether professional valuer can exclude his liability for negligence and whether it would be reasonable and fair to do so. *Stag Line Ltd* v *Tyne Shiprepair Group Ltd*, (1984) 2 Lloyd's Rep 211 QB, consideration of the question whether the Act nullifies all clauses which purport to limit liability.

therefore, not fair and reasonable.[86] The court relied upon the speech of Lord BRIDGE in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd*:[87]

> In considering the requirement of reasonableness, the court must entertain a whole range of considerations, put them in the scales on one side or other and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer should be, where it will be impossible to say that one view is demonstratably wrong and the other demonstratably right.

**Exclusion of right of set-off**

The right of set-off being an instrument of justice and equity, its exclusion under contract clauses has been held to be prima facie unreasonable and hit by Section 13 of the Act. Accordingly, a counter-claim raised by way of set-off against the contractor's bill for final payment was allowed to be raised despite a clause in the contract excluding the right of set-off. The court put the burden upon the contractor to prove the reasonableness of the clause and added that the question whether a contract term satisfied the requirements of reasonableness in Section 13 of the 1977 Act has to be determined by considering the term as a whole and not merely that part of it relied on by the plaintiffs to defeat the defendant's set-off.[88]

**Exclusion clauses and disclaimer**

The House of Lords have laid down that a negligent advice given by a professional man would make him liable to his immediate advisee even if the advice was given under a clause containing disclaimer of all liability. The disclaimer would have to pass the test of reasonableness under the 1977 Act.[89] A house was purchased by the plaintiffs, price being paid on the basis of the advice sought from a local authority whose surveyors prepared a negligent report and advice. The advice was offered under disclaimer of liability. The house turned out to be unusable and required an amount for repair which was more than the cost of the purchase price. The authority was held liable to the plaintiffs. Their Lordships said that having regard to the high cost of the house it would not be fair and reasonable for valuers to impose on purchasers the risk of loss arising as a result of the incompetence or carelessness on the part of valuers. It followed, therefore, that the disclaimer was not effective to exclude liability for the negligence of the valuers.

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86. *Phillips Products Ltd* v *Hylands*, (1987) 2 All ER 620 CA.
87. (1983) 2 All ER 737, 743: (1983) 2 AC 803.
88. *Stewart Gill Ltd* v *Horatio Myer & Co Ltd*, (1992) 2 All ER 257 CA.
89. The case before their Lordships was *Smith* v *Eric S. Bush* (a firm), (1989) 2 All ER 514 HL; *Harries* v *Wyre Forest District Council*, (1989) 2 All ER 514 HL.

# 3
# *Consideration*

Section 25 of the Indian Contract Act opens with the declaration that "an agreement made without consideration is void ....".[1] In England also "promises without consideration are not enforced, because they are gratuitous".[2] In *Rann* v *Hughes*[3] the Lord Chief Baron SKYNNER observed:

> It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of the country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration.

## DEFINITION AND ITS REQUIREMENTS

Consideration has been variously defined. The simplest definition is by Blackstone:

> Consideration is the recompense given by the party contracting to the other.[4]

In other words, it is a price of the promise. 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."[5] Another simple definition is by Justice PATTERSON: [6]

> Consideration means something which is of some value in the eyes of the law .... It may be some benefit to the plaintiff or some detriment to the defendant.

But the most commonly accepted definition is that which was attempted by LUSH J in *Currie* v *Misa*:[7]

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1. The section then goes on to provide certain exceptions to the rule. Questions of consideration do not arise unless there is an agreement. See *Pipraich Sugar Mills* v *P.S. Mills Mazdoor Union*, 1956 SCR 872: AIR 1957 SC 95. The Supreme Court has observed that when a contract consists of a number of terms and conditions, it cannot be said that consideration stands apportioned between so many conditions. *Chaturbhuj V. Jasani* v *Moreshwar Parashram*, 1954 SCR 817, 830: AIR 1954 SC 236. *Associated Bombay Cinemas P Ltd* v *Urmi Developers P Ltd*, (1997) 2 Bom LR 257, an agreement to form partnership for developing the land of the owner; the land to become partnership property on payment of Rs 1.25 crore to the owner; consideration not paid, held, no question of the land becoming partnership property. *Kampta Prasad* v *2nd Addl DJ, Mainpuri*, AIR 1997 All 201, judgment-debtor agreeing to pay decretal amount by stipulated date allowing dismissal of objections but getting no benefit under the agreement, agreement without consideration, void. The agreement was also void by reason of non-compliance with U.P. Regulation of Money Lending Act, 1976. *Keshab Chandra Nayak* v *Laxmidhar Nayak*, AIR 1993 Ori 1, a *benami* transaction is without consideration. *Jupudi Venkata Vijaya Bhaskar* v *Jupudi Kesava Rao*, AIR 1994 AP 134, agreement by a would-be adoptee that he would not claim the coparcernary rights of his would-be parents is not void for want of consideration and also does not involve any surrender of rights so as to attract S. 17 of the Registration Act, 1908.
2. *See* HEATH J in *Lee* v *Muggeridge*, (1813) 128 ER 599.
3. House of Lords, (1778) 7 Term Reports 346.
4. COMMENTARIES.
5. Sir Frederick Pollock in POLLOCK ON CONTRACTS, 13th edn, p 133.
6. In *Thomas* v *Thomas*, (1842) 2 QB 851, 859.
7. (1875) LR 10 Ex. 153, 162.

> A valuable consideration in the sense of the law, may consist either in a right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.

The definition of consideration as a "price of the promise" has been commended by Cheshire and Fifoot. According to the learned writers, "it is easier to understand, it corresponds more happily to the normal exchange of promises and it emphasises the commercial character of the English contract. It reveals the essential simplicity of the concept."[8]

Similarly, the Calcutta High Court has observed in a case that "consideration is the price of a promise, a return or *quid pro quo*, something of value received by the promisee as inducement of the promise."[9]

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. It also avoids the practical difficulties caused by the theory of consideration as consisting of some act which is beneficial to one party or detrimental to the other. This antithesis has been described to be not altogether happy.[10] The Act simplifies the matter by saying that any kind of act or abstinence which is done or undertaken to be done at the desire of the promisor is a sufficient consideration.

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 *promisee or any other person* and, lastly, that the act or abstinence may have been already executed or is in the process of being done or may be still executory, that is to say, it is promised to be done.

**"At the desire of the promisor"** *(Promissory Estoppel)*

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 in accordance with the desire of the promisor. In other words, an act[11] shall not be a good consideration for a promise unless it is done at the desire of the promisor. In *Durga Prasad* v *Baldeo*:[12]

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8. LAW OF CONTRACT, 60 (8th edn, 1972).
9. *Fazaluddin* v *Panchanam Das*, AIR 1957 Cal 92. The same court had held in *Fanindra* v *Kachhemen Bibi*, AIR 1918 Cal 816 that consideration received by two mortgagors was good enough to bind all the four who executed the mortgage deed. This was followed by the A P High Court in *Andhra Bank* v *Anantnath*, AIR 1991 AP 245 so as to hold all the joint promisors executing a promissory note liable though consideration was handed over to only one of them.
10. *See* Cheshire and Fifoot, THE LAW OF CONTRACT, 59-60 (8th edn, 1972).
11. The word 'act', for the purpose of this discussion, includes 'abstinence' also.
12. (1880) 3 All 221.

The plaintiff, on the order of the Collector of a town, built at his own expense, certain shops in a bazar. 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 bazar. The plaintiff's action to recover the commission was rejected.

OLDFIELD J said: "The only ground for the making of the promise is the expense incurred by the plaintiff in establishing the Ganj (market) but it is clear that anything done in that way was not 'at the desire' of the defendants so as to constitute consideration."[13] The act was the result not of the promise but of the Collector's order.

*Acts Done at Request*

On the other hand, an act done at the promisor's desire furnishes a good consideration for his promise even though it is of no personal significance or benefit to him. The decision of the Calcutta High Court in *Kedar Nath* v *Gorie Mohamed*[14] has become well-known in this connection.

It was thought advisable to erect a town hall at Howrah provided sufficient subscription could be got together for the purpose. To this end the Commissioners of Howrah municipality set out to work to obtain necessary funds by public subscription. The defendant was a subscriber to this fund for Rs 100 having signed his name in the subscription book for that amount. On the faith of the promised subscriptions the plaintiff entered into a contract with a contractor for the purpose of building the hall. But the defendant failed to pay the amount and contended that there was no consideration for his promise.

He was, however, held liable: "Persons were asked to subscribe knowing the purpose for which the money was to be applied, they knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work. The promise is: 'In consideration of your agreeing to enter into a contract to erect, I undertake to supply money for it.' The act of the plaintiff in entering into contract with the contractor was done at the desire of the defendant (the promisor) so as to constitute consideration within the meaning of Section 2(*d*)."[15]

It was indeed a promise to pay for the performance of an act and it could not have been revoked once the promisee entered performance.[16] In England also "the law for centuries has been that an act done at the request of another, express or implied, is sufficient consideration to support a promise".[17] Writing in an article

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13. *See* his judgment at p 228. *See* also *Raja of Venkatagiri* v *Krishnayya*, AIR 1948 PC 150 and *Adaitya Das* v *Prem Chand Mondal*, AIR 1929 Cal 369. In this case the defendant promised to bring a Thakur to the plaintiff's house to preside over a dinner to be given to the plaintiff's guests. The defendant failed to bring the Thakur and consequently the dinner was wholly wasted as no guest partook of it in the absence of the Thakur. The plaintiff's action for damages was dismissed as he had done nothing on the desire of the promisor.
14. 1886 ILR 14 Cal 64.
15. *See* the judgment of PETHERAM CJ at p 67. This is an abbreviated view of the judgment.
16. *See* DENNING LJ in *Errington* v *E.*, (1952) 1 KB 290, 295.
17. Rt. Hon. Sir Alfred Denning, *Recent Developments in the Doctrine of Consideration*, (1952) 15 Modern Law Review, p 1. Following authorities are cited in support of the proposition: *Lampleigh* v *Braithwait*, 1615 Hobb, 105: 80 ER 255; and the notes in 1 Sm. LC 142; *Osborne* v *Rodgers*, 1 Wms. Sound 264; *Shadwell* v *Shadwell*, (1860) 9 CB (NS) 159: 184 ER 62; *Scotson* v *Peg*, (1861) 6 Hand N 295; *Chichester* v *Cobb*, (1886) 14 LT 433.

Lord Justice Denning says:[18] "Nowadays there are some grounds for suggesting that an act may be good consideration even though it is not a benefit to the promisor nor a detriment to the promisee. If a man promises a charitable institution that he will pay £ 100 into its funds if it procures nine other persons to do the same, justice requires that his promise should be held binding on him as soon as it has procured the nine others to pay £ 100 each; but the act done by the institution is not a benefit to him nor a detriment to the institution." A trend of this kind is observable in a decision of the Supreme Court.[19] On the death of their father, his two sons picked up a clash. Their mother intervened writing to the junior son that in case his elder brother did not pay the sum of rupees fifty lakhs which was due to him out of the family assets, she would pay the same. The brother paid a part of the amount. The mother supplemented the payment to a certain extent, but she had still to pay the balance amount and for that she claimed a reduction in the computation of her net wealth. The Court allowed the deduction. The contract was a part of the family arrangement. It was not hit by Section 25 as purchase of family peace in such circumstances is good consideration.

*Promises of Charitable Nature*

The decision of the Calcutta High Court in *Kedar Nath* case was followed by the Madras High Court in two cases in both of which the court laid down that "a promise to pay a subscription becomes enforceable as soon as any definite steps have been taken in furtherance of the object and on the faith of the promised subscription".[20] In one of these cases:

> A sum of Rs 5,000 was promised by the defendant as a personal contribution for the purpose of constructing a bridge. He was held liable to pay the amount on the completion of the bridge.[21]

In a subsequent case, *Doraswami Iyer* v *Arunachala Ayyar*[22], the Madras High Court explained the principle of *Kedar Nath* v *Gorie Mahomed* on the footing that there was not a bare promise to subscribe, but also a request that the promisee should do an act (construction of the town hall in that case), and that where there is

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18. *Supra* at pp. 2-3.
19. *CWT* v *Her Highness Vijayaba*, (1979) 2 SCC 213: AIR 1979 SC 982.
20. *Perumal Mudaliar* v *Sendanatha Mudaliar*, AIR 1918 Mad 311. In this case, the court added: "The fact that a similar promise in England may not be enforced by the court of law is not conclusive of the question, as the definition of consideration in the Indian Contract Act is wider and more comprehensive than is accepted in the English courts."
21. *District Board of Ramnad* v *Mohd Ibrahim*, AIR 1933 Mad 524: 64 MLJ 574. There are some English authorities to the same effect. *See*, for example, *Soames, Re*, (1837) 13 TLR 439. In this case *S* promised to leave the plaintiffs £ 3,000 by will for opening of a school and its maintenance. The plaintiffs immediately established the school, which it was clear they would not have done but for Miss Soame's influence. But her will contained no such bequest. It was held that the plaintiffs were entitled to be paid £ 3,000 from the estate by way of damages for breach of contract. Another case to the same effect is *Mountgarret, Re*, (1913) 29 TLR 325. A testator promised to defray the cost of certain alterations in a Chapel in which he was interested, provided the total expense did not exceed a certain amount. Estimates were obtained and submitted to the testator, and thereafter the Provost of the Chapel entered into a formal contract for the work. The testator died after some of the work had been executed, but before a contract for the remainder had been entered into. Held, that the testator's estate was liable for the cost of so much only of the work in respect of which a contract had been entered into before the testator's death.
22. AIR 1936 Mad 135.

no such request for an act the promise will be a bare promise and without any consideration. The facts of the case were:

> The repair of a temple was in progress. As the work proceeded, more money was required and to raise this money subscriptions were invited and a subscription list raised. The defendant put himself down on the list for Rs 125 and it was to recover this sum that the suit was filed.

But no recovery was allowed. CORNISH J proceeded like this:

> The plaint found the consideration for the promise as follows: That plaintiffs relying on the promise of the subscriber incurred liabilities in repairing the temple. The question is, does this amount to a consideration? The definition of consideration in the Contract Act is that where at the desire of the promisor the promisee has done or abstained from doing something, such act or abstinence is called consideration. Therefore, the definition postulates that the promisee must have acted on something amounting to more than a bare promise. There must be some bargain between them in respect of which consideration has been given.... There must have been some request by the promisor to the promisee to do something in consideration of the promised subscription.

The learned judge found support in the English case of *Hudson, Re*[23] where the promise was to contribute a large sum of money for the payment of Chapel debts, the promisor having died after paying a large instalment, the balance could not be recovered from his executors. The claim was considered to be unsustainable in as much as the promisee had not undertaken any liability as part of the bargain with the promisor. Applying these principles to the present case, the learned judge said that there was no evidence of any request by the subscriber to the plaintiff to do the temple repairs.

The principal difference between these cases is that in the *Kedar Nath* case the construction of the hall began on the faith of the promised subscriptions, but in the present case, temple repairs were already in progress when the subscriptions were invited. The action was not induced by the promise to subscribe but was rather independent of it.

### *Unilateral Promises*

A unilateral promise is a promise from one side only and is intended to induce some action by the other party. The promisee is not bound to act, for he gives no promise from his side. But if he carries out the act desired by the promisor, he can hold the promisor to his promise. His act is at the same time an acceptance of and a consideration for the promise. "An act done at the request of the offeror in response to his promise is consideration, and consideration in its essence is nothing else but response to such a request."[24]

It should be noted that in all the above cases where liability arose it arose only when the promisee had by doing some act, on the faith of the promise, altered his position. It follows, therefore, that where the promisee has done nothing, there is no consideration. Accordingly, in *Abdul Aziz* v *Masum Ali*,[25] the defendant promised

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23. 54 LJ Ch 811.
24. C.J. Hamson, *The Reform of Consideration*, (1938) 54 LQR 233, 234.
25. AIR 1914 All 22: 36 All 268.

Rs 500 to a fund started to rebuild a mosque but nothing had been done to carry out the repairs and reconstruction. The subscriber was, therefore, held not liable. Similarly, it has been pointed out in other cases that a mere promise to subscribe to a charitable institution cannot be sued upon.[26] Thus where the defendant had agreed to pay from time to time, out of his own pocket certain sums proportionate to the value of the goods imported by him, to a charitable society, the promise was held to be not enforceable, being without consideration.[27]

*Revocation of Unilateral Promises*

There is yet another problem concerning such unilateral contracts. It is no doubt true that a promise which is given in return for an act is revocable before the promisee begins to alter his position by acting upon the promise. But may it be revoked after the promisee has commenced performance? If, for example, the promise is to pay a sum of money if the promisee walks from Lucknow to Kanpur, can it be revoked after the promisee has embarked upon the journey? The decision in *Kedar Nath* v *Gorie Mohammad*[28] suggests, though not in so many words, that such a revocation is impossible. The defendant, in that case, was held liable as soon as the contract for the construction of the hall was entered into.

The same appears from the decision of DENNING LJ in *Errington* v *Errington*.[29] The owner of a house had mortgaged it. The house was in the occupation of his son and daughter-in-law. He told them that the house would become their property if they paid off the mortgage debt in instalments and they commenced payment. In these circumstances, the court felt, that it would be unjust if the promisor could revoke this promise at his pleasure. His Lordship said:

> "The father's promise was a unilateral contract...a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed."[30]

Either way there is some difficulty. If the promisor is at liberty to revoke, he can frustrate the promisee at his pleasure. On the other hand, if he has no such liberty, he will be bound even though the promisee may stop performance at his sweet will. The House of Lords, therefore, suggested in *Morrison Steamship Co Ltd* v *The Crown*[31] that the mere commencement of performance does not convert the offer into a contract in the sense that the promisor is bound to stay with his promise, but that if he revokes it, he may be sued for damages or on a *quantum meruit*.[32]

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26. See *Gopal (Dr)* v *Trimbak*, AIR 1952 Nag 195; *Doraswami* v *Arunachala*, AIR 1936 Mad 135; *Jiban Krishna Mullick* v *Nirupama Gupta*, (1926) 53 Cal 922; *CIT* v *Kameshwar Singh*, AIR 1953 Pat 231. In this case an assessee purchased Government securities and had agreed that the amount of interest on them would be paid to the Viceroy's War Purposes Fund for the duration of war—held, that the agreement was not legally enforceable. For an English authority see *Hudson, Re*, (1885) 33 WR 819. Prejudice to rights is essential for the representation to be actionable under this rule. *Societe Italo—Belge Pourle* v *Palm & Veg. Oils*, (1982) 1 All ER 19.
27. *Jamuna Das* v *Ram Kumar*, AIR 1937 Pat 358: 169 IC 396.
28. ILR (1886) 14 Cal 64.
29. (1952) 1 KB 290.
30. At p 295.
31. (1924) 20 LI LR 283.
32. For further reading *see* J.C. Smith, *Unilateral Contracts and Consideration*, (1953) 69 LQR 99 and 106. The Supreme Court has also held in *Lakshmanswami Mudaliar* v *LIC*, 1963 Supp (2) SCR 887, 888: AIR 1963 SC 1185, 1190: (1963) 33 Comp Cas 420, that the mere

*Promissory Estoppel and Government Agencies*

The position of the doctrine of promissory estoppel as against the Government and its agencies is thus summarised by RM SAHAI J of the Supreme Court in *Amrit Banaspati Co* v *State of Punjab*:[33]

> Law of promissory estoppel which found its most eloquent exposition in *Union of India* v *Indo Afghan Agencies*[34], crystallised in *Motilal Padampat Sugar Mills* v *State of UP*[35] as furnishing cause of action to a citizen, enforceable in a court of law, against the Government if it or its officials in the course of their authority extended any promise which created or was capable of creating legal relationship, and it was acted upon by the promisee, irrespective of any prejudice. It was reiterated in *Union of India* v *Godfrey Philips (India) Ltd*[36] and was taken further when it was held that no duty of excise was assessable on cigarettes manufactured by the assessee by including the cost of corrugated fibre board containers when it was clearly represented by the Central Board of Excise and Customs in response to the submission made by the Cigarette Manufacturers' Association and the representation was approved and accepted by the Central Government that the cost of containers would not be included in the value of cigarettes for the purpose of assessment of excise duty. In *Delhi Cloth and General Mills Ltd* v *Union of India*[37] it was held: 'All that is now required is that the party asserting the estoppel must have acted upon the assurance given to him. Must have relied upon the representation made to him. It means that the party has changed or altered his position by relying on the assurance or representation. The alteration of his position by the party is the only indispensable requirement of the doctrine. It is not necessary to prove further any damage, detriment or prejudice to the party asserting the estoppel.'

In *Pournami Oil Mills* v *State of Kerala*[38] the Government was not permitted to go back on its earlier promise of wider exemption from sales tax in pursuance of

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acceptance or retention of donated money does not amount to consideration so as to prevent the donor from recovering back his donation. *Subbash Chandra* v *Nagar Mahapalika*, AIR 1984 All 228, where the donee promised to spend Rs 100 on the maintenance of the gifted property. Held, no consideration; it was only a gift.

33. (1992) 2 SCC 411: AIR 1992 SC 1075, 1077.
34. (1968) 2 SCR 366: AIR 1968 SC 718.
35. (1979) 2 SCC 409: (1979) 2 SCR 641: AIR 1979 SC 621. *See* also *Y S Vivekananda Reddy* v *Govt of A P*, (1996) 1 Andh LT 760 FB, lease allotted and approved, subsequently cancelled because of recommendation of House Committee of Assembly, report without reasons, not proper, Government estopped from cancelling lease.
36. (1985) 4 SCC 369, 370: AIR 1986 SC 806.
37. (1988) 1 SCC 86: (1988) 1 SCR 383: AIR 1987 SC 2414, 2419.
38. 1986 Supp SCC 728: (1987) 1 SCR 654: AIR 1987 SC 590 writ jurisdiction is available when promissory estoppel is involved but not otherwise for enforcing a Govt. contract. *Chamundi Roller Flour Mills* v *FCI*, (1992) 1 Kar LJ 579 (Karn).

    For other instances where a contract was not allowed to be enforced by means of a writ see, *Radhakrishna Agarwal* v *State of Bihar*, (1977) 3 SCC 457: AIR 1977 SC 1496 and *Kulchhinder* v *Hardayal*, (1976) 3 SCC 828: AIR 1976 SC 2216. *Srikrishna Khandsari Sugar Mills* v *Sukhjeeha Industries*, (1997) 3 Andh WR 690, on a breach of contract a compromise decree was passed by a civil court which contained interim orders as to the subject-matter of the contract. On the same subject-matter a party filed a writ petition. The subject-matter being wholly contractual, writ remedy was not allowed. The answer is civil court proceedings. *Prakash* v *Union of India*, (1994) 2 Bom CR 53, even in matters of contract, the Government must act fairly (Govt. lessee in this case), writ petition lies against unfairness.

which certain industries were set up. A subsequent notification curtailing the exemption was held to be applicable to industries established after the notification.[39] A promise which is against public policy or in violation of a statutory prohibition cannot be the foundation of an estoppel.[40]

*Estoppel of Licensee*

The party who was granted liquor licence was held to be estopped from saying afterwards that some of the restrictions imposed upon his trade freedom, particularly the one under which the Government reserved with it the power to vary issue prices, were unreasonable. Unreasonableness has to be considered in the totality of the circumstances including public interest. Liquor consumption has to be reduced and, therefore, free trade of such an item cannot be encouraged. The power to vary issue prices is a method of exercising control of this trade. The courts will only prevent a crushing use of this power. Such power does not also offened Section 29 of the Contract Act because there is no uncertainty about the nature of the price variation clause. Its unreasonable use can always be prevented under writ jurisdiction.[41]

A person, who had acquired title to the land of a Council by adverse possession, agreed subsequently to hold the same under a term licence from the Council. On the expiry of the term the Council told him to hand over possession. He tried to assert his title by adverse possession. He was not allowed to do so. Whatever rights he had acquired became substituted under the new arrangement which he voluntarily accepted. The new arrangement constituted a promissory estoppel against him.[42]

## 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 which is to constitute a consideration may be done by "the promisee or any other person". It means, therefore, that as long as there is a consideration for a promise, it is immaterial who has furnished it. It may move from the promisee, or, if the promisor has no objection, from any other person. This principle had its genesis in the English common law, having been adopted by the Court of King's Bench as early as 1677 in *Dutton* v *Poole*:[43]

> A person had a daughter to marry and in order to provide her a marriage portion he intended to sell a wood of which he was possessed at the time. His son (the defendant) promised that if "the father would forbear to sell at his request he would pay the daughter £ 1,000". The father accordingly forbore but the defendant did not pay. The daughter and her husband sued the defendant for the amount.

It is clear that the defendant gave this promise to his father and it was the father alone who, by abstaining from selling the wood, had furnished consideration for the

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39. To the same effect, *Assistant Commr of Commercial Taxes* v *Dharmendra Trading Co*, (1988) 3 SCC 570: (1988) 3 SCR 946: AIR 1988 SC 1247.
40. Thus in *Amrit Banaspati Co* v *State of Punjab*, (1992) 3 SCC 411: AIR 1992 SC 1075, a promise to refund sales tax amounts already paid was held to be not capable of creating an estoppel.
41. *Lekh Raj* v *State of Rajasthan*, (1987) 1 Raj LR 661.
42. *Colchester Borough Council* v *Smith*, (1991) 2 All ER 29 Ch D.
43. Court of King's Bench, (1677) 2 Levinz 210: 83 ER 523.

promise. The plaintiff was neither privy to the contract "nor interested in the consideration". But it is equally clear that the whole object of the agreement was to provide a portion to the plaintiff. It would have been highly inequitable to allow the son to keep the wood and yet to deprive his sister of her portion. He was accordingly held liable. The court said:

> If a man should say, 'Give me a horse, I will give your son £ 10', the son may bring the action, because the gift was upon the consideration of a profit to the son, and the father is obliged by natural affection to provide for his children .... There was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children.

*Position of Beneficiary who is not Party*

Nearly two hundred years later in 1861 in *Tweddle* v *Atkinson*[44] the Court of Queen's Bench refused to follow this principle.

> The plaintiff was to be married to 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 the money. *G* failed to do so and the plaintiff sued his executors. WHITMAN J considered it to be an established principle "that no stranger to the consideration can take advantage of a contract, although made for his benefit".

Thus, although 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 of "privity of contract", which means that a contract is a contract between the parties only and no third person can sue upon it even if it is avowedly made for his benefit. Referring to this in *Drive Yourself Hire Co (London) Ltd* v *Strutt*[45] DENNING LJ suggested that the doctrine never arose until 1861 and then observed:[46]

> For the last two hundred years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract.[47]

The principle was affirmed by the House of Lords in *Dunlop Pneumatic Tyre Co* v *Selfridge & Co.*[48]

> 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

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44. 123 ER 762: 1 B&S 23, 393: 30 LJ QB 218: 4 LT 468.
45. (1954) 1 QB 250.
46. At p 272.
47. *See* a note by E.J.P. on *Privity* of *Contract,* (1954) 70 LQR 467 and also DENNING LJ in *Smith & Snipes Hall Farm Ltd* v *River Douglas Catchment Board,* (1949) 2 KB 500, 514.
48. (1915) AC 847.

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. Lord Viscount HALDANE most emphatically declared that:

> In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him.[49]

*Fundamental Propositions of English law*

Stated in other words the two fundamental propositions of English law referred to by his Lordship 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.[50]

(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.[51]

**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. The leading authority is the decision of the Madras High Court in *Chinnaya* v *Ramayya*:[52]

> 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

49. At p 853. As at present under the MRTP Act, 1969 resale price maintenance is against public policy and, therefore, void.

50. *See* Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 23rd edn by A.G. Guest, (1971), p 89; Cheshire and Fifoot, LAW OF CONTRACT, (8th edn, 1972), p 64.

51. *See* Anson, supra at p 370: Cheshire and Fifoot, *supra* at pp. 380-382; Arthur L. Corbin, *Contracts for the Benefit of Third Persons,* (1930) 46 LQR 12. In this article the learned writer maintains that the doctrine is not after all as dogmatic as the leading authors on the English Law of Contract assert, and says: "It should, therefore, be with a sense of humility and respect that any attempt is made to throw doubt upon what appears to be so well-settled a doctrine." *See also* Earnest H. Scammel, *Privity of Contract,* 8 CURRENT LEGAL PROBLEMS, 1955, p 131 at pp. 131-132, where the learned writer observes: "It is submitted, therefore, that the general rule of privity enunciated in *Tweddle* v *Atkinson* and adopted by the House of Lords in *Dunlop Pneumatic Tyre Co* v *Selfridge & Co,* is likely to continue to represent the law until the Legislature intervenes." Glanville Williams, *Contracts for Third Parties,* (1944) 7 Mod LR 123.

52. (1882) 4 Mad 137: 6 Ind Jur 402.

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 no consideration. Briefly, the whole situation was this: the defendant's promise was given to the plaintiff, but consideration was furnished by the plaintiff's sister. The court could have easily allowed the plaintiff to recover the annuity, as consideration given by "any other person" is equally effective. The court reached the same result but on a somewhat different ground. INNES J tried to equate the situation with the facts of *Dutton* v *Poole*. In that case the defendant's sister would have got her marriage portion but for the defendant's promise. In the present case also it appeared that the plaintiff was already receiving from her sister an annuity of like amount out of the estate and when the estate was handed over to the defendant 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 plaintiff of an amount which she was already receiving and it is a legal commonplace that if a promise causes some loss to the promisee, that is sufficient consideration for the promise. Thus the plaintiff had given consideration.

Justice KINDERSLEY also came to the same conclusion, but on a different ground. According to him the deed of gift and the defendant's promise to pay the annuity were executed simultaneously and, therefore, they should be regarded as one transaction and there was sufficient consideration for that transaction.[53]

American judicial opinion is in favour of this rule. In the words of the great American writer Williston: "The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason that why *A* should not be able for a consideration received from *B* to make an effective promise to *C*. Unquestionably he may in the form of a promissory note, and the same result is generally reached in this country in the case of an ordinary simple contract."[54]

**Privity of contract**

The rule of "privity of contract" which means that a stranger to contract cannot sue has taken firm roots in the English Common Law. But the principle has been generally criticised.[55] In 1937, the Law Revision Committee, under the chairmanship of Lord Wright, also criticised the doctrine and recommended its abolition. In its Sixth Interim Report the Committee stated:

> Where a contract by its express terms purports to confer a benefit directly on a third party, the third party shall be entitled to enforce the provision in his own name, provided that the promisor shall be entitled to raise against the third party any defence that would have been valid against the promisor....

53. For another illustration see *Samuel Pillai* v *Ananthanatha Pillai*, (1883) 6 Mad 351.
54. Samuel Williston, *Contracts for the Benefit of a Third Person*, (1901-2) 15 Harv LR 767.
55. Professor Corbin, *Contract for the Benefit of Third Person*, (1930) 46 LQR 12. *See also* (1933) 40 LQR 474. This is a critical note on a decision of the P.C. in which the doctrine of privity defeated a just claim.

Lord Justice DENNING has also criticised the rule in a number of recent cases,[56] in one of which his Lordship observed:[57]

> It (the privity principle) has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the Court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always, of course, to any defences that may be open on the writs.

In the subsequent case of *Beswick* v *Beswick*[58] the Court of Appeal adopted the same approach. In that case:

> *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.

It was held that she was entitled to enforce the agreement. Thus the plaintiff was allowed to enforce the agreement in her personal capacity, although she was not a party to it and it was considered not necessary to infer a trust in favour of the plaintiff. Lord DENNING MR concluded with the words:

> Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party or jointly with him or, if he refuses to join, by adding him as a defendant. In that sense, and it is a very real sense, the third person has a right arising by way of contract. He has an interest which will be protected by law. The observations to the contrary...are in my opinion erroneous. It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in *Dunlop Pneumatic Tyre Co* v *Selfridge & Co Ltd*[59] or when he is seeking to rely not on any right given to him by the contract, but on an exemption clause, seeking to exempt himself from his just liability.[60]

The case shows that a reform, as was recommended by the Law Revision Committee in 1937, is long overdue and if Parliament takes any step in this respect that would hardly be revolutionary.

Another such observation is to be seen through the words of STEYN L.J. in *Darlington BC* v *Wiltshier Northern Ltd*:[61]

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56. See *Smith & Snipes Hall Farm Ltd* v *River Douglas Catchment Board*, (1949) KB 500; and *Drive Yourself Hire Co, (London) Ltd* v *Strutt*, (1954) 1 QB 250.
57. In first of the above-stated cases, at pp. 514-515.
58. (1966) 3 All ER 1.
59. (1915) AC 857.
60. *Per* Lord DENNING MR at p 9.
61. (1995) 3 All ER 895 at 903-904.

"The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract. I will not struggle further with the point since nobody seriously asserts the contrary. . . . "

But the House of Lords did not approve the approach adopted by Lord DENNING MR and found for the plaintiff on a different ground.[62] Lord REID said that the plaintiff "in her personal capacity has no right to sue, but she has a right as administratrix of her husband's estate to require the appellant to perform this obligation under the agreement". Lord PEARCE put it like this: "The estate (though not the widow *personally)* can enforce it."[63]

In some earlier cases also the House of Lords showed no preference for Lord DENNING'S approach. For example, in *Scruttons Ltd* v *Midland Silicones Ltd*,[64] referring to the argument that the orthodox view which crystallised a century ago in *Tweddle* v *Atkinson* (1861) and finally established in *Dunlop* v *Selfridge* (1915) should be rejected, Viscount SIMOND said that "certain statements which appear to support it in recent cases such as *Smith* v *River Douglas Catchment Board*[65] and *White* v *John Warwick & Co Ltd*[66] must be rejected. If the principle of *jus quaesitum tertio* is to be introduced into our law, it must be done by Parliament after a due consideration of its merit and demerits". His Lordship emphasised that "the law is developed by the application of old principles to new circumstances. Therein lies its genesis. Its reform by the abrogation of those principles is the task not of the courts of law but of Parliament".

### *Position in India: Decisions following English law*

In India also there has been a great divergence of opinion in the courts as to how far a stranger to a contract can enforce it. There are many decided cases which declare that a contract cannot be enforced by a person who is not a party to it and that the rule in *Tweddle* v *Atkinson*[67] is as much applicable in India as it is in England. But there is no provision in the Contract Act either for or against the rule. The Privy Council extended the rule to India in its decision in *Jamna Das* v *Ram Autar*.[68]

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62. *Beswick* v *Beswick*, (1968) AC 58: (1967) 2 All ER 1197.
63. As cited in Anson, THE LAW OF CONTRACT, 388 (23rd edn, by A.G. Guest).
64. (1962) 1 All ER 1 HL: (1962) AC 446.
65. (1949) 2 KB 500: (1949) 2 All ER 179.
66. (1953) 2 All ER 1021: (1953) 1 WLR 1285.
67. 124 RR 610.
68. (1911) 30 IA 7: ILR 34 All 63. *See* also *Iswaram Pillai* v *Sonivaveru Taragan*, ILR (1913) 38 Mad 733; *Nanku Prasad Singh* v *Kamta Prasad Singh*, AIR 1923 PC 54; *Achuta Ram* v *Jainandan Tewary*, AIR 1926 Pat 474; *Ganesh Das* v *Mt. Banto*, (1935) 16 Lah 118: AIR 1935 Lah 354, and *Babu Ram Budhu Mal* v *Dhan Singh Bishan Singh*, AIR 1957 Punj 169. In the last-mentioned case the first mortgagee was not allowed to recover the money retained by the second mortgagee under the agreement between the owner and second mortgagee.

*A* borrowed Rs 40,000 by executing a mortgage of her zamindari in favour of *B*. Subsequently she sold the property to *C* for Rs 44,000 and allowed *C*, the purchaser, to retain Rs 40,000 of the price in order to redeem the mortgage if he thought fit. *B* sued *C* for the recovery of the mortgage money, but he could not succeed because he was no party to the agreement between *A* and *B*.

Lord MACNAUGHTAN, in his very short judgment, said that the undertaking to pay back the mortgagee was given by the defendant to his 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."[69]

Thus, where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie.[70] Similarly, where on a lease of certain *muafi* land, the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindar of certain sums which the *muafidar* was primarily bound to pay, it was held that the zamindar could not enforce this covenant by a suit against the lessees.[71] In still another case[72], the plaintiff could not get a decree against the appellant for his salary on the basis of an agreement entered into by the plaintiff with another person.[73]

In the opinion of RANKIN CJ this seems to be the effect of the Contract Act itself. In *Krishna Lal* v *Promila Bala*[74] he observed:

> Not only, however, is there nothing in Section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'.... In my judgment, it is erroneous...to suppose that in India persons who are not parties to a contract can be permitted to sue thereupon....[75]

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69. At p 9. *See* also *Food Corpn of India* v *D.R. Krishnamurthy*, (1987) 2 Mad LJ (Notes) 53, where the agent of a contractor was not allowed to enforce the contractor's claim; *Tham Saw Fong* v *Teh Teng Seng Realty*, (1990) 2 Current LJ 860, High Court, Ipoh, where the directors of a company were not permitted to sue a person who puported to sell land to their company and about whom they alleged that he defaulted in giving vacant possession.
70. *Subbu Chetti* v *Arunachalam Chettiar*, (1930) 53 Mad 270: AIR 1930 Mad 382.
71. *Mangal Sen* v *Mohd Hussain*, (1915) 37 All 115. *See* also *Panku Menon* v *Dharman Achan*, ILR (1917) 41 Mad 488; *Jiban Krishna Mullick* v *Nirupama Gupta*, AIR 1926 Cal 1009: 53 Cal 922.
72. *State of Bihar* v *Charanjitlal Chaddha*, AIR 1960 Pat 139. *See* also *Kasturamma* v *Venkatsurayya Garu*, (1915) 29 Mad LJ 538.
73. This line of thinking has been followed in insurance cases also. *See*, for example, *Shankar Vishvanath* v *Umabai*, ILR (1913) 37 Bom 471: 15 Bom LR 320, where the beneficiary of an insurance policy could claim no right under the contract between the assured and the insurance company because there was nothing to show that the plaintiff was either the promisor or the promisee and, therefore, a party to the agreement. *See* also *Oriental Government Security Life Assurance Ltd* v *Venteddu Ammiraju*, (1911) 35 Mad 162, where it was held that the contract between the company and the assured gives no right of action to the beneficiary named. Other cases on the point are—*Alice Vendepitte* v *Preferred Accident Insurance Co, New York*, AIR 1933 PC 11: 64 MLJ 133; *Des Raj Pahwa* v *The Concord of India Insurance Co Ltd*, AIR 1951 Punj 114; *Ram Narain Chaudhary* v *Pan Kauer*, (1934) 62 IA 16: AIR 1935 PC 9; *Harmam Singh* v *Purbi Devi*, AIR 2000 HP 108, an agreement for sale of land not allowed to be enforced by the brother of the contracting party.
74. AIR 1928 Cal 518: 55 Cal 1315.
75. At p 522. RANGNEKAR J of Bom HC expressed the same opinion in the case of *National Petroleum Co Ltd* v *Popat Mulji*, (1936) 60 Bom 954: AIR 1936 Bom 344. At p 994 he

Consequently, a Hindu assured's wife's action to recover the money due under her deceased husband's policy was rejected because she, though a nominee under the policy, was not a party to the contract between the deceased and the insurance company and no interest passed to her merely because she was named in the policy.[76]

*Decisions not following English Law*

There is, however, another line of thinking also which is mainly based upon an observation of the Privy Council in *Khwaja Muhammad Khan* v *Husaini Begum.*[77] 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 Indian courts are not bound by the rule in *Tweddle* v *Atkinson.*[78] Accordingly, it has been observed by the Madras High Court:[79]

> There is ample authority for the proposition that in this country, and indeed in a certain class of cases in England where a contract is made between '*A*' and '*B*' for the benefit of '*C*', '*C*' is entitled to sue the defaulting party. It is unnecessary to cite authorities, but the principle is firmly established for this country by the decision of the Privy Council in *Khwaja Muhammad Khan* v *Hussaini Begum.*[80]

Similarly, the Calcutta High Court observed:[81]

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observed: "In my opinion, in spite of the decisions to the contrary the proposition remains good in Indian Law that a person not a party to the contract is not entitled to maintain an action for the breach of that contract, and that seems to be clear from Section 2 of the Indian Contract Act itself read as a whole, and in particular the sub-clauses *(a)*, *(b)* and (*c*). The whole scheme of the section is that a promise comes into existence when one person signifies to another his willingness to do or abstain from doing anything, and the person making the proposal is the promisor, the person accepting the proposal is the promisee and every promise and every set of promises, forming the consideration for each other is an agreement between those two persons. In my opinion it is wrong to say that there is no provision in Indian Law in support of this principle, which has been well-established in England from very old times."

76. Other examples of the rule are: *Protapmull Rameswar* v *State of WB*, (1957) 61 Cal WN 78 and *Chhangamal Harpal Das* v *Dominion of India*, AIR 1957 Bom 276, 59 Bom LR 704. In the last-mentioned case the court held that a bare consignee, who is not a party to the contract of consignment, and who is not the owner of the goods, cannot maintain a suit for compensation for loss of or damage to the goods.

77. (1910) 37 IA 152: 12 Bom LR 638.

78. 124 RR 610.

79. *Muniswami Naicker* v *Vedachala Naicker*, AIR 1928 Mad 23.

80. (1910) 37 IA 152: 12 Bom LR 638.

81. *Kshirodbehari Dutt* v *Mangobinda*, (1932) 61 Cal 841: AIR 1934 Cal 682. *Per* Lord WILLIAMS J at p 857. *Raymond Woollen Mills Ltd* v *Coal India Ltd*, (1998) 1 Cal HN 53, where the court said that the doctrine of privity of contract has undergone a change in recent years and, therefore, a principal can initiate a legal action against a third party although the principal was only one of the beneficiaries under the contract. The court cited the decision of the High Court of Australia in *Trident General Insurance Co Ltd* v *McNiece Bros P Ltd*, (1989) Comm LR 1 where the court observed: "The long-established rule that a contract could be enforced only by the parties to that contract had caused considerable injustice and inconvenience in the context of contracts of liability insurance. The existence of the privity rule had provoked criticism by judges, academics and law reform agencies alike and in some

> Nor is there anything in the Indian Contract Act, which prevents the recognition of a right in a third party to enforce a contract made by others, which contains a provision for his benefit.

Again, JENKINS CJ said in another important case:[82]

> We now have ample authority for saying that the administration of justice in British India is not to be in any way hampered by the doctrine laid down in *Tweddle* v *Atkinson*.[83] That I take to be the result of the decision of the Privy Council in *Muhammad Khan* v *Hussaini Begum*.[84]

*Supreme Court upholds Privity*

The Supreme Court of India has expressed itself in favour of the rule in *Tweddle* v *Atkinson*. In *M.C. Chacko* v *State Bank of Travancore*[85], SHAH AG. CJ (afterwards CJ) endorsed the statement of RANKIN CJ in *Krishna Lal Sahu* v *Promila Bala Dasi*,[86] and after referring to the observation of Lord HALDANE in *Dunlop* v *Selfridge*, said:

> The Judicial Committee applied that rule in *Khwaja Muhammad Khan* v *Hussaini Begum*.[87] In a later case, *Jamna Das* v *Ram Autar*,[88] the Judicial Committee pointed out that the purchaser's contract to pay off a mortgage could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well-settled that except in the case of a beneficiary under a trust or in the case of a family arrangement, no right may be enforced by a person who is not a party to contract.[89]

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jurisdictions statutory abrogation of the rule had occurred. It would be unjust in the present case to apply the rule and preclude the respondent from enforcing the policy of insurance." The court also cited *Indian Mutual General Insurance Society Ltd* v *Himalaya Finance and Construction Co*, AIR 1974 Delhi 114, where the ratio of the decision was that the owners of a vehicle who really have legal interest in the property could very easily come within the definition of beneficiary, though not party to the policy because the same was taken out by the hirer. *Khirodbehari Dutt* v *Mangobinda*, AIR 1934 Cal 682, where also an equity was inferred in favour of the beneficiary of the contract though not a party.

82. *Deb Narayan Datt* v *Chunni Lal Ghose*, ILR (1913) 41 Cal 137. The authorities on the point that English rule is not applicable in India are:
*Shappu Ammal* v *Subramaniyam*, (1910) 33 Mad 238: 19 MLJ 739; *Nehal Singh* v *Fateh Chand*, AIR 1922 All 426; *Arumuga Goundan* v *Chinamal*, (1911) 21 Mad LJ 918; *A. Singarayya* v *Subbayya*, (1924) 47 MLJ 517: AIR 1924 Mad 861; *Rose Fernandez* v *Joseph Gonsalves*, ILR (1924) 48 Bom 673: AIR 1925 Bom 97; *Sunderraja Aiyangar* v *Lakshmiammal*, (1915) 38 Mad 788; *Rakhma Bai* v *Govinda Moneshwar*, (1904) 6 Bom LR 421; *Dan Kuer* v *Mt. Sarla Devi*, (1946) 73 IA 208; *Veeramma* v *Appaya*, AIR 1957 AP 965; *Raua Uma Nath Bakhsh Singh* v *Jang Bahadur*, AIR 1938 PC 245; *Chaudhri Amir Ullah* v *Central Govt (Indian Dominion) through the Secretary, Indian Posts & Telegraphs Deptt*, (1959) All LJ 271; *Postmaster General, Patna* v *Ram Kripal Sahu*, AIR 1955 Pat 442; *Garudappa Peria Thiruwadi Ayyangar* v *Pokutti Janaki*, (1923) 45 MLJ 693: AIR 1924 Mad 103; *G. Ramaswami Aiyar Deivasigamani Pillai*, (1922) 43 MLJ 129: AIR 1923 Mad 585; *Dwarika Nath Ash* v *Priya Nath Malki*, (1917) 22 CWN 279; *Torabaz Khan* v *Nanak Chand*, AIR 1932 Lah 566; *Gauri Shankar* v *Mangal*, AIR 1933 Lah 178; *Des Raj* v *Audi Ram*, AIR 1952 Mys 109; *M.K. Rapai* v *John*, AIR 1965 Ker 203: 1964 Ker LJ 539; *Noratmal* v *Mohanlal*, AIR 1966 Raj 89: ILR (1966) 16 Raj 57.
83. 124 RR 610.
84. (1910) 37 IA 152: 12 Bom LR 638.
85. (1969) 2 SCC 343: (1970) 1 SCR 658: AIR 1970 SC 504.
86. Note 75 above.
87. 37 IA 152 (PC 1910): 12 Bom LR 638.
88. 39 IA 7 (PC 1911): 21 MLJ 1158.
89. *See* (1969) 2 SCC 343 at pp. 347-48. Reaffirmed by the Supreme Court in *P.R. Subramania*

The facts of the case were as follows:

> The Highland Bank was indebted to the State Bank of Travancore 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."

The representatives who held the properties of *K* would have been liable to pay out of the property if the action against them had not been time barred.

*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. Many of the exceptions are connected with the special branches of the law of contract, such as negotiable instruments, agency, bill of lading, railway receipts, transfer of property, etc. Some of the most commonly known exceptions may be considered here.

1. BENEFICIARIES UNDER TRUST OR CHARGE OR OTHER ARRANGEMENTS

A person in whose favour a charge or other interest in some specific property has been created may enforce it though he is not a party to the contract. The decision of the Privy Council in *Khwaja Muhammad Khan* v *Hussaini Begum*[90] is illustrative of this principle. The facts were:

> 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.

It was held that the respondent, although no party to the agreement, was clearly entitled to proceed in equity to enforce her claim. "Here the agreement executed by the defendant (appellant) specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff (respondent); she is the only person beneficially entitled under it."[91] An example of a trust in favour of a third party is to be

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*Iyer* v *Lakshmi Ammal*, (1973) 2 SCC 54. *Fatehchand Murlidhar* v *Maharashtra SEB*, AIR 1985 Bom 71, where it was held that where the supply of electricity was granted to the occupier of a premises, its owner could not be sued for dues, there being no privity.

90. (1910) 37 IA 152: 12 Bom LR 638. A contracting party cannot shift liability under the contract on to a third party which has no contractual relationship with the other contracting party, *Coats Viyella India Ltd* v *India Cement Ltd*, (2000) 9 SCC 376.

91. *Per* Amir Ali, J., at pp. 158-159. Another case on the point is *Shappu Ammal* v *Subramaniyam*, (1910) 33 Mad 238; *see* also *N. Devaraje* v *Kama Krishnath*, AIR 1952 Mys 109.

found in the facts of another Privy Council decision, namely, *Rana Uma Nath Bakhsh Singh* v *Jang Bahadur*:[92]

> *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.

It was held that in the circumstances mentioned above a trust was created in favour of *J* for the specified amount and the village. Hence he was entitled to maintain the suit.[93]

In England also there is a line of cases in which "trust" has been used as a device for holding the promisor to his promise. One such case is *Gregory & Parker* v *Williams*:[94]

> Parker was indebted to both Williams and Gregory. Parker assigned all his property to Williams in satisfaction of the debt and Williams promised to pay Parker's debt to Gregory. Williams failed to pay. But he was held liable to pay Gregory in terms of his promise with Parker.

Another illustration is *Touche* v *Metropolitan Railway Warehousing Co.*:[95]

> The plaintiff rendered services to the promoters of the defendant-company and they promised that he should receive £ 2,000 from the company. Later, when the company was formed, its articles of association provided that £ 2,000 should be paid to Walker, one of the promoters, for the benefit of the plaintiff.

The plaintiff sued the company in his own name. It was held that the defendant-company's promise was for the benefit of the plaintiff and that the plaintiff had the right to obtain the benefit of the arrangement entered into between the promoter and the company.

Trust may be actual or constructive. But in general the courts are slow to infer a constructive trust. Explaining the judicial approach in *Chacko* v *State Bank of Travancore*[96] SHAH, AG CJ (afterwards CJ) said:

> For creating a charge on immovable property no particular form of words is needed;. . . . But in order that a charge may be created, there must be evidence of intention disclosed by the deed that a specified property or fund was intended to be made liable to satisfy the debt. The recitals in the deed (in the present case) do not evidence any intention of the donor to create a charge in favour of the State Bank; they merely set out an arrangement between the donor and the members of his family that the liability under the guarantee will be satisfied by M.C. Chacko out of the property allotted to him under the deed.

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92. AIR 1938 PC 245.
93. In *Kshirodebehari Datta* v *Mangobinda*, (1933) 61 Cal 841: AIR 1934 Cal 682, Lord WILLIAMS J made an exhaustive study of such cases. For other Indian authorities, see *Torabaz Khan* v *Nanak Chand*, AIR 1932 Lah 566; *Gauri Shankar* v *Mangal Chand*, AIR 1933 Lah 178; *Nehal Singh* v *Fateh Chand*, (1922) 20 All LJ 708: AIR 1922 All 426; *Desh Raj* v *Ralli Ram*, AIR 1957 J&K 10; *M.K. Rapai* v *John*, AIR 1965 Ker 203.
94. (1817) 3 Mer 582: 36 ER 224.
95. (1871) 6 Ch 671.
96. Note 74 above. See further *Flavell, Re*, (1883) 53 LJ Ch 185 and *Schebsman, Re*, (1943) 2 All ER 768.

Constructive trust is created in favour of an addressee of insured articles and he can claim compensation from the Central Government on non-delivery of such articles.[1]

An airline company made arrangement with a hotel for accommodating its passengers. One of the passengers so accommodated was injured because of negligent maintenance of the hotel premises. His action directly against the hotel-keeper was allowed. The court said the doctrine of privity of contract is subject to many exceptions, one of them being that a beneficiary can sue on a contract which is meant only to provide some benefits to him.[2]

2. MARRIAGE SETTLEMENT, PARTITION OR OTHER FAMILY ARRANGEMENTS

Where an agreement is made in connection with marriage, partition or other family arrangement and a provision is made for the benefit of a person, he may take advantage of that agreement although he is no party to it. For example, in *Rose Fernandez* v *Joseph Gonsalves*,[3] a girl's father entered into an agreement for her marriage with the defendant, it was held that the girl after attaining majority could sue the defendant for damages for breach of the promise of marriage and the defendant could not take the plea that she was not a party to the agreement. Similarly, where two brothers, on a partition of joint properties, agreed to invest in equal shares a certain sum of money for the maintenance of their mother she was held entitled to require them to make the investment.[4] Also, where a daughter along with her husband agreed that she will maintain her mother if the property of the father is conveyed to them, the mother was held entitled to maintain a suit for specific performance although the agreement was between the father, daughter and the daughter's husband only and the mother was not a party to it.[5] Another interesting case is *Daropti* v *Jaspat Rai*.[6]

> The defendant's wife left him because of his cruelty. He then executed an agreement with her father, promising to treat her properly, and if he failed to do so, to pay her monthly maintenance and to provide her with a dwelling. Subsequently she was again ill-treated by the defendant and also driven out. She was held entitled to enforce the promise made by the defendant to her father.

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1. *Chaudhari Amir Ullah* v *Central Government*, 1959 All LJ 271 and *Postmaster General* v *Ram Kripal Sahu*, AIR 1955 Pat 442. *See* also *Nehal Singh* v *Fateh Chand*, AIR 1922 All 426: 20 ALJ 708; *A. Singarayya* v *A. Subbayya*, (1924) 47 MLJ 517: AIR 1924 Mad 861; *Thirwadi Ayyangar* v *P. Janaki*, (1923) 45 MLJ 693: AIR 1924 Mad 103.
2. *Klans Mittelbachert* v *East India Hotels Ltd*, AIR 1997 Delhi 221 at p 230. The court cited *Bhujendra Nath* v *Sushmamoyee Basu*, AIR 1936 Cal 67 where a beneficiary stranger was allowed to sue and also *Pandurang* v *Vishwanath*, AIR 1939 Nag 20. In *Greene* v *Chelsea Borough Council*, (1954) 2 All ER 318, the husband had taken premises on licence from the defendant. A ceiling fell on his wife injuring her. She was allowed to sue the owner in her own right as a beneficiary under the contract.
3. ILR (1924) 48 Bom 673: AIR 1925 Bom 97. *See* also *Sundarraja Aiyangar* v *Lakchmiamal*, (1915) 38 Mad 788; *Rakhma Bai* v *Govind Moreshwar*, (1904) 6 Bom LR 421; *Mst Dan Kuer* v *Mst Sarla Devi*, AIR 1947 PC 8: 73 IA 208; *Shappu Ammal* v *Subramaniyam*, (1910) ILR 33 Mad 238.
4. *Shappu Ammal* v *Subramaniyam*, (1910) ILR 33 Mad 238.
5. *Veeramma* v *Appayya*, AIR 1957 AP 965. *See* also *Arumuga Goundan* v *Chinnammal*, (1911) 21 Mad LJ 918.
6. (1905) PR 171 (Punjab Rec.).

3. ACKNOWLEDGMENT OR ESTOPPEL

Where by the terms of a contract a party is required to make a payment to a third person and he acknowledges it to that third person, a binding obligation is thereby incurred towards him. Acknowledgment may be express or implied. This exception covers cases where the promisor by his conduct, acknowledgment, or otherwise, constitutes himself an agent of the third party. The case of *Devaraja Urs* v *Ram Krishnaiah*[7] is a good example:

> *A* sold his house to *B* under a registered sale deed and left a part of the sale price in his hands desiring him to pay this amount to *C*, his creditor. Subsequently *B* made part-payments to *C* informing him that they were out of the sale price left with him and that the balance would be remitted immediately. *B*, however, failed to remit the balance and *C* sued him for the same.

The suit was held to be maintainable. "Though originally there was no privity of contract between *B* and *C*, *B* having subsequently acknowledged his liability, *C* was entitled to sue him for recovery of the amount."[8]

An illustration of acknowledgment by conduct is *Kshirodebehari Datta* v *Mangobinda Panda*:[9]

> The tenant and the sub-tenant of a piece of land agreed between themselves that the sub-tenant would pay the tenant's rent direct to the landlord. The agreement was acted upon by all the parties interested.

Under these circumstances the landlord was allowed to obtain a decree for his rent direct against the sub-tenant. In other words, the sub-tenant was estopped from denying his liability to pay the tenant's rent on the ground that there was no such contract between him and the landlord.[10]

In a tripartite building contract the builder contracting with his employer simultaneously agreed to be directly responsible to the owner of the building. It was held that the employer had no right to sue the builder for any loss caused to the owner by any deficiency in works. Such liability was incurred directly to the owner.[11]

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7. AIR 1952 Mys 109.
8. *See* also *Debnarayan Dutt* v *Chunnilal Ghose*, ILR (1913) 41 Cal 137; the judgment of JENKINS CJ who relied upon *Gregory* v *Williams*, (1817) 36 ER 224; *Touche* v *Metropolitan Warehousing Co*, 1871 LR 6 Ch 671; *Candy* v *Candy*, (1885) 30 Ch D 57 and certain other English cases. The soundness of this decision has never been doubted but the sweeping statement of his Lordship that the rule in *Tweddle* v *Atkinson* is not at all applicable in India, has been described to be too wide: *Per* BEAUMONT CJ at p 982 in *National Petroleum Co Ltd* v *Popat Mulji*, (1938) 60 Bom 954: AIR 1936 Bom 344. *See also* the criticism passed on this view by GHOSE J in *Krishna Lal* v *Promila Bala*, AIR 1928 Cal 518: 32 CWN 634: 55 Cal 1315; SHASHTRI J in *Subbu Chetti* v *Arunachalam*, AIR 1930 Mad 382: 53 Mad 270.
9. (1933) 61 Cal 841: AIR 1934 Cal 682. *See* also *Noratmal* v *Mohan Lal*, AIR 1966 Raj 89: ILR (1966) 16 Raj 57.
10. *See* also *Dwarika Nath Ash* v *Priyanath Malki*, (1917) 22 CWN 279, where the court imposed liability without any estoppel or acknowledgement.
11. *Panatown Ltd* v *Alfred McAlpine Construction Ltd*, (2000) 4 All ER 97 (HL).

4. COVENANTS RUNNING WITH LAND

The rule of privity may also be modified by the principles relating to transfer of immovable property. The principle of the famous case of *Tulk* v *Moxhay*[12] is that a person who purchases a land with notice that the owner of the land is bound by certain duties created by an agreement or covenant affecting the land, shall be bound by them although he was not a party to the agreement.

A modern illustration of the principle is *Smith & Snipes Hall Farm Ltd* v *River Douglas Catchment Board*:[13]

> The defendants (the Board) agreed with certain landowners adjoining a stream to improve the banks of the stream and to maintain them in good condition. The landlords on their part paid proportionate costs. Subsequently one of the landlords sold his land to the first plaintiff and he to the second plaintiff. There was negligence on the part of the Board in maintaining the banks, which burst and the land was flooded.

Both the plaintiffs were strangers to the agreement with the Board, but even so the Court of Appeal allowed them to sue the Board for breach of the contract, for the whole arrangement was for the benefit of the landowners whoever they might be and not merely the parties to the agreement.

Where the Central Government assigned a piece of land to its own corporate undertaking with all the rights, interests and privileges, it was held that privileges or rights to exemption from payment of land revenue which had accrued to the Central Government in respect of that land would also be available to the undertaking as a successor in interest to the Central Government.[14]

"...HAS DONE OR ABSTAINED FROM DOING...."

These words mean that consideration is an act which has already been done at the desire of the promisor, or is in progress or is promised to be done in future.[15] An act which has already been done in response to the promise is referred to as an executed consideration.

**Past Consideration**

It is an age-old principle of English law that consideration should be contemporaneous with the promise. Consideration, being the price for the promise, should be given in response to and as an inducement for the promise. If the act has been done before any promise is made, it is called past consideration and a past consideration is no consideration.[16] If, for example:

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12. (1919) 88 LJKB 861 HL: (1843-60) All ER Rep 9.
13. (1949) 2 KB 500: (1949) 2 All ER 179 (CA). *See* Andrew Tettenborn, *Covenants, Privity of Contract and the Purchase of Personal Property*, (1982) Camb LJ 59.
14. *Steel Authority of India Ltd* v *State of M P*, (1999) 4 SCC 76: AIR 1999 SC 1636.
15. See *Central Bank of India* v *Tarseema Compress Wood Mfg Co*, AIR 1997 Bom 225: (1997) 2 Bom CR 267, where the court said that consideration can be either past, present or future. Applying this to the case of a negotiable instrument, the court held that there being presumption of consideration, burden of proof was upon the person who said that there was no consideration to prove that fact.
16. *See* Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 23rd edn, (1972), p 85; Cheshire and Fifoot, THE LAW OF CONTRACT (8th edn, 1972), pp. 60-61; Street, FOUNDATIONS OF LIABILITY, Vol 281; P.S. Atiyah, AN INTRODUCTION TO THE LAW OF CONTRACT, (1961), pp. 60-61.

> *A* has lost his purse and *B*, a finder, delivers it to him. *A*, in recognition 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.[17] "The consideration and the promise ought to go together."[18] An example is *In re, McArdle*:[19]

> *A* effected certain improvements to property. The ultimate beneficiaries of the property signed a document declaring that: "In consideration of your carrying out certain alterations and improvements, we the beneficiaries shall repay to you the sum of £ 488 in settlement of the amount spent on such improvements." An action to enforce this promise was rejected.

JENKINS LJ said: "But the true position was that, as the work had in fact all been done and nothing remained to be done by the promisee at all, the consideration was wholly past consideration, and, therefore, the beneficiaries' agreement for the repayment to her out of the estate was *nudum pactum*, a promise with no consideration to support it."[20]

The rule involves inconvenience and hardship. If a person promises to pay for a past act, he means to recognise the past consideration and, therefore, should not be permitted to break his voluntary promise. The (English) Law Reform Committee has, therefore, recommended the abolition of the rule.[21]

### *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*[22] 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 him £ 100 and then refused to pay. He was, however, held liable.

The court observed: "A mere voluntary courtesy will not have consideration to uphold as assumpsit.[23] But if the courtsey were moved by a request of the party that gives the promise, it will bind, for the promise, though it follows, yet it is not naked, but it couples itself with the suit before."

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

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17. 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.
18. Street, FOUNDATIONS OF LEGAL LIABILITY, 281.
19. (1951) 1 Ch 669: (1951) 1 All ER 905.
20. *See* also *Savage* v *Umechia*, (1961) 1 WLR 455.
21. 6th Interim Report, para 32.
22. Hob 105: 80 ER 255.
23. *Assumpsit* was the name of a form of action (now abolished) from which the law of contract originated.

paid for and that subsequent promise is nothing but a fixation of reasonable compensation for the service.[24]

Besides this, two more exceptions have been admitted. A promise to pay a time-barred debt[25] and a negotiable instrument issued for a past consideration are both valid.[26]

*Position in India*

It is not necessary for the courts in India to follow the English rule as to past consideration.[27] A past consideration may arise in two ways. It may consist of services rendered at request but without any promise at the time or it may consist of voluntary services.

1. 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 subsequent promise to pay for the same. For example, to borrow an illustration from Anson:

> "If *A* saves *B* from drowning and *B* later promises *A* a reward."

Then in English law "*A* cannot rely on his action as consideration for *B's* promise for it is past in point of time".[28] But in India the promise would be enforceable by virtue of Section 25(2) which provides that "a promise to compensate, 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(*b*). 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 even 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*,[29] infer an implied promise. Every request for an act carries an

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24. *See*, for example, ERLE CJ in *Kennedy* v *Brown*, (1863) 13 CB 677: 143 ER 268; BOWEN LJ in *Re Casey's Patents*, (1892) 1 Ch 104.
25. Discussed more fully at the end of this chapter along with exceptions to consideration.
26. For this *see* Consideration for Negotiable Securities, in Avtar Singh, NEGOTIABLE INSTRUMENTS, 37-88 (1980). For the meaning of past consideration, see *Dwarampudi* v *K. Ramayya*, (1968) 1 SCR 43, 45: AIR 1968 SC 253: (1968) 1 MLJ 110.
27. *Devukutty Amma* v *Madhusudanan Nair*, (1995) 2 Ker LT 118, where it was observed that past consideration is good consideration under the Indian Contract Act and that it is a deviation from the English common law.
28. Anson's, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, (23rd edn, 1972) 86.
29. (1942) 1 All ER 200. *See* "Proposal" or "Offer" in the first chapter.

inbuilt promise to pay. In the words of BOWEN LJ in *Re Casey's Patents, Stewart* v *Casey*:[30]

> The fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered.

In that case, *J* and *T*, the joint owners of a patent, wrote a letter to their manager saying: "We now have pleasure in stating that in consideration of your services as the practical manager in working both our patents, we hereby agree to give you one-third share of the patents". The court held that "here for past services there is ample justification for the promise to give the third share."[31]

Pollock and Mulla have been heavily in favour of this interpretation of Section 2(*d*). The learned editor, Mr J.L. Kapur expresses his preference in these words:[32]

> They (the words 'has done or abstained from doing') declare the law to be that an act done by *A* at *B's* request, without any contemporaneous promise from *B*, may be a consideration for a subsequent promise from *B* to *A*.... The use of the perfect tense in the clause embodies in the law of India the exception to the general rule which is supposed to have been made by the seventeenth century case of *Lampleigh* v *Brathwait*.[33]

The Bombay High Court in *Sindha Shri Ganpat Singh* v *Abraham*[34] laid down 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. Explaining this in *Union of India* v *Chaman Lal Loona & Co*[35] S.K. DAS J of the Supreme Court said: "An executed consideration consists of an act for a promise. It is the act which forms the consideration. No contract is formed unless and until the act is performed, e.g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a *nudum pactum*. In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration."

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30. (1892) 1 Ch 1048, at p 115: 61 LJ Ch 61: 66 LT 93.
31. *See* the concluding words of BOWEN LJ's judgment.
32. (9th edn, 1972), pp. 41-42.
33. (1616) Hob 105: I Sm LC (13th edn,) 148: 80 ER 225.
34. ILR (1896) 20 Bom 755.
35. AIR 1957 SC 652: 1957 SCR 1039.

"In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the other. The contract is concluded as soon as promises are exchanged. In mercantile contracts this is by far the most common variety."[36]

*Executory Consideration*

Thus consideration may consist of an act which has already been, or is in the process of being done. It may also 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. To put it in a few words, consideration may, under Section 2(*d*), consist of a past, present or a future act.[37]

## "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.[38] 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. For example:

> *A* promises to give his new Rolls-Royce car to *B*, provided *B* will fetch it from the garage.[39]

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 words 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 of the law."[40] *White* v *Bluett*[41] may be cited as an illustration in point.

> The defendant owed a sum of money under a promissory note to his father. The defendant perpetually, day and night, complained to his father that he had not been treated equally with other children in the distribution of his property. Thereupon the father promised to discharge him from all liability in respect of the loan and the note, provided he would stop complaining, which the defendant accordingly did. The question was whether the defendant's promise to cease his complaints was a sufficient consideration to sustain his father's promise.

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36. *Ibid.*
37. *Pankaj Bhargava* v *Mohinder Nath*, (1991) 1 SCC 566 where the court in reference to Ss. 5 and 51 said that mere reciprocal promises are sufficient to constitute a contract.
38. See *Mannalal* v *Bank of Bengal*, (1876) 1 All 309, 311.
39. This problem is posed in Smith and Thomas, A CASEBOOK ON CONTRACT, 2nd edn, (1961), p 144.
40. *See* Anson, PRINCIPLE OF THE ENGLISH LAW OF CONTRACT, 22nd edn, by A.G. Guest, (1964), p 91.
41. (1853) 23 LJ Ex 36.

POLLOCK CB said: "It would be ridiculous to suppose that such promises could be binding. In reality there was no consideration whatever." In a later case a judge said that "a contract founded upon such an illusory consideration appears to be as invalid as a promise by a father made in consideration that his son would not bore him".[42]

In India also it has been laid down by SUBBA RAO J (afterwards CJ) of the Supreme Court in a case[43] that consideration "shall be 'something' which not only the parties regard but the law can also regard as having some value". Similarly, it has been observed by the Madras High Court:[44]

> Though the Indian Contract Act does not in terms provide that consideration must be good or valuable to sustain a contract it has always been understood that consideration means something which is of some value in the eyes of law. It must be real and not illusory, whether adequate or not.... So long as the consideration is not unreal it is sufficient if it be of slight value only.

But the courts have been very liberal in this respect and have always tried to find value in something to which parties attach value. Thus, a transfer of property "in consideration that the transferee shall accept the responsibility and discharge those recurrent religious services and ceremonies",[45] and a promise by a wife to pay off her husband's debts and to maintain his mother made in consideration of enjoying certain properties, were held to be for valuable consideration.[46]

### Value need not be adequate

It is not, however, necessary that consideration should be adequate to the promise. The courts can hardly assume the job of settling what should be the appropriate consideration for a promise. It is entirely for the parties. If a party gets what he has contracted for and if it is of some value, which may be great or small, the courts "will not enquire whether it was an equivalent to the promise which he gave in return".[47] "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.[48] This is the English rule and is applicable in India also, for Explanation 2 attached to Section 25 lays it down so clearly that "an agreement to which the

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42. HOOD J in *Dunton* v *Dunton*, Supreme Court of Victoria, (1892) 18 VLR 114.
43. *Chidambara* v *P.S. Renga*, AIR 1965 SC 193, 197: (1966) 1 SCR 168. The court also observed that in many respects the definition of consideration in S. 2(*d*) and that in *Currie* v *Misa* is the same.
44. *Kulasekaraperumal* v *Pathakutty*, AIR 1961 Mad 405: 74 Mad LW 16. See also *Sonia Bhatia* v *State of UP*, (1981) 2 SCC 585, where the Court explained the meaning of adequate consideration and held that it does not include love, affection or spiritual benefit as involved in a gift.
45. *Ramacharya* v *Shiv Nivascharya*, (1918) 20 Bom LR 441: 46 IC 19.
46. *Kulasekaraperumal* v *Pathakutty*, AIR 1961 Mad 405: 74 Mad LW 16.
47. Anson, PRINCIPLES OF THE LAW OF CONTRACT, 22nd edn, by Guest, (1964), p 91. *Desigowda* v *Karnataka Industrial Area Development Board*, AIR 1996 Kant 197, land acquisition, landholders agreed to receive compensation under S. 29(2) of the Karnataka Industrial Area Development Act, 1966, such agreement could not by itself be regarded as unconscionable or unreasonable, the court could not also examine inadequacy of agreed amount of compensation. *Vijaya Minerals Ltd* v *Bikash Chandra Deb*, AIR 1996 Cal 67, parties bargaining power equal for settling their terms, it is unbelievable that there would be inadequacy of consideration in such a situation and even if it is there the contract cannot be rendered nugatory on that ground.
48. BLACKBURN J in *Bolton* v *Madden*, 1873 LR 9 QB 55, 57.

consent of the promisor is freely given is not void merely because the consideration is inadequate". This is further fortified by illustration (*f*) 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*.[49]

> The defendants, who were newspaper proprietors, offered to answer inquiries 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 stock broker. 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.

Holding that there was, VAUGHAN WILLIAM J said: "Such publication might obviously have a tendency to increase the sale of the defendant's paper. I think that this offer, when accepted, resulted in a contract for good consideration."

The principle has been followed in this country also. The transfer of the goodwill and the whole of the assets of a business for a bare Rs 1000 has been upheld.[50]

**Inadequacy as evidence of imposition**

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

"A party seeking to set aside a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition."[51] For "once a court is satisfied that a person has entered into an agreement freely and with knowledge of its purport and effect", the agreement will be valid notwithstanding the inadequacy of consideration. Even where a transaction is avoided under this principle, it is not because of the inadequacy of consideration, but because of fraud or some other vitiating element. For "inadequacy of consideration may in circumstances suggest fraud, coercion, mistake and such like".[52] The same result would follow where the consideration is so markedly

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49. (1908) 1 KB 280. *See* also *A. Lakshmanaswami Mudaliar* v *LIC*, 1963 Supp (2) SCR 887: AIR 1963 SC 1185, where the Supreme Court discusses the concept of inadequacy.
50. *Devji Shivji* v *Karsandas Ramji*, AIR 1954 Pat 280. *See* also *Rai Bahadur H.P. Banerji* v *CIT, Bihar & Orissa*, (1940) 20 Pat 202: AIR 1941 Pat 59; *Administrator-General of Bengal* v *Juggeswar Roy*, ILR (1877) 3 Cal 192 (PC).
51. *Per* Lord WESTBURY in *Tennent* v *Tennents*, LR 2 Scot Ap 6, cited in *Administrator-General of Bengal* v *Juggeswar Roy*, (1877) 3 Cal 192 (PC), 196: 1 CLR 107.
52. *See* HARRISS CJ in *R.B. Banerji* v *Commissioner of Income Tax*, (1940) 20 Pat 202, 214: AIR 1941 Pat 59. *See* also *Bande Ali* v *Banaspat Singh*, (1882) 4 All 352: 1882 AWN 66 where

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. Subsequently she sued the defendant in tort and her damages were assessed at $ 21000. 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.[53]

**Forbearance to sue**

Forbearance to sue has always been regarded as valuable consideration. It is, indeed, a kind of abstinence, which is so very clearly recognised as good consideration in the definition itself. 'Forbearance to sue' means that the plaintiff has a certain right of action against the defendant or any other person[54] and on a promise by the defendant he refrains from bringing the action. The Patna High Court observed in a case that:[55]

> 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.

Another easy illustration is in a decision of the Kerala High Court:[56]

> Three depositors of a bank refrained from demanding payment of their deposits, although they had matured and become payable, as the director of the bank had given them a written agreement undertaking personal liability to return the amount with interest at 6% within 12 months.

This forbearance to withdraw the amount or press for its repayment was held to be sufficient consideration for the agreement within the meaning of Section 2(*d*).[57]

"An act or forbearance on the part of the creditor, though it may not be for a definite period, is a good consideration."[58] The compromise of doubtful rights has

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the Allahabad High Court set aside a bond executed for inadequate consideration as the circumstances revealed duress; *Bhimbat* v *Yeshwant Rao*, (1900) 25 Bom 126: 2 Bom LR 703.

53. *Pridmore* v *Calvert*, (1975) 54 DLR (3d) 133 (BCSC).
54. See *Jagindra Nath Roy* v *Chandra Nath Poddar*, (1903) 31 Cal 242.
55. *Debi Radha Rani* v *Ram Dass*, AIR 1941 Pat 282. *See* also *Indira Bai* v *Makarand*, AIR 1931 Nag 197, where another agreement of this kind was upheld, although the claim for maintenance was doubtful. *Also* see *Kastoori Devi* v *Chiranji Lal*, AIR 1960 All 446, where the withdrawal of a pending suit by a wife against her husband was held to be a good consideration for his promise to pay her maintenance.
56. *M. Ramiah* v *A. Sankaranarayana*, AIR 1958 Ker 246: 1958 Ker LJ 253.
57. *See* also *Dadabhoy Dajibhoy* v *Pestonji*, (1893) 17 Bom 457, where forbearance of the right to rescind a contract was held to be good consideration for an agreement; *Aya Ram Tola Ram* v *Sadhu*, AIR 1938 Lah 781.
58. See *Anant Krishna* v *Sarasvati Bai*, AIR 1928 Bom 316; *Srinivasa Raghava Aiyangar* v *K.R. Ranganatha Aiyangar*, (1918) 36 Mad LJ 618.

also been regarded as sufficient consideration for an agreement.[59] But there must be a *bona fide* claim and not merely one which is set up frivolously or vexatiously. "If there is in fact a serious claim honestly made, the abandonment of the claim is good consideration for a contract."[60] "If a person believes that he has a *bona fide* claim to enforce, his forbearance from trying to put that claim in a court and to have it decided will be a good consideration for a contract, however the claim, if brought, may be decided."[61] A claim set up on the basis of a false or forged "will" cannot sustain an agreement. Rejecting a claim of this kind in *Krishna Chandra* v *Hemaja Sankar Nandi*[62] the Calcutta High Court cited the following statement of Lord BLACKBURN:

> Of course, forbearance of a non-existing claim would not be forbearance at all.[63]

Again there can be no real forbearance unless the claim is immediately due. In *Mannalal* v *Bank of Bengal*:[64]

> A *hundi* debt had not yet matured when the acceptor of the *hundies* pledged his own house and shops as security for due payment in the event of their dishonour on maturity.

The court quite obviously came to the conclusion that there was no consideration for the pledge.[65]

### Compromise good irrespective of merits

Compromise of a pending suit is a good consideration for the agreement of compromise. But here also it is essential that the dispute should be *bona fide*, although the Patna High Court has held in a case that a compromise is binding even if the "suit was based on a false claim".[66] However, a compromise is a good consideration "irrespective of merits of the claim of either side", and even "where there is some doubt in the minds of the parties as to their respective rights".[67]

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59. *Rameshwar Prasad Singh* v *Lachmi Prasad Singh*, (1904) 31 Cal 111; *Olati Pulliah Chetti* v *Vardadajalu*, (1908) 31 Mad 474; *Indira Bai* v *Makarand*, AIR 1931 Nag 197; *United Provinces Government* v *Church Missionary Trust Association Ltd*, (1947) 22 Luck 93.
60. COTTON LJ in *Miles* v *New Zealand Alford Estate Co*, LR 32 Ch D 266, (1886) *cited* in *Krishna Chandra* v *Hemja Shanker Nandi*, (1917) 22 Cal WN 463.
61. *Gulabchand* v *Kamal Singh*, AIR 1922 All 260; *see* also *Vathyam Balrama Sastri* v *V.V. Sastri*, (1948) 1 Mad LJ 47 (PC); AIR 1948 PC 7; *Tinsukia Municipal Board* v *Harikissen*, AIR 1957 Ass 10.
62. (1917) 22 Cal WN 463.
63. *Cook* v *Wright*, (1861) 1 B & S 559.
64. (1876) ILR 1 All 309.
65. *See* also *Muttuharuppa Mudali* v *Kathapudayan*, (1914) 27 Mad LJ 249. Compare with *Srinivasa* v *K.R. Ranganatha*, (1918) 36 Mad LJ 618, where a forbearance to sue after a promissory note had reached its maturity was held to be for good consideration.

    For English authorities see *Alliance Bank* v *Broom*, (1864) 11 LT 332: 62 ER 631; *Fullerton* v *Provincial Bank of Ireland*, (1903) AC 309; *Glegg* v *Bromley*, (1912) 3 KB 474; *Hyarms* v *Stuart King*, (1908) 2 KB 696.
66. *Rameshar Mistri* v *Babulal Pandit*, AIR 1946 Pat 97; *M.M. Hussain* v *Laminated Package P Ltd*, (1999) 6 Andh LT 529, the surrender of a disputed title was recognised as good consideration. It is not necessary that consideration should always be investment in the shape of money.
67. *United Provinces Government* v *Church Missionary Trust Assn Ltd*, (1947) 22 Luck 93. *See* also *Sunder Singh* v *Haro*, (1929) 116 IC 719; *S.A. Ananthiarayan* v *Savithri Ammal*, (1913) 36 Mad 151; *Ram Kripal* v *Gaya Dat*, (1914) 12 All LJ 331. *Kailash Narain* v *Mahila*

An agreement to accept a new mortgage in substitution and in consideration of not enforcing the earlier mortgage, although the original was executed only by one person and the substitute by four persons[68] and an agreement to release a debtor and to accept a new debtor in his place have been sustained.[69] "An agreement to avoid further litigation is not an agreement void of consideration."[70] Similarly, it has been held that "where an agreement has been arrived at between certain members of a family that is designed to promote grace and goodwill, this by itself is a good consideration to support the transaction."[71] In a case before the Supreme Court[72] two brothers were quarelling over the division of their late father's property. Their mother persuaded the junior to give up the struggle on the promise that if the elder one did not provide him a sum of money she would subsidise him. The promise was held to be enforceable. It was given to purchase family peace and that was sufficient consideration.

## PERFORMANCE OF EXISTING DUTIES

### Performance of legal obligations

Consideration, it is generally said, must be something more than what the promisee is already bound to do. A person may be bound to do something by law or by contract. "Performance of a legal duty is no consideration for a promise." This principle of English law was adopted by the Madras High Court in *R. Sashannah Chetti* v *P. Ramaswami Chetti*[73] even before the Contract Act came into force, although the Act contains no provision on the point.

> The facts of the case were that 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.

The court observed: "It is quite clear that if a *sub poena* (summon) had been served, and the note had been given to compensate the plaintiff for his loss of time or other inconvenience, it would have been without consideration, because his attendance and the giving of evidence would have been merely the performance of a duty imposed upon him by law."[74] *Collins* v *Godefroy*[75] is an English authority to the same effect. Similarly, a promise to pay a sum of money to a police officer for investigating a crime will be without consideration if he is already bound to do so by law. "But doing or agreeing to do more than one's official duty will serve as

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*Manbhota*, AIR 1996 MP 194, compromise, allegation that it was induced by fraud not substantiated, the court entitled to pass decree in terms of compromise.

68. *Fanindra Narain Roy* v *Kacheman Bibi*, (1917) 45 Cal 774. *See* also *Amin Chand* v *Guni*, AIR 1929 Lah 466; *Anant Krishna* v *Sarasvati Bai*, AIR 1928 Bom 316.
69. *Mohesh Chandra Guha* v *Rajni Kanta Dutt*, (1915) 31 IC 29.
70. *Bhima* v *Nigappa*, (1868) 5 BHC 75 (Appeal Civil). *See* also *Chidambara Iyer* v *P.S. Renga Iyer*, (1966) 1 SCR 168: AIR 1966 SC 193, where a charitable institution gave up its rights for a transfer of a property to it, held, good consideration.
71. *Latif Jahan Begam* v *Mohd Nabi Khan*, AIR 1932 All 174.
72. *Commissioner of Wealth Tax* v *Vijayaba*, (1979) 2 SCC 213: AIR 1979 SC 982.
73. (1868) 4 MHC 7.
74. Following English authorities were relied upon; *Willis* v *Peckham*, 4 Moore 300; *Collins* v *Godefroy*, 1 B&Ad 950: (1831) 109 ER 1040: 9 LJ KB 158; *England* v *Davidson*, (1840) 9 LJ (QB) 287.
75. *Supra*.

consideration." As was observed by Lord DENMAN CJ in *England* v *Davidson*:[76] "I think there may be services which the constable is not bound to render and which he may, therefore, make the ground of a contract." Following this principle the Court allowed in that case a police officer who had given information leading to the conviction of a criminal to recover the reward offered by the defendant for such information. But in all such cases the court must make sure that the service rendered is really beyond the scope of official duty and not a mere pretence for extracting money. An American Judge remarked in a case that:

> If a constable for making extraordinary efforts to perform an ordinary official act, may not only receive, but may also collect by law a compensation beyond what the statute allows for the act, any other officer may do the same; and sheriffs, legislators and judges might, and soon would, put their extraordinary efforts in the market, to be had by the higher bidder. This is a sickening and revolting view of the subject:[77]

In an American case:

> A fireman was allowed to receive a reward offered by a husband to anyone who would rescue his wife from a burning building, dead or alive, because at great peril to his life and health he accomplished the rescue of her dead body and because the court found that as a fireman of the city he was not legally bound to risk his life in that rescue.[78]

The English case of *Glassbrook Brothers Ltd* v *Glamorgan County Council*[79] is another illustration of services rendered 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 force on the colliery premises. The police superintendent was prepared to provide what in his opinion was adequate protection by means of a mobile force, but refused to billet police 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 illegal in the agreement, nor was it void for want of consideration.

The court laid down that "although the police authority is bound to provide sufficient protection to life and property without payment, if in particular circumstances, at the request of an individual, they provide a special form of protection outside the scope of their public duty, they may demand payment for it".[80]

On the same principle, the mother of an illegitimate child, having been separated from the child's father, was allowed to enforce the father's promise to pay £ 1 per week for looking after the child, although she was herself under a statutory

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76. *Supra*, at p 59.
77. *Hogan* v *Stophelt*, Supreme Court of Illinois, (1899) 170 Ill 150; the judge cited this opinion from *Hatch* v *Mann*, 15 Wend NY 45. *See* Costigan, CASES ON CONTRACT, 3rd edn, p 309.
78. Costigan, CASES ON CONTRACT, 3rd edn, p 309.
79. (1925) AC 270.
80. Lord CARSON and Lord BLANESBURGH dissenting. *See* the speeches of Viscount CAVE LC Viscount FINLAY and Lord SHAW OF DUNFERMINE. The quotation is from the headnote to the report.

obligation to maintain the child.[81] Similarly, a married woman who had deserted her husband was allowed to enforce her husband's promise to pay her a weekly sum if she would maintain herself and lead a chaste life.[82] In the last-mentioned case DENNING LJ said:

> A promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest.[83]

**Performance of contractual obligations**

*A. Pre-existing Contract with Promisor*

Secondly, compliance with legal obligation imposed by a contract with the promisor can be no consideration for a promise. An illustration is supplied by the facts of *Ramchandra Chintaman* v *Kalu Raju*:[84]

> 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.

Rejecting the action, WESTROPPE CJ said: "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."

The better known illustration is the old English case of *Stilk* v *Myrick*:[85]

> In this case while a ship was on a voyage, two of the seamen deserted; and the captain, having in vain attempted to supply their places, entered into an agreement with the rest of the crew that if they work the ship home, they should have the wages of the two who had deserted equally divided among them.

Lord ELLENBOROUGH CJ held that the agreement was void for want of consideration in as much as it was the contractual duty of the mariners who remained with the ship to exert themselves utmost in any emergency of the voyage to bring the ship in safety to her destined port and the desertion of a part of the crew was definitely an emergency of the voyage.[86]

But where, in another case, 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.[87] The principle would seem to be that "where conditions have arisen under which a party is entitled to refuse to go ahead with his

81. *Ward* v *Byham*, (1956) 1 WLR 496: (1956) 2 All ER 318.
82. *Williams* v *Williams*, (1957) 1 WLR 148: (1957) 1 All ER 325.
83. At p 151.
84. (1877) 2 Bom 362.
85. (1809) 2 Camp 317: 11 RR 717: 170 ER 1168.
86. *See* also *Harris* v *Watson*, King's Bench 1791 Peake 102: 170 ER 94.
87. *Liston* v *Owners of S.S. Carpathian*, (1915) 2 KB 42. *See* also *Hartley* v *Ponsonby*, Queen's Bench (1857) 7 E&B 872: 119 ER 1471: 26 LJ QB 322: 29 LT 195, where the number of deserters was so great that only a few hands were left and, therefore, the captain's promise to pay them extra was held enforceable.

contract, a promise to pay him extra if he will not do so is valid".[88] Where the main contractor found that his sub-contractor was slow in progress and it was partly due to the low rates allowed to him. Partly for this reason and partly for the reason that the main contractor would fall under heavy penalties if the work was not completed in time, he promised more money to the sub-contractor for doing the same work which he had already undertaken and no additional work. He was held bound to pay the sub-contractor according to the increased rates.[89] It has been observed that the case provided an authority for the proposition that a promise to perform an existing obligation can amount to good consideration provided there are practical benefits to the promisee. This statement was not accepted to be a working principle in a subsequent case in which the payment of tax arrears was rescheduled to the acceptance of the Tax Collector, but the agreement was held to be not binding. An aggravating factor was that the taxpayer was not able to keep up the payment of instalments.[90] The court said: [91]

> "When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing."

The court continued to say that if there were no authority, like the decision in *Foakes* v *Beer*,[92] there would have been much to be said for the enforceability of such a contract. The same result was reached in another case involving part payment, namely *Re C (A debtor)*.[93] A person was under a statutory demand of the Legal Aid Board for about £ 16,500. He mailed a cheque for the lesser amount of £ 14,000 with a request for the Board to return the cheque if it was not acceptable in full settlement. The Board accepted the cheque but only "on account". Thus, it was not possible for the debtor to prove a promise by the Board to accept the lesser sum. These cases were distinguished from the decision in *Williams* v *Roffey Bros*.[94] Here money was promised to a contractor in excess of the amount for which he undertook to complete the project. The promise was intended to ensure the completion of the work in time. There was no evidence of any undue influence or exploitation by the contractor. The court overcame the effect of authorities by resorting to the doctrine of promissory estoppel. The best and simplest description of the doctrine and how it works is to be found in the following words of Lord DENNING:[95]

> "When a man, by his words or conduct, has led another to believe that he may safely act on the faith of them—and the other does act on them—he will not be allowed to go back on what he has said or done when it would be unjust and inequitable to do so."

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88. *See* Costigan, CASES ON CONTRACT, 3rd edn, p 322, f.n. 197; A.L. Goodhart, *Blackmail and Consideration in Contracts*, (1928) 44 LQR 436 and Samuel Williston, *Successive Promises of the same Performance*, (1894-95) 8 Har LR 27.
89. *Williams* v *Roffey Bros & Nickolls (Contractors) Ltd*, (1990) 1 All ER 612 CA.
90. *Selectmore Ltd, Re*, (1995) 2 All ER 531 CA.
91. *Ibid.* at p 538.
92. (1884) 9 App Cas 605.
93. May 11, 1994 (unreported). Noted in Norma J Hird and Ann Blair, *Minding Your Own Business—Williams* v *Roffey Revisited: Consideration Re-considered*, 1996 JBL 254.
94. (1990) 1 All ER 512.
95. THE DISCIPLINE OF LAW, 223. *See* for further study Adams and Brownsword, *Contract, Consideration and Critical Path*, (1995) Mod LR 536.

In a Canadian case[1], a contractor was carrying out a construction work for the completion of which the plaintiff was to supply steel at a fixed price. The plaintiff then found that steel prices were rising and, therefore, asked the contractor for an upward revision of the price for future supplies. The contractor orally accepted the revision and also accepted deliveries against invoices reflecting the increased price. The contractor, however, did not pay and the supplier sued for the difference. It was held that the price revision being without consideration, the contractor was not bound. The fact that he continued to accept supplies without repudiating the invoices did not create any promissory estoppel against him.[2]

*Promise to Pay Less than Amount Due*

On the same principle, a promise to pay less than what is due under a contract cannot be regarded as a consideration. This rule, having been laid down in an early case,[3] was thus formulated in *Pinnell* case.[4]

> "Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility can a lesser sum be a satisfaction to the plaintiff for a greater sum. 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; or otherwise, the plaintiff would not have accepted of it in satisfaction."

The rule was criticised by JESSEL MR in a case[5] where his Lordship said:

> According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit he chose, and that was accord and satisfaction but, by a most extraordinary peculiarity of the English Common Law, he cannot take 19s. 6d. in the pound.

Similarly, Earl of SELBORNE LC said in *Foakes* v *Beer*:[6]

> It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole) where held to be, generally, binding, . . . .

Despite this criticism the rule was unanimously affirmed by the House of Lords in the above-cited case:

> 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 agreed not to enforce the judgment. When the

1. *Gilbert Steel Ltd* v *University Construction Ltd*, (1976) 12 OR (2d) 19, CA.
2. *Gilbert Steel Ltd* v *University Construction Ltd*, (1976) 12 OR (2d) 19, CA. *See* also *Syros Shipping Co* v *Elaghill Trading Co*, (1981) 3 All ER 189 where a consignee's promise to pay extra money to the carrier was not allowed to be enforced.
3. 1495 YB 10 Hy vii for 4 p 14 (Anon).
4. (1602) 5 Co Rep 117a.
5. *Couldery* v *Bartrum*, (1881) 19 Ch D 394, 399.
6. (1884) 9 App Cas 605.

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 she accepted less in satisfaction of the whole and there was no consideration for her promise to accept anything less than the sum to which she was entitled.

*Exceptions to the Rule in Pinnel's case*

The Law Revision Committee in its report in 1937 recommended abolition of the rule.[7] But while no legislative action has followed the report, the courts have tried to avoid the awkward results of the rule by admitting exceptions to it.

1. PART-PAYMENT BY THIRD PARTY

In the first place, 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 proceeds 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.[8]

A debtor's wife has not been regarded as a third person for this purpose.

> The plaintiff had a claim of £ 480 against the defendant. To the knowledge of the defendant he was in desperate financial straits. Exploiting this knowledge they offered him only £ 300 in full satisfaction, which he accepted. The payment was made by the defendant's wife.

The plaintiff was allowed to recover the remaining £ 180 on two grounds, first, there was no consideration for the settlement and, second, there was no true accord because no person can insist upon a settlement procured by intimidation.[9]

2. COMPOSITION

Secondly, payment of a lesser sum is a good satisfaction for a larger sum where this is done in pursuance of an agreement of compromise entered into by the debtor with 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 a horse, hawk or robe, etc., in satisfaction is good."[10]

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7. 6th Interim Report, paras 35, 40.
8. *Hirachand Punamchand* v *Temple*, (1911) 2 KB 330, 331, CA.
9. *D & C Builders* v *Rees*, (1966) 2 QB 617, CA: (1965) 3 All ER 837.
10. See *Pinnel case*. Also *see* JESSEL MR in *Couldery* v *Bartrum*, (1881) 19 Ch D 394, 399.

4. PROMISSORY ESTOPPEL

The following statement of BOWEN LJ is an instructive expression of the principle of promissory estoppel.[11]

> 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 Enquiry to enforce the rights until such time has elapsed....

This principle is well-known in the United States[12] and seems to have been first applied in England in *Hughes* v *Metropolitan Railway Co*[13]

> A landlord had given notice to his tenant to repair the premises within six months, failing which the lease was to be forfeited. A month after this the landlord entered into negotiations for the sale of the land to the tenant and, consequently, during the period covered by the negotiations, the tenant carried out no repairs. The negotiations failed to materialise and shortly thereafter the period of six months expired and the landlord claimed the lease to have been forfeited.

But it was held that six months would run from the failure of the negotiations. The conduct of entering into negotiations was an implied promise on the part of the landlord to suspend the notice and the tenant had acted on it by not carrying out the repairs.

Another landmark in the development of this principle is the much debated case of *Central London Property Trust Ltd* v *High Trees House Ltd*[14] where DENNING J asserted "that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply".[15]

> The plaintiffs gave to the defendants a tenancy of a block of flats at a ground rent of £ 2500 a year for a period of 10 years. 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 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, but not for the arrears.

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11. *Birmingham & District Land Co* v *L. & N.W. Rly Co*, (1888) 40 Ch D 268, 286.
12. *See* for example, G.H.L. Fridman, *Promissory Estoppel*, (1957) 35 CBR 279. *See* also the Restatement, CONTRACTS, Section 90.
13. (1877) 2 App Cas 439.
14. (1947) 1 KB 130.
15. *Ibid.* at p 136. This statement of his Lordship has been the subject of what seems to be an unending debate. *See*, for example, J.F. Wilson, *Recent Developments in Estoppel*, (1951) 67 LQR 330. A comment on the case by Wilmot H. Broughall, (1947) 25 Can B Rev 510 ; Cheshire & Fifoot, *Central London Property Trust Ltd* v *High Trees House Ltd*, (1947) 63 LQR 283 ; L.A. Sheridan, *Equitable Estoppel Today*, (1952) 15 Mod LR 325, 328 ; A.G. Guest, *The New Estoppel, An English Development*, (1956) 30 Australian LJ 187 ; Fridman, *Promissory Estoppel*, (1957) 35 Can B Rev 279 ; Notes by R.F.M. in 63 LQR 278 and by J.H.C.M. in 64 LQR 28. For further insight see John P. Dawson, GIFTS AND PROMISES and P.S. Atiyah, PROMISES: MORALS AND LAW. The doctrine of promissory estoppel has no place in formally concluded contracts. See *C.V. Enterprises* v *Brathwaite & Co*, AIR 1984 Cal 386.

One of the questions was what was the consideration for the agreement to reduce the rent. Apparently there was none. But in the opinion of DENNING J there was no necessity of finding consideration in a case like this where the promise is not set up as cause of action, but only as a defence. 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 here was no consideration for the promise.[16]

Referring to the above principle in his judgment in *Combe* v *Combe*,[17] DENNING LJ said: "That principle does not create new cause of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties."

> In this case a wife obtained a decree *nisi* against her husband for divorce. She received a letter from the husband in confirmation of her own, as exchanged through solicitors, that he would make her £ 100 allowance a year. The husband did not make the payments and ultimately the wife brought an action to enforce the promise.

The Court of Appeal held that neither there was any consideration for promise nor was there any promissory estoppel against the husband. The husband never made a request that she should not enforce her normal right to maintenance, nor there was any undertaking on her part not to do so. Her abstinence was not the result of any promise of the husband.

Though promissory estoppel may not sustain a new cause of action, it is not necessarily confined to cases where the parties are bound by a subsisting contract and one of them promises not to enforce his normal contractual rights. The decision of the Court of Appeal in *Evenden* v *Guildford City Football Club*[18] marks a further extension of the boundaries of promissory estoppel. Lord DENNING MR stated that the doctrine of estoppel applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act on it and he does act on it. The facts were that the plaintiff had been working since 1955 as a groundsman in a supporters' club of a football club. In 1968 the football club itself acquired his services on the same terms and for the same work. In 1974 he was made redundant. He claimed redundancy benefit right from 1955 whereas the club proposed to pay him only from 1968. The principle of promissory estoppel was applied because there was a representation that his employment would be treated as continuous:

> That representation was intended to be binding and intended to be acted on. He did act on it. He did not claim from the supporters' club the redundancy payment to which he would otherwise have been entitled from that club. Six months later his claim against the supporters' club was barred by lapse of time.

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16. Where certain employees were induced to change their Department by holding out promises of better service conditions, the Supreme Court did not permit the Government to resile from its promise. ***Bhim Singh*** v ***State of Haryana***, (1981) 2 SCC 673.
17. (1951) 2 KB 215. But *see*, MP Thompson, *From Representation to Expectation, Estoppel as a Cause of Action*, 1983 Camb LJ 257.
18. (1975) 3 All ER 269, CA.

It would be most unfair for the football club to go back now on that representation. The employment must be treated as continuous for 19 years.

The House of Lords considered this line of cases in their decision in *Tool Metal Manufacturing Co Ltd* v *Tungsten Electric Co Ltd*,[19] and applied the principle of promissory estoppel to the facts of the case. Their Lordships held that where a party has suspended his normal rights under a contract, he can at any time by giving reasonable notice to the other resume them and a counter-claim based on those rights which was raised in an earlier case was a sufficient notice of the intention to resume the original rights. The Tool Metal Company was entitled to a fixed rate of compensation depending upon the quantity of material consumed by the Electric Co A new agreement being under preparation, the T.M. Co told the other company that they would not claim compensation in the meantime. The new agreement was not accepted by the Electric Co and, therefore, T.M. Co sought to restore its right to compensation and was allowed to do so for the future. The final shape of the principle of promissory estoppel as it has resulted from the line of cases has been stated by Lord HODSON while delivering the opinion of the Judicial Committee of the Privy Council in *F.A. Ajaji* v *R.T. Briscoe (Nigeria) Ltd.*[20]

> The principle is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications: (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.

A promise to pay more than the sum due under an existing contract may be equally void. A recent illustration is provided by a Canadian case in which there was agreement to supply steel at stated price for completing a construction contract. On account of rising steel prices it was orally agreed between parties that increased price would be charged. Subsequent deliveries were made and accepted on increased prices, but not paid for. The contractor was held to be not bound to pay the extra price, the revision agreement being without any consideration.[21]

*Position under Indian Contract Act different*

Luckily in India controversies of this kind are not likely to arise, for the Contract Act 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:

*(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.

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19. (1955) 2 All ER 657: (1955) 1 WLR 761.
20. (1964) 1 WLR 1326: (1964) 3 All ER 556.
21. *Gilbert Steel Ltd* v *University Construction Ltd*, (1976) 12 OR (2d) 19, CA.

(*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 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 *Shadwell* v *Shadwell*.[22]

> The plaintiff was already engaged to be married to a girl, named *EN*. His uncle, the defendant, sent him the following letter: 'I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £ 150 yearly during my life, and until your annual income derived from your profession of a Chancery barrister shall amount to 600 guineas.'

The question was what was the consideration for the uncle's promise. The majority judgment was delivered by ERLE CJ who found sufficient consideration to sustain the promise. According to his Lordship the promise of the annuity might have been intended as an inducement to the marriage. "The plaintiff may have made the most material changes in his position . . . and have incurred pecuniary liabilities resulting in embarrassments, which could be in every sense a loss, if the income which had been promised should be withheld." His lordship also noted that there was some benefit to the promisor as the marriage of a near relative is always an object of interest.

BYLES J dissented. In his opinion the letter disclosed no consideration. "Marriage of the plaintiff at the testator's express request would be, no doubt, an ample consideration; but the marriage of the plaintiff without the testator's request is no consideration to the testator..., for the plaintiff before the letter had already bound himself to marry, by placing himself not only under a moral but under a legal obligation, to marry and the testator knew it."[23]

To the same effect is the decision in *Scotson* v *Pegg*:[24]

> The plaintiffs were carrying a cargo of coal aboard their ship and had contracted with the charterer to deliver it to his order. The charterer ordered the coal to be delivered to the defendant. The defendant promised to unload the ship at a specified rate if the shipowner would deliver the coal to him. This the shipowner agreed to do, but the defendant delayed unloading for a few days putting the plaintiffs to loss. In an action by the plaintiffs to recover the loss, the defendant contended that there was no consideration for his promise as the

22. (1860) 9 CB (NS) 159: 142 ER 62: 127 RR 604.
23. Followed in India in *Indermal* v *Ram Prasad*, AIR 1970 MP 40, where a person who had agreed to execute a sale-deed did so only when a third person promised to give him a promissory note for Rs 30,000 held, that the promise was for consideration.
24. (1861) 30 LJ Ex 225: 158 ER 121: 123 RR 516.

shipowner was already bound by his contract with the charterer to deliver the cargo to him. Nevertheless the court held for the plaintiff.

WILDE B observed as follows:

> I accede to the proposition that if a person contracts with another to do a certain thing, he cannot make the performance of it a consideration for a new promise to the same individual. But there is no authority for the proposition that where there has been a promise to one person to do a certain thing, it is not possible to make a valid promise to another to do the same thing. Therefore, deciding this matter on principles it is plain to my mind that the delivery of the coals to the defendant was a good consideration for his promise, although the plaintiffs had made a previous contract to deliver them to the order of other persons.[25]

The principle of these cases has been followed in India by the High Court of Madhya Pradesh in *Gopal Co Ltd* v *Hazarilal Co*:[26]

> The plaintiff was under a contract to purchase some bales of cotton from a mill, but 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 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 defendants contended that their promise was void for want of consideration as the plaintiff was already bound to take the cotton. The court reviewed English authorities and said: "From these decisions it appears that the second agreement brings into existence a new contract between different parties and therefore a promise to do a thing which the promisee is already bound to do under a contract with a third party can be good consideration to support a contract."

Here also the courts have to safeguard a party from being blackmailed into extra payment.

> A vessel was chartered to carry a consignment of tractors to Yemen. The freight was prepaid by the consignees. The charterers, however, defaulted in their payment of hire to the shipowners, because there was congestion at the port of discharge and the ship had proceeded to other ports. During this period the shipowners negotiated an extra payment by the consignees for the discharge of cargo. The consignees agreed to pay, but, after the cargo was discharged, refused to make the payment.

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25. The principle established by these two cases has been discussed in a number of articles. *See*, for example, Samuel Williston, *Successive Promises of the Same Performance*, (1894) 8 Harv LR 27 ; James Barr Ames, *Two Theories of Considerations*, (1898) 12 Harv LR 515 and (1899) 13 Harv LR 29 ; C.C. Langdell, *Mutual Promises as a Consideration for Each Other*, (1900) 14 Harv LR 496 ; Joseph H. Berle Jr., *Notes on Consideration*, (1903) 17 Harv LR 71 ; *Consideration in Bilateral Contract*, by Samuel Williston, (1914) 27 Harv LR 503 ; C.J. Hamson, *The Reform of Consideration*, (1938) 54 LQR 233 ; Frederick Pollock, *Afterthoughts on Consideration*, (1901) 17 LQR 415 ; Cheshire & Fifoot, LAW OF CONTRACT, (1964) 6th edn, p 91 ; A.G. Davis, *Promises to Performance of Existing Duty*, (1938) 6 Camb LJ 202.

26. AIR 1963 MP 37.

It was held that the promise of extra payment did not create any estoppel against the consignees. There being no consideration for the promise, it was not enforceable.[27]

**Consideration and motive**

Consideration should be distinguished from motive or a pious desire to fulfil an obligation. "Motive is not the same thing with consideration." This well-known phrase occurs in the judgment of PATTERSON J in *Thomas* v *Thomas*:[28]

> A testator had declared in his will that he was desirous that his wife should enjoy certain premises for her life. The executor of the will in consideration of such desire agreed with the widow to convey her the premises provided she would pay the sum of £ 1 yearly towards the ground rent.

The court pointed out that the cause for the gift was unquestionable respect for the memory of the testator. But a motive should not be confounded with consideration. The agreement was, however, held to be binding as the undertaking to pay the ground rent was a sufficient consideration.[29]

## EXCEPTIONS TO CONSIDERATION

**Contracts under seal in English Law**

In English law a contract under seal is enforceable without consideration. In the words of Anson: "English law recognises only two kinds of contract, the contract made by deed that is under seal, which is called a deed or speciality, and the simple contract."[30] A contract under seal means a contract which is in writing and which is "signed, sealed and delivered."

**Exceptions under Section 25, Contract Act**

Indian law, however, does not recognise any such exception. But Section 25 of the Contract Act lays down a few exceptions.

> **25. An agreement made without consideration is void, unless—**
>
> **(1) it is in writing and registered.**—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) or is a promise to compensate for something done.**—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; unless.

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27. *Syros Shipping Co, SA* v *Elaghill Trading Co*, (1981) 3 All ER 189, QBD.
28. (1842) 2 QB 851, 859.
29. For another illustration see *Eastwood* v *Kenyon*, (1840) 11 Ad and El 438: 113 ER 482: 52 RR 400: 9 LJ QB 409. The distinction thus drawn between a moral obligation and consideration has been approved by the Madhya Pradesh High Court in *Gopal Co Ltd* v *Hazarilal Co*, AIR 1963 MP 37. *See* at p 40.
30. PRINCIPLES OF THE LAW OF CONTRACT, 22nd edn A.G. Guest, (1964), p 65.

(3) **or is a promise to pay a debt barred by limitation law.**—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 not 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 promisor was freely 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 contract.

(*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.

(*f*) *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.

(*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 essence of the first exception is that a written and registered agreement based on natural love and affection between near relatives is enforceable without consideration.[31] Who is a near relative? The Act provides no guidance, nor has the expression been judicially construed. The expression will without doubt include

31. Love and affection has to be the basis of the promise because otherwise such emotional expressions and such human sentiments cannot take the place of consideration in the material sense of the word. See *Surendra Behari Lal* v *Jodonath*, 1984 All LJ (NOC) 21, transfer of a house allotted to a member to his brother-in-law, held void for want of consideration.

parties related by blood or marriage.[32] 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*:[33]

> The defendant promised to pay his wife a fixed sum of money every month for 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 quarrels had compelled them to separate.[34]

With this should be contrasted the decision of the Bombay High Court in *Bhiwa* v *Shivaram*:[35]

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

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 that in order to be reconciled to him, he was willing to give him his property."[36]

A family settlement between a man and his wife was made for providing maintenance to wife. This was held to be enforceable because it was meant for deriving satisfaction and peace of mind from family harmony. So it could be interpreted either as a consideration or as love and affection.[37] The court followed the decision of the Supreme Court in *Ram Charan Das* v *Girja Nandini Devi*[38] where it was observed that "the courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property among members of a family. The word 'family' in this context is not to be understood in the narrow sense of being a group of persons who are recognised in law as having the right of succession or having a claim to a share in the property in dispute . . . . The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or

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32. See *Poonoo Bibee* v *Fyaz Buksh*, (1875) 15 BLR 5 (Appendix) which is an illustration on an agreement between husband and wife upon love and affection.
33. (1900) 4 Cal WN 488. Prize chits are not without consideration so as to attract S. 25. *Sanchaita Investment* v *State of WB*, AIR 1981 Cal 157.
34. *See* also *Appa Pillai* v *Ranga Pillai*, (1882) 6 Mad 71. In this case a member of an undivided Hindu family by a registered document renounced all rights in the family property in favour of the other members who agreed to maintain him in the family. This promise was held to be void as the plaintiff did not seem to have been moved by love and affection in renouncing his share.
35. (1899) 1 Bom LR 495.
36. *See* also *Ram Das* v *Kishan Devi*, AIR 1986 HP 9, a family settlement between cousins (brother and sister) to resolve disputes regarding family property on account of natural love and affection, held binding. The court recognised a cousin (brother) as a near relative.
37. *Manali Singhal* v *Ravi Singhal*, AIR 1999 Delhi 156.
38. AIR 1966 SC 323.

ensuring amity and goodwill among persons bearing relationship with one and another. That consideration having passed by each of the disputants, the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter." The same view was again reiterated in *Maturi Pullaiah* v *Maturi Narasimham*.[39]

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 other words, a promise to pay for a past voluntary service is binding. It is necessary to attract this exception that the service should have been rendered voluntarily[40] and also for the promisor. Thus where services were rendered for a company not then in existence, a subsequent promise to pay for them could not be brought within the exception.[41] But a promise made after attaining majority to pay for goods supplied to the promisor during minority has been held to be within the exception.[42] The court in that case said: "It is now settled law that a promise by an infant is in law a mere nullity and void, but we fail to see how an agreement made by a person of full age to compensate a promisee, who has already voluntarily done something for the promisor even at a time when the promisor was a minor does not fall within the purview of Section 25(2) of the Indian Contract Act. As at the time when the thing was done the minor was unable to contract, the person who did it for the minor must, in law, be taken to have done it voluntarily. But he has in fact *done something* for the minor, and if words mean anything at all, surely his case must be deemed to come within the scope of the Act."[43]

Earlier the Bombay High Court had held in *Sindha* v *Abraham*[44] that "services rendered at the desire of the minor expressed during his minority and continued at the same request after his majority form a good consideration for a subsequent express promise by him in favour of the person who rendered the services".[45]

Another situation covered by the exception is where the promisee has done something for the promisor "which the promisor was legally compellable to do". A subsequent promise to pay for the act is enforceable.

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39. AIR 1966 SC 1836.
40. See *T.V. Krishna Iyer* v *Official Liquidator of Cape Comorin General Traffic Co*, AIR 1952 TC 99, where it was held that the payment of bonus will not come under Section 25(2) as the employees render services in return for wages and not voluntarily. *See* also *Kalipa Das* v *Durgadas Roy*, (1923) 27 Cal WN 769 ; *Raja of Venkatagiri* v *Sri Krishnayya*, AIR 1948 PC 150.
41. *Ahmedabad Jubilee S. & M. Co* v *Chhotalal Chaganlal*, (1908) 10 Bom LR 141. An agreement between brothers if it was for some consideration, would be enforceable even if it does not satisfy the requirements of this section. An oral agreement to avoid future disputes and to distribute among themselves the father's share in a partnership was held to be enforceable outside this exception. *Ch Satyanarayana Murthy* v *Ch V R Rao*, (1988) 2 Mad LJ 93.
42. *Karam Chand* v *Basant Kaur*, (1911) Punjab Records No. 31, p 91. *See* also *Kundan Bibi* v *Shree Narayan*, (1906) 11 Cal WN 135, where a bond executed by a person for a loan allowed during his minority as well as at the time of the execution was held valid.
43. *Per* RATTIGAN J at pp. 108-109.
44. (1895) 20 Bom 755.
45. *See* also *Abdulla Khan* v *Parshottam*, 1947 Bom 807: AIR 1948 Bom 265, where it was pointed out that a promise given for any motive other than the desire to compensate the promisee would not be within the exception.

### 3. *Time-barred Debt*

Lastly, a promise to pay a time-barred debt is enforceable.[46] The promise should be in writing. It should also be signed by the promisor or "by his agent generally or specially authorised in that behalf."[47] The promise may be to pay the whole or any part of the debt. The debt must be such "of which the creditor might have enforced 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 original time-barred debt? The Bombay High Court has held that "a promise made by a person who is under no obligation to pay the debts of another... does not fall within the clause."[48] But in the opinion of the Madras High Court "the words 'by the person to be charged therewith' in Section 25(3) are wide enough to include the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning."[49]

An admission by the legal heir of a deceased debtor in his deposition in the court to the effect that he was willing to pay the principal time-barred amount was held to be a promise to pay making him liable.[50]

"The promise referred to in Section 25(3) must be an express one and cannot be held to be sufficient if the intention to pay is unexpressed and has to be gathered from a number of circumstances. There must be a distinct promise to pay before the document can be said to fall within the provisions of the section." Thus a debtor's letter to his creditor "to come and receive" what was due to him, was held to disclose no express promise. A brief note by the promisor on the back of the promissory note written at the expiry of the period of limitation that he had taken the loan and unaccompanied by any words promising or undertaking to pay, was held to be not sufficient to attract Section 25.[51] In another case there was a demand by a landlord for rent including time-barred rent. The tenant replied that the rent

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46. It is different from acknowledgment of liability because that has to be within the period of limitation, whereas under this exception the matter is ex hypothesi an already time-barred debt. Hence, the promisee gets new cause of action. *Umesh Chandra Chakravarty* v *Union Bank of India*, (1991) 1 Gau LR 223 ; *Ban Behari Deb* v *Ashit Kumar Deb*, (1991) 2 Gau LR (NOC) 41. A pronote executed for a time-barred debt was held to be enforceable, *Indian Bank* v *C. K. Syed Mohammed*, (1997) 2 Ker LJ 290.

47. *Devkutty Amma* v *Madhusudanan Nair*, (1995) 2 Ker LT 118, where the pronote did not seem to have been signed either by the promisor or by generally or specially authorised agent.

48. *Pestonji Manekji Mody* v *Bai Meherbai*, (1928) 30 Bom LR 1407.

49. *Paliyath Govinda Nair* v *Parekalalhil Achutan Nair*, AIR 1940 Mad 678.

50. *State Bank of India* v *Dalip Chandra Singh Deo*, AIR 1998 Ori 129. For distinction between acknowledgment under the Limitation Act, 1963 and promise to pay time-barred debt *see*, *Tebha Barihani* v *Prafulla Chandra Bhol*, (1998) AIHC 1184. For another case of undertaking by a Collector to pay a time-barred debt, see *Vizianagaram Central Consumers' Coop Stores Ltd* v *Govt of AP*, (1996) 2 Andh WR 75.

51. *Tulsi Ram* v *Same Singh*, AIR 1981 Del 165. *See* also *Ajit Chandra Bagchi* v *Harishpur Tea Co*, (1991) 1 Gau LR 180, a take over of the assets and liabilities of a business house does not amount to a promise to pay a time-barred debt; *Vimla Pradhan* v *United Commercial Bank*, 1990 MPLJ 819, promise to pay time-barred debt. *State Bank of India* v *Dalip Chandra Singh Deo*, (1999) 87 CLT 662, no definite understanding was spelt out that the defendant would clear the dues of his late mother. He had made one payment towards the over-drawn account and undertook in writing to clear the dues. Such undertaking was distinguished from a promise. *Rajnath Khetriya Gramin Bank* v *Taliram Gupta*, 1999 AIHC 2823 (MP), fresh pro-note executed, new period of limitation.

may be collected by cash or cheque, but mentioned no amount. This was not regarded by the court as a promise to pay time-barred debt.[52] As against it, in another case, where an acknowledgment of a debt was coupled with an agreement to pay interest, it was held to be an agreement with a promise to pay within the meaning of Section 25(3).[53] Similarly, where a tenant in a letter to the landlord referred to the arrears of time-barred rent and said: "I shall send by the end of the Vysakh month", it was held that the document contained the ingredients required by Section 25(3).[54] Where, in a reply to a notice, the authorised advocate stated that on receiving payment from a third person the account with the plaintiff will be settled, it was held that this amounted to a promise to pay.[55]

The Bombay High Court has given a new turn to this exception by holding that a statement in the balance sheet of a firm signed by a partner showing that the firm was indebted to the plaintiff in respect of the stated sum became an implied promise to pay.[56] In reply to a winding-up petition, the company admitted its liability and also promised to pay by a letter to the creditor. The debt being time-barred at the time, the letter revived it.[57]

**Gift actually made [S. 25 (Exp. 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.[58]

**Inadequacy of consideration [S. 25 (Exp. II)]**

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

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52. *Daulat Ram* v *Som Nath*, AIR 1981 Del 354. It is not necessary that the new promise should expressly mention the time-barred debt. *Bishambhar Dayal* v *Vishwanath*, AIR 1985 All 12. *Canara Bank* v *Vijay Shamrao Ghatole*, (1996) 5 Bom CR 338, a mere admission of liability, not sufficient to attract the section.
53. *Debi Prasad* v *Bhagwati Prasad*, AIR 1943 All 63. For another example, see *Baldev Raj Agarwal* v *State Bank of India*, AIR 2002 NOC 68 (Orissa).
54. *Appa Rao* v *Suryaprakash Rao*, (1899) 23 Mad 94.
55. *G. S. Panicker* v *K. Prabhakaran*, (1993) 2 Ker LJ 380: (1993) 2 Ker LT 417. The court followed *Noor Mohammad Rawther* v *Charu*, 1959 Ker LJ 168 and *Puliyath Govinda Nair* v *Parekalathil Achutan Nair*, AIR 1940 Mad 678 where it was held that "a promise to pay a part of the barred debt cannot be taken to be a promise to pay the whole of the debt. If a person promised to pay a portion of a barred debt, he can only be sued for that portion alone and not for the whole debt.
56. *R. Suresh Chandra & Co* v *Vadnese Chemical Works*, AIR 1991 Bom 44. *See* also *South Eastern Roadways* v *US State Agro Industrial Corpn Ltd*, (1993) 1 Bom CR 709, time-barred transporters' charges, recovery allowed under the section inferring a promise to pay from the debtor's reply to the claim that "the matter would be settled", it amounted to acknowledgment.
57. *Business Forms Ltd* v *Ashoka Agencies*, AIR 1996 Cal 153.
58. *Vasant Rajaram Narvekar* v *Ankushu*, (1995) 3 Bom CR 196.

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# *Capacity to Contract*

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

**11. Who are competent to contract.**—Every person is competent to contract who is of the age of majority according to law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Thus the section declares the following persons to be incompetent to contract—

(1) minors,

(2) persons of unsound mind, and

(3) persons disqualified by law to which they are subject.

## MINOR

### Age of majority

The age of majority is generally eighteen, except when a guardian of a minor's person or property has been appointed by the court, in which case it is twenty-one.[1] The age of majority of a person is to be determined "according to the law to which he is subject."[2]

In England the age of majority formerly was 21 years. But now under the Family Law Reform Act, 1969, "a minor is a person under the age of eighteen years". Formerly a minor was referred to as an "infant", but this Act has changed the term to "minor".

### Nature of minor's agreement

Section 10 requires that the parties to a contract must be competent and Section 11 declares that a minor is not competent. But neither section makes it clear whether, if a minor enters into an agreement, it would be voidable at his option or altogether void. These provisions had, therefore, quite naturally given rise to a

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1. The Indian Majority Act, 1875. Section 3, which reads:

   "Every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a court, or of whose property the superintendence is assumed by a court of wards, before the minor has attained the age of eighteen years, when he has completed the age of 21 years."

2. For Indian authorities on this point see: *Keshiba* v *Sripat*, ILR (1895) 19 Bom 697 ; *T.N.S. Firm* v *Mohd Hussain*, AIR 1933 Mad 756 ; *Raman Chettiar* v *Raman Chettiar*, AIR 1954 Mad 297 ; *Union of India* v *Braien*, AIR 1953 Cal 366 ; *Dhanrajmal Gobindram* v *Shamji Kalidas*, AIR 1961 SC 1285: (1961) 3 SCR 1020 ; *Rohilkhand and Kamaun Bank Ltd* v *Row*, (1885) 7 All 490. The section defines inherent competence to be a party to a contract, and not competence for being an agent or representative, etc. *Dharmashwar* v *Union of India*, AIR 1955 Ass 86.

controversy about the nature of a minor's agreement.[3] The controversy was only resolved in 1903 by the Judicial Committee of the Privy Council in their well-known pronouncement in *Mohoribibi* v *Dharmodas Ghose*.[4] Sir Lord NORTH observed:

> "Looking at Section 11 their Lordships are satisfied that the Act makes it essential that all contracting parties should be competent to contract and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant."

Ever since this decision it has not been doubted that a minor's agreement is absolutely void. In England also the Infants' Relief Act[5] of 1874 declares the following categories of a minor's agreement to be "absolutely void".

(1) contract for repayment of money lent or to be lent, or

(2) contract for goods supplied or to be supplied (other than necessary), and

(3) contract for accounts stated.[6]

Any other rule would have made the law asymmetrical leaving it to the whim of a child to pick and choose between agreements made by him which he will and which he will not enforce. A child may show poor judgment in making a particular contract, and it is a protection against his own ignorance and immaturity—not merely fraudulent manipulation by others—that the law affords. The general presumption that every man is the best judge of his own interests is suspended in the case of children.[7]

The ruling of the Privy Council in the *Mohoribibi* case has been generally followed by the courts in India and applied both to the advantage and disadvantage of minors. Another decision of the Privy Council in line is *Mir Sarwarjan* v *Fakhruddin Mohd Chowdhury*.[8]

> "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; that as the minor was not bound by the contract, there was no mutuality; and that consequently the minor could not obtain specific performance of the contract.

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3. *See*, for example, *Raj Coomari* v *Pero Madhub Nandi*, 1 CWN 453 ; *Boide Nath Dey* v *Ram Kishore Dey*, 10 Bengal Law Reports 326 ; *Sarat Chand Mitter* v *Mohan Bibi*, 25 Cal 371 ; *Dhunmall* v *Ram Chandra Ghose*, 2 CWN 18. Of the four requirements of a contract, S. 25 tells the effect of absence of consideration, Sections 15-22, the effect of absence of free consent, and Sections 23 and 24 of illegality. There is no provision as to the effect of incompetency.
4. (1903) 30 IA 114: 30 Cal 539.
5. 37 and 38 Vict C 62.
6. But, apart from these categories, the contract of an infant may be either valid or voidable at his option. *See* Anson's PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 22nd edn by A.G. Guest, (1964), p 178.
7. Anthony T. Kronman, *Paternalism and the Law of Contract*, (1988) 92 Yale LJ 763, 786.
8. (1912) 39 Cal 232 (PC). Also followed in *Ma Hn It* v *Hashim*, (1920) 22 Bom LR 531 PC.

In its subsequent pronouncement in *Subramanyam* v *Subba Rao*[9] the Privy Council overruled earlier decisions and entertained no doubt that it was within the powers of the mother of a minor as guardian to enter into a contract of sale for the purpose of discharging his father's debts. Following this decision the Orissa High Court held that endowment of property for religious purposes by guardians on behalf of minors, being within their competence, was specifically enforceable.[10] The other High Courts have also expressed the view that the doctrine of mutuality should not have been imported into the matter where the contract was within the competence of the guardian and that there is no scope for this doctrine under S. 20 of the Specific Relief Act, 1963.[11] If the contract is within the competence of the guardian and it is for the benefit of the minor it is specifically enforceable.[12]

In today's society it does not seem to be possible, much less desirable, for law 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 even before. A minor has to travel, to get his dresses tailored, or cleaned, to visit cinema halls and deposit his cycle at a stand. He has to deal with educational institutions and purchase so many things for the facility of life and education. If, in any one of these cases, the other party to the contract could brush aside the minor on the ground that the engagement is void, the legal protection against contractual liability would be too dear to minors. The Privy Council had, therefore, to modify its earlier decisions. This trend is evidenced by the decision of their Lordships in *Srikakulam Subrahmanyam* v *Kurra Subba Rao*.[13] In order to pay off the promissory note and the mortgage debt of his father, the minor son and his mother sold a piece of land to the holders of the promissory note in satisfaction of the note and he was also to pay off the mortgage debt. He paid off the mortgagee accordingly and the possession of the land was given over to him. Afterwards the minor brought an action to recover back the land. It was found as a fact that the transaction was for the benefit of the minor and the guardian had the capacity to contract on his behalf. Lord MORTON said that Section 11 and the *Mohoribibi* case leave no doubt that a minor cannot contract and that if the guardian and the mother had taken no part in this transaction it would have been void. The contract being for the benefit of the minor and within the power of the guardian was held to be binding upon him.

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9. AIR 1948 PC 25: 75 IA 115.
10. *Durga Thakurani* v *Chintamani*, AIR 1982 Ori 158.
11. *Suryaprakasam* v *Gangaraju*, AIR 1956 AP 33. For the power of the manager of a family to contract on behalf of the family including minor members, see *CIT* v *Hukumchand & Co*, (1970) 2 SCC 352: (1971) 1 SCR 646: AIR 1971 SC 383. Properties belonging to certain minors were contracted to be sold to raise money for their marriages. Specific enforcement allowed.
12. *Gopalkrishna* v *Tukaram*, AIR 1956 Bom 566 ; *Gujaba* v *Nilkanth*, (1958) 59 Bom LR 1123 ; *Suryaprakasam* v *Gangaraju*, AIR 1956 AP 33 ; *CIT* v *Shah Mohandas*, AIR 1966 SC 15 ; *Lachuram* v *Madhoram*, AIR 1962 Ass 41 ; *Great American Ins Co* v *Madanlal*, 37 Bom LR 461.
13. (1949) 75 IA 115: ILR 1949 Mad 141 PC. *Etwaria* v *Chandra Nath*, (1906) 10 CWN 763 ; *Babu Ram* v *Said-un-Nisa*, (1913) 35 All 499.

**Effects of minor's agreement**

A minor's agreement being void, ordinarily it should be wholly devoid of all effects.[14] 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.

*1. No Estoppel against Minor*

Suppose that a minor by misrepresenting his age induces another to contract with him, will there be any estoppel against him, or, in other words, will he be precluded from disclosing his true age in a litigation resulting from the contract? Even this question had at one time created a controversy. But it is now settled by a preponderance of authority that there is no such estoppel against the minor.[15] The infant is not estopped from setting up the defence of infancy.[16] The reason is very simple. There can be no estoppel against a statute. The policy of the law of contract is to protect persons below age from contractual liability and naturally the doctrine of estoppel cannot be used to defeat that policy. Thus, in a case before the Bombay High Court,[17] BEAUMONT CJ reviewed the earlier authorities and concluded by saying:

> "The court is of opinion that where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him then in an action founded on the contract the infant is not estopped from setting up infancy."

*2. No Liability in Contract or in Tort arising out of Contract*

A minor's agreement is, of course, in principle devoid of all legal effects. "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.[18] In England it was laid down as early as 1665 in *Johnson* v *Pye*[19] 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." The court pointed out that if infants were held liable on their contracts by means of actions in tort, all the infants of England

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14. Though, as we shall see later, this is not wholly true of the present state of Indian Law. An agreement which confers benefits on a minor is not only held not void, but is enforced at his instance. A minor's consent, being nullity, it cannot change matters, in this case, matters relating to validity of possession. See *Padma Vithoba* v *Mohd Multani*, (1963) 3 SCR 229: AIR 1963 SC 70 ; minor releasing rights in a property, infructuous, see *Wali Singh* v *Sohan Singh*, AIR 1954 SC 263 ; family settlements are binding, but minor's position under it will depend upon the principle that a minor's agreement is void. *Pratap Singh* v *Sant Kaur*, (1938) 19 Lah 313, PC ; *Mohd Amin* v *Vakil Ad*, 1952 SCR 1133: AIR 1952 SC 358.
15. *See*, for example, *Jagar Nath Singh* v *Lalta Pd*, (1908) 31 All 21, where the courts said: "the law of estoppel cannot be invoked in aid to validate that which is void under the law" ; *Tikki Lal Jaithu Teli* v *Komal Chand*, AIR 1940 Nag 327 ; *Manmatha Kumar Saha* v *Exchange Loan Co Ltd*, AIR 1936 Cal 567 ; *Brahmo Dutt* v *Dharmodas Ghose*, (1899) 26 Cal 381 ; *Sarada Pd Das* v *Binay Krishna Dutta*, (1931) Cal 393 ; *Nawab Sadiq Ali Khan* v *Jai Kishori*, AIR 1928 PC 152: 109 IC 387 ; *Golam Abdin* v *Hem Chandra*, (1916) 20 CWN 418 ; *Kanhayalal* v *Girdharilal*, (1912) 9 All LJ 103 pleading minority against a promissory note, allowed.
16. *Gadigeppa Bhimappa Mets* v *Balangowda Bhimangowda*, AIR 1931 Bom 561, where the court reviewed all authorities on this point.
17. *Ibid.*
18. *Padma Vithoba* v *Mohd Multani*, AIR 1963 SC 70, 74: (1963) 3 SCR 229.
19. (1665) 1 Sid 258: 82 ER 1091.

would be ruined. Hence a minor cannot be held responsible for anything which would be an indirect way of enforcing his agreement. "You cannot convert a contract into a tort to enable you to sue an infant."[20] This principle has been generally followed in India. The Calcutta High Court, for example, refused to hold a minor liable in tort for money lent on a bond.[21] The court said: "If the tort is directly connected with the contract and is the means of effecting it and is a parcel of the same transaction, the minor is not liable in tort."[22]

But where the tort is independent of the contract, the mere fact that a contract is also involved, will not absolve the infant from liability.[23] Thus, where an infant borrowed a mare for riding only, he was held liable when he lent her to one of his friends who jumped and killed her.[24] Similarly, in another case, an infant was held liable for the tort of detenue for his failure to return certain instruments which he had hired and then passed on to a friend.[25]

ATKIN J's (as he then was) judgment in *Fawcett* v *Smethurst*[26] explains the earlier cases and also the test for ascertaining whether the tort in question is independent of the contract. "The principle of law applicable to this case is that which is referred to in *Leslie (R) Ltd* v *Sheill*[27] where KENNEDY LJ in his judgment cites with approval the following passage from POLLOCK ON CONTRACTS:[28] 'He (*i.e.*, the infant) cannot be sued for a wrong when the cause of action in substance is *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract.... But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable.' In the present case the car was hired for the purpose of going to Cairn Ryan and back, but was in fact driven further. In my opinion nothing that was done upon that further journey made the defendant an independent tortfeasor; and, if any damage was done to the car on that journey, the defendant would only be liable if he were liable under the contract made.... In *Burnard* v *Haggis*,[29] the defendant who was a Cambridge undergraduate and an infant, hired a horse for the purpose of going for a ride, expressly stating that he did not want a horse for jumping. The defendant let the horse to a friend, who used it for jumping, with the result that it fell and was injured. The defendant was liable on the ground that the act resulting in injury to the horse was one which was quite outside the contract, and could not be

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20. *Jennings* v *Rundall*, (1799) 101 ER 1419 ; also cited in *Leslie* v *Sheill*, (1914) 3 KB 707.
21. *Hari Mohan* v *Dulu Miya*, (1934) 61 Cal 1075.
22. The court relied upon the following: *Dharmo Dass Ghose* v *Brahmo Dutt*, ILR (1898) 25 Cal 616 ; *Motilal* v *Maneklal*, ILR (1924) 45 Bom 225 ; *Punjabhai* v *Bhagwandas*, ILR (1928) 55 Bom 309 ; *Ayyangar* v *Naraiayan*, (1930) 54 Mad 112. For another illustration of the same principle see *Radhey Shiam* v *Biharilal*, (1918) 48 IC 478. An agreement by a minor to release his rights in a property is equally infructuous. *Wali Singh* v *Sohan Singh*, AIR 1954 SC 263, 265.
23. His liability to compensate the injured party for fraud on him is outside the purview of the law of contract.
24. *Burnard* v *Haggis*, (1863) 4 CBNS 45: 8 LT 328.
25. *Ballet* v *Mingay*, (1943) KB 281.
26. (1914) 84 LJKB 473: 112 LT 309.
27. (1914) 3 KB 607.
28. (8th edn), p 78.
29. (1863) 4 CBNS 45: 8 LT 328.

said to be an abuse of the contract. In *Jennings* v *Rundall*,[30] on the other hand, where the defendant, an infant, had hired a horse to be ridden for a short journey and took it on a much longer journey, with the result that it was injured, the court held the defendant not liable upon the ground that the action was founded in contract and that the plaintiff could not turn what was in substance a claim in contract to one in tort."

*3. Doctrine of Restitution*

If an infant obtains property or goods by misrepresenting his age, he can be compelled to 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 them, he cannot be made to repay the value of the goods, because that would amount to enforcing a void contract.[31] Again, the doctrine of restitution is not applied where the infant has obtained cash instead of goods. The well-known authority is *Leslie (R) Ltd* v *Sheill*:[32]

> 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 for the reasons explained above. They then claimed the return of the principal moneys under a *quasi*-contract as "money had and received to the plaintiff's use". To this Lord SUMNER replied: "Further, under the statute[33] the principal, which at common law relieved an infant from liability for a tort directly connected with a voidable contract, namely, that it was impossible to enforce in a roundabout way an unenforceable contract, equally forbids the courts of law to allow, under the name of an implied contract or in the form of an action *quasi ex contractu*, a proceeding to enforce part of a contract, which the statute declares to be wholly void."[34]

Finally, the money-lenders relied upon the doctrine of restitution, contending that the infant should be compellable in equity to restore the money. Rejecting this contention, Lord SUMNER said:

> "I think that the whole current of decisions down to 1913... went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud.... Restitution stopped where repayment began.
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> .... the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion

30. (1799) 8 Term Rep 335.
31. 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 SUMNER in *Leslie (R) Ltd* v *Sheill*, (1914) 3 KB 607, and is not likely to be followed.
32. (1914) 3 KB 607.
33. His Lordship was considering the effect of the Infants' Relief Act, 1874.
34. (1914) 3 KB 607, 613.

through a personal judgment to repay an equivalent sum out of his present and future resources.... I think this would be nothing but enforcing a void contract."[35]

*Minor Seeking Relief, Compellable to Restore*

However, where an infant invokes the aid of the court for the cancellation of his contract, the court may grant the relief subject to the condition that he shall restore all benefits obtained by him under the contract, or make suitable compensation to the other party.[36]

This aspect of the doctrine of restitution found expression in Section 41 of the original Specific Relief Act of 1877.[37] The section authorised the courts to order any compensation that justice required to be paid by the party at whose instance a contract was cancelled. The first well-known case decided under the section is that of *Mohoribibi* v *Dharmodas Ghose*.[38]

The plaintiff, a minor, mortgaged his houses in favour of the defendant, a money-lender, to secure a loan of Rs 20,000. A part of this amount was actually advanced to 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 underage when he executed the mortgage and the same should, therefore, be cancelled.[39]

The relief of cancellation had to be granted as the plaintiff was entitled to it under Section 39 of the Specific Relief Act, 1877 [S. 31 of 1963]. 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 this section, a person who, having the right to do so, rescinds a voidable contract, he 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. The essence of this section is that a party receiving any benefit under a contract shall have to restore it if the contract becomes void or is discovered to be void. Quite obviously the Privy Council said "that this section, like Section 64, starts from the basis of there being an agreement or contract between competent parties, and has no

35. (1914) 3 KB 607, 618.
36. *See*, for example, *Jagar Nath Singh* v *Lalta Pd*, (1908) 31 All 21, where a minor was allowed to recover possession of property sold by him only subject to the condition that he restored the consideration. This principle has been approved by the Privy Council in *Mahomed Syedol Ariffin* v *Yeoh Ooi Gark*, AIR 1916 PC 242: 43 IA 256, where their Lordships also approved the rule of restitution as stated by Lord SUMNER in *Leslie (R) Ltd* v *Sheill*, (1914) 3 KB 607.
37. Act 1 of 1877. The section ran as follows: "On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other party which justice may require."
38. 30 IA 114: 30 Cal 539 (1903).
39. Under Section 39 of the original Specific Relief Act of 1877 courts were authorised to order cancellation of void contracts. Now S. 31 of the Act of 1963.

application to a case in which there never was, and never could have been, any contract."[40]

Finally, the money-lender relied upon Section 41 of the Specific Relief Act, 1877 [S. 33 of 1963], which was as follows: "On adjudging the cancellation of an instrument the court may require the party to whom such relief is granted to make any compensation to the other which justice may require." As to this their Lordships said: "This section no doubt gave a discretion to the court; but the court of first instance and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

The second landmark in this line of cases on the extent of relief available against a fraudulent minor was the decision of the Lahore High Court in *Khan Gul* v *Lakha Singh*:[41]

> The defendant, while still a minor, by fraudulently concealing his age, contracted to sell a plot of land to the plaintiff. He received the consideration of Rs 17,500 and then refused to perform his part of the bargain.

The plaintiff prayed for recovery of possession or refund of consideration. There could be no question of specific enforcement, the contract being wholly void. The only question, therefore, was: "Can a minor who has entered into a contract by false representation refuse to perform the contract and at the same time retain the benefit he may have received therefrom?" Section 41 of the Specific Relief Act, 1877, would not help the plaintiff as Sir SHADILAL CJ admitted that "the language of the section no doubt shows that the jurisdiction conferred thereby is to be exercised when the minor himself invokes the aid of the court." Nor would the principle of restitution as explained by Lord SUMNER in *Leslie (R) Ltd* v *Sheill*[42] be of any help unless it was extended in India to cover cases of money also. The learned Chief Justice found sufficient reason for this extension as he said:

> "There is no real difference between restoring the property and refunding the money, except that the property can be identified but cash cannot be traced.... It must be remembered that, while in India all contracts made by infants are void, there is no such general rule in England. There should therefore be a greater scope in India than in England for the application of the equitable doctrine of restitution."[43]

Referring to Sections 39 and 41 of the Specific Relief Act, 1877 [now Ss. 31 and 33 of Act 1963], his Lordship said: "The doctrine of restitution is not however confined to cases covered by those sections. The doctrine rests upon the salutary principle that an infant cannot be allowed by a court of equity to take advantage of his own fraud." Accordingly, the learned Chief Justice ordered refund of the consideration.[44]

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40. 30 IA 114, 124. *See also* the judgment of SULAIMAN CJ in *Ajudhia Pd* v *Chandan Lal*, AIR 1937 All 610, 612.
41. ILR (1928) 9 Lah 701: AIR 1928 Lah 609. *See* also *Limbaji* v *Rahi*, 27 Bom LR 621: 49 Bom 576.
42. (1914) 3 KB 607, 618.
43. (1928) 9 Lah 701, 715-19.
44. See also *Dattaram* v *Vinayak*, (1903) 28 Bom 181.

This opinion was not followed by the Allahabad High Court in another landmark on the subject, namely, *Ajudhia Prasad* v *Chandan Lal*.[45]

> A sum of money was borrowed by two minors under a mortgage deed. They were more than 18 but less than 21 years of age, but fraudulently concealed the fact that a guardian had been appointed for them. The question was whether the lender could get a decree for the principal money or sale of mortgaged property.[46]

SULAIMAN CJ who delivered the judgment of the Full Bench, refused to follow the enlarged view of restitution as applied by Sir SHADILAL CJ in *Khan Gul* v *Lakha Singh*.[47] His Lordship felt that the courts in India were probably bound by the principle of restitution as explained and restricted by Lord SUMNER in *Leslie (R) Ltd* v *Sheill*,[48] as it had already been approved by the Privy Council.[49] In the opinion of his Lordship, any other "view would be contrary to the great preponderance of authority both in England and in India and would ignore the well-recognised distinction between the position of a minor when suing as a plaintiff and when he is being sued as a defendant."[50] The learned Chief Justice added: "Where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void.... There is no rule of equity, justice and good conscience which entitles a court to enforce a void contract of a minor against him under the cloak of restitution."

The Andhra Pradesh High Court had aligned itself with the Allahabad High Court.[51] After an extensive review of authorities, SUBBA RAO CJ said that the effect of the authorities is "that a person, who has parted with his goods can trace them into the hands of the quondam minor and recover them back in specie, for he has not lost his title to them. But he cannot seek to recover their price or damages, for, if allowed to do so, the court would be enforcing the contract of loan".

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45. AIR 1937 All 610 (FB).
46. The case was first argued under Section 65 of the Contract Act. But SULAIMAN CJ who delivered the judgment, followed the ruling of the Privy Council in *Mohoribibi* v *Dharmodas Ghose*, (1903) 30 IA 114, noted above, to the effect that Section 65 is not applicable to a minor's agreement. After quoting extensively from their Lordships' judgment, the learned Chief Justice said: "Where, therefore, one of the parties is a minor and is incapable of contracting so that there never is and can never be a contract, Section 65 can have no application to such a case as that section starts from the basis of there being an agreement or contract between competent parties." (at p 613.)
47. AIR 1928 Lah 609.
48. (1914) 3 KB 607, 618.
49. The learned Chief Justice cited the decision of the Privy Council in *Mohd Syedol Ariffin* v *Yeoh*, AIR 1916 PC 242, in which their Lordships had observed: "A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *Leslie (R) Ltd* v *Sheill*, (1914) 3 KB 607, would apply and such a case would fail." On the basis of this observation, SULAIMAN CJ referring to the decision of Sir SHADILAL CJ said: "With great respect, the learned Chief Justice apparently omitted to note that their Lordships of the Privy Council had expressed their clear approval of the ruling in *Leslie* case." (At p 616, AIR 1937 All 610.)
50. AIR 1937 All 610, 617.
51. *Gokeda Latcharao* v *Viswariadham Bhimayya*, AIR 1956 AP 182.

*Amended provisions in Specific Relief Act, 1963*

The Law Commission of India preferred the view of Sir SHADILAL CJ[52] and accordingly the controversy has now been set at rest by the new Specific Relief Act, 1963. The principle of restitution is contained in Section 33 of the new Act.[53] The net result of the amendment may be stated in terms of the following two 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.

Sub-section (1) of the above provision, as noted before, incorporates the principle that he who seeks equity must do equity. The courts have the discretion to require the minor-plaintiff to restore the advantages he has obtained under a void agreement.[54] A good illustration of the circumstances in which this power is to be exercised is the case of *Jagar Nath Singh* v *Lalta Prasad*,[55] where BANERJI J of the Allahabad High Court said:

> "Where persons who are in fact underage 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."[56]

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52. 9th Report, pp. 44-46.

53. The new provisions are as follows:

> 33. (1) On adjudging the cancellation of an instrument, 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.
>
> (2) Where a defendant successfully resists any suit on the ground:
>
> (*a*) .....
>
> (*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 (9 of 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.

This amendment incorporates the recommendation of the Law Commission of India, 9th Report, Specific Relief Act, 1877, pp. 44-46. The Commission had expressed the following view: "Having considered the rival points of view we are inclined to prefer the view of SHADILAL CJ in the Lahore case, AIR 1928 Lah 609."

54. There is no question of any relief to be obtained where there is no proof of any benefits arising in favour of the minor. *Panchu Gopal Saha* v *Usha Rani Modak*, (1988) 1 Cal LT 14, a partnership agreement.

55. (1908) 21 All 21.

56. (1908) 21 All 21, p 27. *See* also *Manmatha Kumar Saha* v *Exchange Loan Co*, AIR 1936 Cal 567 ; *Bhattiprole Hanumanth Rao* v *Kondarakota Sitharamayya*, 1939 Mad 203. The *Mysore High Court in Dyaviah* v *Shivamma*, AIR 1959 Mys 188, without paying any attention to the *Mohoribibi* case has gone to the extent of holding that even Section 65

But the court will not compel any restitution by a minor even when he is a plaintiff, where the other party was aware of the infancy so that he was not deceived,[57] or where the other party has been unscrupulous in his dealings with the minor,[58] or where, though the minor had misrepresented his age, the other party was so zealous to enter into the transaction that the false representation exerted no influence on him,[59] or where the other party lays no material before the court for coming to the conclusion that justice requires return of the money paid to the minor.[60]

Section 33 (1) of the Specific Relief Act, 1963 does not alter the earlier law. If the minor comes to the court as a plaintiff, he can be compelled to disgorge his gains under the agreement. Sub-section (2), however, makes this difference that if a minor is brought before the court as a defendant, he can be compelled to account for such portion of the money or anything else received by him as has gone to benefit him personally, such as education or training, or has resulted in an accretion to his estate.

**Beneficial contracts**

The law declared by the Privy Council in the *Mohoribibi* case[61] that a minor's agreement is "absolutely void" has been generally followed, but it has been growingly "confined to cases where a minor is charged with obligations and the other contracting party seeks to enforce those obligations against the minor."[62] It has been observed by ABDUR RAHIM J of the Madras High Court that "what is meant by the proposition that an infant is incompetent to contract or that his contract is void is that the law will not enforce any contractual obligation of an infant". Accordingly, a minor is allowed to enforce a contract which is of some benefit to him and under which he is required to bear no obligation. In *Raghava Chariar* v *Srinivasa*,[63] the following question was referred for the decision of a Full Bench of the Madras High Court:

> "Whether a mortgage executed in favour of a minor who has advanced the whole of the 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. WALLIS CJ said:

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applies to such cases. The reasoning of the court is that Section 65 deals with agreements which are discovered to be void. Where a minor is a party, the agreement is void but the parties may subsequently discover this fact and, therefore, the minor cannot recover back anything unless he himself restores the benefits.

57. *Bhim Mandal* v *Mangaram Corain*, AIR 1961 Pat 21 ; *Shiamlal* v *Ram Piari*, (1910) 32 All 25 ; *Radhey Shiam* v *Biharilal*, (1918) 48 IC 478 ; *Hari Mohan* v *Dulu Miya*, (1934) 61 Cal 1075. In all these cases the minor had committed no fraud and, therefore, he was allowed to recover the property sold without restoring the consideration obtained by him. *Vaikunta Ram Pillai* v *Authminmoolaun Chettiar*, (1915) 38 Mad 1071.
58. *Mohammad Said* v *Bishamber Nath*, AIR 1924 All 156.
59. *K. Maungll* v *Ma Hda On*, (1939) Rang 545.
60. *Kampta Prasad Singh* v *Sheo Gopal Lal*, (1904) 26 All 342.
61. (1903) 30 IA 114: (1903) AC 6: 1903 ILR 30 Cal 539 (PC).
62. *Raghava Chariar* v *Srinivasa*, (1916) 40 Mad 308, *per* SESHGIRI AYYAR J at p 311. *Satyadeva Narayana* v *Tribeni Prasad*, AIR 1936 Pat 153, minor a mortgagee.
63. *Ibid. Zafar Ahsan* v *Zubaida Khatun*, (1929) 27 All LJ 1114 ; *Hari Mohan* v *Mohini Mohan*, (1918) 22 CWN 130.

"The provision of law which renders minors incompetent to bind themselves by contract was enacted in their favour and for their protection, and it would be a strange consequence of this legislation if they are to take nothing under transfers in consideration of which they have parted with their money."[64]

The same opinion has been expressed by BEAUMONT CJ of the Bombay High Court:[65]

"The provisions of the law which make a contract by a minor not binding were no doubt intended to be for the benefit of the minors, and the courts in this country when faced with a contract which has been carried out by or on behalf of the minor, the performance of which by the other party is then resisted on the ground of minority, have struggled hard to avoid holding the contract wholly void to the detriment of the minor."[66]

Accordingly, the learned Chief Justice rejected the defence of an insurance company that the person on whose behalf certain goods were insured was a minor and allowed the minor to recover the insurance money.[67]

On the same principle it has been held that "a minor is capable for purchasing immovable property and he may sue to recover the possession of the property purchased upon tender of the purchase money."[68] A transfer which has already been executed in favour of a minor can, of course, be much less impeached.[69]

"A lease, however, is not like other transfers of property and a lease to a minor has been held to be void."[70] A minor may enforce a promissory note executed in his favour.[71] "There is nothing in the Contract Act to prevent an infant from being the

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64. Note 62, at p 314. To the same effect is the decision of the Calcutta High Court in *Bhaggabhor Mandal* v *Mohini Mohan Banerjee*, AIR 1918 Cal 1027. *See* also *Zafar Ahsan* v *Zubaida Khatun*, AIR 1929 All 604 ; *Munni Kuar* v *Madan Gopal*, (1916) 38 All 62 ; *Narain Das* v *Mst Dhania*, (1916) 38 All 154 ; *Munia* v *Perumal*, (1914) 37 Mad 390 ; *Bholanath* v *Balbadhra*, AIR 1964 All 527.

65. *Great American Insurance Co Ltd* v *Mandanlal Sonulal*, (1935) 59 Bom 656.

66. For other cases of the same kind see, *Raghava Chariar* v *Srinivasa*, (1916) 40 Mad 308 ; *Sathruraju* v *Basappa*, (1913) 24 Mad LJ 363 ; *Madhab Koeri* v *Baikuntha*, (1919) 4 Pat LJ 682 and *Rose Fernandes* v *Joseph Gonsalves*, (1924) 48 Bom 673: 26 Bom LR 1035 ; *Daniel* v *Mariamma*, AIR 1951 Mad 466.

67. The decision has been criticised in Pollock and Mulla, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, p 73 (8th edn by Setalvad and Gooderson, 1957), on the ground that it was either the minor's contract, in which case it was a nullity ; or it was the guardian's contract, in which case he alone should be entitled to sue. However, as the decision achieves substantial justice, the present writer finds no fault with it. It would have been absurd to allow an insurer to escape responsibility having accepted the proposal with full knowledge of the plaintiff's minority.

68. *Thakar Das* v *Mt Putli*, AIR 1924 Lah 611.

69. *Ulfat Rai* v *Gauri Shanker*, (1911) 33 All 657, where the court said that "there is nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immovable property. He cannot transfer immovable property, it is true, but that is a different thing from recovering as transferee". *See* also *Collector of Meerut* v *Lala Hardian Singh*, AIR 1945 All 156.

70. *Jaykant* v *Durgashankar*, AIR 1970 Guj 106. Quoted from Ponnuswami and Puri, CASES AND MATERIALS ON CONTRACTS, p 313 (1974).

71. *Sharfath Ali* v *Noor Mohammed*, AIR 1924 Rang 136 ; *Sathrurazu* v *Basappa*, (1913) 24 MLJ 363. *See* also the judgment of ABDUR RAHIM J in *Raghava Chariar* v *Srinivasa*, (1916) 40 Mad 308, 317-18 where the learned judge has given a number of illustrations in which a minor may be a party to a contract without affecting its validity.

promisee." "The law does not regard a minor as incapable of accepting a benefit."[72]

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.[73] But where the contract is still executory or the consideration is still to be supplied, the principle of the *Mohoribibi* case[74] will thwart any action on the contract. In *Raj Rani* v *Prem Adib*:[75]

> 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 artist 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. If it was a contract with the plaintiff, she being a minor, it was nullity. If it was a contract with her father it was void for being without consideration. The promise of a minor girl to serve, being not enforceable against her, cannot furnish any consideration for the defendant's promise to pay her a salary.[76]

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".[77]

For this principle to apply there should be total failure of consideration. Where, for example, a minor purchased shares in a company and then repudiated them and also asked for refund of the partly paid purchase price, the court held that the price which he has already paid was not refundable, because there was evidence that the shares were of some value. If the shares were totally worthless there would have been a total failure of consideration entitling the minor to refund. But he was not liable to pay further demands or calls for payment.[78]

"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."[79] This is the principle of the well-known case of *Valentini* v *Canali*:[80]

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72. *Sharfath Ali* v *Noor Mohammad*, AIR 1924 Rang 136. *Great American Ins Co* v *Madanlal*, 59 Bom 656 ; *Vijaya Kumar* v *New Zealand Ins Co*, AIR 1954 Bom 347, right to recover under insurance.
73. *See*, for example, *Hanmant Lakshman* v *Jayarao Narsinha*, 13 Bom 50 ; *Abdul Gaffar* v *Piarelal Salig Ram*, AIR 1934 Lah 480 ; *Raghava Chariar* v *Srinivasa*, (1916) 40 Mad 308: AIR 1917 Mad 630 (FB).
74. *Mohori Bibi* v *Dharmodas Ghose*, (1903) 30 IA 114.
75. AIR 1949 Bom 215.
76. *Ibid.*, p 217, by DESAI J. The learned judge added: "I am constrained to hold that the contract of personal service does not stand on the same footing as the contract of apprenticeship or a contract of marriage of a minor." To the same effect is *Maung Nyi Pu* v *East End Mills*, AIR 1939 Rang 266.
77. *Walidad Khan* v *Janak Singh*, AIR 1935 All 370.
78. *Steinburg* v *Scala, (Leeds) Ltd*, (1923) 92 LJKB 944: (1923) 2 Ch 452 CA.
79. LORD COLERIDGE CJ in *Valentini* v *Canali*, (1889) 24 QBD 166: (1889) 59 LJ QB 74.
80. *Ibid.*

> 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. "The infant plaintiff had the quantity use of furniture for some months. He could not give back this benefit or replace the defendant in the position in which he was before the contract.... The legislature never intended, in making provisions for this purpose (for the protection of infants), to sanction a cruel justice."[81]

*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 between their minor children and the law has to adapt itself to the habits and customs of the people." It has, therefore, become well-established, almost without any controversy, "that while the contract of marriage could be enforced against the other contracting party at the instance of the minor it cannot be enforced against the minor."[82]

*Contracts of Apprenticeship*

Contracts of apprenticeship is another species of contracts which are for the benefit of minors. The Indian Apprentices Act, 1850 provides for contracts in the nature of contracts of service which are binding on minors. The Act was passed, as the preamble of the Act shows:

> "For better enabling children, and specially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which, when they come to full age, they may gain a livelihood."[83]

The Act requires the contract to be made by a guardian on behalf of the minor.[84]

"In English law contracts of service and apprenticeship are put on the same footing and in the same category as contracts for necessaries." The well-known English case on the subject is *Roberts* v *Gray*:[85]

> 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.

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81. BEAUMONT CJ, commenting on this case in *Khimji Kuverji* v *Lalji Karamsey*, (1941) Bom 211, 215-16: AIR 1941 Bom 129.
82. KANIA J (1941) Bom 211, 221. The Bombay High Court allowed such actions in the following cases: *Umed Kika* v *Nagindas*, (1870) 7 Bom HC 122 ; *Thakersay* v *Gomti*, (1887) 11 Bom 412 ; *Parshotamdas* v *Mangaldas*, (1896) 21 Bom 23 ; *Abdul Razak* v *Mohd Hussain*, (1916) 42 Bom 499 ; *Rose Fernandes* v *Joseph Gonslaves*, (1924) 48 Bom 673 ; *Janak Prasad* v *Gopi Krishna*, AIR 1947 Pat 132. Those decisions are, however, subject to the provisions of applicable laws as to age of marriage.
83. *See* the judgement of DESAI J in *Raj Rani* v *Prem Adib*, AIR 1949 Bom 215, 218-19.
84. Section 9.
85. (1913) 1 KB 520.

The contract was held to be one for necessaries as it was for the infant's "good teaching or instruction whereby he may profit afterwards".[86] The most important part of the contract was the instruction that would be received by the defendant from playing constantly with the plaintiff under the conditions of a worldwide tour, a thing which a distinguished billiards player apparently contemplates as part of his career.[87]

It has been suggested by DESAI J of the Bombay High Court in *Raj Rani* v *Prem Adib*[88] that "though according to English Law the minor would be liable in the case of a contract of service where the contract was for his benefit, it is clear that under Section 11, the minor's contract being void, the minor would not be held liable".

*Trade Contracts not included in Beneficial Contracts*

This category of beneficial contracts does not include ordinary trade contracts. In *Cowern* v *Nield*,[89] 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. PHILLIMORE J observed:

> "In a general sense contracts which can be brought within certain categories and are also for the benefit of the infant can be supported. A trading contract does not come within any of these categories. The only contracts of an infant which can be enforced are which relate to the infant's person, as contracts by which he provides himself with clothes, food, or lodging or contracts of marriage, apprenticeship and service."

*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.[90]

**Ratification**

A person cannot on attaining majority ratify an agreement made by him during his minority.[91] Ratification relates back to the date of the making of the contract and,

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86. HAMILTON LJ quoting Lord COKE, Co Litt. 172-a.
87. To the same effect are: *Clements* v *London & North Western Rail Co*, (1894) 63 LJ QB 837 CA and *Doyle* v *White City Stadium Ltd & British Boxing Board of Control*, (1934) All ER Rep 252: (1935) 1 KB 10.
88. AIR 1949 Bom 215.
89. (1911-13) All ER Rep 425: (1912) 2 KB 419.
90. *Edwards* v *Carter*, 1893 AC 360: (1891-4) All ER Rep 1259.
91. *Nazir Ahmad* v *Jiwandas*, AIR 1938 Lah 159 ; *Indian Cotton Co* v *Raghunath*, 33 Bom LR 111 ; *Arumugan* v *Duraisinga*, (1914) 37 Mad 38.

therefore, a contract which was then void cannot be made valid by subsequent ratification.[1] "It would be a contradiction in terms to say that a void contract can be ratified."[2] If it is necessary, a fresh contract should be made on attaining majority. And a new contract will also require a fresh consideration. "The consideration which passed under the earlier contract cannot be implied into the contract into which the minor enters on attaining majority."[3] In a case before the Full Bench of the Allahabad High Court the facts were:[4]

> 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.[5] SULAIMAN CJ said:

> "Section 25, sub-clause (2), applies when there is a promise to *compensate* wholly or in part a person who has already *voluntarily done something for the promisor*. The word 'compensate' has been used advisedly and does not connote the same idea as a loan. The word 'voluntarily' also indicates to my mind that something has been done without any promise of compensation.... Similarly the expression 'done something for' does not mean 'advance money to another person'. Doing something for a person is not paying money to him."[6]

Where, however, 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. In the view of the Allahabad High Court such a debt is only void and not unlawful.[7]

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[8] and Allahabad[9] High Courts, becomes binding. "There is no question of ratification in such cases."[10] A person can always make a fresh promise after attaining majority in terms of the promise made during minority. All that is necessary is that there should be some fresh

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1. *Tukaram Ramji* v *Madhorao Manaji*, AIR 1948 Nag 293.
2. *Bhola Ram* v *Bhagat Ram*, AIR 1927 Lah 24 ; *Raja Narindra Lal Khan* v *Hrishi Kesh Mukherjee*, (1918) 46 IC 765.
3. *Nazir Ahmad* v *Jiwandas*, AIR 1938 Lah 159.
4. *Suraj Narain* v *Sukhu Ahir*, ILR (1928) 51 All 164 ; *Bindeshri Bakhsh Singh* v *Chandika Pd.*, (1926) 49 All 137.
5. *Per* SULAIMAN ACJ (as he then was) with whom BOYS J agreed. MUKHERJEE J dissented as in his opinion Section 25, clause (2) applied.
6. Overruling its earlier decision in *Narain Singh* v *Chiranjilal*, AIR 1924 All 730. *See* also *Arumugam Chetti* v *Krishnan*, (1914) 37 Mad 38 ; *Karim Khan* v *Jaikaran Godamal*, AIR 1937 Nag 390 and *Gobind Ram* v *Piranditta*, ILR (1935) 16 Lah 546.
7. *Anant Rai* v *Bhagwan Rai*, AIR 1940 All 12. *See* also *Tikait Umed Narain Singh* v *Equitable Coal Co Ltd*, AIR 1942 PC 1 ; *Maganlal* v *Ramanlal*, 45 Bom LR 761, ratification of partnership.
8. *Kundan Bibi* v *Shree Narayan*, (1906) 11 Cal WN 135.
9. *Narain Singh* v *Chiranjilal*, ILR (1924) 46 All 568: AIR 1924 All 730.
10. SULAIMAN ACJ in *Suraj Narain* v *Sukhu Ahir*, (1928) 51 All 164, 166. Whether fresh contract has been made or not is a question of fact. *S. Shanmugam Pillai* v *K.S. Pillai*, (1973) 2 SCC 312, 320: (1973) 1 SCR 570.

consideration for it.[11] For example, in *Ditcham* v *Worrall*,[12] which arose at a time when a breach of promise of marriage was actionable,[13] a minor's promise of marriage, though void under the Infants' Relief Act, 1874, became binding on him when after attaining majority he fixed a date for the marriage. This was a new promise and, therefore, he was liable for its breach.

**Liability for necessaries [S. 68]**

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

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

(*b*) *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" in the Act. We may consequently turn to judicial decisions to determine its precise import.[14] An illustrative statement of the meaning of the term is to be found in the judgment of ALDERSON B in *Chappel* v *Cooper*:[15]

> "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious education may be necessary also. . . . Then the classes being established, the subject and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of full age. . . . But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and of reasonable advantage and comfort of the infant contractor. Thus articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed."[16]

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11. *Anant Rai* v *Bhagwan Rai*, 1939 All LJ 935, payment of mortgage debt after attaining majority.
12. (1880) 49 LJ QB 688.
13. Such actions have been abolished by the Law Reform (Miscellaneous Provisions) Act, 1970.
14. *Jogan Ram Marwari* v *Mahadeo Prasad Sahu*, (1909) 36 Cal 768, 776.
15. (1844) 13 M and W 252, 258: 13 LJ (Ex) 286.
16. The decision of the Calcutta High Court in *Jogan Ram Marwari* v *Mahadeo Prasad Sahu*, (1909) 36 Cal 768 gives a summary of the points established in English law as to the meaning and scope of the term "necessaries".

Thus, "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 life in which the infant moves. The infant's need of things may also sometimes depend upon the peculiar circumstances under which they are purchased and the uses to which they are put.[17] 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."[18] But where such marriage is forbidden by law, the position will be different.[19] Where "the funds are supplied to a minor for the marriage of a minor female in the family the lender may be able to get himself reimbursed from the property of the minor."[20] "The debt incurred for performing the funeral obsequies of the father of a minor" is a necessary.[21] Where a minor is involved in a litigation threatening his property[22] or liberty,[23] expenses reasonably incurred on his defence may be recovered from his estate.

"In *Peters* v *Fleming*[24] the court took judicial notice that it was *prima facie* not unreasonable 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 supplied on credit was such as was necessary to support himself properly in his degree. PARKE B says: "All such articles as are purely ornamental are to be rejected, as they cannot be requisite for anyone." Possibly there may be exceptional cases in which things purely ornamental may be necessary."[25] The burden lies upon the supplier to prove that the ornamental thing is specially necessary for the minor. Thus, where a minor was supplied a pair of jewelled solitaires and an antique goblet and though he moved in high society, he was held not liable as the plaintiff could not prove that the articles were specially necessary for the minor.[26]

To render an infant's estate liable for necessaries "two conditions must be satisfied, namely: (1) the contract must be for goods reasonably necessary for his support in his station in life, and (2) he must not have already a sufficient supply of

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17. *Kanwarlal* v *Surajmal*, AIR 1963 MP 58, educational needs, house provided.
18. *Jogan Ram* v *Mahadeo Prasad*, (1909) 36 Cal 768, 777. Following, *Johnstone* v *Marks*, (1887) 19 QBD 509. The court cited the following English cases: *Peters* v *Fleming*, (1840) 6 M & W 42 ; *Ryder* v *Woombell*, (1868) LR 3 Exch 90 ; *Walter* v *Everard*, (1891) 2 QB 369 ; *Jenner* v *Walker*, (1868) 19 LT 398 ; *Jugessur Sircor* v *Nilumber Biswas*, (1865) 3 WR 917 ; *Mukundi* v *Sarabsukh*, ILR (1884) 6 All 417.
19. *Tikki Lal* v *Komal Chand*, AIR 1940 Nag 327: ILR 1940 Nag 632.
20. *Ibid.*
21. *Bechu Singh* v *Baldeo Prasad*, AIR 1933 Oudh 132.
22. Thus in *Kedar Nath* v *Ajudhia Prasad*, (1883) Punj Rec 165, p 522, money advanced to save a minor's estate from execution sale was held to be necessary.
23. *Shyam Charan Mal* v *Choudhary 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.
24. (1840) 6 M & W 42: 9 LJ Ex 81.
25. WILLES J in *Ryder* v *Wombwell*, (1868) 38 LJ Ex 8.
26. *Ibid.*

these necessaries."[27] The supplier has to prove, "not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with the goods of that class." This is the principle of *Nash* v *Inman*[28] where an undergraduate in the Cambridge University, who was amply supplied with proper clothes according to his position, was supplied by the plaintiff with a number of dresses, including eleven fancy waistcoats. The price was held to be irrecoverable.[29]

### Nature of liability

There are two theories relating to the liability of a minor's estate for necessaries. According to one of the theories the liability does not depend upon the minor's consent. It arises because the necessaries have been supplied to him and is, therefore, *quasi*-contractual in nature. The best statement of this theory is that of FLETCHER MOULTON LJ in *Nash* v *Inman.*[30]

> "An infant, like a lunatic, is incapable of making a contract of purchase in strict sense of the word; but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries the law will imply an obligation to repay him for the services so rendered, and will enforce that obligation against the estate of the infant or lunatic. The consequence is that basis of the action is hardly contract. The real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words, the obligation arises *re* and not *consensu*."

In India the subject has been dealt with in the chapter on "Certain Relations Resembling Those Created by Contract". The chapter provides for obligations of *quasi*-contractual nature.[31] Further, the liability is not personal, but is only that of the minor's estate. Thus it has a very little contractual element.

The other view of the liability in England is that it is contractual. An infant is not absolutely destitute of contractual capacity. A contract for necessaries is just one of those categories of contracts which an infant is permitted to make.[32]

## PERSONS OF UNSOUND MIND

### English Law

In English law a person of unsound mind is competent to contract, although he may avoid his contract if he satisfies the court that he was incapable of understanding the contract and the other party knew it. The contract is voidable at his option. It becomes binding on him only if he affirms it.[33] In this case Lord ESHER said that a lunatic (now such a person is known as mentally disordered) can only set aside a contract entered into with a person of sound mind in the following circumstances:

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27. BUCKLEY LJ in *Nash* v *Inman*, (1908) 2 KB 1, 12.
28. (1908) 2 KB 1.
29. Followed in India in *Jogan Ram* v *Mahadeo Prasad*, (1909) 36 Cal 768.
30. (1908) 2 KB 1, 8.
31. Chapter V of the Contract Act. That a minor is incapable of giving consent has been expressly recognised by the Supreme Court in *Padma Vithoba Chakkayya* v *Mohd Multani*, AIR 1963 SC 73, 74: (1963) 3 SCR 229.
32. *See* BUCKLEY LJ in *Nash* v *Inman*, (1908) 2 KB 1, 12.
33. *Imperial Loan Co* v *Stone*, [illegible] QB 599. See the judgment of Lord ESHER MR at p 601.

"When a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what it was about."

The position of a drunken person is also the same. If he makes a contract while drunk, he may, when sober, elect to avoid the contract or to affirm it.[34]

As regards the general effect of mental incapacity on the contractual competence of a person, HALSBURY'S LAWS OF ENGLAND states the following:[35]

"There must be a free and full consent to bind persons in contract. Consent is an act of reason and of volition or choice, and it is on the ground that there is a want of rational and deliberate consent that the contracts of mentally disordered persons may be invalidated. A valid contract cannot be made by a person suffering from such incapacity of mind as not to understand the nature of what he is doing....

A fair contract with a person who was apparently of sound mind, but who in fact was suffering at the time of the contract from such mental disorder as rendered him incapable of entering into the contract, is voidable but not void. If the contract is not to be enforced against him, the person mentally disordered must prove that the other party either knew that he was of unsound mind or knew of such facts as would justify the Court in inferring such knowledge."[36]

In *Campbell* v *Hooper*,[37] where a mortgagee sought a decree directing repayment and foreclosure in default of such repayment and where there was evidence that at the time the mortgage was executed the mortgagor was a lunatic, VC STUART said:

"I do not understand that the simple fact of lunacy, if established, would deprive the mortgagee of all rights to equitable relief. I am not aware of any case in which it has been so held....

Even at law the contract of a lunatic is not necessarily void. Even at law the plaintiff in an action at law, seeking to recover under the contract of a person whose lunacy is established, has been held to be entitled to relief....

Mr Justice Patterson, in the case of *Dane* v *Lady Kirkwall*[38] in directing the jury laid down the law thus: 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it and took advantage of it.' It would be a strange thing if a Court of Equity in dealing with contracts were to deal on any different principle."

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34. *Mathews* v *Baxter*, (1873) LR 8 Ex 132. *See* the judgement of MARTIN B at p 134.
35. *Paras* 1005-1006, Vol 30 (4th edn).
36. As reproduced in *Che Som Binte Yip* v *Maha P Ltd*, (1989) 2 CLJ at 802 High Court, Singapore. It is opined in this case that the word 'fair' in the above statement may have to be deleted in view of the decision of the Privy Council in *Hart* v *O'Connor*, (1985) 1 AC 1000, on appeal from New Zealand. This case is the most recent authority on the point. In the *Maha P Ltd* case the mortgage executed by a person who was mentally unsound was enforced because it was not proved that the mortgagee bank had knowledge of his mental disorder.
37. (1855) 3 Sm 4 G at 153.
38. 8 C & P 685.

**Position in India**

In India, on the other hand, the agreement of a person of unsound mind is, like that of minor, absolutely void.[39] According to Section 12 "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 effects upon his interest."[40] However, a person who is usually of unsound mind may make a contract when he is of sound mind. But a person who is usually of sound mind may not make a contract when he is of unsound mind.

**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 a 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.

An illustration is the decision of the Patna High Court in *Inder Singh* v *Parmeshwardhari Singh*.[41] A property worth about Rs 25,000 was agreed to be sold by a person for Rs 7000 only. His mother proved that he was a congenital idiot, incapable of understanding the transaction and that he mostly wandered about. Holding the sale to be void, SINHA J explained the effect of Section 12 in the following passage:

> "According to this section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgment as to whether what he is about to do is to his interest or not. The crucial point, therefore, is to find out whether he is entering into the contract after he has understood it and has decided to enter into that contract

39. *Machaiman* v *Usman Boari*, (1907) 17 Mad LJ 78 ; *Amina Bibi* v *Saiyid Yusuf*, 44 All 748, a case of lease which was held to be void.

40. He can be favoured with benefits. *Sheoratan* v *Kali Charan*, 79 IC 955, Oudh, mortgage in favour of a person suffering from mental disorder.

41. AIR 1957 Pat 491. *See* also *Jyotirindra Bhattacharjee* v *Sona Bala Bora*, AIR 1994 Gau 99, the person in question filed cases against family members, remained away from house for long periods, transferred family properties to the extent of making the family homeless, the court said that all this was sufficient to indicate that the vendor was not normal and was not mentally sound at the time of sale. The purchaser adduced no evidence that the vendor was of sound mind. *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. .

after forming a rational judgment in regard to his interest.... It does not necessarily mean that a man must be suffering from lunacy to disable him from entering into a contract. A person may to all appearances behave in a normal fashion, but, at the same time, he may be incapable of forming a judgment of his own, as to whether the act he is about to do is to his interest or not. In the present case (he) was incapable of exercising his own judgment."

Illustration (*b*) appended to Section 12 shows that a drunken person is in the same category as a person of unsound mind.

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# *Free Consent*

## DEFINITION OF FREE CONSENT [S. 14]

According to Section 10 free consent is an essential requirement of a contract. Section 14 defines "free consent".

**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.

### Vitiating factors and their effect

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.[1] If, for example, a person is induced to sign an agreement by fraud, he may, on discovering the truth, either uphold the contract or reject it. If he confirms it, the contract becomes binding on both the parties. It is a contract which is enforceable at the option of only one of the parties, namely, the party whose consent was not free. Giving the meaning of a voidable contract, S. 2(*i*) says that "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.[2]

Where consent is caused by mistake, the agreement is void.[3] A void agreement is not enforceable at the option of either party.[4]

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1. Sections 19 and 19-A. For an example of compulsory consent under a statute see *Mangaldas Raghavji* v *State of Maharashtra*, (1965) 2 SCR 894, 906: AIR 1966 SC 128: 1966 Cri LJ 106.
2. See *Nokhia* v *State of HP*, AIR 1985 HP 88, where it was observed that consent to an acquisition cannot be described as a real consent. In the absence of these vitiating factors the contract binds and no one can get rid of it by unilateral action. Thus a site allotted and accepted by the allottee by performance of all the requirements for the purpose of establishing a nursing-home was not allowed to be cancelled by the allotting authority. *Kailash Chandra Kotia (Dr)* v *Rajasthan State Industrial Devp & Investment Corpn*, (1991) 1 Raj LR 174 Jodhpur Bench. *Sheo Ratan Prasad Gupta* v *Prema Devi*, (1997) 1 BLJR 695, a compromise agreement signed by the parties and their counsels, the court decided the suit by relying on it, not allowed to be questioned on the ground of lack of free consent unless there was proof of that fact available.
3. Sections 20, 21 and 22.
4. Section 2(*g*).

## COERCION

### Definition [S. 15]

An agreement the consent to which 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.

*Illustrations*

*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.

### Techniques of causing coercion

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 IPC

"It is clear that coercion as thus defined implies a committing or threatening to commit some act which is contrary to law."[5] "The section has given rise to few decisions."[6] Similarly, the Privy Council observed in *Askari Mirza* v *Bibi Jai Kishori*[7] that "cases brought under this particular branch of Section 15 of the Contract Act must be of rare occurrence". A clear illustration would be consent obtained at the point of pistol, or by threatening to cause hurt, or by intimidation or by threatening to burn a man's house or slashing his valuable picture.[8] An intriguing question in this connection was before the Madras High Court in *Chikham Amiraju* v *Chikham Seshamma*:[9]

> 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.

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5. *Gobardhan Das* v *Jai Kishen Das*, (1900) 22 All 224.
6. OLDFIELD J in *Chikham Amiraju* v *Chikham Seshamma*, (1917) 41 Mad 33, 36.
7. (1912) 16 IC 344.
8. *The Siboen and the Sibotre, Re*, (1976) 1 Lloyd's Rep 293; cf. *The Atlantic Baron, Re*, (1978) 3 All ER 1170.
9. Note 6.

It was held by a majority "that the threat of suicide amounted to coercion within Section 15 and the release deed was, therefore, voidable." The difference of opinion related to whether suicide is an act forbidden by the Indian Penal Code. An attempt to commit suicide is punishable under the Code, but there is no punishment provided for suicide.[10] The majority consisting of WALLIS CJ and SESHAGIRI J believed that the man who commits suicide goes unpunished, not because the act is not forbidden, but because there is nobody left to be punished. OLDFIELD J dissented on the ground that unless an act is made punishable it cannot be said to be forbidden.

"When a criminal prosecution is instituted against a person and such person fearing the result of the prosecution enters into an agreement in favour of the complainant in consideration of his abandoning the prosecution, it cannot be held simply upon these facts that the consent of such person was caused by coercion."[11] "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." This was pointed out by the Privy Council in *Askari Mirza* v *Bibi Jai Kishori*:[12]

> A minor, having borrowed on two mortgage deeds, agreed to a compromise decree although the mortgages were void. Subsequently he pleaded that he entered into the compromise because he was threatened with prosecution for falsely misrepresenting his age and that this amounted to coercion. Their Lordships observed: "The law as contained in Section 15 is much wider than anything to be found in the English authorities and in India it is not correct to say that a contract is vitiated merely by proof of a threat to bring a criminal charge. Of course, if the charge of cheating was a true one, there is an end to the plaintiff's case, for a threat to bring such a charge would not be an act forbidden by the Indian Penal Code."[13]

As the court below recorded no finding as to the truth or falsity of the charge, the case was referred back for re-trial.

The plea was that the plaintiff was dispossessed of promises forcibly under threat 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 S. 15.[14]

**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.

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10. Section 309, Indian Penal Code.
11. *Masjidi* v *Ayisha*, (1880) Punj Rec No. 135, p 378. *See* also *Gobardhan Das* v *Jai Kishen Das*, (1900) 22 All 224.
12. Note 7 above.
13. Compulsory sales prescribed by an Act, for example, that the grower will sell all his product only to a particular mill, there is no coercion in it. *Andhra Sugars Ltd* v *State of AP*, (1968) 1 SCR 705: AIR 1968 SC 599. For an earlier view see *New India Sugar Mills, Re*, 1963 Supp (2) SCR 459: AIR 1963 SC 1207. For a subsequent decision see *Salar Jung Sugar Mills* v *State of Mysore*, (1972) 1 SCC 23: (1972) 2 SCR 228: AIR 1972 SC 87.
14. *Kishan Lal Kalra* v *NDMC*, AIR 2001 Delhi 402: (2001) 92 Delhi LT 67.

He was in immediate need of his article and the defendant extracted from him an extra amount by refusing to deliver it.[15] 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.[16]

**Comparison with English Law**

The following comparison has been attempted by the Madras High Court:[17]

> "What the Indian Law calls 'coercion' is called in English Law 'Duress or Menace'. Duress is said to consist in actual or threatened violence or imprisonment of the contracting party or his wife, parent or child, by the other party or by anyone acting with his knowledge and for his advantage. But coercion as defined in S. 15 is much wider and includes the unlawful detention of property also. Further, coercion may be committed by any person, not necessarily a party to the contract. Again, it need not be directed against the contracting party, or his parent, wife or child. It may be directed against any person, even if he is a stranger. While in English Law, duress must be such as will cause immediate violence and also unnerve a person of ordinary firmness of mind, these requisites are not necessary in Indian Law."

## UNDUE INFLUENCE

**Definition [S. 16]**

Section 16 of the Act defines undue influence.

**16.** (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 in a position 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) Where 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.

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15. *Astley* v *Reynolds*, (1731) 2 STR 915: 93 ER 939.
16. *Superintending Engineer, Irrigation Deptt* v *Progressive Engg Co*, (1997) 4 Andh LD 489 DB, AP.
17. *Karuppayee Ammal* v *Karuppiah Pillai*, (1987) 1 Mad LJ 138.

Nothing in this sub-section shall affect the provision of Section 111 of the Indian Evidence Act, 1872 (1 of 1872).

*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 moneylender of his village, contracts a fresh loan on terms which 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 loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

**Ability to dominate will of other**

Sometimes the parties to an agreement are so related to each other that one of them is able to dominate the will of the other. The person who occupies the superior position may prevail upon the other to obtain his consent to an agreement to which he, but for the influence so exerted, would not have consented. A spiritual adviser (guru), for example, in a case before the Allahabad High Court,[18] induced the plaintiff, his devotee, to gift to him the whole of his property to secure benefits to his soul in the next world. Such a consent is said to be obtained by undue influence. "Would any reasonable man," the court said, "in full possession of his senses and not under unusual influence of some kind or the other do such a thing?"

*Subtle Species of Fraud*

"Undue influence is said to be a subtle species of fraud whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion, importunity or other domination, calculated to prevent expression of the victim's true mind. It is a constraint undermining free agency, overcoming the powers of resistance, bringing about a submission of the other."[19] The following statement bears out the distinction between coercion and undue influence:

> "The law draws a distinction between duress and undue influence. Duress (coercion) in the execution of a contract or deed occurs when there is a physical compulsion of the person, which must be very rare, or when there is a threat to the person's life or limb, or threat of a physical beating or of imprisonment. It may also take into account threats of a wrongful imprisonment or prosecution of the person and possibly of the person's near relative.

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18. *Mannu Singh* v *Umadat Pandey*, (1890) 12 All 523. For an English case of the same kind see *Allcard* v *Skinner*, (1887) 36 Ch D 145.
19. *Mahboob Khan* v *Hakim Abdul Rahim*, AIR 1964 Raj 250.

> In contrast to duress, undue influence may exist without violence or th[reat] of violence against the victim. It depends upon the existence of a relationship between two parties which, while it continues, causes one to place a confidence in the other which produces a natural influence over the one which that other abuses to his own advantage."[20]

**Relations which involve domination**

When can it be said that one party is able to dominate the will of the other? The answer is, in all cases where there is active trust and confidence between the parties or the parties are not on equal footing.[21] "The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed."[22] It applies "to all variety of relation in which domination may be exercised by one person over another."[23] "The relationships which may develop a dominating influence of one over another are infinitely various. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is a world doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case."[24] For example, in *Williams* v *Bayley*:[25]

> A son forged his father's signature on several promissory notes and paid them into his banking account. When the truth came to light, the manager of the bank threatened prosecution of the son and "transportation" if a satisfactory solution were not found. To avert this threat, the father agreed to give an equitable mortgage to the bank on his property in return for the promissory notes. Subsequently the father sought to have this agreement cancelled on the ground that he was influenced by the threat.

The House of Lords held the agreement to be voidable. Lord CHELMSFORD expressed the opinion that the negotiation proceeded upon an understanding that the agreement to give security for the promissory notes would relieve the son from the consequences of his criminal act; and the fears of the father were stimulated and operated on to an extent to deprive him of free agency, and to extort an agreement from him for the benefit of the bankers. There was inequality between the parties and one of them took unfair advantage of the situation of the other and used undue influence to force an agreement from him.

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20. *Saxon* v *Saxon*, (1976) 4 WWR 300, 305, 306 (BCSC) Canada.
21. The ordinary trade buyers and sellers are on equal footing and not related in fiduciary capacity. See *Devki Nandan* v *Gokli Bai*, (1886) 2 Punj LR 325 P&H.
22. Lord KINGSDOWN in *Smith* v *Kay*, (1859) 7 HLC 750, 779: 30 LJ Ch 45.
23. Sir SAMUEL ROMILLY in *Huguenin* v *Basely*, (1807) 14 Ves 273: 9 RR 283.
24. Lord SCARMAN in *National Westminster Bank* v *Morgan*, (1985) 1 All ER 821.
25. (1866) LR 1 HL 200: (1861-73) All ER Rep 227. It has been observed by the Supreme Court that S. 16 is based on English law of undue influence. *Subhas Chandra* v *Ganga Pd*, (1967) 1 SCR 331: AIR 1967 SC 878.

In particular, however, and without prejudice to the generality of the principle, the Act lays down, in sub-section (2) of Section 16 that a person is deemed to be in a position to dominate 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

(*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 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.[26] And confidence is at the base of innumerable transactions of mankind. This category is, therefore, a very wide one. It includes the relationship of solicitor and client,[27] trustee and *cestui que trust*,[28] spiritual adviser and his devotee,[29] doctor and patient,[30] woman and her confidential managing agent,[31] parent or guardian and child,[32] and creditor and debtor.[33] The relationship of trust and confidence presents a very good opportunity to the person in whom confidence is held to exploit it to his own use. A contract between persons so related is, therefore, voidable if the consent was obtained by abusing the confidence. The duty of the person in whom confidence is reposed was explained by the Court of Appeal in *Moody* v *Cox*.[34] A solicitor sold certain property to one of his clients. The client subsequently alleged that the property was considerably overvalued. SCRUTTON LJ proceeded as follows:

> "Generally when you have made a legal contract and correctly expressed it in writing, and it has not been obtained by any misstatement of facts, innocent or fraudulent, the contract stands, and the fact that one party or the other knows

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26. See *Subhas Chandra* v *Ganga Pd*, (1967) 1 SCR 331: AIR 1967 SC 878.
27. *Pushong* v *Mania Halwani*, (1868) BLR AC 95, where a poor woman agreed to give one-half of the property which she might recover with the assistance of her *Mookhtaar*. *See* also *Brojendra Nath* v *Sreemutty*, (1910) 6 CWN 816; *Sandersons & Morgans* v *Mohanlal*, AIR 1955 Cal 319. *See*, for example, *Moody* v *Cox*, (1917) 2 Ch 71: (1916-17) All ER Rep 548, CA, where a solicitor sold a trust property to one of his clients who subsequently sought rescission on the ground that the property was considerably overvalued. The Court of Appeal held that when undue influence is alleged against a solicitor he has to prove that he disclosed all the material facts and that the transaction was of advantage to the client.
28. *Raghunath* v *Varjivandas*, (1906) 30 Bom 579.
29. *Mannu Singh* v *Umadat Pande*, (1890) 12 All 523.
30. *Mitchell* v *Homfray*, (1881) 8 QBD 587.
31. *Wajid Khan* v *Raja Ewaz Ali Khan*, (1891) 18 IA 144; *Palanivelu* v *Neelavathi*, AIR 1937 PC 50; *Subbamma* v *Mohd Abdul*, AIR 1950 Hyd 55.
32. *Lakshmi Doss* v *Roop Lall*, (1907) 30 Mad 169.
33. *Dialaram* v *Sarga*, AIR 1927 Lah 536. *See* Dealy, *Fiduciary Relationships*, 1962 Camb LJ 69.
34. (1917) 2 CH 71: (1916-17) All ER Rep 548, CA.

facts about which he says nothing, which made the contract unprofitable one to the other party, is of no legal consequence. But there are certain relations and certain contracts in which a higher duty is imposed upon the parties and they must not only tell the truth, but they must tell the whole truth so far as it is material, and they must not only not misrepresent by words, they must not misrepresent by silence if they know of something that is material. Some of those cases depend on the relationship between the parties, and, generally speaking, are cases where the relation is such that there is confidence reposed by one party and influence exercised by the other. In that class of relation of parties you may get the duty, first of all, that the party who has influence must make a full disclosure of everything that he knows material to the contract, and, secondly, that the party who has the influence must not make a contract with the party over whom he has influence unless he can satisfy the court that the contract is an advantageous one to the other party."

*Mental Distress*

The last category of persons whose will is vulnerable to all sorts of influences is that of "persons in mental distress". A person is said to be in distress when his mental capacity is temporarily or permanently affected. It may be due to extreme old age or mental or bodily illness or any other cause. Such a person is easily persuaded to give consent to a contract which may be unfavourable to him. Accordingly, if a contract is made with him by taking advantage of his distress, it is voidable on the ground of undue influence. In a case, for example, before the Madras High Court, a poor Hindu widow, who was in great need of money to establish her right to maintenance, was persuaded by a moneylender to agree to pay 100 per cent rate of interest.[35] This is a 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*

But 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 instance of his father and borrowed on exorbitant terms a sum of money to defend himself, it was held that he was not in such mental distress as would enable a moneylender to dominate his will.[36] Similarly, where a person, fearing the result of the prosecution pending against him, enters into an agreement in favour of the complainant in consideration of his abandoning the prosecution, it cannot be held simply upon these facts that the consent of such person was caused by undue influence.[37]

*Statutory compulsion, no distress*

A contract made under statutory compulsion cannot be regarded as one made under undue influence. In a case before the Supreme Court, a cane grower had the freedom to offer canes to the factory of his area or not but if he made an offer, the factory was bound under an Act to accept. The Court pointed out that in such a case the consent, though compulsory, is not caused by undue influence, fraud,

35. *Rannee Annapurni* v *Swaminatha*, (1910) 34 Mad 7.
36. *Raghunath Prasad* v *Sarju Prasad*, AIR 1924 PC 60.
37. *Masjidi* v *Ayisha*, 1880 Punj Rec No. 135, p 398; *Gobardhan Das* v *Jai Kishen Das*, (1900) 22 All 224.

misrepresentation or mistake. The compulsion of law is not coercion. "As a result of economic compulsions and changes in the political outlook, the freedom of contract is now being confined gradually to narrower and narrower limits. Here is a case where one party to contract of sale is compelled to enter into it on rigidly prescribed terms and conditions and has no freedom of bargaining. But, in the eyes of the law, the agreement is freely made."[38]

**Burden of proof**

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

> The law says that: (1) not only must the defendant have a dominant position, but (2) he must use it.[39] It is not enough, for a person to avoid the contract, to show that the other party is his father who could have influenced him. He must go further and show that his father actually did influence him.[40]

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38. *Andhra Sugars Ltd* v *State of AP*, (1968) 1 SCR 705: AIR 1968 SC 599. *See* also *New Sugar Mills Ltd, Re*, AIR 1963 SC 1207.

39. Both these requirements must coexist for the reversal of the rule as to burden of proof under this section and S. 111 of the Evidence Act, 1872. See *Mathu* v *Cherchi*, (1990) 1 Ker LT 416.

40. *Anjadennessa Bibi* v *Rahim Buksh*, (1915) 42 Cal 286. The Supreme Court has held that all the particulars must be given as in the case of fraud. *Subhash Chandra* v *Ganga Pd*, (1967) 1 SCR 331: AIR 1967 SC 878. *See* also *Ram Chandra Singh* v *Basdeo Singh*, AIR 1982 All 437. A man's only son died. His widowed daughter-in-law with the help of her brothers drove him out of his land. He joined his nephews and transferred his land to them. Held, they (those questioning) must prove undue influence. *Alec Lobo (Garage) Ltd* v *Total Oil G.B. Ltd*, (1983) 1 All ER 944 Ch D. Every person occupying a position of influence does not necessarily abuse it. Thus where finance was provided twice over to a garage subject to certain protective clauses but with a genuine concern to help its business, no undue influence was found though a part of the agreement was struck down as unreasonable restraint of trade. *Afsar Sheikh* v *Soleman Bibi*, (1976) 2 SCC 142, the fact of undue influence must be made out of the particulars pleaded by the plaintiff and not from the written statement. Where an ailing father executed a sale deed in favour of his two sons who were caring for him and the third living apart questioned validity, the court held that though the burden was on those who were favoured, the transaction did not disclose any element of influence or fraud. *Dharamdas Pal* v *Krishnadhan Pal*, 1988 Reports 25, 276, SC. The courts must give reasons as to why the gift has been held to be unconscionable. *Sukhdev Rai* v *Champa Devi*, (1986) 34 BLJR 90, gift deed in favour of grandson upheld though executed by the donor only a few days before his death. The court followed the remark in HALSBURY'S LAWS OF ENLAND, p 678, Vol 17 (3rd edn) to the effect that: "There is no presumption of undue influence in the case of gift to a son, grandson or son-in-law, although made during the donor's illness and a few days before his death." *Shrimati* v *Sudhakar R Balkar*, (1997) 4 Bom CR 237, the mere fact that the person in whose favour a property was gifted by registered deed was the tenant of the owner was held to be not sufficient to shift the burden of proof on the donee. *Kartick Prasad Gorai* v *Neami Prasad Gorai*, AIR 1998 Cal 278, there was no consideration and the sale deed seemed to be fake, hence presumption and shifting of burden of proof on to the beneficiary of the sale deed. *Chinnappa* v *Ayyanar Raju*, (1996) 2 Mad LJ 258, no cause of undue influence shown, both parties leading evidence, question of burden of proof loses significance. *Shivdas Loknathsing* v *Gayabai Shankar Surwase*, (1993) Mah LJ 1623, mere existence of the relationship not enough, initial burden is on the plaintiff to show relationship and prejudicial bargain. *Savithramma* v *H. Gurappa Reddy*, AIR 1996 Kant 99, allegation of undue influence, level of proof required is extremely high, it is rated on a par with criminal trial. *K.M. Madhvakrishanan* v *S.R. Swains*, AIR 1995 Mad 318, undue influence alleged but could not be substantiated. *Premnarayan* v *Kunwarji*, AIR 1993 MP 162, alleged undue influence in a contract of sale not substantiated by proof. *K. Jagannathan* v *A.M. Vasudevan*, AIR 2001 Mad 184, family partition, no proof of unfairness or of coercion or misrepresentation. *Dalbir Singh* v *Vir Singh*, AIR 2001 P&H

**Presumption of undue influence**

But in certain cases presumption of undue influence is raised. The effect of the presumption is that once it is shown that the defendant was in a position to dominate the will of the plaintiff it will be presumed that he must have used his position to obtain an unfair advantage. It will be then for the defendant to show that the plaintiff freely consented. For example, in *Lancashire Loans Ltd* v *Black*:[41]

> 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.

SCRUTTON LJ held that "in the case of the benefit of contractual advantage obtained from a person coming within certain defined relations, such as the relation of parent and young child, solicitor and client, religious superior and inferior, by the related member of that class, it is enough to prove the existence of such a relation to throw on the recipient of the advantage the burden of proving independent advice to the donor and in other respects justifying the transaction." His Lordship then pointed out that a married woman is not necessarily independent of the influence of her mother. Such cases should be dealt with on their own facts, and not on any general presumption. On the facts of the case the court found that she was under the influence of her mother.[42]

Similarly, where a *parda* lady of 70 years, having three daughters, was supposed to have gifted her entire land to the defendant, who was the tenant of that land, it was held that from the position of his possession of the land he must have dominated the woman and burden lay upon him to show the circumstances of the gift. He being not able to do so, the gift deed was set aside.[43]

The presumption is raised at least in the following cases:

*1. Unconscionable Bargains, Inequality of Bargaining Power or Economic Duress*

UNCONSCIONABLENESS.—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 consent must have been obtained by undue influence. The burden is shifted to the stronger party to prove that he did nothing to

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216, sale of land, agreement between an *adatia* and his customer, the former could influence the latter and, therefore, better proof of fairness was expected.

41. (1934) 1 KB 380: (1933) All ER Rep 201, CA.

42. For a contrary decision where no influence was in evidence, see *Mahabir Saha* v *Haripada Saha*, AIR 1982 Cal 353. *Turnbull & Co* v *Duval*, 1902 AC 429 and *Chaplin & Co* v *Brammal*, (1908) 1 KB 233 are two cases involving the relationship of husband and wife. In *Turnbull* the creditor used the husband in order to exert pressure on the wife to procure a security for the benefit of the creditor. In *Chaplin* the creditor left it to the husband to obtain the execution of a guarantee by the wife. In these cases, equity intervened to grant relief to the two wives on the ground of undue influence exerted by their husbands. This should be contrasted with *Bank of Baroda* v *Shah*, (1988) 3 All ER 24 where the pressure to create a legal charge in favour of the bank was exerted not at the biddance of the bank and, without its knowledge, but by the director of the borrower company upon his sister and, therefore, mortgage in favour of the bank was held to be not voidable. For a survey of a large number of such cases see *Che Som Binte* v *Maha P Ltd*, (1989) 2 CLJ 893, 906-911, High Court, Singapore.

43. *Chand Singh* v *Ram Kaur*, (1987) 2 Punj LR 70. *Rajgor Bhanji Mulji* v *Sonabai*, (1993) 2 Guj LR 1243, a clog on the equity of redemption, presumption of unconscionable transaction.

overbear the will of the other. An instructive illustration is the decision of the Privy Council in *Wajid Khan* v *Raja Ewaz Ali Khan*:[44]

> 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. The onus is on the grantee to show conclusively that the transaction is honest, bona fide, well-understood, the subject of independent advice and free from undue influence".

**Some instances of unconscionableness**

The presumption of undue influence was raised where a poor Hindu widow, having no means for maintenance, borrowed, in order to establish her right to maintenance, a sum of money at 100 per cent rate of interest;[45] where a person, without having the means of subsistence, in order to prefer an appeal against a judgment, borrowed Rs 3700 on a bond promising to pay Rs 25,000 within a year from recovery of the possession of an estate;[46] where a youth of 18 years of age, spendthrift and a drunkard, borrowed Rs 900 on a bond bearing compound interest at 2 per cent per mensem with monthly rests, the court saying that "the instrument itself bears upon its face the impress of unconscionable dealing, the rate of interest charged being so exorbitant";[47] where a person of the age of some 28 years, the son of a wealthy man, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs 500 with 37 1/2 per cent interest with six-monthly rests, the bond further providing that the sum would not be repayable within three years and even if it was repaid the interest would run for three years,[48] in all these cases the court gave relief by scaling down the rate of interest to what appeared to be reasonable in the circumstances. Gift in favour of a religious organisation by a person weak in mind and suffering in health has been held to be one which carries the apparent impress of undue influence.[49]

UNCONSCIONABLENESS IN MONEYLENDING TRANSACTIONS.—Unconscionable bargains have been witnessed mostly in moneylending transactions and in gifts. But the principle is not confined to such transactions only. In a case before the Bombay High Court,[50] 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.

POSITION OF DOMINANCE NECESSARY FOR PRESUMPTION TO ARISE.—It should, however, be borne in mind that the presumption of undue influence on the ground of unconscionableness of the bargain is raised only when one of the parties is in a position to dominate the will of the other. As between parties on equal footing the mere unconscionableness of the bargain does not create the presumption of undue

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44. (1891) 18 IA 144.
45. *Rannee Annapurni* v *Swaminatha*, (1910) 34 Mad 7.
46. *Chunni Kuar* v *Rup Singh*, (1889) 11 All 57.
47. *Kripa Ram* v *Sami-ud-in Ad Khan*, (1903) 25 All 284. STANLEY CJ at p 285.
48. *Balkishnadas* v *Madanlal*, (1907) 29 All 303.
49. *Philip Lukka* v *Franciscan Assn*, AIR 1987 Ker 204.
50. *Bhimbat* v *Yeshwantrao*, (1900) 25 Bom 126.

influence. The mere fact that the bargain is a hard one is no ground in itself for granting relief. This was pointed out by the Privy Council in *Raghunath Prasad* v *Sarju Prasad*.[51]

> The defendant and his father were equal owners of a vast joint family property over which they had quarrelled. Consequently the father had instituted criminal proceedings against the son. The defendant, in order to defend himself, mortgaged his properties to the plaintiff and borrowed from him about ten thousand rupees on 24% compound interest. In eleven years this rate of interest had magnified the sum covered by the mortgage more than elevenfold, *viz.*, Rs 1,12,885. The defendant contended that the lender had, by exacting high rate of interest, taken unconscionable advantage of his mental distress and, therefore, there should be presumption of undue influence.

Their Lordships, however, held that there could be no such presumption in the circumstances of the case. Referring to sub-section (3) of Section 16, which provides for presumption of undue influence, Lord SHAW observed as follows:

> "By this sub-section three matters are dealt with. In the first place, the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, *viz.*, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. The burden of proving that the contract was not induced by the undue influence is to lie upon the person who was in a position to dominate the will of the other.
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> Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?"

The borrower failed to prove that the lender was in a position to dominate his will. The only relation between the parties that was proved was simply that they were lender and borrower. The first requirement of Section 16 was, therefore, not fulfilled and, therefore, the borrower got no relief.[52]

UNCONSCIONABLE GIFTS.—Where a person was suffering from a number of ailments which confined him to a nursing-home and from there he made a deed gifting all his properties to one of his sons to the exclusion of others, the Supreme Court held that the presumption of undue influence was proper.[53]

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51. AIR 1924 PC 60. *See* also *Maria Eudaria Apolonia Gonsalves* v *Shripad Vishnu Kamat Tarcar*, AIR 1998 Bom 46, agreement for sale of property, immaterial that it was written in Portuguese, seller's son knew that language, no particulars of undue influence alleged, agreement enforceable, the price was found by experts to be reasonable and fair.

52. *See* also *Sundar Koer* v *Sham Kishan*, (1907) 34 Cal 150: 34 IA 7. Their Lordships distinguished the case from *Dhanipal Das* v *Raja Maheshwar Baksh Singh*, (1906) 28 All 570: 33 IA 118 and *Raja Maheshwar Baksh Singh* v *Shadilal*, (1909) 31 All 386: 36 IA 76, on the ground that in these cases the borrower was placed under the Court of Wards and was, therefore, under a peculiar disability. This enabled the lender to dominate his will.

53. *Lakshmi Amma* v *T. Narayan*, (1970) 3 SCC 159: AIR 1970 SC 1367. However, the mere fact of old age or that the donor had no other property with him would not create a presumption of undue influence. *Dharam Kaur* v *Gurdev Singh*, (1988) 2 Punj LR 436 P&H. In another case of gift of entire property by an old lady to the exclusion of her sons the court said that the age of the donor is definitely one of the most important facts to be taken into

Gifts of this kind are often made under influence. In another case before the Privy Council:[54]

> An old Malay widow, wholly illiterate, was the owner of considerable rent-producing landed property. She gifted all her property to her nephew who was helping her, leaving for her an income only of about 30 dollars. The deed of gift was prepared with the help of a lawyer.

On these facts the Lord CHANCELLOR observed:

> "In the present case their Lordships do not doubt that the lawyer acted in good faith, but he seems to have received a good deal of his information from the respondent (nephew); he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties; and they regard it as most important from the point of view of the public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which gave rise to the presumption must be set aside unless the donee is able to satisfy the court of the facts sufficient to rebut the presumption."[55]

In another case of benefits without consideration and which was also before the Privy Council,[56] a woman, who was described as a submissive wife and who at the bidding of her husband, gave security of her *stridhan* (personal property), which comprised some land, to secure the growing indebtedness of her husband, Lord GODDARD expressed the opinion that "it is unnecessary to enter into a discussion as to the burden of proof in such a case as this as the evidence here abundantly justifies a presumption that she was acting under the influence of her husband for whose benefit the mortgage was being executed". His Lordship continued:

> "It would certainly not be true to say that there is a presumption in every case where a wife confers a benefit on her husband without consideration. Equally it is not necessary in order to establish the presumption that the parties should stand in some particular category of relationship to each other. The presumption no doubt can be more easily established and indeed may be assumed in such cases as transactions between parent and infant child, solicitor and client, or spiritual adviser and penitent, but it will arise in any case in which

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account in the totality of the circumstances surrounding the transaction. *M. Karunnakara Kurup* v *Vaniyarambath L. Amma*, 1984 Ker LT 83 SN. *Subramanian* v *Ramachandran*, (1995) 2 Ker LT 38 (Short Notes), dispute as to the genuineness of a will.

54. *Inche Noriah Binte Mohd Tahir* v *Shaik Ali*, AIR 1929 PC 3; *Hamelo* v *Jang Sher Singh*, AIR 2002 P&H 147, 99 year lease signed by a lady who was old, illiterate and sick, also victim of fraud because nominal consideration, held voidable.

55. Another instance of an unconscionable dealing of this kind, *Lallan Singh* v *Dulhin Chandmani Devi*, (1984) II PLJR 622.

56. *Tungabai Bhratar Purushottam Shamji Kumbhojkav* v *Yeshvant Dinkar Jog*, AIR 1945 PC 8.

the facts show that the circumstances are such that influence can fairly be inferred."

RELATIONSHIP BY BLOOD, MARRIAGE OR ADOPTION NOT SINE QUA NON.—Thus, what is necessary to establish the presumption is not that the parties should be related by blood, marriage or adoption, but that their relations are, or position towards each other is, such that one is in a superior position over the other.[57] Even where they are so related, the presumption may not arise for the influence may as well be fairly and wisely exercised. This has been pointed out by the Supreme Court in *Subhas Chandra Das* v *Ganga Prasad Das*:[58]

> Some agricultural property was gifted by a person to his only grandson through one of his two sons to the total exclusion of his sons. Although the donor was of great age, he was taking active interest in his property. Four years after the gift he died and still four years after that the other sons questioned the validity of the gift on the ground of undue influence.

The court approved the principles laid down by the Privy Council in *Raghunath Prasad* v *Sarju Prasad*[59] and also noted the fact that Section 16 of the Contract Act is based on the English common law as noted in the judgment of the Supreme Court in *Ladli Prasad Jaiswal* v *Karnal Distillery Co*[60] and held that on the facts of the case no presumption of undue influence could arise. "The circumstance that a grandfather made a gift of a portion of his properties to his only grandson (on account of natural love and affection) a few years before his death is not on the face of it an unconscionable transaction." Where, on the other hand, a person made a very negligible provision for his third wife and the daughters borne by her, and donated the whole of his property only to one of his grandsons, the Supreme Court held that, in the absence of any explanation from the side of the donor for the discrimination, the presumption of undue influence arose.[61]

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57. *See*, for example, *Avon Finance Co* v *Bridger*, (1985) 2 All ER 281 CA. An elderly couple, willing to purchase a retirement house, signed certain documents at the bidding of their son which were prepared by the finance company's solicitors and executed at the solicitor's office, the son acting as an agent to procure signature and did so by committing a fraud on his parents, the Court of Appeal unanimously held that the charge should be set aside. Similarly, in *Kingsworth Trust Ltd* v *Bell*, (1986) 1 All ER 423, the Court of Appeal set aside the transaction of a mortgage which was executed by a wife upon her property under misrepresentation from her husband whose company had been provided the loan and who was authorised by the lending company to get the documents executed. Contrast with *Coldunell* v *Gallon*, (1986) 1 All ER 429 CA, where no relief was allowed because the son was not acting as an agent of the finance company to get their parents' signatures upon mortgage documents which he procured by committing a fraud on his parents.
58. AIR 1967 SC 878: (1967) 1 SCR 331.
59. AIR 1924 PC 60.
60. (1964) 1 SCR 270, 300: AIR 1963 SC 1279.
61. *Lakshmi Amma* v *Talengal Narayna*, (1970) 3 SCC 159: AIR 1970 SC 1367. *See* also *Takri Devi* v *Rama Dogra*, AIR 1984 HP 11, where the donor was an illiterate lady separated from her husband and the donee was her legal advisor, held, presumption of undue influence. *Marei Celine D'Souza* v *Renie Fernandez*, AIR 1998 Ker 280, the person executing settlement of property in favour of the defendants was ill and totally dependent on them for existence. The defendants had no other claim to or interest in the property. Held, the document was vitiated by undue influence. *Kennedy Alemas* v *Executive Engineer*, (1998) 2 Bom CR 320, the doctrine of inequality of bargaining power does not apply where the Government is a party to the contract. A tender for one-year supply system was approved for 3 months' supplies with right to extend up to 12 months. No extension was granted after first extension. No illegality on the part of the Government. The court distinguished the case from

INEQUALITY OF BARGAINING POWER.—The presumption of undue influence may also arise from the fact that there is such an inequality of bargaining power between the parties that one can cause economic duress to the other. The decision of the Court of Appeal in *Lloyds Bank* v *Bundy*[62] is a remarkable illustration of the concept of inequality of bargaining power.

> A contractor borrowed a sum of money from a bank. He could not pay back in time. The banker pressed for payment or for security. He suggested that his father might mortgage the family's only residential house. The bank officer visited the father and obtained his signatures upon readymade papers. The contractor still could not pay and the banker sought to enforce the mortgage which might have meant throwing out of the family from its only residence. Accordingly Mr Bundy relied upon the unfair character of the mortgage.

He was allowed to set aside the mortgage. Lord DENNING MR tried to locate the principle which runs through all the varied situations in which relief is allowed on account of unequal bargaining power. He said:

> "English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair, or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influence or pressure brought to bear on him by or for the benefit of the other."

The bank exploited the vulnerability of the father, caused by his desire to help his son, to such an extent that he charged his house to his ruin for a very short moratorium, which was a highly inadequate consideration for the mortgage.

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*Central Inland Water Transport Corpn* v *B.N. Ganguli*, AIR 1986 SC 1571; *Kumari Shrilekha Vidyarthi* v *State of UP*, AIR 1991 SC 537 and *LIC of India* v *Consumer Education & Research Centre*, AIR 1995 SC 1811 where it was observed that the State could not be allowed to enforce a contract which has been entered into with a citizen where there did not exist equality of bargaining power. *Sita Bewa* v *Gangadhar Bharati*, AIR 1999 Ori 154, sale deed executed by an illiterate lady, there was a concurrent finding of fact based on material evidence that she understood the nature of the transaction. The court refused to interfere in the finding in second appeal.

62. (1975) 1 QB 326. *See* also *Midland Bank Plc* v *Massey*, (1995) 1 All ER 929 CA, where the woman borrower for the benefit of another had the independent advice of her solicitors. The bank was entitled to treat the solicitors as respectable solicitors who would take seriously their obligation to give Ms Massey independent advice. It was not for the bank to check up and find out exactly what advice had been given. *Bank of Baroda* v *Rayasel*, (1995) 2 FLR 376 CA, facts similar to those of *Massey case*. *Banco Exterior International* v *Mann*, (1995) 1 All ER 936, wife mortgaging her joint property with her husband for the husband's loan. The court said that the bank was not required to conduct a meticulous examination of the advice given by the solicitor. Once the bank knows that the wife had received advice from a solicitor, the bank was entitled to think that the solicitor's advice would be such as a reasonably competent professional person would give. *TSB Bank plc* v *Camfield*, (1995) 1 All ER 951, CA, the husband misrepresented to induce his wife to charge her property for the husband's loans. She had no advice. The whole transaction was set aside and not merely the extent to which she was told that her estate would be burdened. *Barclays Bank plc* v *O'Brien*, (1993) 4 All ER 417 HL, wife standing surety for the husband's debt without independent advice, held voidable because of undue influence or misrepresentation. *CBC Mortgages plc* v *Pitt*, (1993) 4 All ER 433 HL, wife told loan needed for buying holiday home, she agreed to give her property in mortgage, money spent by husband on investment in shares, loss, wife allowed to avoid, for the finance company did not take care to see that she had independent advice.

INFLUENCE DISTINGUISHED FROM PERSUATION.—"Influence" has to be distinguished for this purpose from persuation. This distinction was put to work by the Bombay High Court[63] in a case in which the only relationship between the parties was that the defendant was a tenant of a part of the plaintiff's premises. The owner was an illiterate widow, but she had been managing her agricultural property for over two decades. The tenant treated her as his mother and presuaded her to gift to him her entire property. The gift deed, as duly executed by her, was registered. The court felt that it could not be said that the tenant was in a position to dominate her will. The gift deed was not the result of undue influence. The court said:[64] Influence in the eyes of the law has to be contradistinguished with persuation. Every persuation is not the same thing as influence. One may by his acts and conduct convince and persuade the other party to do a particular act and if the other party does such an act freely and out of own volition, may be to his prejudice or disadvantage or peril, it cannot be said that such act was influenced by the other.[65]

ECONOMIC DURESS BY FORCING RENEGOTIATION OF TERMS.—The House of Lords in their decision in *Universe Tankships Inc.* v *International Transport Workers' Federation*[66] allowed the shipping company to recover back from the Workers' Federation 80,000 US Dollars which were paid under an agreement and which agreement the shipping company had to execute because the workers did not permit the ship to leave without signature. It amounted to economic duress upon the shipowners. The conduct was so catastrophic as to amount to coercion of the shipowner's will which vitiated their consent to those agreements and payments made by them.

The Bombay High Court[67] followed this case so as to hold that where a supplier of raw materials to the ONGC, which was an import substitution, gave a bank guarantee to the ONGC which was to be enforced only when the customs duty paid by the supplier was refunded to him and he was subsequently asked to drop this condition and make the guarantee enforceable absolutely and that the condition would be orally observed, it amounted to economic duress and fraud. The court

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63. *Shrimati* v *Sudhakar R. Bhatkar*, AIR 1998 Bom 122.
64. At p 125.
65. The court distinguished the case from *Shivgangawa Madiwalappa Vulaviv* v *Basangouda Govindgoura Patil*, AIR 1938 Bom 304. In this case a widow's husband's brother was living with her. They quarrelled and the man threw her out. She recovered the premises with the help of an influential *Watandar Patil*, who started living with her in immorality. He drove her out after obtaining from her the gift of her property. The court observed that the gift was presumably obtained through undue influence. The court also distinguished *Miti Bewa* v *Daitari Nayal*, AIR 1982 Ori 174, where the sale deed was executed by an illiterate lady thinking that it was a power of attorney in favour of her son-in-law who was living with her and managing her property. The burden was on the latter to prove that there was no undue influence. Similarly in *Jakri Devi* v *Ratna Dogra*, AIR 1984 HP 11, an illiterate lady, living separately from her husband, donated her apple orchard to her lover and the same was held to be the result of undue influence. *Annarpurna Barik Dev* v *Indu Bewa*, AIR 1995 Ori 272, deed executed by illiterate woman, burden is on the other party to prove that terms were fair and equitable, that she had independent advice and that the document was explained to and understood by her.
66. (1982) 2 WLR 803 HL: (1983) AC 366. For further study see M.H.Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, (1980) 26 McGill LJ 289.
67. *Dai-ichi Karkaria P Ltd* v *Oil and Natural Gas Commission*, AIR 1992 Bom 309. Followed in *B & S Contracts and Designs Ltd* v *Victor Green Publications Ltd*, (1989) ICR 419 where it was observed that for the purpose of this case it was sufficient to say that if the claimant had been influenced against his will to pay money under the threat of unlawful damage to his economic interest, he would be entitled to claim that money back.

cited Lord DIPLOCK in *Pao On* v *Lao Yiu Long*[68] as saying that the rationale behind the developing law of economic duress was that the apparent consent of the party aggrieved was induced by pressure exercised upon him by the other party which the law does not regard as legitimate with the consequence that his consent was treated as revocable unless approbated expressly or by implication after the illegitimate pressure had ceased to operate on mind.[69] His Lordship took specific precaution to distinguish the concept of economic duress from mere commercial pressure which in some degree always exists whenever one party to a commercial transaction was in a stronger bargaining position than the other party. Commercial pressure by itself does not amount to economic duress. In the view of the Privy Council, two elements were necessary to constitute duress, *i.e.*, (1) pressure amounting to compulsion of the will of the victim, and (2) the illegitimacy of the pressure exerted. For all practical purposes the victim of the duress must have no other choice.[70]

In another case on the subject,[71] a national road carrier backed out of the contract already entered into and compelled the other side to renegotiate the terms of the contract. The defendants were heavily dependent on the retail chain's contract and were unable at the time to find an alternative carrier. They agreed to the new terms but later on refused to pay at the new rate. The court observed:

> "Where a party to a contract was forced by the other party to re-negotiate the terms of the contract to his disadvantage and had no alternative but to accept the new terms offered, his apparent consent to the new terms was vitiated by economic duress."

The court cited the dictum of Lord DENNING in *D&C Builders Ltd* v *Rees*:[72]

> "No person can insist on a settlement procured by intimidation."

The party had to surrender to the demand of increased charges for carriage because they had to meet their commitment to customs. Accordingly, there was no consideration for the promise to pay increased charges and the same was held to be not enforceable.

Where a government department refused to extend time for completion of the ongoing works unless the contractor agreed to do the same type of further work at the old rates, the court said that it amounted to economic duress.[73]

EXPLOITATION OF THE NEEDY.—This approach has been used in some other cases also. One of them is *A. Schroeder Music Publishing Co* v *Macaulay*:[74]

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68. 1980 AC 614 PC: (1979) 3 All ER 65 PC.
69. For example, in *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd*, (1979) 1 QB 705: (1978) 3 All ER 1170 QB, the shipbuilders refused to honour the contract unless the stipulated payment was increased by 10%. They made the final payment without protest and thereafter claimed refund. But their conduct was held as amounting to ratification. The pressure on mind had ceased to exist when final bills were under consideration.
70. Their Lordships cited Goff and Jones, THE LAW OF RESTITUTION, with the remark that the developments in this field are very well traced in the work.
71. *Atlas Express Ltd* v *Kafco*, (1989) 1 All ER 641 QBD Commercial Court.
72. (1965) 3 All ER 837, 841. The court also referred to *Occidental Worldwide Investment Corpn* v *Skibs A/s Avanti*, (1976) 1 Lloyd's Rep 293, 336.
73. *Superintendent Engineer, Irrigation Deptt* v *Progressive Engineering Co*, (1997) 4 Andh LD 489 DB, AP.
74. (1974) 1 WLR 1308.

> There was an agreement between a young songwriter and a music publishing company. The arrangement was to remain in force for 5 years and was to be automatically extended for another five years should the boy's royalty reach the figure of £ 5,000. The company could terminate the agreement at any time by a month's notice. The boy had no such right and he wanted to get out of it.

The House of Lords ordered his liberation from the bond. The contract was on the terms of company's standard terms and was, therefore, the result of the company's dictation.

A similar relief was allowed in a case where a songwriter's copyright was purchased on terms that he was not to publish his songs through any other company but the company had the right to reject his songs.[75]

> "In determining the respective bargaining positions of the parties, the courts will look at a number of factors, such as age, poverty, illiteracy and emotional state."[76]

With these should be contrasted *National Westminster Bank* v *Morgan*.[77] A self-employed businessman's joint home with his wife was mortgaged to a building society who were threatening foreclosure. A bank provided him money with which he paid off the society and a new charge on the house was created in favour of the bank for all his present and future liabilities. When his wife was called upon to sign the papers, she was told that it covered only the loan and not business liabilities. The House of Lords were not able to relieve her from the consequences of her signature. The charge had conferred reasonably equal benefit on both parties. The relationship of banker and customer is not automatically characterised as one to which the doctrine of undue influence attaches.

TECHNIQUE OF JUDICIAL INTERVENTION IN UNFAIR BARGAINS.—These developments show that undue influence or duress has become a technique of judicial intervention in unfair bargains.[78] The traditional approach of confining duress to threats to the person and to goods is about to undergo expansion to include other threats, particularly those forms of economic coercion which force a person to enter or vary a contract against his will.[79] Forcing a person to accept less money than is due to him by exploiting his economic stringency is an example of this kind.[80]

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75. *Clifford David Management Ltd* v *W.E.A. Records Ltd*, (1975) 1 All ER 227. An illiterate donor transferring all her property to her lawyer, held, unconscionable. *Takri Devi* v *Rama Dogra*, AIR 1984 HP 11.
76. Nicholas Rafferty, *Recent Developments in the Law of Contract*, (1978) 24 McGill LJ 236, 271.
77. (1985) 1 All ER 821; (1985) 2 WLR 588 HL; noted, *The Limits of Undue Influence*, (1985) 48 Mod LR 579.
78. A study in this respect has been presented by M H. Oglivie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, (1980) 26 McGill LR 289. *See* also *Vinayakappa* v *Dulichand*, AIR 1986 Bom 193, consideration for a multistorey commercial complex unnaturally low.
79. For recent spurt of literature on the subject *see*, Waddam, *Unconscionability in Contract*, (1976) 39 Mod LR 369; Ogilvie, *Swiss Atlantique Revisited: How Long, O Lords How Long?*, (1980) 5 Can Bus LJ 100; Dalzell, *Duress by Economic Pressure*, (1942) 20 N Carolina L Rev 237, 341.
80. *D & C Builders* v *Rees*, (1966) 2 QB 617 CA; Llewellyn, *Bargaining, Duress and Economic Liberty*, (1943) 43 Colum LR 603 and *What Price Contract*, (1931) 40 Yale LJ 704. Beatson,

RESCUING EMPLOYEES AND OTHERS FROM UNREASONABLE TERMS.—Picking up the meaning of the word "unconscionable" from a dictionary[81] the Supreme Court has noted that it means something as shows no regard for conscience and which is irreconcilable with what is right or reasonable. The matter before the court was a service contract.[82] A clause in the contract empowered the employer (a Government undertaking) to remove an employee by three months' notice or pay in lieu. The employee, who contested the validity of this clause, was removed by handing him over a three months' pay packet. The Supreme Court regarded the clause to be constitutionally as well as contractually void. The court added that any term which is so unfair and unreasonable as to shock the conscience of the court would be opposed to public policy and therefore also void under S. 23. The contract was not based upon a real consent. It was rather an imposition upon a needy person.[83] The term was unconstitutional because it was so absolute that any officer could be made a target irrespective of his conduct, good or bad.

Commenting upon this expanding power of the court to relieve a party from the consequences of his own contract, a learned writer says that "freedom of contract turns out to be a misleading guide when so many contracts are not free in the economic sense. The notion of contract as private legislation appears less attractive when legislation is always drawn up one-sidedly. Judges are empowered to read in terms which are not there, or read out terms which are there. They are to impose reasonableness. Whatever is not reasonable is not law. If the parties have agreed to something unreasonable, they should be treated as if they have not agreed at all and released."[84]

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*Duress by Threatened Breach of Contract*, (1976) 92 LQR 496. Sutton, *Duress by Threatened Breach of Contract*, (1974) 20 McGill LJ 554. Adams, *Contract Law at Sea*, (1979) 42 Mod LR 557; (1979) 95 LQR 475; Coote, (1980) Camb LJ 40; Charles Fried, CONTRACTS AS PROMISES: A THEORY OF CONTRACTUAL OBLIGATIONS, where it is observed: "Many lawyers have a growing conviction that some degree of paternalistic protection of unsophisticated and unskilful bargains is necessary to avoid results that shock the conscience and this has led to the development of doctrines of unconscionability and a host of ad hoc statutory protections that violate the basic principle of freedom of contract"; Melvin Avon Eisenberg, *The Bargain Principle and its Limits*, (1982) 95 Harv LR 741; P.S. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT, where it is observed that society should not tolerate the results of unequal starting points for the trading process as the lottery of nature or as the price of civilisation. *See* also *Vinayakappa* v *Dulichand*, AIR 1986 Bom 193, consideration for multistorey commercial complex unnaturally low; *Atlas Express Ltd* v *Kafco (Importers and Distributors) Ltd*, (1989) 1 All ER 641, complaining party forced to accept change of terms.

81. SHORTER OXFORD ENGLISH DICTIONARY, 2288 (Vol II, 3rd edn).

82. *Central Inland Water Transport Corpn* v *Brojo Nath Ganguly*, (1986) 3 SCC 156, 206.

83. The court consulted the following on the subject of unconscionable bargains: CHITTY ON CONTRACTS, Vol I, Para 4, 25th edn, where contracts by way of imposition are considered; BLACK'S LAW DICTIONARY, 38 (5th edn) for definition of ADHESION CONTRACT; RESTATEMENT OF THE LAW by the American Law Institute, 107, Sec. 28, Vol II for *Unconscionable Contract Terms*; John R Peden, THE LAW OF UNJUST CONTRACTS, 28-29 (1982); the court noted the influence of the emerging doctrines of distributive justice and unfairness and their impact upon the law of contract at pp. 210-211; as to relationship between unfairness and public policy under S. 23 *see* the judgment of MADON J at p 217. Reaffirmed in *Delhi Transport Corpn* v *DTC Mazdoor Congress*, 1991 Supp (1) SCC 600: AIR 1991 SC 101.

84. J H Baker, *From Sanctity of Contract to Reasonable Expectation*, Current Legal Problems 1979. The law plays in this respect the role of a parent. *See* Anthony T Kronman, *Paternalism and the Law of Contracts*, (1988) 32 Yale Law Journal 763. A person who

NATURAL JUSTICE.—The process of contracting has also been subjected to the requirements of natural justice. The acceptance of a revised price by a low bidder without giving any such opportunity to the highest bidder was held by the Supreme Court to be a denial of natural justice rendering the auction to be void.[85]

2. *Contracts with Pardanashin Woman*

A contract with a *pardanashin* woman is presumed to have been induced by undue influence. She can avoid the contract unless the other party can show that it was her "intelligent and voluntary act". There is, however, no statutory or judicial definition of the term "pardanashin woman". In the opinion of the Bombay High Court[86] a woman does not become *pardanashin* simply because "she lives in some degree of seclusion". The concept probably means a woman who is totally "secluded from ordinary social intercourse". The following observation of the Privy Council explains the concept to a certain extent.[87]

> "It is abundantly clear that Mrs Hodges was not a *pardanashin*. The term *quasi-pardanashin* seems to have been invented for this occasion. Their Lordships take it to mean a woman, who not being of the *pardanashin class*, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business should be ascribed to her, and the same amount of protection which the law gives to *pardanashins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established with the wisdom of which we are not now concerned; outside that class it must depend in each case on the character and position of the individual woman whether those who dealt with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute."

In a case before the Bombay High Court:[88]

> It was found that a lady appeared before the Registrar for registration of certain documents, that she stood as a witness in the box in a suit, that she put in tenants and fixed and recovered rents from them in respect of her house. The court held that she could not be treated as a *pardanashin* lady.

Once it is shown that a contract is made with a *pardanashin* woman, the law presumes undue influence. The burden lies on the other party to show that no undue influence was used, that the contract was fully explained to her and that she freely consented. The following statement of the Privy Council in *Kalibaksh Singh* v. *Ram Gopal Singh*[89] explains the extent of this onus:

> "In the first place, the lady was a *pardanashin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof

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would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances.

85. *Ram and Shyam Co* v *State of Haryana*, (1985) 3 SCC 267.
86. *Shaik Ismail* v *Amir Bibi*, (1902) 4 Bom LR 146, 148.
87. *Hodges* v *Delhi & London Bank*, (1901) 27 IA 168, 175-76.
88. *Shaik Ismail* v *Amir Bibi*, (1902) 4 Bom LR 146.
89. (1913) 41 IA 23, 28-29.

shall in such a case rest, not with those who attack, but those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

In this case:

> About two months before her death, a Hindu widow (who was a *pardanashin* woman) gifted half of her landed properties to the son of her paramour, who was also the manager (*mukhtar*) of her estate.

This, it was contended, combined with the fact that she had no independent advice, was sufficient to show that the gift was the result of the influence the *mukhtar* had over the lady. Their Lordships, however, held that there is no rule of law which makes independent advice necessary in every case. "The possession of independent advice, or the absence of it, is a fact to be taken into consideration and will be weighed on a review of the whole of the circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out the transaction. If she did, the issue is solved and the transaction is upheld."[90]

The extent of burden was further explained by the Privy Council in more concrete terms in *Moonshe Buzloor Raheem* v *Shumsoonisa Begum*.[91] A widow remarried and endorsed and delivered to her new husband certain valuable Government papers. In an action to recover them back from him she proved that she lived in seclusion and that she had given over the papers to him for collection of interest. He contended that he had given her full consideration for the notes. It was held that the mere fact of endorsement and the allegation of consideration were not sufficient to lift the presumption of undue influence. He should prove that the transaction was a bona fide sale and that he gave full consideration for the paper which he received from his wife.

**Rescission [S. 19-A]**

Rescission of contract for undue influence is allowed under the provisions of Section 19-A.

**19-A. Power to set aside contract induced by undue influence.**—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of 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.

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90. (1913) 41 IA 23, 31. *See* also *Life Insurance Corpn* v *Nadrani*, AIR 1970 Cal 200.
91. (1867) M IA 551 PC. *See* further *Kharbuja Kuer* v *Jangbahadur Rai*, (1963) 1 SCR 456: AIR 1963 SC 1203.

*Illustrations*

(*a*) *A's* son has forged *B's* name to a promissory note. *B*, under threat of prosecuting *A's* son obtains 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 moneylender 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 Rs 100 with such interest as may seem just.

## MISREPRESENTATION [S. 18]

### Definition

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:[92]

**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 any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one 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 warrant it to be so, though he believes it to be true, this is misrepresentation.[93] In a Bombay case[94] for example:

> The defendants chartered a ship from the plaintiffs, who stated that the ship was certainly not more than 2800 tonnage register. As a matter of fact the ship had never been in Bombay and was wholly unknown to the plaintiffs. She turned out to be of the registered tonnage of more than 3000 tonnes.

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92. The charge of misrepresentation and fraud is of very serious nature. High standard of proof is requisite which is almost equal to a criminal trial which requires proof beyond all doubt. See *Savithramma* v *H. Garappa Reddy*, AIR 1996 Kant 99.

93. *See* illustrations (*a*) and (*c*) to Section 19:

(*a*) *A*, intending to deceive *B*, falsely represents that 500 maunds of indigo are made annually at *A's* factory and thereby induced *B* to buy the factory. The contract is voidable at the option of *B*.

(*c*) *A* fradulently 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.

94. *Oceanic Steam Navigation Co* v *Soonderdas Dharamsey*, (1890) 14 ILR Bom 241.

It was held that the defendants were entitled to avoid the charter-party. "There was the positive assertion by the plaintiffs about the size of the ship—an assertion not warranted by any information the plaintiff had at the time, and which was not true.[95]

A statement is said to be warranted by the information of the person making it when he receives the information from a trustworthy source. It should not be a mere hearsay. In a Calcutta case:[96]

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

The judge said: "I am not inclined to think that if *B* relied on second-hand information he derived from *L*, he was warranted in making the positive assertion that *C* would be a director."[97]

Where a representation acquires the status of being a term of the contract, and it turns out to be untrue, the disadvantaged party may, not only avoid the contract but also sue for damages for breach. Where in the course of negotiations for the sale of lamb, the seller stated that the whole of the lot was fully serviced, whereas this was not so, the buyer was allowed damages for the breach of the warranty.[98] In another case[99] the plaintiff was orally assured that his containers would be carried under the deck, but by mistake they were loaded on deck and were lost. The defendant was not allowed to claim the protection of a clause in the contract limiting his liability only to wilful misconduct. The oral assurance had overridden the written clauses.

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95. PARSONS J at p 248. Contrast this with *Howard Marine & Dredging Co Ltd* v *Ogden & Sons (Excavations) Ltd*, (1978) 2 All ER 1134 CA, where the sellers of the barges were convinced about their dead weight capacity having seen it in the Lloyd's register and, therefore, they were not held guilty of misrepresentation though Lloyd entries were found to be wrong. *Oscar Chess Ltd* v *Williams*, (1957) 1 All ER 525 CA, a car was exchanged for another second-hand car believed by both parties to be 1948 model because it was registered in that year and priced accordingly. It turned out to be 1939 model and, therefore, of much lesser value. The matter was very important to the value and identity of the subject matter. The buyer was allowed to recover his loss in this respect. *Routledge* v *McKay*, (1954) 1 All ER 855 CA, sale of motor cycle, buyer told that it was 1942 model, registration book indicated Sept. 1941, the seller knew that the motor cycle was either 1936 or 1938 model. The sale was made on the basis of a written agreement drawn up by the buyer which made no mention of the date or model. On discovering the true age of the motor cycle the buyer wanted to make the seller liable but could not do so because the age of the motor cycle was the subject-matter of a mere representation and not a warranty.

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

97. MACLEAN CJ at p 388. *See* also *In re Nursey Spg & Wvg Co*, ILR (1880) 5 Bom 92; *Banarsi Devi* v *New India Assurance Co*, AIR 1959 SC 540; *Bimlabai* v *Shankerlal*, AIR 1959 MP 8.

98. *Richview Construction Co* v *Raspa*, (1975) 11 Ontario Reports (2d) 377. *See* also *Birch* v *Paramount Estates (Liverpool) Ltd*, (1956) 168 EG 396 CA, oral warranty that the house would be of the same standard of workmanship as the company's show house. The buyer was allowed compensation for inferior paintwork which deteriorated faster. The court said that "the very purpose of having a show house was that a prospective purchaser might be attracted by what he saw and might have the opportunity of knowing what he was to get."

99. *J. Evans & Son* v *Andrea Merzario Ltd*, (1976) 2 All ER 9130, CA.

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.[1]

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.[2]

**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',[3] 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".[4] In that case, for example:[5]

> 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. "The defendant," the court said, "was under no obligation, legally or morally, to communicate the contents of the deed. But the plaintiff placed confidence. It then became his duty to state fully without concealment, all that was essential to a knowledge of the contents of a document."[6]

A female patient was told that her sterilisation would be irreversible, but was not told that there was the minute risk (less than 1%) of failure and of pregnancy. She conceived again, delivered a child and sued the gynaecologist for his breach of contract. The representation that the operation was 'irreversible' was held as not amounting to an express guarantee that the operation was bound to achieve its acknowledged object of sterilising the plaintiff. The representation meant no more than this that the operative procedure in question was incapable of being reversed.

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1. *Alessio* v *Jovica*, (1973) 42 DLR (3d) 242, Canada.
2. *Dick Bently Production Ltd* v *Harold Smith Motors Ltd*, (1965) 2 All ER 65.
3. It was observed in *Dynamics Corpn of America* v *Citizens and Southern National Bank*, 356 Fed Supp 991 that fraud had a broader meaning in equity than at law and an intention to defraud or to misrepresent was not a necessary element. "Fraud, indeed, in the sense of a court of equity includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed and are injurious to another or by which an undue or unconscientious advantage is taken of another." Applying this to the facts of a case before it, *Dai-ichi Karkaria P Ltd* v *Oil and Natural Gas Commission*, AIR 1992 Bom 330, the Bombay High Court held that to force a person, at the pain of stopping business with him, to change the conditions attached to the encashment of his bank guarantee was a fraud on him. *Oil and Natural Gas Commission* v *Dai-ichi Karkaria P Ltd*, (1994) Mh LJ 1084, no fraud or coercion could be proved, encashment of bank guarantee not stayed.
4. *Oriental Banking Corporation* v *John Fleming*, (1879) 3 Bom 242, *per* SARGENT LJ at p 287.
5. *Ibid.*
6. *Oriental Banking Corporation* v *John Fleming*, (1879) 3 Bom 242, *per* SARGENT LJ at p 287, *per* SARGENT LJ.

The court would be slow to imply a term that the expected result would actually be achieved.[7] Where, on the other hand, 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 and 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 of a normal pregnancy and delivery.[8]

### 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.[9]

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. For example, in a Bombay case:[10]

> The directors of a company, while acting within their authority, sold on the company's behalf a bill of exchange to a bank. The company denied liability on the bill.

But the bank was held entitled to recover the amount of the bill from the company as money received to the use of the bank. "The bill was different from what it was expressly represented to be by the agents of the company."[11]

The Government auctioned certain forest coupes. A part of the land was occupied by tenants. The Forest Department knew this fact but did not disclose it to the purchaser. The contract was held to be vitiated by misrepresentation. The purchaser was allowed to recover damages for loss.[12]

### Suppression of 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 subject-matter of the agreement. For example, in *R.* v *Kylsant*,[13] the prospectus of a company stated that the company had regularly paid dividends, which created the impression that 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 wartime accumulated profits. The

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7. *Eyre* v *Measday*, (1986) 1 All ER 488 CA, distinguishing *Thake* v *Maurice*, (1984) 2 All ER 513: (1985) 2 WLR 215, where the husband became fertile after vasectomy operation and his wife conceived and on the facts the doctor was held liable.
8. *Thake* v *Maurice*, (1986) 1 All ER 497 CA. See further *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.
9. Section 18(3).
10. *Nursey Spinning & Weaving Co, Re*, ILR (1880) 5 Bom 92.
11. *Ibid.* SARGENT J at p 98.
12. *Dambarudhar* v *State of Orissa*, AIR 1980 Ori 188.
13. (1932) 1 KB 442: (1931) All ER Rep 179.

suppression of this fact was held to be a misrepresentation. Similarly, where in the negotiations for a marriage contract, those speaking for the girl failed to disclose that she was suffering from epileptic fits, the engagement was held to be voidable, a very material fact having been suppressed.[14]

**Of material facts**

Misrepresentation should be of facts material to the contract. Mere "commendatory expression" 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 that the land is fertile and improvable, whereas parts of it had been abandoned as useless, cannot, except in extreme cases, as, for instance, where a considerable part is covered with water, or otherwise irreclaimable, be considered such a misrepresentation as to entitle a purchaser to be discharged."[15] But, when, in the sale of a hotel, the tenant was described "as a most desirable tenant", whereas his rent was in arrears, this was held to be a material misrepresentation.[16]

In the matters of matrimony it has been held that qualifications of the spouse are a material fact. Where the girl was in possession of high academic qualifications and agreed to matrimony because she was told that her match was in an attractive job whereas he was only an apprentice in a factory, the court ruled that it was a misrepresentation and, therefore, annulment of the marriage would have to be decreed.[17] Where the fact suppressed was that the girl was incapable of child bearing because of operation for excision of fallopian tube, this was held to be a material misrepresentation enabling the court to pass a decree of nullity.[18]

**Expression of opinion**

A mere expression of opinion cannot be regarded as a misrepresentation of facts even if the opinion turns out to be wrong. But in some cases, a statement of opinion may also amount to misrepresentation. One such situation was stated by BOWEN LJ in *Smith* v *Land and House Property Corpn.*[19]

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14. *Haji Ahmad Yarkhan* v *Abdul Gani Khan*, AIR 1937 Nag 270. A 56-year-old man got himself insured and died within 2 years of heart attack. LIC refused to pay on the ground that he suffered from diabetes and carbuncle, but did not disclose. The family doctor produced by LIC could not give any information about the family. Held, fraud was not proved. Insurance of a man of that age carries its own risks and LIC had accepted it with eyes wide open. *Kamlawanti* v *LIC*, AIR 1981 All 367. A person authorising an agent to sell but prohibiting him from making any representation and excluding his liability if the agent makes any, protects him from liability, *Excluding Liability for Misrepresentation*, (1981) 97 LQR 522, considering *Overbrooke Estates Ltd* v *Glencombe Properties Ltd*, (1974) 1 WLR 1335. Another example of misrepresentation of immaterial facts is *Bhagwani Bai* v *LIC*, AIR 1984 MP 126.

15. *Dimmock* v *Hallet*, (1866) LR 2 Ch App 21, *per* TURNER LJ at p 27. *See* further, *Amina* v *Hasan Koya*, 1985 Ker LT 596: 1985 Cri LJ 1996, where the fact that the girl was running pregnancy was concealed from the would be groom and it was held that no fact could be more material than this, for it would possibly have deterred the groom from going ahead and when he avoided the marriage, it became nullity *ab initio*, as if it never existed.

16. *Smith* v *Land & House Property Corporation*, (1884) 28 Ch D 7.

17. *Bindu Sharma* v *Ram Prakash Sharma*, AIR 1997 All 429. *See* also *Anurag Anand* v *Sunita Anand*, AIR 1997 Delhi 94, monthly income and property status of groom misrepresented, annulment of marriage.

18. *Benjamin Doming Cardoza* v *Gladys Benjamin Cardoza*, (1997) 3 Bom CR 553.

19. *Ibid.*

"It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. In a case where the facts are equally well-known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. But if the facts are not equally well-known to both sides, then a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

This statement was affirmed by the Privy Council in *Bisset* v *Wilkinson*.[20]

Certain lands were sold. The seller was aware that the land was required for sheep-farming and, therefore, expressed the opinion that 'the land had a carrying capacity of 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. Lord MERRIVALE felt 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 an expression of opinion on the subject."

**Representation of state of mind**

A representation of one's state of mind is also a representation of fact. In *Edgington* v *Fitzmaurice*,[21] the prospectus of a company misstated the purpose to which the money to be borrowed by issuing debentures was going to be applied. The directors contended that the representation related to the state of their mind as to what use the money was going to be put and they could change their mind and, therefore, it was not a misrepresentation of a specific fact. The Court of Appeal, however, pointed out that the state of a man's mind is as much a fact as the state of his digestion. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

The intention of the parties is very important in the matter of contracting. "The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded or the sale may be conditional, to be null and void if the warranty is broken."[22]

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20. (1927) AC 177; (1926) All ER Rep 343.
21. (1885) 29 Ch D 459, 476; (1881-5) All ER Rep 856 Ch.
22. *See* ERLE CJ in *Bannerman* v *White*, (1861) 10 CBNS 844 CP. Here the buyer of hops particularly asked the seller whether sulphur had been used in the growth or treatment of the crop and he was told that no sulphur had been used. After the delivery the buyer found that sulphur had been used in the cultivation of a portion of the hops only but the whole crop had become inseparably mixed up. The buyer was allowed to reject all the hops. The court said that the intention of the parties appeared to be that the contract should be null if sulphur had been used.

**Change of circumstances**

A petroleum company acquired a site on a main road for constructing a petrol pump estimating its annual consumption to be 2,00,000 gallons from the third year of operation. The planning authority, however, permitted the pump to be erected only at the back side of the site which was accessible only from the side streets and not at all visible from the busy main road and this considerably affected the sale potential. But even so they failed to point this out to the lessee of the pump who in consequence invested money on the basis of the originally intimated estimates and suffered loss. They were held liable for the plaintiff's loss. The court laid down that where during the course of precontractual negotiations, one party, who had special knowledge and expertise concerning the subject-matter of the negotiations, made a forecast with the intention of inducing the other party to enter into a contract, and the other party did so, the court can construe that the forecast was not merely an expression of opinion but as constituting a warranty and accordingly they were liable for the breach of the warranty. Every person who offers an advice, information or opinion of this kind is under a duty of reasonable care to see that it is true, and this duty was not limited to persons carrying on the profession or business of giving advice.[23]

There is often a gap of time between the representation of a fact and the ultimate conclusion of the contract. Any change of circumstances in the meantime affecting the fact represented must be brought to the knowledge of the other party. This was pointed out by the Court of Appeal in *With* v *O'Flanagan*:[24]

> In the negotiations for the sale of his medical practice, the defendant represented that his practice had brought in £ 2000 per annum for the preceding three years and that he had a specified number of patients on his panel. Negotiations resulted in a contract in about five months. During this time the defendant became ill and could not attend to his practice. This resulted in a serious loss of practice, but the purchaser could learn about it only after the completion of the sale. It was held that the plaintiff was entitled to rescind the contract. The court emphasised that the change of circumstances should have been brought to the notice of the purchaser.[25]

**Inducement**

It 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.[26] The explanation to Section 19 provides:

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

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23. *Esso Petroleum Co Ltd* v *Mardon*, (1976) 2 All ER 5.
24. (1936) 1 All ER 727: (1936) Ch 575.
25. Lord WRIGHT relied upon *Davies* v *London & Marine Provincial Inc*, (1878) 8 Ch D 469: 47 LJ Ch 511.
26. See *Hims Enterprises* v *Ishak Bin Subari*, (1992) 1 CLJ 132 (HC), Johor Bahru, where the agreement between the parties was made on terms with which the plaintiffs were familiar, as they were terms previously used by the plaintiffs in their earlier contracts, that being so, the terms contained no surprise for the plaintiffs and hence no culpable misrepresentation.

If the plaintiff would have consented in any case, he can hardly complain. Again "the representation must be made with the intention that it shall be acted upon by the other party."[27] If a person to whom the statement was not addressed voluntarily chooses to act upon it, he is not entitled to rescission.[28]

**Means of discovering truth**

A party cannot complain of misrepresentation if "he had the means of discovering the truth with ordinary diligence."[29] This is recognised by way of an exception stated along with Section 19. The statement is as follows:

> 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.[30] But where the truth cannot be discovered with ordinary diligence, the party guilty of misrepresentation cannot rely on the defence. Thus, for example, in a case[31] the director of a company falsely told a bank that the bill they were selling to the bank was one on which the company was liable, it was held that "no ordinary diligence would have enabled the bank to discover that the company was not liable on the bill."[32]

A difficult question about this exception is that where a person has the means of discovering the truth, but does not use them and contracts in reliance upon the statements made to him, whether the contract would be voidable? In such cases the principle seems to be that if he relies upon those means he cannot afterwards

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27. Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT, 22nd edn by A.G. Guest, (1964), p 211.
28. *Peek* v *Gurney*, (1873) LR 6 HL 377: (1874) 43 LJ Ch 19.
29. See *Balraj Chibber* v *N.O.I.D.A.*, (1995) All LJ 1513: (1996) 27 All LR 10, allotment of plots to members of a society, allotment to some of the allottees was cancelled on the ground that they misrepresented to be members, the cancellation was set aside because they proved their membership in fact: even otherwise the truth of their membership could have been easily discovered. *Nasiran Bibi* v *Mohd Hussain*, (1996) All LJ 1648, a person who himself appeared before the Registrar to receive a part of the consideration and acknowledged receipt of notice of execution of sale deed, not allowed to say that he was the victim of fraud or misrepresentation.
30. *Shoshi Mohun Pal Chowdhry* v *Nobo Krishto Poddar*, (1874) 5 Cal 801. A statement on behalf of the Government that the rates of royalty would be revised cannot be described as misrepresentation which influenced consent. See *M. Hansraj & Sons* v *State of MP*, AIR 1965 SC 470, 472. See *Misrepresentation, Warranty and Estoppel*, 9 Aust LJ 347.
31. *Nursey Spg & Wvg Co Ltd. Re*, (1880) 3 Bom 92.
32. *Ibid.*, SARGENT J at p 78. *See* also *Morgan* v *Government of Hyderabad*, ILR (1888) 11 Mad 419; *Mohan Lal* v *Shri Gungaji Cotton Mills Co*, (1900) 4 Cal WN 369. *See* also *Mithoolal Nayak* v *LIC*, 1962 Supp (2) SCR 571: AIR 1962 SC 814: (1962) 32 Comp Cas 177. *U.S. State Sugar Corpn Karamchari Assn* v *State of UP*, (1995) All LJ 937, a person entering into a contract with a company which is under industrial sickness proceedings, and if he did so because he was kept in the dark, he is entitled to be relieved of the bargain and, if he did so with full knowledge, no relief can be granted to him because he was not induced by fraud or misrepresentation. *Oriental Insurance Co Ltd* v *Gowramma*, AIR 1994 Kant, motor vehicle insurance policy issued after due verification about the ownership of the vehicle. After accident, the company was not allowed to take the plea that the policy was obtained by misrepresentation and that the claimant was not the owner of the vehicle.

complain of the misrepresentation. But if he does not use the means and relies upon the statements made to him, he can avoid. This was laid down by the Court of Appeal in *Redgrave* v *Hurd*.[33] Here also a medical practice was under sale. The seller misrepresented the income which it produced, but gave documents to the purchaser from which he could have verified, but he did not do so and having only cursorily looked at them, purchased the business. On learning the truth he sought to avoid the contract and was allowed to do so. Sir GEORGE JESSEL MR remarked:

> "If a man is induced to enter into a contract by false representation, it is not sufficient answer to him to say: 'If you had used due diligence, you would have found out that the report was untrue. You had the means afforded you of discovering its falsity, which you did not choose to avail yourself of.' One of the most familiar instances in modern times is this. Men issue a prospectus containing false statements, and then say the contracts themselves may be inspected at the office of the solicitors. It has always been held that those who accept those false statements as true are not deprived of their remedy merely because they neglected to go and look at the contracts themselves. Another instance with which we are familiar is a false statement as to the contents of a lease; in such a case as a man saying that there was no covenant or provision in the lease to prevent the carrying on, in the house to be sold, the trade which the purchaser was known by the vendor to be desirous of carrying on therein. Although the lease itself might be produced at the sale or might have been open to the inspection of the purchaser, it was held that the vendor could not be allowed to say: 'You are not entitled to give credit to my statement.' It is not sufficient, therefore, to say that a man has had the opportunity of investigating the real state of the case, but has not availed himself of that opportunity."[34]

## FRAUD

### Definition

Intentional misrepresentation of facts, speaking broadly is called "fraud". According to 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 having knowledge or belief of the fact;

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

(4) any other act fitted to deceive;

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33. (1881) 20 Ch D 1: (1881-5) All ER Rep 77 CA. *See* also *Babu Ram Jain* v *LIC*, AIR 1990 MP 351 where in a proposal of life insurance, the medical examination revealed that most of the teeth of the proposee were removed, LIC accepted the policy with increased premium and, therefore, could not avoid the policy afterwards.

34. To the same effect is the decision of the Madras HC in *Venkataratnam* v *Shivaramudu*, AIR 1940 Mad 560. In all cases the burden of proof is on the party alleging misrepresentation. See *Kuppuswami Chettiar* v *A.S.P.A. Chettiar*, (1967) 1 SCR 275: AIR 1967 SC 1395.

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

*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

*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 *B*, 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 truth**

In English law "fraud" was defined in the well-known decision of the House of Lords in *Derry* v *Peek*.[35] Lord HERSCHELL said:[36]

"Fraud is proved when it is shown that a false representation has been made,—

(1) knowingly, or

(2) without belief in its truth, or

(3) recklessly careless whether it be true or false."

In this case:

A company's prospectus contained a representation that the company had been authorised 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, but no mention was made of this. The Board refused consent and consequently the 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.[37]

35. (1889) 14 App Cas 337.

36. At p 374.

37. *A.L. Mustaneer Establishment* v *Varuna Overseas P Ltd*, (1998) 72 Delhi LT 186, fraud is a facet of dishonesty, fraud in connection with letters of credit.

**Active concealment**

"Active concealment" is something different from mere "passive concealment". Passive concealment means mere silence as to material facts. An active concealment of a material fact is a fraud; mere silence, excepting the few cases noted below, does not amount to fraud.

The expression "any other act 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.[38]

The last category includes cases in which the law specially declares an act or omission to be fraudulent. For example, the Insolvency Acts and Companies Act declare certain kinds of transfer to be "fraudulent preference".

**Mere silence is no fraud**

False impression is ordinarily conveyed by deliberate misstatement of facts. But it may also be done by active concealment of material facts. "I do not care," said Lord HALSBURY, "by what means a false impression is conveyed—by what trick or device or ambiguous language, all those are expedients by which fraudulent people seem to think that they can escape from the real substance of the transaction."[39] 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."[40] A contracting party is under no obligation to disclose the whole truth to the other party or to give him the whole information in his possession affecting the subject-matter of the contract. It is under this principle that a trader may keep silent about a change in prices. A seller who puts forth an unsound horse for sale, but says nothing about its quality, commits no fraud. In a case before the Supreme Court,[41] 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. The University having failed to do so, was estopped from cancelling the examination of the candidate.

A house was let out for three years without disclosing to the tenant what the landlord knew it that was in such a ruinous and dangerous state and condition as to be dangerous to occupy. When the tenant discovered this fact he applied for setting aside, arguing that the landlord should have disclosed the real state of the house. The court did not allow the relief. There was no warranty that the house was fit for

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38. *Ningawwa* v *Byrappa S. Hirekurabar*, (1968) 2 SCR 797: AIR 1968 SC 956. *See* also *Mukhlal Agarwal* v *Trustees of the P.F.*, AIR 1956 SC 336. For an example of active concealment see *Mithoolal Nayak* v *LIC*, 1962 Supp (2) SCR 571: AIR 1962 SC 814: (1962) 32 Comp Cas 177.

39. *Aaron's Reefs* v *Twiss*, (1896) AC 273, 281.

40. Section 17 (Explanation). *See*, for example, Illustrations (*a*) and (*d*) which are follows:
   (*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*.
   (*d*) *A* and *B*, 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*.

41. *Krishnan* v *Kurukshetra University*, (1976) 1 SCC 311: AIR 1976 SC 376.

immediate occupation. No misrepresentation was made, nor it was the case that the plaintiff was acting on the impression produced by any conduct on the part of the owner as to the state of the house or that he was not to make investigation before he began to reside in it. There was no obligation on the owner to say anything about the state of the house.[42]

**When silence is fraud**

But then how far may silence go? Silence may become deceptive in certain cases.

*1. Duty to Speak* (Contracts *uberrima 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. A father, for example, selling a horse to his son must tell him if the horse is unsound, as the son is likely to rely upon his father. But the principle is not so confined. The duty to disclose the truth will arise in all cases where one party reposes, and the other accepts, confidence.[43] 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. An insurance company, for example, knows nothing about the life or circumstances of the assured. It has to depend on the disclosures made by the assured. It is, therefore, the duty of the assured to put the insurer in possession of all the material facts affecting the risk covered.[44] A contract of insurance is, for this reason, called a contract of absolute good faith, *uberrima fides*.[45] Where false answers as to the state of health were given in a proposal for life insurance, the policy was held to be voidable and it was not material that the medical officer of the corporation had certified the life assured as good.[46] Where a person got his motor vehicle insured in the evening of the day on the morning of which the vehicle had met with an accident, the policy was held to be not

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42. *Keats* v *Earl of Cadogan*, (1851) 20 LJ CP 76 Common Pleas.

43. *See* for example, *Nursey Spinning & Weaving Co Ltd, Re*, (1880) 5 Bom 92, noted *supra* note 15. *See* also *Turner* v *Green*, (1895) 2 Ch 205. *Sri Alam* v *Newaires*, (1994) 1 Current LJ 32 (Malaysia). An agreement to develop land jointly was held to result in a joint venture agreement and the venturers being in the position of partners became fiduciaries of each other, but no misrepresentation or fraud was found on facts. The court was of the view that public policy requires imposition of fiduciary duty, *Paul Dainty* v *National Training Centre Trust*, 94 ALR 225. In *Mideon Oil & Gas* v *New British Dominion Oil Co Ltd*, (1958) 12 DLR (2nd), the court held that circumstances must govern the application of the principle. There must be a pretty strong case in the face of a commercial agreement to impose on the defendant a fiduciary duty. In construing a written agreement the court is entitled to take into account the surrounding circumstances with reference to which the words of the agreement were used, and the object which the person using them had in view. But the court should not look into the prior negotiation of the parties as an aid to the construction of the written agreement resulting from the negotiations.

44. See *Foel* v *Law Union & Crown Insurance Co*, (1908) 2 KB 863 and Lord BLACKBURN'S judgment in *Brownlie* v *Campbell*, 5 App Cas 925, 954; *Hindustan General Ins Society Ltd* v *Punam Chand Chajar*, AIR 1971 Cal 285; *Mithoo Lal Nayak* v *LIC of India*, AIR 1962 SC 814. *Banque Financiere de la cite* v *Westgate Ins Co Ltd*, (1989) 2 All ER 952; *Bank of Nova Scotia* v *Hellenic Mutual War Risk Assn*, (1989) 3 All ER 628.

45. *See* Reuben Hasson, *The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance*, (1984) 47 Mod LR 523. Failure to disclose heart ailment, held material, avoiding the policy, AIR 1986 Ker 210. *P. Sarojam* v *LIC*, AIR 1986 Ker 201.

46. *P. Sarojam* v *LIC*, AIR 1986 Ker 201.

enforceable, the duty of the insurer to check the vehicle notwithstanding.[47] Burden of proof lies on the insurer to show that the fact misstated or suppressed was of material nature to the risk covered and that the same was done to cause misconception about the risk undertaken by the insurer.[48]

In the absence of any such relationship there is no duty to speak and mere silence even if it amounts to misrepresentation, will be no fraud. For example, in *Haji Ahmad Yarkhan* v *Abdul Gani Khan*:[49]

> The plaintiff spent a sum of money to mark the engagement of his son. He then discovered that the girl suffered from epileptic fits and so broke off the engagement. He sued the other party to recover from them compensation for the loss which he had suffered on account of their deliberate suppression of a vital fact which amounted to fraud.

The court relied upon the decision of the House of Lords in *Nocton* v *Ashburton*[50] where it was pointed out that a mere passive non-disclosure of the truth, however deceptive in fact, does not amount to fraud, unless there is a duty to speak. Referring to the facts the court said that the law imposes no general duty on anyone to broadcast the blemishes of his female relations; not even to those who are contemplating matrimony with them. There was no fiduciary relation between the parties. The engagement was, however, held to be voidable by reason of the misrepresentation, but the plaintiff was not entitled to recover any compensation under Section 75 of the Contract Act.

### 2. *Where Silence is Deceptive*

Silence is sometimes itself equivalent to speech. A person who keeps silent, knowing that his silence is going to be deceptive, is no less guilty of fraud. Where, for example, the buyer knows more about the value of the property, which is the subject of sale, but prefers to keep the information from the seller, the latter may void the sale.[51]

### 3. *Change of Circumstances*

Sometimes a representation is true when made, but, it may, on account of a change of circumstances, become false when it is actually acted upon by the other party. In such circumstances, it is the duty of the person who made the representation to communicate the change of circumstances. In an English case,[52] for example:

> A medical practitioner represented to the plaintiff that 'his practice was worth £ 2,000 a year'. The representation was true. But five months later when the plaintiff actually bought the practice, it had considerably gone down on account of the defendant's serious illness.

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47. *George P. Varghese* v *G. Daniel*, AIR 1998 Ker 120. *See* also *Life Insurance Corpn of India* v *Ajit Gangadhar Shanbagh*, AIR 1997 Kant 157, misrepresentation and concealment of material facts by the insured, insurer allowed to repudiate the policy. *Life Insurance Corpn of India* v *Narmada Agarwalla*, AIR 1993 Ori 103, the insurer would have to prove the fact of misrepresentation which he could not do in this case.
48. *LIC* v *B. Kusuma T Rai*, (1989) 1 Kar LJ 52.
49. AIR 1937 Nag 270.
50. (1914) AC 932.
51. *See* illustration (*d*), Section 17.
52. *With* v *O'Flanagan*, (1930) Ch 575 CA.

It was held that the change of circumstances ought to have been communicated. Similarly, in a case before the Madras High Court:[53]

> "A company's prospectus represented that certain persons would be the directors of the company. This was true. But before the allotment took place, there were changes in the directorate, some directors having retired."

That was held to be sufficient to entitle an allottee to avoid the allotment.

*4. Half-truths*

Even when a person is under no duty to disclose a fact, he may become guilty of fraud by non-disclosure if he voluntarily discloses something and then stops half the way. A person may keep silence, but if he speaks, a duty arises to disclose the whole truth. "Everybody knows that sometimes half a truth is no better than a downright falsehood."[54] In a U.S. case,[55] for example:

> The plaintiff purchased a tract of land. The contract of sale stated that the land was subject to a right of the Borough to open two streets within the area. But as a matter of fact the Borough had the right to open three streets.

Holding that the plaintiff had the right of rescission, CORDOZO CJ said: "We do not say that the seller was under a duty to mention the projected streets at all. That question is not here. What we say is merely this, that having undertaken or professed to mention them, he could not fairly stop halfway."[56]

As in misrepresentation, so in fraud by silence, if the plaintiff had means to discover the truth by ordinary diligence, he cannot obtain rescission. But in any other case the fraudulent party cannot say that the other could have discovered the truth. In a case, for example, before the Gujarat High Court:[57]

> False estimates of the costs of construction were given in a tender. The contractor agreed to some reduction on the belief that the estimate was correct. The court held that the representations contained in the tender were fraudulent and that it was no defence that the plaintiff could have discovered the true costs by reasonable effort.

**Promise made without intention of performing**

To tie-up a person to a promise with no intention of performing from one's side and with the intention of only preventing the other from dealing with others, is an example of a promise made without the intention of performing it. This is the third type of fraud included in the definition in S. 17. A purchase of goods without any intention of paying the price is a fraud of this species.[58] A builder entered into a large number of bookings, nearly three times the available units of accommodation and collected moneys. This was held by the Supreme Court to be fraud because he should have known that he would not be able to perform the contract with all of them. There was no provision for interest on the deposit money. Inspite of this he was held liable to pay interest. The court said that there was fraud causing

53. *Rajagopala Iyer* v *South Indian Rubber Works*, (1942) 2 MLJ 228.
54. *Per* Lord MACNAUGHTAN in *Gluckscin* v *Barnes*, (1900) AC 240, 250.
55. *Junius Construction Corpn* v *Cohen*, (1931) 257 NY 393. Facts and opinion collected from Thurston and Seavey, CASES OF TORTS, 677 (1942).
56. *Ibid.*, p 678.
57. *R.C. Thakkar* v *Gujarat Housing Board*, AIR 1973 Guj 34. But see *M. Hasanji & Sons* v *State of MP*, AIR 1965 SC 470, 472.
58. *Clough* v *L & NW Rly Co*, (1871) LR 7 Ex 21; *Whitaker Ex p, Re*, (1875) LR 10 Ch 449.

inducement for booking by the purchasers: such fraud creates liability even outside the agreement.[59]

**Any other act fitted to deceive**

The fourth kind of fraud identified by S. 17 is any act which is fitted to deceive. Of this, it has been observed in Pollock and Mulla:[60] "The mention of 'any other act fitted to deceive' in sub-section (4) appears to be inserted merely for the sake of abundant caution." The result is that all kinds of intentional cheating would be covered.[61]

**Any act or omission specially declared to be fraudulent**

The fifth and the last category of frauds included in the definition of S. 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 fradulent transfer.

**Distinction between fraud and misrepresentation**

Misrepresentation and fraud have many points in common. For instance, both render the contract voidable;[62] 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[63] and finally, where there is a fraud by silence, the fact, that there were "means of discovering the truth by ordinary diligence", is a good defence.[64] This is so in misrepresentation also. Damages for loss caused by innocent misrepresentation are assessed on the same principles as in the case of a deliberate fraud.[65] Yet the following points of distinction are also noticeable:

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

Secondly, fraud, in addition to rendering the contract voidable, is a cause of action in tort for damages. Simple misrepresentation is not tort but under Section 75 of the Contract Act, "a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract."[66] The (English) Misrepresentation Act, 1967, also enables the court to award damages instead of rescission.[67] A person

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59. *Delhi Development Authority* v *Skipper Construction Co P Ltd*, (2000) 10 SCC 130.
60. INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 180 (10th edn, 1986).
61. Application for allotment of premises containing false particulars, fraud, allotment liable to be set aside, *Ponnurangam* v *Chairman, Slum Clearance Board of TN*, (1996) 1 Mad LJ 347.
62. Section 19.
63. Section 19 (Explanation).
64. Section 19 (Exception).
65. *Royscot Trust Ltd* v *Rogerson*, (1991) 3 All ER 294 CA.
66. The section gives the following illustration: "*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 100 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* is entitled to claim compensation for the damages which he has sustained through the non-fulfilment of the contract." There is no such right if the damage is not caused by non-fulfilment of the contract. See *Haji Ahmad Yarkhan* v *Abdul Gani Khan*, AIR 1937 Nag 270.
67. Section 2(2). See *William Syndall plc* v *Cambridgeshire County Council*, (1994) 3 All ER 932 CA, loss in value of land because of foul sewer under it, compensation for loss instead of rescission.

who purported to sell his wife's property without obtaining her consent and she refused to sign the deed, was held liable to the buyer for his loss.[68] A purchaser of premises completed the purchase even after discovering that a tenancy agreement affecting one of the flats was concealed from him. He was nevertheless allowed to sue for damages for the loss caused to him, though he had in tort the right to rescind.[69]

Lastly, a person complaining of misrepresentation can be met with the defence that he had "the means of discovering the truth with ordinary diligence",[70] but excepting fraud by silence,[71] 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."

**Limits of Rescission [Ss. 19 and 19-A]**

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.[72] Section 19 provides:

"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."

The provision does not refer to "undue influence" because this is specially dealt with by Section 19-A. Section 19 further goes on to provide something special about the effect of fraud and misrepresentation. It says:

"A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be

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68. *Walts* v *Spence*, 1978 Ch 165.

69. *Production Technology Consultants* v *Bartlett*, (1988) 25 Eg 121 CA (Estate's Gazette): 1988 CLY 460.

70. Section 17 (Exception).

71. *Ibid.* See *John Minas Apcar* v *Louis Caird Matchus*, AIR 1939 Cal 473. The P&H High Court laid emphasis in *Sardara* v *State of Haryana*, (1995) AIHC 1163 upon the fact that there are no other grounds for cancelling and rescinding a contract than those provided in the Act and that any other kind of cancellation would be a breach. A rescission of contract notified by unauthorised functionaries of the State was set aside. *P. Anasuyamma* v *Commr of Land Revenue*, (1995) AIHC 2082 AP, the period of limitation for filing a suit for rescission is three years. A suit commenced twelve years after an assignment was quashed.

72. Sections 19 and 19-A. Burden is on the party alleging fraud to establish it. *Hajra Bai* v *Jadavabai*, AIR 1986 MP 106. He has also to disclose in his plaint the full particulars of the acts that constitute any of the vitiating factors entitling him to avoid the contract. See *G. Subhashini* v *P. Lakshmi Bai*, (1987) 1 Mad LJ 107. Vague and general allegations are insufficient. The vitiating factors must be separately pleaded with specificity, particularity and precision, (1987) 1 All LJ 64, following *Bishundeo Narain* v *Seogeni Rai*, AIR 1951 SC 280. *Kuluwa* v *Punia*, (1995) AIHC 8 All, an illiterate person who was the victim of fraud was held entitled to the same amount of protection as a *pardanashin* woman, namely, burden of proof on the other party to prove fairness of the transaction. *Upendra Mohanta* v *Champa*, (1996) AIHC 3449 Ori, an illiterate woman entitled to the protection of a *pardanashin* woman. *N. Narayani Ammai* v *P. Sanjeev*, AIR 2001 Ker 305, document obtained by fraud is voidable and not void. A suit filed under it should declare it to be voidable and not void. *Hakim Singh* v *Ram Sanehi*, AIR 2001 All 231: (2001) All LJ 1718, execution of sale deed for immovable property, fraud though alleged, could not be proved. *Ratan Pal Singh* v *Kunwar Pal Singh*, AIR 2001 All 224: (2001) All LJ 1743, seller's contention that he was induced by fraud, concurrent of finding of fact by courts below belied the plea, no intereference in appeal.

performed, and that he shall be put in the position in which he would have been if the misrepresentation made had been true."

He has the option either to avoid the contract or, alternatively, to affirm it. The onus is on the plaintiff to prove fraud, etc. For this purpose he has to plead the precise particulars which constitute the alleged fraud. This onus is quite as high as the burden to prove in criminal law that the accused is guilty beyond a reasonable doubt.[73] He can exercise his option only once. If the contract is affirmed, it becomes enforceable by both the parties and, if it is avoided, it becomes void as against both.[74] Moreover, the right to rescind is subject to certain infirmities which defeat it in the following circumstances:

*1. By Affirmation*

Where the party, after becoming aware of his right to rescind, affirms the contract, the right of rescission is lost. Affirmation may be express or implied. An implied affirmation takes place when he does some act inconsistent with his right to rescind, for example, where he appropriates to his use the goods received under a voidable contract or has sold or attempted to sell them. An interesting illustration of implied affirmation is to be found in *Long* v *Lloyd*.[75]

> 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 he then claimed rescission.

The court held that on the first breakdown the plaintiff came to know that the representation was false. But, instead of asking for rescission then, he accepted the offer of repair and sent the lorry on a second trip. This amounted to "a final acceptance... for better or for worse and conclusively extinguished any right of rescission remaining to the plaintiff after completion of the sale."[76]

Similarly, 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

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73. *Hims Enterprise* v *Ishak Bin Subari*, (1992) 1 CLJ 132, (HC), Johore Bahru, where the plaintiffs failed to prove fraud, for one thing, that they were aware of all the terms of their relations, and for another, that they never mentioned 'fraud' in their prolonged correspondence with the defendants about delay in performance. See also *Krishna Wanti* v *LIC of India*, AIR 2000 Delhi 63, the LIC could not prove that the assured had concealed or suppressed knowledge about his heart condition at the time of taking out the policy. *John Thomas* v *Joseph Thomas*, AIR 2000 Ker 408, purchaser of land alleging fraud by seller about quality of land but, instead of rescinding, went on paying the price, held, fraud not proved. *Dinesh Tulshidas Sheth* v *Hemchandra Ganpat Desai*, 1999 AIHC 1719 (Bom), no details were given of the alleged coercion, fraud, etc., vague allegations would not do.

74. Section 2(*j*) and Section 64 which say that when a person at whose option a contract is voidable rescinds it, the other party need not perform his part of the promise. The Supreme Court has gone to the extent of holding that a licence obtained by misrepresentation is voidable and remains good till it is avoided by the licensing authority in the manner prescribed by law. *East India Commrl Co* v *Collector of Customs*, (1963) 3 SCR 338: AIR 1962 SC 1893.

75. (1958) 1 WLR 753: (1958) 2 All ER 402 CA; *Broadway Centre* v *Gopaldas Bagri*, AIR 2002 Cal 78, allegation by the partner that he signed the retirement while he was in police station was rejected because he had already taken a big sum of money under the retirement deed.

76. *See* P.S. Atiyah, (1959) 22 MLR 76 and J.D. Davies, 75 LQR 32.

express words or by unequivocal acts affirmed the contract, his election is determined forever. The party defrauded may keep the question open so long as he does nothing to affirm the contract.[77]

*2. By Lapse of Time*

Rescission must be claimed within reasonable time after discovering the misrepresentation. Thus 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.[78]

In respect of defences of this nature, including that of mistake, it is necessary that they should be raised while contracting or immediately thereafter. Once the contract has run its full period, such a plea may cease to be available.[79]

*3. Intervention of 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. Thus, where a person obtains goods by fraud and, before the seller is able to avoid the contract, disposes them off to a *bona fide* party, the seller cannot then rescind.[80]

**Mode of rescission**

The usual method of rescinding a contract is by giving a notice to the other party of the intention to rescind. But what should he do if the other party cannot be contacted with? The answer is to be found in *Car & Universal Finance Co Ltd* v *Caldwell*:[81]

> The plaintiff gave the possession of his car to a buyer for his cheque. The cheque turned out to be worthless. The plaintiff wanted to give notice to the buyer of his intention to avoid the contract and to take back his car, but could not trace him. He thereupon informed the police and the Automobile Association to trace his car. Sometime later the fraudulent buyer sold the car to the defendant and the plaintiff sought to recover it.

It was held that by informing the police and the Association the plaintiff had done an *overt act* clearly showing his intention to rescind and the sale of the car after rescission could not convey to the defendant a good title. To hold otherwise, said SELLERS LJ "would involve that the defrauding party, if skilful enough to keep out of the way, would deprive the other party to the contract of his right to rescind. That another innocent party or parties may suffer does not justify imposing on a defrauded seller an impossible task. He has to establish clearly and unequivocally that he terminates the contract and is no longer to be bound by it. If he cannot

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77. *Ningawwa* v *Byrappa Shiddappa Hirekurabar*, (1968) 2 SCR 797, 800-1: AIR 1968 SC 956, 958: (1968) 2 SCA 97, quoting from *Clough* v *L. & N.W. Rly Co*, (1871) LR 7 Ex 26, 34.
78. *Chiristineville Rubber Estates Ltd, Re*, (1911) 81 LJCR 63; *Jagannath Pd, Re*, AIR 1938 All 1931. *See* further, *Ram Rattan* v *Sushil Chand*, (1985) LXXXVII Punj LR 283 where also fraud could not be proved.
79. *Oriental Insurance Co Ltd* v *Mantora Oil Products P Ltd*, (2000) 10 SCC 26. A right once given up, cannot be insisted upon again, *Surjit Kaur* v *Nauratra Singh*, (2000) 7 SCC 379: AIR 2000 SC 2927.
80. *Phillips* v *Brooks Ltd*, (1919) 2 KB 243. And *see* effect of mistake as to identity, *infra*.
81. (1964) 1 All ER 290: (1965) 1 QB 525 CA.

communicate his decision he may still satisfy a judge that he had made a final and irrevocable decision and ended the contract."

A similar problem was before the Allahabad High Court in *Official Receiver* v *Jugal Kishore*:[82]

> Under an agreement for sale of certain goods, the plaintiff received through a bank the railway receipts supposed to represent the goods and obtained them from the bank after paying Rs 15,000. The amount was sent to the seller's account at his place of business. Meanwhile the plaintiff discovered that the railway receipts were bogus and immediately informed the bank not to part with the amount which was accordingly withheld. But before the plaintiff could inform either the fraudulent seller or file a suit for rescission an insolvency judge ordered the bank not to pay the amount to either party.

The plaintiff then filed a suit for declaration that he was entitled to his money. The Full Bench was of the view that the plaintiff had parted with his money under a fraud. Thus the money came into the insolvent's account under a defeasible title and the plaintiff had defeated it when he directed the banker to stop payment which was done before the insolvency judge's order. Even if he had rescinded by filing the suit, he was entitled to the money, because he had done nothing to affirm the contract.[83]

Section 66 lays down the way in which the communication of rescission is to be made effective.

**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.

**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 requires him to do so.

**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 have 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.

Thus a person avoiding a loan bond on the ground of undue influence has to pay back the loan, the court only reduces the rate of interest to what may seem to be reasonable in the circumstances.[84] A corporation supplied, after taking

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82. AIR 1963 All 459 FB.
83. JAGDISH SAHAI J with whom MUKERJI J concurred and DWIVEDI J reached the same conclusion on different grounds.
84. *See*, for example, *Bechu* v *Babhuti Prasad*, AIR 1931 All 201; *Muralidhar Chatterjee* v *International Film Co Ltd*, AIR 1934 PC 34 and the cases cited there under "Undue Influence."

payment in advance, a quantity of rapeseed oil which turned out to be mixed with water, the corporation had to refund the money with interest.[85]

Even where the party seeking rescission is not in a position to restore to the defendant his *status quo ante*, the court may allow rescission by doing what is practically just in the circumstances.[86] Thus, where a wife wanted to set aside on the ground of misrepresentation the 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.[87] SWINFEN EADY LJ said: "The general rule is that as a condition of rescission there must be *restitution in integrum*, but at the same time the court has the full power to make all just allowances. It was said by Lord BLACKBURN in *Erlangar* v *New Sombrero Phosphate Co*,[88] that the practice had always been for a court of equity to give relief by way of rescission whenever by the exercise of its power it can do what is practically just, though it cannot restore the parties precisely in the state that they were in before the contract. On the other hand, where both parties had spent money on the property in terms of the contract in such manner that restitution was not possible, rescission was not allowed even though there was innocent misrepresentation on the part of the seller of the property.[89]

The position is thus summarised by Treital:[90]

> "As in cases of misrepresentation, the party seeking rescission must restore benefits that he has obtained under the contract, but he is not required to make precise restitution: the principle of allowing rescission for misrepresentation so long as equity can achieve a result that is 'practically just' applies also where rescission is sought on the ground of undue influence."

Following this position of law in a case, it was held that where a party received nothing under the mortgage which was set aside on the ground of undue influence, there was nothing for him to make restitution.

**Damages for innocent misrepresentation**

A person who is the victim of a fraud is entitled to sue for damages, fraud being a tort also. But the victim of an innocent misrepresentation was not allowed to recover any compensation for any loss that might have been occasioned to him by the misrepresentation. Liability in tort for negligent or innocent misrepresentation is still groaning for recognition. However, much of the sufferings of the victims of innocent misrepresentations have now been relieved by the (English) Misrepresentation Act, 1967. The Act contains the following main provisions:

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85. *Ashok Vandhan Bhagat* v *West Bengal Essential Commodity Supply Corpn Ltd*, AIR 1992 Cal 135.
86. *Neill* v *Morley*, 32 ER 687 and *Molton* v *Camroux*, 154 ER 1107: (1848) 2 Exch 487, mental patient's option to avoid, in England such contract being only voidable.
87. *Hulton* v *Hulton*, (1917) 1 KB 813: (1917) All ER Rep 595.
88. (1878) App Cas 1218: (1874-80) All ER Rep 271. Section 64 cannot be invoked where the party has abandoned the plea of misrepresentation and admitted breach *Shree Hanuman Cotton Mills* v *Tata Aircraft Ltd*, (1969) 3 SCC 522: (1970) 3 SCR 127: AIR 1970 SC 1986.
89. *Lagunas Niterate Co* v *Lagunas Syndicate Ltd*, (1899) 81 LT 334: (1899) 2 Ch 392. Followed in *Spence* v *Crawford*, (1939) 3 All ER 271.
90. LAW OF CONTRACT, 321 (7th edn).

(1) A person who has entered into a contract on account of a misrepresentation will have the same right to recover compensation for loss, if any, caused to him as if the misrepresentation had been made to him fraudulently. The defendant will not be liable if he had a reasonable ground to believe and did up to the time of the contract believe that the facts represented were true.

(2) Where it is alleged in any proceeding that the contract ought to be or has been rescinded, the court may, instead, declare the contract to be subsisting and award damages in place of rescission, if it is equitable to do so.

(3) Provisions in the contract which exclude or restrict liability would be of no effect, unless they are fair and reasonable in the circumstances of the case.

The vendor of a property relied on her husband to deal with her business affairs. The husband stated to the purchaser that to the vendor's knowledge there was no dispute with any neighbour over boundary. In fact there was a dispute of this kind, though the husband did not know it. His statement amounted to an innocent misrepresentation. The purchaser was allowed rescission and refund of deposit.

He was further entitled under Section 2(1) to an inquiry into damages suffered arising out of the loss of interest for the period between the date of deposit and its placement in an interest-earning account.[91]

Under the Indian Contract 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 through 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 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, and *B*, in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

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91. *Walker* v *Boyle*, (1982) 1 All ER 634 Ch D; Boyle, while selling his wife's house to Walker, represented that there were no disputes regarding the boundaries of the property. This turned out to be false amounting to innocent misrepresentation. A clause in the contract stated that "no error, misstatement or omission in any preliminary answers concerning the property shall annul the sale". Rescission for misrepresentation was allowed under which *Walker* got the refund of his deposit. *See* Anthea Cameron, *Measuring Dilectual Damages for Fraudulent Misrepresentation*, (1982) 99 SALJ 99. *McGrath* v *Shah*, (1989) 57 P&CR 452 Ch D, misrepresentations in a building contract. The court held that a contract can contain a provision that it contains its entire terms. Such an exhaustive clause does not invalidate the contract.

# 6
# *Mistake*

**Definition of "Consent" [S. 13]**

The provisions of the Contract Act relevant to a study of the effect of "mistake" upon a contract that the parties have purported to make may be noted first. Mistake may operate upon a contract in two ways. It may, firstly, defeat the consent altogether that the parties are supposed to have given, that is to say, the consent is unreal. Secondly, the mistake may mislead the parties as to the purpose which they contemplated.

The cases in which the consent is defeated or is rendered unreal fall under Section 13. This section defines "consent" as follows:

> 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.

This seems to have been picked up from a passage[1] in the judgment of Lord HANNEN in *Smith* v *Hughes*.[2]

> "It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus if two persons enter into an apparent 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*".[3]

**Definition of "Mistake"**

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

> 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.

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1. The word 'consent' in S. 30(2) of the Sale of Goods Act, 1930, means the same. *Central National Bank* v *United Industrial Bank*, 1954 SCR 391: AIR 1954 SC 181. Once "consent" has been proved, it cannot be defeated by application of criminal law. *See*, for example, *Kaur* v *Chief Constable, Hampshire*, (1981) 1 WLR 578 QB, where it was held that a mistake as to price induced by wrong marking was not so fundamental as to destroy the validity of contract of sale.
2. (1871) LR 6 QB 597, 609: 40 LJ QB 221: 25 LT 329.
3. Exchequer, (1864) 2 H & C 906: 159 ER 375: 33 LJ Ex 160. If a thing is not understood by the parties in the same sense, the agreement would be invalidated at the inception stage itself even if the communication gap is discovered at a later stage, *Tarsem Singh* v *Sukhminder Singh*, (1998) 3 SCC 471.

*Illustrations*

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

(*b*) *A* agrees to buy from *B* a certain horse. It turns out that the horse was dead at the time of 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 time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 20 will come into play:

(1) when both the parties to an agreement are mistaken,

(2) their mistake is as to a matter of fact, and

(3) the fact about which they are mistaken is essential to the agreement.

*Supplementary provisions*

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.

**21. Effect of mistake 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.

**What facts are essential**

What facts are essential to an agreement? The answer is naturally linked with the nature of promise in each case. The plaintiff was a wholesale dealer under a Rationing Order. He was entitled to transport charges variable according to distance for collecting goods from Government godowns. He was paid at the rate applicable to a zone less than 25 miles in distance. 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 distance. The plaintiff's claim for the arrears up to the time of rectification was dismissed, the court saying that the mistake did not relate to an essential fact.[4] Thus essentiality depends upon each case. In the above case the mistake related to a minor distance. The fact would have become more important and essential to the

4. *A.P. Kochudevassy* v *State of Kerala*, AIR 1982 Ker 90.

contract if a longer distance had been involved. Speaking broadly, certain 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.

The present study of the effects of mistake proceeds along these lines and includes the combined effect of Sections 13 and 20.[5]

## MISTAKE AS TO IDENTITY

### Assumption of false identity

Mistake as to identity occurs where one of the parties represents himself to be some person other than he really is. Thus, for example, in *Jaggan Nath* v *Secretary of State for India*:[6]

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

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. The defendant's agent intended to contract only with *S's* brother and not with *S* and *S* knew this.

In the above case, the Government's offer was meant for *S* and his brother posing as *S* accepted it. This prevented real consent. It means that an offer which is meant for one person cannot be accepted by another.

### Mistake caused by takeover of business

In England there is a long line of cases on the subject. In *Boulton* v *Jones*[7] the mistake arose naturally in the course of business.

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

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5. For general literature on the subject see *Couturier* v *Hastie and the Sale of Non-Existent Goods*, (1957) 73 LQR 340; C.J. Slade, *The Myth of Mistake in the English Law of Contract*, (1954) 70 LQR 385; A.L. Goodhart, *Mistake as to Identity in the Law of Contract*, (1941) 57 LQR 228; G.C. Cheshire, *Mistake as Affecting Contractual Consent*, (1944) 60 LQR 175; K.O. Shatwell, *The Supposed Doctrine of Mistake in Contract: A Comedy of Errors*, (1955) 33 Can BR 164; E.C.S. Wade, *Mistaken Identity in the Law of Contract*, 38 LQR 201; Glanville Williams, *Mistake as to Party in the Law of Contract*, 23 Can B Rev 271; B.R. Ramford, *Mistake and Contract*, (1955) 72 SA LJ 166; J.F. Wilson, *Identity in Contract and the Pothier Fallacy*, (1954) 17 Mod LR 515, Smith and Thomas, *Pothier and the Three Dots*, (1957) 20 Mod LR 38.

6. (1886) 21 Punj Rec No. 21, p 37. The Supreme Court has observed that mistake of identity will prevent consent in the sense of an agreement of two persons in the same sense. *Central National Bank* v *United Industrial Bank*, 1954 SCR 391: AIR 1954 SC 181: (1954) 1 MLJ 87.

7. (1857) 27 LJ Ex 117: 157 ER 232.

Four unanimous judges held the defendant not liable. "Now," said POLLOCK CB, "the rule of law is clear, that if you propose to make a contract with *A*, then *B* cannot substitute himself for *A* without your consent and to your disadvantage, securing to himself all the benefit of the contract."[8] Similarly, BRAMWELL B said: "When anyone makes a contract in which the personality, so to speak, of the particular party contracted with is important, for any reason, whether because it is to write a book or paint a picture or do any work of personal skill, or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with."

**Mistake of identity caused by fraud**

The principle of this case found further support in *Hardman* v *Booth*:[9]

> The plaintiffs, meaning to deal with Thomas Gandell & Sons, went to their office and took an order from a person who represented himself to be a partner in the firm. He told the plaintiffs that the goods should be sent in the name of Edward Gandell & Sons. He received the goods, carried them away and sold them to the defendant, a *bona fide* buyer. The plaintiffs sued the defendant to recover their goods.

POLLOCK CB explained the principle thus: "There are some cases in which it is very clear that there is no contract at all; and the present case seems to be one of those cases. It is argued that the contract was made personally with the particular individual who made the communication: it is very true that the words were uttered by and to him; but what they imported was a contract with Gandell & Co, the facts being that he was not a member of the firm, and had no authority to act as their agent, and Gandell & Co, therefore, were not the buyers; and, consequently, at no time were there two consenting minds drawn together to the same agreement."

The principle established by this case was affirmed by the House of Lords in *Cundy* v *Lindsay*:[10]

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

It was held that there was no contract between the plaintiffs and *Blenkarn* and, therefore, he had no right to sell the goods. The plaintiffs intended to contract with *Blenkiron & Co* and consequently no contract could have arisen between them and *Blenkarn*. "Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely one side to a contract, whereas, in order to produce a contract, two sides would be required."

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8. (1857) 27 LJ 117, 118-119.
9. (1863) 1 H & C 803: 32 LJ Ex 105.
10. (1878) 3 App Cas 459: 38 LT 573: 47 LJ QB 481.

**Distinction between identity and attributes**

A distinction has been made for this purpose between a person's identity and his attributes and a mistake about the latter has been held not to avoid the agreement. There can be a mistake of identity only when a person bearing a particular identity exists within the knowledge of the plaintiff, and the plaintiff intends to deal with him only. If the name assumed by the swindler is fictitious, there will be no mistake of identity. For instance, in *King's Norton Metal Co* v *Edridge, Merrett & Co*:[11]

> A man named Wallis adopted the name of "Hallam & Co", a non- existent firm, and by letters placed order for some goods with the plaintiffs who complied with the order by sending the goods. Wallis sold the goods to the defendants, who acted in good faith. The plaintiffs sued the defendants for the value of the goods.

The facts of this case were different from those of *Cundy* v *Lindsay* as in that case *Blenkiron & Co* was a separate entity and the plaintiffs intended to contract only with it. But in this case there was no separate *Hallam & Co* Accordingly the court said: With whom did the plaintiffs contract to sell the goods? Clearly with the writer of the letters. If it could have been shown that there was a separate entity called *Hallam & Co* and another entity called Wallis then the case might have come within the decision in *Cundy* v *Lindsay*. The contract with Wallis was, therefore, only voidable for fraud and it could not be disaffirmed after the defendants had acquired the property in good faith.

The scope for operative mistake as to identity is further reduced when the parties are in each other's presence. In *Phillips* v *Brooks Ltd.*[12]

> A man, called North, entered the plaintiff's shop and selected some pearls and some rings worth £ 3,000. He produced a cheque book and wrote out a cheque for the amount. In signing it he said: "You see who I am, I am *Sir George Bullough*" and finding on reference to a directory that *Sir George Bullough* lived at the address mentioned, the plaintiff let him have a ring. He promised to come for the other articles after the cheque was cleared. Before the fraud was discovered he pledged the ring with the defendants who advanced money bona fide, and without notice. The plaintiff sued the defendants for the ring or its value.

It as held that the plaintiff intended to contract with the person present before him. HORRIDGE J said:

> "The following expressions used in the judgment of MORTON CJ[13] seems to me to fit the facts in this case: "The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by the fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell

11. Court of Appeal, (1897) 14 TLR 98.
12. (1919) 2 KB 243.
13. *Edmunds* v *Merchant Despatch Co*, (1883) 135 Mass 283, 286. Also reported in Costigan, CASES ON CONTRACT, 3rd edn, p 205.

to the person present, and identified by sight and hearing, it does not defeat the sale because the buyer assumed a false name...."[14]

The authority of this case seems to have been considerably shaken by the decision of the Court of Appeal in *Ingram* v *Little*:[15]

> Three ladies, the joint owners of a car, advertised it for sale. A person called at their house and offered to pay an acceptable price. But, when he pulled out a cheque book, the ladies told him that the deal was over as they would not accept a cheque. He then persuaded them to believe that he was one *Hutchinson*, a leading businessman, and quoted an address and a telephone number. On verification of the particulars from a directory, the ladies gave him the car for a cheque. He resold the car to the defendant and absconded. The cheque proved worthless and the plaintiffs sued the defendant for the car or its value.

The defendant was held liable.[16] In the opinion of the court the decision must depend upon the intention of the ladies. The question was with whom did they intend to contract, with the man present in their drawing room or with the real Hutchinson? Did the identity of Hutchinson or the physical presence of the man in the room preponderate? Can it be said that the *prima facie* predominance of the physical presence of the false Hutchinson identified by sight and hearing was overborne by the identity of the real Hutchinson on the facts of the present case? In answer to these questions the court said that there could be no doubt that the offer which the plaintiffs made was one made soley to, and one which was capable of being accepted only by, the honest Hutchinson. So far as the rogue was concerned there was no offer made to him and consequently there could be no contract with him. His right to the car was no more than that of a thief or a finder and he could not convey a good title to the defendant.[17]

### *Where Fraud does not lead to Mistake of Identity*

In the dissenting judgment DEVLIN LJ emphasised the need for a new approach. In his view cases like these pose a problem of practical justice, and theoretical considerations such as whether the contract is void or voidable should not stand in the way of doing practical justice. Why should the title of the innocent buyer be made to depend on the state of a contract between third parties? It was this approach that found favour with the Court of Appeal in *Lewis* v *Averay*:[18]

> Lewis, the plaintiff, had a car to sell. A man, described in the judgment as "rogue", came along and introduced himself as Richard Green, a famous film

14. For a criticism of this decision *see* E.C.S. Wade, *Mistaken Identity in the Law of Contract*, 38 LQR 201, 204; A.L. Goodhart, *Mistake as to Identity in the Law of Contract*, (1941) 57 LQR 228, 241, *See also* 35 LQR 289.
15. (1961) 1 QB 31: (1960) 3 All ER 332. Noted in A.L.G.: *Mistake as to Identity in the Law of Contract*, (1961) 77 LQR 31; J.C. Hall: *New Developments in Mistake of Identity*, (1961) Camb LJ 86. *See also* a comment by the same writer in (1960) Camb LJ 147: 24 Mod LR 267.
16. DEVLIN LJ *dissented.*
17. *See* also *Hardman* v *Booth*, (1863) 1 H&C 803; *Lake* v *Simmon*, (1927) AC 487; *Macleod* v *Kerr*, (1965) SLT 358 and *Car and Universal Finance Ltd, Re*, (1964) 2 WLR 600, noted in 1966 Journal of Business Law, pp. 79 and 259.
18. (1971) 3 All ER 907: (1972) 1 QB 109: (1971) 3 WLR 603 CA.

actor. He tested and liked the car and offered a cheque. The plaintiff told him to wait till the cheque was cleared, but when his resistance was broken, he demanded proof of identity. The rogue produced a special pass of admission to a film studio which showed his photograph and the official stamp. This convinced the plaintiff and he allowed the car to be taken away for the cheque. The rogue lost no time in disposing of the car to an innocent buyer, the defendant. The worthless cheque came back and the plaintiff sued the defendant to recover his car.

The Court of Appeal held that the car was delivered under a contract voidable by reason of the fraud and the contract having not been avoided before the car passed into the hands of an innocent buyer, he acquired a good title. Lord DENNING felt that the facts of *Phillips* v *Brooks*[19], *Ingram* v *Little*[20] and those of the present case were indistinguishable and that the contradictory decisions in these two earlier cases cannot be reconciled. In each case, his Lordship pointed out, an innocent seller is visited by a rogue, who by the usual tricks of his trade, convinces that he is a man of standing and credit and thereby induces the seller to part with his possession for a cheque. In each case he disposes of the goods to an innocent buyer. Whose failure has brought about this misfortune upon the two innocent parties? Should the title of the ultimate buyer be made to depend upon fine questions as to whether the fraud was committed before or after the contract was struck, or whether the mistake related to identity as opposed to attributes or whether the contract was void or voidable? Referring to these needless subtleties Lord DENNING said:

"For instance, in *Ingram* v *Little*[21], the majority of the court suggested that the difference between *Phillips* v *Brooks*[22] and *Ingram* v *Little* was that in *Phillips* v *Brooks* the contract of sale was concluded after the rogue made the fraudulent misrepresentation[23] whereas in *Ingram* v *Little* the rogue made the fraudulent representation before the contract was concluded. My own view is that in each case the property in the goods did not pass until the seller let the rogue have the goods.

Again it has been suggested that a mistake as to the identity of a person is one thing; and a mistake as to his attributes is another. A mistake as to identity, it is said, avoids a contract, whereas a mistake as to attributes does not. But this is a distinction without a difference. A man's very name is one of his attributes. It is also a key to his identity. If then, he gives a false name, is it a mistake as to his identity? Or, a mistake as to his attributes? These fine distinctions do no good to the law.

As I listened to the arguments in this case, I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements. After all he has acted with complete circumspection and in entire good faith; whereas it was the seller who let the rogue have the goods and thus enabled him to commit

19. (1919) 2 KB 243: (1918-19) All ER Rep 246.
20. (1961) 1 QB 31: (1960) 3 All ER 332.
21. (1961) 1 QB 31.
22. (1917) 2 QB 243.
23. *See* (1961) 1 QB 51, 60: (1960) 3 All ER 337, 343.

the fraud. I do not therefore accept the theory that a mistake as to identity renders a contract void."

When the parties are present face to face, the presumption is that the contract is made with the person actually present, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. This approach was heralded by PEARCE LJ and also by DEVLIN LJ in *Ingram* v *Little*, in support of which DEVLIN LJ quoted not only the English case of *Phillips* v *Brooks*, but also cases in the United States where:[24]

> "The courts hold that if *A* appeared in person before *B*, impersonating *C*, an innocent purchaser from *A* gets the property in the goods against *B*."

PHILLIMORE LJ and MEGAW LJ also subscribed to the view that there was nothing in the conduct of the plaintiff to overthrow the presumption of contracting with the person who was present in person.[25]

*Where Identity Specially Important*

Where, however, the identity of the other party is of vital importance to the offeror, a mistake as to identity will prevent an agreement from arising. Importance of identity must depend upon the nature of the promise in each case. In *Said* v *Butt*[26], for example:

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

But it was held that there was no contract between him and the theatre. "The non-disclosure of the fact that the ticket was bought for the plaintiff prevented the sale of the ticket from constituting a contract, the identity of the plaintiff being in the circumstances a material element in the formation of the contract."

Yet another illustration is *Sowler* v *Potter*:[27]

> The defendant was convicted for permitting disorderly conduct in a cafe. She subsequently assumed a false name and obtained from the plaintiff a lease of premises in the same neighbourhood with a view to conducting a restaurant therein. The plaintiff contended that if he had known her true identity he would never have granted the lease and the same was therefore void for mistake.

It was held that the consideration of the person with whom the plaintiff was entering into the lease was a vital element in that agreement so that the plaintiff having been mistaken with regard to the identity of the defendant, the lease was void *ab initio*.

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24. This quotation is from CORBIN ON CONTRACTS, Vol 3, S. 602.
25. The same approach was adopted where a person by forgery of signature of a customer induced the banker to issue a draft which was ultimately received by an innocent person and it was held that the issuing bank must suffer this loss. *Citibank NA* v *Brown Shipley & Co Ltd*, (1991) 2 All ER 691 QBD.
26. (1920) 3 KB 497.
27. (1940) 1 KB 271.

In a German case,[28] a room was booked in a private hotel. When the plaintiff and his lady arrived, the hotelier discovered that they were affianced but not married. The room was refused. The hotelier was held not liable for damages for breach of contract:

> "The defendant, when accepting the plaintiff's booking, had acted on the assumption that he and his lady were a married couple, whereas in fact they were not. In view of the defendant's own feelings and the effect which it might have on other guests if they learned that the defendant rented out double rooms to unmarried couples, the mistake was a material one and negated consent."

## MISTAKE AS TO SUBJECT-MATTER

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

### 1. Non-existent subject-matter

In the first place, the subject-matter may have ceased to exist before the contract was made. This happened in *Couturier* v *Hastie*:[29]

> The defendant was employed to sell the plaintiff's cargo which was on voyage. After the defendant had sold the cargo to a third person, it was discovered that the cargo, having been damaged by bad weather, had been sold at an intermediate port. The buyer repudiated the contract and the defendant, being a *del credere agent*[30] was sued for the price.

But he was held not liable. Lord CRANWORTH said: "The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased." But as the goods had been totally lost before the contract was made, the contract was void *ab initio* (from the very beginning).[31] On the same principle, the sale of a horse which, unknown to the parties, was dead at the time of the bargain[32] and the sale of the life estate of a person who, unknown to parties, was dead at the time of the sale, would be void.[33]

### 2. Mistake as to Title or Rights

"Corresponding to mistake as to the existence of subject-matter is mistake in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intend to effectuate a transfer of ownership: such a transfer is impossible...."[34]

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28. (1975) 28 New Juristische Wachen Schrift 1363, noted H R Hablo, *Morality Vindicated*, (1975) SALJ 440.
29. (1856) 5 HLC 673: 25 LJ Ex 253: 10 ER 1065. *See also* the judgment of Lord ATKIN in *Bell* v *Lever Bros*, (1932) AC 161.
30. The expression means an agent who undertakes to be liable if the third person with whom he contracts on behalf of his principal fails to perform the contract.
31. *See* Illustration (*a*) to Section 20 which seems to have been cast upon this case. The case is considered by P.S. Atiyah, *Couturier* v *Hastie and the Sale of Non-Existent Goods*, (1957) 73 LQR 340.
32. *See* Illustration (6).
33. Illustration (*c*) which seems to be based upon *Strickland* v *Turner*, (1852) 7 Ex 208: 86 RR 619 and *Cochrane* v *Willis*, (1865) LR 1 Ch 58.
34. Lord ATKIN in *Bell* v *Lever Bros*, (1932) AC 161, 218. His Lordship cited *Cooper* v *Phibbs*, (1867) LR 2 HL 149: 16 LT 678, "where *A* agreed to take a lease of fishery from *B*, though contrary to belief of both parties at the time *A* was tenant for life of the fishery and *B* appears

In such a case, however, equity only allowed the agreement to be set aside. This was affirmed by the House of Lords in 1867 in the great case of *Cooper* v *Phibbs*.[35] In that case an uncle had told his nephew, not intending to misrepresent anything but being in fact in 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 agreement voidable, but also liable to be set aside on such terms as the court thought fit to impose.

The principle was further explained by the Court of Appeal in *Sole* v *Buthcher*[36] where DENNING LJ stated the position thus:

> "All previous decisions on this subject must now be read in the light of *Bell* v *Lever Bros Ltd*[37] The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for breach of some condition expressed or implied in it, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. *A fortiori* if the other party did not know the mistake, but shared it."

In this case:

> A landlord carried out repairs to a house which was with a tenant on a standard rent fixed in 1939. The tenant expressed the opinion that after the reconstruction the standard rent would not be applicable. If it was applicable the landlord could have increased it by notice to the tenant by taking into account the costs of improvement. Without giving such notice the tenancy was renewed in favour of the tenant for seven years on the increased rent. The tenant paid the increased rent for some time and then started proceedings for restoring the original rent and for recovering overpaid rent.

The court held that the standard rent was still applicable and the plaintiff was prevented from giving notice by the misrepresentation made by the tenant. It was liable to be set aside, but was not a nullity from the very beginning. "The parties agreed in the same terms on the same subject-matter. It is true that the landlord was under a mistake which was to him fundamental. But whether it was his own mistake or a mistake common both to him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity." His Lordship further pointed out that what the tenant said was not merely an expression of opinion but an unambiguous statement as to private rights and a misrepresentation as to private rights is equivalent to a misrepresentation of fact for this purpose.[38]

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to have had no title at all". The agreement was set aside. But the decision is criticised by his Lordship.

35. (1867) LR 2 HL 149: 16 LT 678 HL.
36. (1949) 2 All ER 1107: (1950) 1 KB 671 CA.
37. (1932) AC 161.
38. His Lordship cited *Mackenzie* v *Royal Bank of Canada*, (1934) AC 468: 103 LJ PC 81 PC.

No contract would follow where though the buyer is not owner, the vendor also does not have the right to sell and the parties have mistakenly believed that he has the right.[39] Where a vendor purported to sell all his rights in a land, including the rights to mine minerals, the agreement was held void when it was subsequently found that the vendor's rights simply did not include the right to mine. Without this right the land was worthless for the buyer whose only object was to work the mines.[40] A mistake of this kind must be reasonable in the circumstances. Where, for example, "the position was too notorious and well-known to all concerned in the locality that the tenants of an estate, which was the subject-matter of sale, had the right to sell Tendu leaves to whomsoever they pleased", the buyer's ignorance of this right was not reasonable and consequently the contract was valid.[41] In a case before the Bombay High Court:[42]

> *C* mortgaged the property of his brother *L.M.* fraudulently representing himself to be *L.M.* The defendant, who was the mortgagee transferred his interest to the plaintiff. The plaintiff insisted that the owner of the property should join the transfer and *C* again committing the same fraud, executed the transfer. On discovering the fraud, the plaintiff sued the defendant for the return of the purchase money.

It was held that he must succeed. "Both the parties being in the belief that the real owner had joined in the transfer were under a mistake of fact essential to the agreement which was, therefore, avoided under Section 20."

### 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. As, for example, in *Raffles* v *Wichelhaus*:[43]

> The defendant bought of 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."

Where the buyer believed that the land was being sold at the stated price per bigha and the seller thought the price was applicable per *kanal*, it was held that there was no agreement on the matter of an essential fact and, therefore, no contract.[44]

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39. *Rani Kunwar* v *Madhub Baksh*, 132 IC 39. *See* also *U. Pan* v *Maung Po Tu*, 100 IC 327.
40. *Ramchandra* v *Bisra Gonesh Chandra*, 39 IC 78.
41. *State of Orissa* v *Mohd Khan*, AIR 1961 Ori 75. *See* also *Kochuvareed* v *Mariappa*, AIR 1954 Tra-Co 10.
42. *Ismail Allarkhia* v *Dattatraya*, ILR (1916) 40 Bom 638.
43. Exch (1864) 2 H&C 906: 159 ER 375: 133 RR 853. In a sale by auction, the seller intending to sell tow and the buyer intending to buy hemp and the jury found that the two commodities were commercially different, the seller could not recover the price, *Scriven Bros & Co* v *Hindley & Co*, (1913) 3 KB 564.
44. *Tarsem Singh* v *Sukhminder Singh*, (1998) 3 SCC 471. The court added that no part of the agreement is enforceable unless it is severable from the void features and is capable of supporting an independent contractual tie.

### 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."[45] The decision of the Privy Council in *Seikh Bros Ltd* v *Ochener*,[46] 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. Their Lordships, relying upon the statements in *Bell* v *Lever Bros*[47], came to the conclusion that "having regard to the nature of the contract, which was a kind of joint adventure, it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence, and the mistake was as to a matter of fact essential to the agreement".[48]

On the same principle an agreement for the sale of land was held void as, unknown to the parties, the land had been notified for acquisition at the time of the contract.[49] An agreement to compromise a suit already decided in favour of the plaintiff, but unknown to the parties, is void for the same reason.[50] The acquisition of a land, which is the subject-matter of a sale, after the contract is made will not upset the contract,[51] so also a contract for the sale of goods on certain price cannot be avoided by the seller on the ground that a new excise tax has made the goods dearer and the buyer is unwilling to pay the extra price.[52] This will be so even if the parties have made the bargain in the expectation that there will be no upward revision of taxes.[53] Where the expectations of the parties are frustrated by subsequent events, their contract may fall under Section 56 but cannot be declared void *ab initio* under Section 20.[54] In such cases there is no mistake as to existing facts. The distinction was emphasised by the Calcutta High Court[55] in a case where a contract was entered into upon the assumption that the Jute Control Order, which was due to expire, would be continued and extended, but it was not extended. Rejecting the plea of mistake, HARRIES CJ observed as follows:[56]

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45. *See* HALSBURY'S LAWS OF ENGLAND, 2nd edn., Vol 23, p 135 and paragraph 89.
46. 1957 AC 136 (PC).
47. (1932) AC 161.
48. At p 147. The judgment of their Lordships was delivered by LORD COHEN. *See* also *Shahabuddin* v *Vilayat Alikhan*, 75 IC 614; *Ramachandra* v *Bisra Ganeshchandra*, 39 IC 78.
49. *Nursing Das Kothari* v *Chuttoo Lal Misser*, ILR (1923) 50 Cal 615.
50. *Bibi Soloman* v *Abdool Azeez*, (1881) 6 Cal 687; *Ananda Chandra Das* v *Kalidas*, 50 IC 955.
51. *Jodha Mal* v *Associated Hotels of India*, AIR 1950 Lah 106.
52. *Chin Gwan & Co* v *Adamjee Haji Dawood & Co*, AIR 1939 Rang 79.
53. *Babshetti* v *Venkatramana*, ILR (1879) 3 Bom 154.
54. *Chandumal Jhaleria* v *Clive Mills*, AIR 1943 Cal 257.
55. *Ibid.*
56. *Ibid.*, at p 261.

"The difference between a mistake as to an existing fact and a mistake as to a future occurrence is clear and the consequences are very different. A mistake as to an existing fact will render the contract void *ab initio*. In short, if the parties have entered into a contract upon such a mistake, there is and never has been any contract at all between them. On the other hand, if the mistake is as to some future event, a binding contract is entered into between the parties. The contract may be avoided or rescinded at some future date if the expected event does or does not happen."[57]

The fact about which the parties are mistaken must be "essential" to their agreement. A mistake as to a collateral fact, which leaves the subject-matter substantially what it was supposed by the parties to be, does not negative the contract. Thus the lease of a mining estate which was known by reputation to measure 100 bighas was not regarded as void on discovering that the area was actually less. "The exact area of 100 bighas more or less was not essential for the colliery purpose for which agreement was arrived at and, therefore, there was no common mistake with regard to an essential fact."[58] Similarly, a contract for the sale of goods "to arrive by a certain ship" is not void, if the ship does not bring the goods.[59] Since, land acquired under statutory power cannot be divested in favour of any person, much less in favour of the person from whom it was acquired, any such divesting under mistaken notion of the rights was held to be void. The agreement was also opposed to public policy.[60] Handing over by Zila Parishad of the right to collect fee to the highest bidder was held to be against law.[61]

**Mistake as to quality of subject-matter**

A mistake as to the quality of the subject-matter as distinguished from its substance may not render the agreement void. *Smith* v *Hughes*[62] 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.

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57. The distinction was also clearly pointed out by Lord ATKIN in his judgment in *Bell* v *Lever Bros*, (1932) AC 161, 224.
58. *Soornath Banerjee* v *Babasanker Goswami*, AIR 1929 Cal 547.
59. *Bhailal Chaturbhai Patel* v *Kalyanrai*, 63 IC 952. *See* also *Indian Trades & General Ins Co* v *Bhailal*, AIR 1954 Bom 148, the judgment of CHAGLA CJ at p 151.
60. *Seth Srenikbhai Kasturbhai* v *Seth Chandulal Kasturchand*, AIR 1997 Pat 179.
61. *Surendra Kumar Rai* v *Zila Parishad*, AIR 1997 All 387, the collections were not accounted for by the person, that amount was held to be recoverable. But the amount could not be recovered as arrears of land revenue. In another similar case, *Mahesh Chandra* v *Zila Parishad*, AIR 1997 All 248, the Parishad authorised a bidder the right to remove and dispose of dead animals. The amount which became due from him could not be recovered as arrears of land revenue. Such authority can be given to the Collector only under a statute. *State Industrial and Investment Corpn of Maharashtra* v *Narang Hotels P Ltd*, AIR 1995 Bom 275, a mistake as to whether a particular type of industry was included in the subsidy scheme of a backward area did not make the contract to provide subsidy by the Financial Corporation voidable.
62. 1871 LR 6 QB 597.

But the court could find no ground entitling the buyer to reject. COCKBURN CJ summed up by saying: "All that can be said is that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them."[63]

The effect of mistake as to quality has been further explained by the House of Lords in *Bell* v *Lever Bros*[64] where Lord ATKIN said: "Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be."[65] The facts of the case were as follows:

> Lever Bros. appointed one Bell as a managing director for five years on an annual salary of £ 8,000 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.

But their action failed. It was held by a majority "that the mutual mistake related not to the subject-matter, but to the quality of the service contract."[66] The plaintiffs contended that they agreed to pay compensation on the assumption that the service contract was one which could not be terminated without compensation, whereas the true fact was that the defendant could have been dismissed without compensation. Referring to this contention, Lord ATKIN said:[67] "I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract of release is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain." The mistake was mutual as the jury found that at the time of negotiating the compensation agreement the defendant had not in mind his breaches of duty.[68]

In a sale of table napkins under a mistake that they were of historic value, it has been suggested that the transaction could be regarded in two ways:

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63. 1871 LR 6 QB 597, 606.
64. (1932) AC 161.
65. (1932) AC 161, 218.
66. Lord BLANESBURGH, Lord ATKIN and Lord THANKERTON (VISCOUNT HAILSHAM and Lord WARRINGTON of Clyffe dissenting).
67. At pp. 223-224.
68. *See* also *Kennedy* v *Panama Royal Mail Co*, LR 2 QB 580, where it was held that a material misrepresentation in a company's prospects does not make the shares an applicant obtained a different thing in substance from those which he applied for.

"1. The parties have intended to buy and sell table-linen: in this case a mistake as to its age or value would be irrelevant—it would be a mistake as to quality and therefore not an operative mistake.

2. The parties may have intended to buy and sell a Carolean relic, i.e., a mistake as to substance; in that case their mistake would be fundamental and make the contract void."[69]

**Misapprehension as to parties' respective rights**

The Court of Appeal has reiterated in *Magee* v *Pennine Insurance Co*[70] that a common misapprehension either as to facts or as to the parties' relative and respective rights will not make the contract void but only voidable provided that the misapprehension was fundamental and that the party seeking to set aside was not himself at fault. The facts of the case were:

> The plaintiff bought a car for his 18-year-old son. The son had a provisional driving licence. The proposal form for the insurance of the car was filled by the manager of the firm from where the car was bought and he happened to state that the plaintiff had a provisional driving licence when in fact he had none. The son made an accident and the plaintiff claimed £ 600 for it. The company compromised the claim undertaking to pay £ 385. But before paying, the company came to know of the misstatement and declined to pay.

The agreement of compromise was entered into under the common and fundamental mistake that the original policy was valid and binding, when in fact it was voidable for the misstatement. In *Bell* v *Lever Bros*, the original contract of employment was supposed by the parties to be binding when in fact it was terminable for the breaches of duty. The only difference was that in *Bell* the compromise amount had already been paid. The Court of Appeal held that the agreement was liable to be set aside on the ground that the parties were mistaken as to a fundamental assumption.

In another similar case before the Court of Appeal[71] after a contract had been made for the purchase of a property at a relatively high price because of its suitability for occupation and redevelopment, the property was listed by the State as being of architectural or historic interest. The purchaser sought to avoid the contract on the ground of common mistake because unknown to the parties at the time of the contract the property was already under consideration for the purpose of listing. But he was not allowed to do so. The property was listed only after the contract had already been signed. No relief was allowed under the doctrine of frustration also. Listing was an inherent risk, of which every purchaser should be regarded as being aware. The plaintiffs had been aware that the risk existed and it was a risk they had to bear. It could not therefore be said that the performance of the contract that would be called for would, in consequence of the listing, be radically different from that which had been undertaken by the parties. The principle would, therefore, seem to be that a contract is void *ab initio* if its subject-matter is essentially and radically

69. *Nicholson & Vern* v *Smith-Marriott*, (1947) 177 LT 189 KB, a conclusion on the basis of this decision in Max Young, CASES & MATERIALS IN CONTRACT LAW, 380 (1st edn, 1997).
70. (1969) 2 All ER 891: (1969) 2 QB 507: (1969) 2 WLR 1278 CA.
71. *Amalgamated Investment* v *John Walker*, (1976) 3 All ER 509.

different from what both contracting parties believed it to be, provided that the party relying on the mistake has reasonable grounds for his mistaken belief.[72]

To the same effect is the decision of the Supreme Court in *Kalyanpur Lime Works Ltd* v *State of Bihar*:[73]

> The State of Bihar granted the lease of a hill to one K. Co for quarrying limestone. The lease was not assignable to anyone else without the approval of the Government. K. Co went into liquidation and its liquidator assigned the lease to another without the approval of the State. This provoked the State to forfeit the lease and to offer it to the plaintiffs for a period of 20 years. K. Co started proceedings against the forfeiture and the same was held by the Privy Council to be invalid. K. Co was restored to its lease and vacated after the expiry of its full term, that is after about 11 years. The plaintiffs now claimed the lease in terms of the agreement made before the forfeiture was declared to be invalid. But the Government allotted the same to another person and the plaintiff started the present proceedings. The Supreme Court held that the agreement was not void by reason of any mistake. The Government had the right to forfeit and to re-allot. The forfeiture having been declared void, its right was not wholly gone; it was restricted only by reason of the lease which had still several years to run. In these circumstances it might have been open to the plaintiffs to repudiate the contract if they so liked, but the defendant could not certainly plead that the contract was void on the ground of mistake and refuse to perform that part of the agreement which it was possible for it to perform.

Similarly, where the Government allotted certain plots assuming that the sitting tenants would vacate them, but they refused to oblige, it was held by the Allahabad High Court[74] that "Section 20 does not apply to a case where the contracting parties have made no mistake as to any fact existing at the making of the contract and it is complained that one of them is unable to carry out his part of the contract on account of the unexpected refusal of a third person to carry out his obligation under another agreement."[75]

## MISTAKE AS TO NATURE OF PROMISE

The principle is well established by authorities that when a deed of one character is executed under the mistaken impression that it is of a different character, then it is wholly void and inoperative.[76] Thus where a gift deed is signed under the impression that it is only a power of attorney, the deed is inoperative.[77] If a mistake of this kind is common to both parties, the agreement is void under

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72. *Associated Japanese Bank* v *Credit Dul Nuro*, (1988) 3 All ER 902 QB. The principle of this case was applied in *William Sindall plc* v *Cambridgeshire County Council*, (1994) 3 All ER 932 CA where the party was held to be entitled to rescind the contract for a common mistake as to the existence of a sewer.
73. (1954) SCR 958; *Dalmia Jain & Co Ltd* v *Kalyanpore Lime Works Ltd*, AIR 1952 Pat 393.
74. *UP Government* v *Lala Nanhoo Mal Gupta*, AIR 1960 All 420.
75. *Per* S.N. DWIVEDI J.
76. *Apanna* v *Venkatappadu*, AIR 1953 Mad 611. For English authorities *see* Anson's PRINCIPLES OF THE LAW OF CONTRACT, 22nd edn by Guest, (1964), pp. 282-87. *See* also *Mandakini* v *Chandrasen*, AIR 1986 Bom 172 where the allegation that unknown to him the girl whom he married was illegitimate of her parents was not proved and even if proved, the court held that it would not have been a material fact.
77. *Sarat Chandra* v *Kanailal*, AIR 1929 Cal 786. *See* the judgment of SANDERSON J at p 788.

Section 20, the parties being mistaken about the very nature of the promise. But more frequently a mistake of this kind is brought about by the fraud of one party. One of the parties, being under a duty to do so, fails to disclose to the other the true nature of the document and thereby induces him to sign the same under the 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. This distinction has been thus indorsed by the Supreme Court:[78]

> "Though a contract or other transaction induced by fraud is not void, but only voidable at the option of the party defrauded, there is a clear distinction between fraudulent misrepresentation as to the character of the document as opposed to its contents. While in the former case the transaction is void, in the latter it is only voidable."

There is not the type of "consent" as is required by Section 13. In a case of this kind before the Patna High Court:[79]

> 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*.[80]

In a similar case before the Madhya Pradesh High Court,[81] an illiterate lady who was the owner of farming land generally consulted her uterine brother on all important matters. Once, finding that some strangers were occupying her lands, she approached her brother, who advised that an application should be made to the Collector. He took her to the Collector's office and obtained her thumb-impressions upon some blank papers. These were then registered as sale deeds in the name of some persons. On discovering her mistake she challenged the transaction and obtained an order that the transaction was void and that she was still the owner of her lands. 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."

This distinction was developed by the Supreme Court in *Ningawwa* v *Byrappa Shiddappa Hirekurabar*[82] following the principle enunciated in *Foster* v *Mackinnon*.[83] Following these rulings again in another case of the same kind, where an illiterate woman was called upon by her son-in-law and his brothers to put her thumb-impression upon two stamp-papers telling her that she was thereby gifting

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78. *Dularia Devi* v *Janardan Singh*, 1990 Supp SCC 216: AIR 1990 SC 1173: 1990 All LJ 245.
79. *Raja Singh* v *Chaichoo Singh*, AIR 1940 Pat 201. For other illustrations see *Tyagaraja* v *Vedathanni*, AIR 1936 PC 70; *Banku Bihari Shaha* v *Krishto Govindo Joardar*, (1930) 30 Cal 433.
80. For circumstances in which there is a duty to disclose the real nature of the agreement see: *Oriental Bank Corporation* v *John Fleming*, (1877) 3 Bom 242, considered in "Misrepresentation" and "Fraud by silence", *supra*.
81. *Pratap* v *Puniya*, AIR 1977 MP 108. RAINA J relied upon the Supreme Court decision in *Ningawwa* v *Byrappa Shiddappa Hirekurabar*, (1969) 2 SCR 797: AIR 1968 SC 956.
82. (1969) 2 SCR 797: AIR 1968 SC 956.
83. (1869) LR 4 CP 704.

her agricultural land to her daughter, who was her only child and one of the papers was a sale deed to them by which they became the registered owners of the land, the Supreme Court held that the document was a nullity by reason of the fraudulent misrepresentation as to its character.[84]

An agreement to pay money in final settlement under a contract of insurance in which there were false statements has been held by the Court of Appeal to be voidable at the option of the insurance company:[85]

**Where the 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 *Hartog* v *Colin and Sheilds*:[86]

> The defendants contracted to sell to the plaintiff 3,000 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.

SINGLETON LJ felt satisfied "that it was a mistake on the part of the defendants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realised that there was a mistake.... The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not have reasonably supposed that the offer contained the offeror's real intention."

If relief of this kind was 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 followed this principle in granting relief in *New India Rubber Works P Ltd* v *Oriental Fire & General Insurance Co Ltd*:[87]

> 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 the fire risk only. The company issued a policy in usual terms covering the risks of fire, riot and strike. The factory was destroyed by fire due to riot. The company contended that in so far 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 raise this defence. The court considered the principles of equity under which documents executed under mistake are allowed to be rectified and that in reference to an insurance policy such rectification would be possible even after the loss has occurred because equity treats

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84. *Dularia Devi* v *J. Singh*, 1990 Supp SCC 216.
85. *Magee* v *Pennine Ins Co*, (1969) 2 WLR 1278, considered *Effective Mistake in Law of Contract*, (1963) 85 LQR 454. *See* also *Kaur* v *Chief Constable, Hampshire*, (1981) 1 WLR 578 QB, where it was held that a mistake as to the price induced by wrong marking was not so fundamental as to destroy the validity of the contract of sale, but merely rendered it voidable.
86. (1939) 3 All ER 566.
87. (1969) 1 Comp LJ 153 (Cal).

as done that which ought to have been done. The court then considered the effect of Section 26 of the Specific Relief Act, 1963, which provides that an instrument can be rectified if through fraud or a mutual mistake of the parties, the contract does not express their real intention. The court held that where on account of an error on the part of a party a written document fails to express their common intention it will be a case of mutual mistake. The court further pointed out that the defence of mutual mistake can be raised even where the document has become redundant by reason of the occurrence of the loss and there is nothing left to be rectified, for otherwise the assured will be allowed to take the advantage of a mistake which if pointed out would have been rectified at the proper time.[88] The court relied upon its own earlier decision[89] where the defendant was allowed to seek the rectification of a conveyance in which he by mistake happened to include his homestead when that was not the intention of the parties.

The principles relating to this matter have recently been re-examined by the Court of Appeal in *Joseelyne* v *Nissen*,[90] where the court cited a passage from an earlier judgment,[91] wherein it was observed that "it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was". The facts of the case were:

> The plaintiff, who shared a house with his daughter, proposed that she should take over his car-hire business. It was made clear in the very early stage of negotiations that if the proposal was accepted, the daughter should pay all the household expenses, including the electricity, gas and coal bills due in respect of the part of the house occupied by her father. The written contract which followed from these discussions, however, failed to impose any liability on the daughter in respect of the household charges. After honouring the oral agreement for some time, she refused to meet the expenses although she continued to draw the profits of the business.

The plaintiff was held entitled to rectification so as specifically to impose that liability on the daughter. One of the difficulties was the remarks of DENNING LJ in an earlier case,[92] to the effect that mere common intention is not sufficient, it must have found expression in an outward agreement. He said:

> "There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove if he can, that they *agreed something different*: see *Lovell and*

88. The court cited the decision of the Bombay High Court in *Sateri Shiddappa Godkari* v *Rudrappa Shettappa*, (1954) Bom 930, where it was held that the defendant would be allowed to raise the defence of mutual mistake on which he could have obtained rectification.
89. *Mahendra Nath Mukherjee* v *Jogendra Nath Roy Chowdhary*, (1897) 2 Cal WN 260.
90. (1970) 1 All ER 1213: (1970) 2 QB 86: (1970) 2 WLR 509, CA.
91. From the judgment of SIMMONDS J in *Crane* v *Hegeman Harris Co Inc*, (1971) Ch 375: (1939) 1 All ER 662: (1970) 1 WLR 1390: *affirmed* (1939) 4 All ER 68: (1971) 1 WLR, 1400.
92. *Frederick E. Rose* v *Wm. H. Pim Jurn & Co Ltd*, (1953) 2 All ER 739, 747-48: (1953) 2 QB 453, 461-62.

*Christmas* v *Wall*[93], *per* Lord COZENS HARDY MR and *per* BUCKLEY LJ but not that they *intended* something different."

Referring to this passage RUSSEL LJ commented that if this means to suggest that an antecedent concluded contract is necessary, it would be contrary to the views in *Crane* v *Hegeman Harris*.[94] The view supported by other judgments is that there should be a convincing proof of an outward expression of accord.

Centrovincial's solicitors invited Merchant Investors to agree to the appropriate rental value of £ 65,000 per annum at the review date of 25th December, 1982 which should have read £ 12,600 but Merchant Investors were not aware of the mistake. Merchant Investors agreed to the figure of £ 65,000 per annum. Centrovincial contended that no contract was formed because of mistake and Merchant Investors contended that a contract had been formed. It was held that it is a well-established principle that ordinarily an offer, where unequivocally accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror and cannot thereafter be revoked without the consent of the other party. Although the law is concerned with the objective appearance as well as the actual fact of agreement, if the intention of the parties is clear then their intention will prevail over any objective appearance.[95]

Where neither party had disclosed his intention as to the effect of the agreement but coincidentally both entertained the same thought as to the effect of their bargain, it was held that such undisclosed intention was irrelevant for the purposes of interpretation of their contract. It is necessary that each party should know what is agreed at the time the contract is made.[96]

**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.[97]

But subsequently it was extended to others. This extension occurred through the judgment of BYLES J in *Foster* v *Mackinnon*:[98]

> "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading it to such a degree that the written contract is of a nature altogether different from

93. (1911) 104 LT 88, 93.
94. (1939) 1 All ER 662.
95. *Centrovincial Estates plc.* v *Merchant Investors' Assurance Co Ltd*, (1983) Com LR 158.
96. *New Hampshire Ins Co* v *MGN*, The Times, July 25, 1995 CA. *See* also *Commission for the New Towns* v *Cooper*, (Great Britain) (1995) Current Law Year Book, 184, where it was observed that it would normally be wrong to force the party who had not made the mistake to keep to the terms of a contract it did not intend to make.
97. *Noorudeen* v *Umairathu Beevi*, AIR 1998 Ker 171, signature of blind person by telling that the document was a hypothecation deed whereas in fact it was a sale deed of property, nullity. In such cases pleadings have to be in full particulars which were there in this case. *See* on the point of pleadings *United India Ins Co Ltd* v *Andrew Vivera*, (1989) 2 Ker LJ 348: AIR 1990 Ker 139.
98. (1869) LR 4 CP 704: 38 LJ CP 310: 20 LT 887.

the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign and therefore in contemplation of law never did sign, the contract to which his name is appended."

The learned judge did not make any distinction between mistake as to the nature or character of the contract as opposed to its terms, for in a later part of his judgment he said: "But the position that, if a grantor or covenantor be deceived or misled as to the *actual contents* of the deed, the deed does not bind him, is supported by many authorities."[1]

The facts of the case were that 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 as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or on an order for admission to the Temple Church, or on the flyleaf of a book, and there had already been, without his knowledge, a bill of exchange or a promissory note payable to order inscribed on the other side of the paper."

The principle of this case has been with some qualification affirmed by the House of Lords in *Gallie* v *Lee*.[2]

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 House of Lords, affirming the decision of the Court of Appeal, held that she was bound by the contract. It was only voidable by reason of the misstatements made by Lee, but it was too late to avoid once the building society had advanced a sum of money on the house in good faith. In her own statements to the court she

1. See *Edwards* v *Brown*, (1863) 2 H&C 175: 9 LJ (OS) Ex 84.
2. *Saunders* v *Anglia Building Society*, (1970) 3 All ER 961: (1971) AC 1004: (1970) 3 WLR 1078.

said that she thought that her nephew and Lee would raise money on the house and that she would do anything to help her nephew. She was not, therefore, mistaken about the character of the document. The only thing was that it was put to a use which she did not expect. Relying on this evidence in the Court of Appeal SALMON LJ felt that she would have executed the assignment to Mr Lee even if the transaction had been properly explained to her. Lord DENNING MR reached the same conclusion but was not prepared to be fettered by the distinction between character and contents. But Lord HODSON was not prepared to accept this rejection of a principle which is supported by authorities and is sound in principle.[3] "The distinction is a valid one in that it emphasises that points of detail in the contents of a document are not to be relied on in support of a plea of *non est factum*. Lord DENNING MR did, however, demonstrate that using the words as terms of art for test purposes may produce ludicurous results; *e.g.*, a mistake as to the amount of money involved may be described as a mistake as to contents although the difference between two figures may be so great as to produce a document of an entirely different character from the one the signer intended."

His Lordship further pointed out that the plea of *non est factum*, requires clear and positive evidence before it can be established, and cited with approval the statement of DENOVAN LJ[4] that "the plea of *non est factum* is a plea which must necessarily be kept within narrow limits". To take an example, the man who in the course of his business signs a pile of documents without checking them takes the responsibility for them by appending his signature. It would be surprising if he was to be allowed to repudiate one of those documents on the ground of *non est factum*. The person signing has to take care.[5]

Lord WILBERFORCE emphasised that the law in this respect must retain flexibility because it has to reconcile two conflicting objectives: relief to a signer whose consent is genuinely lacking; and protection to innocent third party who have acted on an apparently regularly and properly executed document. Trying to work out the principles on which the plea of *non est factum* should be admissible, his Lordship said:

> "In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, *i.e.*, more concretely, when the transaction, which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives could be used—'basically', or 'radically' or 'fundamentally'."[6]

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3. His Lordship considered this established by authorities prior to *Howatson* v *Webb*, (1907) 1 Ch 537; on appeal, (1908) 1 Ch 1.
4. *Finance Ltd* v *Howard*, (1963) 1 QB 904, 912; (1963) 1 All ER 81, 83.
5. The Supreme Court has similarly laid down in *Bihar State Electricity Board* v *Green Rubber Industries*, (1990) 1 SCC 731: AIR 1990 SC 699 that a person who signs a document which contains contractual terms is normally bound by them though he had not read them or was ignorant of precise legal effects.
6. His Lordship pointed out that this test is the same as was applied in the leading cases of *Thoroughgoods case*, (1582) 2 Co Rep 9a and *Foster* v *Mackinnon*, (1869) LR 4 CP 704, except in moving from the character-contents distinction to an area better understood in modern practice.

His Lordship then added three qualifications to the principle. Firstly, in the case of fraud, the principle of *Foster* v *Mackinnon* will apply and the transaction would be void. Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document, if being a man of ordinary education and competence, he chooses to sign it without informing himself of its purports and effect. Thirdly, there is the case where the signer has been careless, in not taking ordinary precautions against being deceived.[7]

Commenting on this case it is observed in CHITTY ON CONTRACTS:[8]

> "The law on this subject was completely reviewed and restated by the House of Lords in *Saunders* v *Anglia Building Society*[9] and the distinction between the character or nature of a document and the contents of the document was rejected as unsatisfactory. It was stressed that the defence of *non est factum* was not lightly to be allowed where a person of full age and capacity had signed a written document containing contractual terms. But it was nevertheless held that in exceptional circumstances the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appeared to have concentrated on the disparity between the effect of the document actually signed and the document as it was believed to be rather than on the nature of the mistake, stressing that the disparity must be 'radical', 'essential', 'fundamental' or 'very substantial'."

The Supreme Court of India considered the principle of *Foster* v *Mackinnon* in *Ningawwa* v *Byrappa Shiddappa Hirekurabar*[10] and concluded on the facts that where a husband 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.[11]

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7. The principle of *Foster* v *Mackinnon*, (1869) 4 CP 704 has been followed in *Sanni Bibi* v *Siddik Hassain*, AIR 1919 Cal 728 and *Brindalan* v *Dhurha Charan*, AIR 1929 Cal 603 and considered in *Ningawwa* v *Byrappa Shiddappa Kurabar*, (1969) 2 SCR 797: AIR 1968 SC 956.
8. 194-195 (15th edn) Vol 1, Chap 5 under Sec. 343, cited by S. S. SUBRAMANI, J., in *Selvaraju Kounder* v *Sahadeva Kounder*, (1998) 1 Mad LJ 209 at p 213.
9. *Supra.*
10. *Ibid.* An illiterate woman signing under the impression that it was wakf, when, in fact, it was a sale deed. Held, void, *Ashok Kumar* v *Gaon Sabha*, AIR 1981 All 222; *Deo Nandan* v *Chotta*, AIR 1983 All 9, on the validity of a sale deed. *See* B. Alcock, *Documents Signed in Blank*, 45 Mod LR 18. *Followed* in *Seivaraju Kounder* v *Sahadeva Kounder*, (1998) Mad LJ 209, it was clear that the plaintiff was totally ignorant of the mischief played upon her, she honestly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that her thumb-impression was taken upon a single document, whereas there were two, one only was a gift deed, the other was sale of property. The doctrine of *non est* applied to this part.
11. *See* also *Mathu* v *Cherchi*, (1990) 1 Ker LT 416 where the court emphasised that the defence of being too busy to read is not available to a person to enable him to get rid of his signature and that the plea is not available to an able-bodied person unless he is a victim of fraud. Persons fully competent have to show that they acted with care. *Palanivelu* 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. *Palaniammal* 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.

## 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 matter of fact". Thus, where the Government sold by auction the right of fishery and the plaintiff offered the highest bid under the impression that the right was sold for three years, when in fact it was for one year only, he could not avoid the agreement because it was his unilateral mistake.[12] As to what is the nature of a unilateral mistake as provided under Section 22 of the Contract Act, would be best explained by the case of *Haji Abdul Rehman Allarakhia* v *Bombay and Persia Steam Navigation Co.*[13] There the plaintiffs chartered a steamer which was to sail from Jedda on "10th August, 1892 (fifteen days after the Haj)". The plaintiffs believed that "10th August, 1892" corresponded with the fifteenth day after the Haj. The defendant had no such belief and contracted only with respect to the English date, *viz.*, "10th August, 1892". The plaintiffs subsequently discovered that their belief was mistaken inasmuch as fifteen days after Haj fell on a different day and on the basis of that they sued the defendants for rectification of the charterparty. The court held that it was a unilateral mistake and the plaintiffs were not entitled to any relief.[14] Similarly, where a tenderer, in calculating the price which he wanted to charge, happened, by mistake, to insert wrong figures, and the authority accepted the tender without knowing the mistake, no rectification was allowed.[15]

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. For an agreement to be avoided on the basis of unilateral mistake, it must be shown: first, that one party erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did not contain; second, that the other party was aware of the omission or the inclusion and that it was due to a mistake on the part of one party; third, that the party who was aware of the mistake omitted to draw the mistake to the notice of the other party and there must be a fourth element involved, namely, that the mistake must be one calculated to benefit one party. Applying these principles to the facts of the case in *Thomas Bates & Son Ltd* v *Wyndham (Lingerie) Ltd*[16] the court came to the conclusion that where a lease deed contained arbitration clause but the new deed which was prepared by the landlord did not contain that provision without the knowledge of the

12. *A.A. Singh* v *Union of India*, AIR 1970 Mani 16.
13. (1892) 16 Bom 561.
14. This passage appears in the judgment of the Calcutta High Court in *New India Rubber Works (P) Ltd* v *Oriental Fire & Gen Ins Co Ltd*, (1969) 1 Comp LJ 153 (Cal).
15. *W. Higgins Ltd* v *Northampton Corpn*, (1927) 136 LT 235.
16. (1981) 1 All ER 1077 CA.

landlord and though the lessee was aware of the omission he did not draw it to the attention of the landlord, the landlord was entitled to seek rectification of the document for inserting arbitration clause.

The mistake of both parties of which Section 20 speaks may be either common or mutual. The classification of mistakes in terms of "common", "mutual" and "unilateral" is adopted by Cheshire and Fifoot, THE LAW OF CONTRACT. The expression "common mistake" is thus explained in this learned work:

> "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 fact. The parties, for example, are unaware that the subject-matter of their contract has already perished.[17]"

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*[18] where the subject-matter unknown to the parties was extinct at the time of the agreement; in *Strikland* v *Turner*[19] payment of annuity upon the life of a person who was already dead; in *Pritchard* v *Merchants and Tradesmen Mutual Life Assurance Society*,[20] where a premium was paid for the revival of a lapsed policy at a time when the assured was already dead; in *Galloway* v *Galloway*[21], where the parties made a separation deed under the mistaken assumption that they were in fact married.

The scope of this kind of mistake as to the validity of the contract has been considerably reduced since the decision of the House of Lords in *Bell* v *Lever Bros*[22] and its interpretation by DENNING LJ in *Solle* v *Butcher*.[23] Its operation has been growingly confined to cases where the subject-matter does not exist or is vitally different in character (as opposed to quality) than what it was supposed by the parties to be. Thus in *McRae* v *Commonwealth Disposals Commission*,[24] the defendants were not allowed to escape from the consequences of selling a ship supposed to be stranded at a described place when the plaintiff discovered at a considerable expense that there was no such ship. The court cited DENNING LJ in *Solle* v *Butcher*[25] to the effect: "Neither party can rely on his own mistake to say it was a nullity from the beginning." DENNING LJ reinforced his views in *Leaf* v *International Gallories*.[26] 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. In a still subsequent case *Frederick E. Rose (London) Ltd* v *Williams H.*

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17. THE LAW OF CONTRACT, 202 (8th edn 1972).
18. (1852) 8 Exch 40: (1856) 5 HL Cas 673.
19. (1852) 7 Exch 208.
20. (1858) 3 CB NS 622.
21. (1914) 30 TLR 531.
22. 1932 AC 161: (1931) All ER Rep 1.
23. (1950) KB 671: (1949) 2 All ER 1107.
24. (1951) 84 Commonwealth LR 377; Reported, Smith and Thomas, A CASE BOOK ON CONTRACT, 345 (4th edn) and noted, (1952) 68 LQR 30-34: 15 Mod LR 229-32.
25. Note 4 above.
26. (1950) 2 KB 86: (1950) 1 All ER 693.

*Pin. Inr. & Co Ltd*,[27] where the parties were confused between "horsebeans" and "feveroles", DENNING LJ explained the effect of common mistake in these words:

> "What is the effect in law of this common mistake on the contract between the plaintiff and defendant? I am clearly of opinion that the contract was not a nullity. It is true that both parties were under a mistake and that mistake was of a fundamental character with regard to the subject-matter. The goods contracted for—horsebeans—were essentially different from what they were believed to be—'feveroles'—Nevertheless, the parties to all outward appearances were agreed. They had agreed with the quite sufficient certainty on a contract for the sale of goods by description, namely horsebeans."

The expression "mutual mistake" is thus defined in the same work:[28]

> "In mutual mistake, the parties misunderstand each other and are at cross-purposes. *A*, for example, intends to offer his Ford Cortina car for sale, but *B* believes that the offer relates to the Ford Zephyr also owned by *A*."

*Raffles* v *Wichelhaus*[29] involved a mistake of this kind.[30]

### 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:[31]

> 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 buyer wanted to have the agreement set aside on the ground of mistake about this right.

But the court held "that there was no mistake and that even if there was a mistake it was not as to a matter of fact essential to the agreement for sale. It could only be an erroneous opinion which the parties had formed as to the real value of the subject-matter and would not be deemed to be a mistake vitiating the agreement."

### 3. Mistake of fact and not of law

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".[32] 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.

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27. (1953) 2 QB 450: (1953) 2 All ER 739.
28. Cheshire & Fifoot, 203 (8th edn 1972).
29. (1864) 2 H&C 906.
30. Noted at p 210 *supra*.
31. *Kochavareed* v *Mariappa*, AIR 1950 Trav-Co 10.
32. *See* the decision of the Supreme Court in *Kalyanpur Lime Works Ltd* v *State of Bihar*, 1954 SCR 958. For a fresh look on the subject *see* G.D. Goldberg and J.M. Thomson, *The Effect of Mistake on Contracts*, (1978) JBL 30 and 147.

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.[33] But a mistake as to a foreign law will avoid.

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33. *Kalyanpur Lime Works* v *State of Bihar*, 1954 SCR 958: AIR 1954 SC 165.

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# *Legality of Object*

The fourth and the last requirement for the formation of a valid contract is that parties must contract for a lawful object. An agreement the object of which is opposed to the law of the land may be either unlawful or simply void, depending upon the provision 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 the 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 is 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's* 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 of the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(*f*) *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 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.

(*j*) *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 (XLV of 1860).

### 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 usually they are 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 of this kind before the Madras High Court,[1] the court found that the marriage in question was hit by the provisions of the Child Marriage Restraint Act of 1929. "The purpose for which the guardian borrowed the money is to celebrate the marriage of a child which is an offence under the Act."[2] Thus, the object was to defeat the provisions of the Child Marriage Restraint Act. The court relied upon the earlier decision of the Calcutta High Court in *Jaffar Meher Ali* v *Budge Budge Jute Mills*[3] where a debtor transferred certain property to one of his creditors, the object being to give him preference over other creditors and SALE J stated the difference between "object" and "consideration":

> The word "object" in Section 23 of the Contract Act was not used in the same sense as "consideration", but was used as distinguished from

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1. *Chandra Sreenivosa Rao* v *Kowapatti Raja Rama Mohana Rao*, AIR 1952 Mad 579. There is no presumption of illegality. Such a presumption cannot be raised except where it is warranted by rules relating to presumptions. A presumption of legality—not a presumption of illegality is the rule. The mere possibility of transgression of law is not a ground for saying that the agreement offends S. 23. The agreement must be shown to be *ex facie* illegal or capable of being performed only through illegal means. *Mathai George* v *Mathew Chacko*, (1987) 1 Ker LT 341.
2. *Per* SUBBA RAO J.
3. (1906) 33 Cal 702.

consideration and means "purpose" or "design". If then the purpose of the parties was to defeat the provisions of the Bankruptcy Law, there can be no doubt that the transfer would be inoperative under the provisions of Section 6 of the Transfer of Property Act.

**1. Forbidden by Law**

Where the object of an agreement is forbidden by law, the agreement is void. "Law" in this connection means the law for the time being in force in India and, therefore, includes Hindu and Mohammedan laws also and also principles of unwritten law.[4] A simple illustration is the sale of liquor without licence. The sale is void and the price irrevocable.[5]

*Violation of Licences and Permits*

Cases on this point have mostly been found 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.[6]

> The plaintiff was licensed under an Excise Act to work a liquor shop. The Act forbade the sale, transfer or sub-lease of the licence or the creation of a partnership to run the shop. The plaintiff took the defendant into partnership.

The partnership was held void as it would defeat the policy of the law if unapproved persons could find their way into working liquor shops.[7] An agreement indirectly defeating the provisions of an Act would be equally void.[8] 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 Legislature is to forbid an act in public interest, an agreement to do the forbidden act will obviously be void.[9] But if the intention is merely to regulate an act by prescribing

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4. *Gherulal Parekh* v *Mahadeo Das*, 1959 Supp (2) SCR 406, 417: AIR 1959 SC 781, 786.
5. *Boistrub Charan* v *Wooma Charn*, (1889) 16 Cal 436. *See* also *Kateshwar Mittal Kamath* v *K. Rangappa Baliga & Co*, AIR 1959 SC 781: (1959) 2 SCA 342; *Ajit Singh* v *Kakbhir Singh*, AIR 1992 P&H 193, a clog on the equity of redemption (95 yrs) violates Transfer of Property Act and is, therefore, unlawful under S. 23; *Denzyl Winston Ferries* v *Abdul Jaleel*, AIR 1992 AP 246, sale of excess land without obtaining permission of competent authority under Urban Land (Ceiling and Regulation) Act, 1976, held unlawful, to the same effect. *Raj Kumar Tajendra Singh* v *Dr Sital Raj Mehta*, (1988) 1 Raj LR 523; *Denzyl Winston Ferries* v *Abdul Jaleel*, (1992) 2 Andh LT 144.
6. *Nandlal* v *Thomas J. William*, 171 IC 948.
7. *See* also *Thithi* v *Bheemudu*, (1902) 26 Mad 430, involving an agreement forbidden by Madras Akbari Act (1886); *Raghunath* v *Nathu Hirji*, (1894) 19 Bom 626, decided under the Opium Act, 1878; *Hormasji* v *Pestanji*, (1887) 12 Bom 422; *Bobhiah* v *Mohd Abbas Subhan*, AIR 1954 Hyd 156; *Rama Rao* v *Papayya*, AIR 1954 Andh 51; *Kishanlal* v *Bhanwerlal*, AIR 1952 Raj 81. A partnership for conducting business under a Government licence granted to an individual for retail sale of country spirit which was contrary to the prohibition contained in the relevant State Excise Act was held to be unlawful and void, *Biharilal Jaiswal* v *CIT*, (1996) 1 SCC 443.
8. *Beharilal* v *Jogodish Chunder*, (1904) 31 Cal 798. A restraint on sub-letting, sale or transfer does not, however, exclude the taking in of a partner. See *Gauri Shanker* v *Mumtaz Ali*, (1817) 2 All 411; *Kaiarsan* v *Katlu*, (1913) 37 Bom 320; *Champsey* v *Gordhandas*, (1917) 19 Bom LR 381, which went before the Privy Council, AIR 1921 PC 137.
9. *See* Pollock, PRINCIPLES OF CONTRACT, as adopted by a Full Bench of the Hyderabad High Court in *Bobhiah* v *M.A. Subhan*, AIR 1954 Hyd 156; *Fakirchand* v *Banvilal*, AIR 1955 Hyd 28.

certain terms and conditions and formalities, a contract to do the act without fulfilling the statutory requirements may not itself be void, even if the parties have to pay a penalty for the breach of the statute.[10] A Bombay High Court decision[11] illustrates the point:

> The plaintiff was a lessee of certain tolls under the Bombay Tolls Act, 1875. One of the conditions of the lease was that the lessee should not sublet the tolls to any other person without the permission of the Collector. A fine of Rs 200 was payable for a breach of the condition. The plaintiff contracted with the defendant to sublet the toll to him without obtaining the necessary permission.

The question was whether the sub-lease was void. The court held that it was not. The object of the statute was not to forbid such transactions. It was "an Act passed for the benefit of the revenue and not an Act for the protection of public morals". The transaction may be void as against the Collector, but between the parties it stands.[12]

Where an Act or Rules made thereunder prohibit sale or transfer, the licensee cannot form a partnership to work the licence as that also amounts to a transfer.[13] In a subsequent Full Bench decision[14] the Madras High Court further pointed out that "irrespective of the facts whether the contract for partnership was entered into before the licence had been granted or subsequent to the issue of the licence, the result would be the same. The partnership must be deemed to be void *ab initio*.[15]

The decisions of the Bombay High Court, however, have struck a different note. In *Champsey* v *Gobardhandas*,[16] a licence granted under the Bombay Salt Act,

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10. *See*, for example, *Amritsar Rayon & Silk Mills Ltd* v *Amin Chand Sajdeh*, (1987) 2 Punj LR 253 P&H, violation of the regulatory requirements of S. 299 of the Companies Act, 1956 does not make the contract unlawful.
11. *Bhikanbhai* v *Hiralal*, (1900) 24 Bom 622. *See* also *Waman Shrinivas* v *Ratilal Bhagwandas & Co*, AIR 1959 SC 689: 61 Bom LR 1011, an agreement contrary to tenancy laws.
12. For other illustrations see: *Abdulla* v *Mammood*, (1902) 26 Mad 156: *Gauri Shanker* v *Mumtaz Ali Khan*, (1879) 2 All 411: *Bhagwant Genuji* v *Gangabishan*, (1941) Bom 71: AIR 1940 Bom 369. *See* also *Umacharan Shaw & Bros* v *CIT*, (1959) 37 ITR 271 (SC), where an agreement to take a partner for running a route permit was held valid. Followed in *Dayabhai & Co* v *I.T. Commissioner*, AIR 1967 MP 13. An agreement to lease equipment instead of selling it would be unlawful if the dominant purpose was evasion of sales tax laws. See *D. Trak Sdn Bhd* v *Bingkul Timber Agencies*, (1989) 1 Malaysia LJ 124 High Court of Kota Kinabalu.
13. So held by a Full Bench of the Madras High Court in *Ramanarayadu* v *Seetharamayya*, (1935) 53 Mad 727. The decision was under the Madras Abkari Act, 1886. *Satchidananda Samanta* v *Ranjan Kumar Basu*, AIR 1992 Cal 222, cinema hall licence, partnership formed to run it, held void. *WB Cinemas (Regulations) Act*, 1954 and rules framed under it; *Moti Lal Chunni Lal* v *CIT*, (1987) 1 Raj LR 737, liquor licence granted jointly to two persons, admitting more into partnership, void.
14. *Velu Padayachi* v *Sivasooriam Pillai*, (1950) Mad 987.
15. HORWILL J.
16. AIR 1917 Bom 250. MACLEOD J *relying* upon Allahabad Full Bench decision in *Gauri Shanker* v *Mumtaz Ali*, 2 All 411. A Calcutta decision is to the same effect. *Gobardhan Chakraborty* v *Abani Mohun*, AIR 1991 Cal 195. A partnership to run a municipal stall, held illegal. *Rasamoy Chowdhary* v *Anil Krishna*, AIR 1988 Cal 55. But an agreement by the holder of a motor vehicle licensed under the Motor Vehicles Act to share his profits with another is not illegal. *Mohit Mohan Choudhury* v *Abdul Rouf Mia*, (1991) 1 Cal LT HC 361. Sale of a bus without transfer of permit is not illegal. *B. Ratnasabhthy Chetty* v *M. Veerappa*, (1989) 1 ALT 588.

1890, which also prohibited transfer of every kind and the licensee admitted his brothers into partnership with him to work the licence, the court held "that the admission of a partner to share in the profits could not be considered as a subletting or alienating a part of the privilege unless there had been a document directly transferring to the partners a part of the right to manufacture or vend".

All such authorities have been reviewed by the Calcutta High Court in *Mafizuddin Khan Chowdhury* v *Habibuddin Sheikh*,[17] where the court emphasised that decisions must rest on the definiteness of prohibition against sale etc. Here a licence was granted under the Bengal Silk Control Order, 1945, to work raw silk because at that time the Order prohibited working of raw silk without a licence. Although the licence was taken in one name, the understanding was that it would be worked with another person under partnership and that other person brought an action for accounts and dissolution. The court allowed the action, because the Order did not impose any restriction upon transfer etc. Where a party purchased a motor car in the name of a permit-holder so as to make use of his permit, the arrangement was held to be not a void one.[18]

Regulatory laws also give rise to the question whether a statute impliedly prohibits the making of a contract. In *Hughes* v *Asset Managers plc*:[19]

> A transaction in securities was made through the medium of a person whose firm was licensed but he himself did not hold the representative's licence as required by the Prevention of Frauds (Investments) Act, 1958 (English).

It was held that the Act did not amount to automatically invalidating such transactions because in that case public interest would suffer more instead of being protected.

Carrying on moneylending business without registration and licence under any Money-Lenders Act has been held to be contrary to the enactment and, therefore, void.[20]

A provision in the Foreign Exchange Regulation Act, 1973 (S. 31) [now repealed] that a non-resident Indian selling property in India would be liable to a penalty if the sale is made without prior permission of the Reserve Bank, would not affect the validity of the sale transaction itself. The purchaser would be entitled to a valid title.[21]

Where a stage carriage permit was granted to a State Road Transport Corporation, it was not allowed to allot the same to a private operator for working it

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17. AIR 1957 Cal 336. *See* also the observations of the Supreme Court on this distinction in *Mannalal Khetan* v *Kedar Nath Khetan*, (1977) 2 SCC 424. See also *M.G. Bros Lorry Service* v *Prasad Textiles*, (1983) 3 SCC 61: AIR 1984 SC 15, a condition in a carriage contract against S. 10 of the Carriers Act was held to be void.
18. *Parakkate Shankaran Keshavan* v *T. A. Sukumaran*, AIR 1997 Bom 381.
19. (1995) 3 All ER 669 CA.
20. *Haseen Bano* v *Syed Habeeb Sayeedudin*, (1997) AIHC 135 AP. Kerala High Court has differed from this opinion. See *Balakrishnan* v *Babu*, (1994) 1 Ker LT 947, where it was held that a suit for recovery of the loan amount would be maintainable even if the lender had no licence under the Money-Lenders Act.
21. *Jaswinder Singh* v *Sanjogta Nanda*, 1996 AIHC 4477 P&H. *Relying* upon *Ajit Prasad Jain* v *N.K. Widhani*, AIR 1990 Delhi 42, specific performance of a contract of the above kind was ordered. *A. Lakshmana Rao* v *P. Rama K. Raju*, (1993) 1 Andh WR (Notes of Recent Cases) 5, under the bye-laws of the society, the members could alienate the house only to any other member with the permission of the board of directors. Not void.

as a nominee.[22] Permission granted by a State Road Transport Corporation to private operators to operate on nationalised routes when their buses were not licensed for those routes was held to be violative of the prohibitions of the Motor Vehicles Act.[23]

A suit for refund of price paid in advance for the sale of a woman has been held to be not maintainable.[24]

### *Violation of Enactments*

A contract for the sale of jaggery powder (a form of gur) above control price could not be enforced because "it was tainted with all that anti-social desire against which the Control Orders attempted to fight".[25] Similarly, where a company and its customer knowingly entered into a contract for supply of electricity in contravention of the Bihar Electricity Control Order, 1942, the customer could not recover the money paid in excess though the payment was made under protest.[26] The Allahabad High Court has held that a contract to supply electricity on the condition that the consumer would be liable to replace the transformer if it is stolen is void, being contrary to the Electricity (Supply) Act, 1948 which provides that the Board must maintain the distribution lines and transformers are parts of it.[27] The Madhya Pradesh High Court held that the grounds specified by a Rent Control Act for the eviction of a tenant cannot be changed by an agreement or compromise because that would be contrary to the Act.[28] The High Court of Delhi refused to grant specific

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22. *Brij Mohan* v *MPSRTC*, (1987) 1 SCC 13: AIR 1987 SC 29. *See* further *K.M. Jose* v *Anantha Rao*, AIR 1987 Kant 173, sale of agricultural land for non-agricultural purposes, though forbidden by Karnataka Land Reforms Act (10 of 1962) was held not void under S. 23 because the Act prescribed an inquiry for investigation as to the buyer's purposes and no inquiry had been undertaken up to the date of the suit.
23. *Prem Chand* v *State of UP*, 1987 All LJ 1320.
24. *Nihal Singh* v *Ram Bhai*, AIR 1987 MP 126.
25. *Sita Ram* v *Kunjlal*, AIR 1963 All 206. A transfer without obtaining proper permissions of material imported on actual user's licence is illegal. *Canara Bank* v *Gokuldas Shenoy*, (1989) 1 Ker LT 281. But transfer of a licensed theatre, the buyer undertaking to obtain his own licence is not unlawful. *K. Srinivasa Murthy* v *P. Ananda Rao*, (1985) 1 Andh LT 53, Notes on Cases.
26. *Jharia Coal Field Electric Supply Co Ltd* v *Kaluram Agarwala*, AIR 1951 Pat 463.
27. *UPSE Board* v *Lakshmi Devi*, AIR 1977 All 499.
28. *Hubbilal* v *Mad. Maqboot Ad.* AIR 1977 MP 65. To the same effect in *Shankarlal* v *Udai Singh*, AIR 1976 Bom 237; *Murlidhar* v *State of UP*, (1974) 2 SCC 72: AIR 1974 SC 1924 and *Nagindas* v *Dalpatram*, (1974) 1 SCC 242: AIR 1974 SC 471. *See* also *Karam Chand Thappar & Bros* v *A.B. Gujral*, (1986) 3 SCC 334: AIR 1986 SC 1202; *New Central Jute Mills Co Ltd* v *UP Electricity Board*, 1986 Supp SCC 581, action in terms of statutory authority supersedes contract terms; *Mahendra Pal Singh* v *2nd Addl DJ*, AIR 1993 All 176, six months' notice requirement of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, a condition precedent, not to be modified by agreement. *Lombard Tricity Finance Ltd* v *Paton*, (1989) 1 All ER 918 CA, increasing the rate of interest chargeable from a consumer under a hire-purchase agreement does not require to be supported by a statement of reasons if it is in the normal exercise of a right provided in the contract and there is no statutory prohibition. *Krishna Gopal Bajaj* v *Mahendra Kumar Garg*, (1996) All LJ 1652, fixation of rent through court, subsequent alteration by the parties of the mode of payment, no violation of Act. *New India Assurance Co Ltd* v *Kesavan Ramamurthy*, (1997) 2 Andh LD 446 AP, there is nothing wrong in a vehicle insurance policy providing that no compensation would be payable if the vehicle was being driven by an unlicensed person or learning licence-holder. *Navayuga Exports Ltd* v *A P Mineral Devp Corpn*, (1998) 4 Andh LT 505, a licence to work a mine for precious stones cannot be

enforcement of a contract of lease under which a land meant for residential purposes was to be handed over to a bank for commercial purposes in violation of S. 14 of the Delhi Development Act, 1957.[29] An agreement to purchase an area of land beyond the statutory limit was held to be not specifically enforceable but refund of advance with interest was ordered.[30]

A solicitor's agreement of fee sharing with a person introducing clients has been held to be void being in violation of rules [(English) Solicitors' Practice Rules, 1990, Rule 7]. The court said that the only alternative remedy of the person who introduced a client was to sue for reasonable remuneration for services if rendered in ignorance of the violation.[31]

*Stay Order*

A stay order on construction which was obtained otherwise than under the allegation that the object of the contract was unlawful was held as not amounting to illegality of object. It may be that a construction under disputed circumstances may not find buyers, yet the contractor cannot get rid under the doctrine of illegality or impossibility.[32]

**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 any law. Such an agreement is also void. Easy illustrations are to be found in agreements relating to bail bonds.

> 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.[33]

The Allahabad High Court held the agreement void and the amount irrecoverable. The intention in requiring a surety is that the surety shall at his own risk see to the

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questioned as to its legality only on the ground that it was for too short a period of 6 months.

29. *State Bank of India* v *Aditya Finance Leasing Co P Ltd*, AIR 1999 Delhi 18. Unless there is prohibition of transfer of a house allotted under hire-purchases, the property is transferable, *Khair Mohd Khan* v *S. Eramani*, (1998) 4 Andh LT 66. *Himatrao Ukha Mali* v *Popat Devram Patil*, (1998) 3 Bom CR 680, sale of premises in violation of Bombay Tenancy and Agricultural Lands Act, 1948. *Netyam Venkataramanna* v *Mahankali Narasimhan*, AIR 1994 AP 244, purchase of land in excess of limit permitted by AP Agricultural Lands (Prohibition of Alienation) Act, 1972 which was repealed before judgment in this case, specific enforcement not refused. The only consequence would have been surrender of extra land on redetermination. *Atique Ahmad* v *D M Banda*, (1999) 36 All LR 226 (All), clearing public roads of encroachments is not opposed to public policy, Tenancy and occupation of illegally constructed roadside shops was held to be illegal.

30. *Balbir Singh* v *Arjun Singh*, AIR 2000 All 37: 2000 AIHC 1350. *National Insurance Co Ltd* v *New Darjeeling Union Tea Co Ltd*, (2001) 1 Cal LT 218 (Cal), Section 64 V-B of the Insurance Act, 1938 prohibits the insurer from entering into a contract unless the premium is paid in advance. It was held that such condition could be waived. *Dinesh Tulsidas Sheth* v *Hemchandra Ganpat Desai*, 1999 AIHC 1719 (Bom), a term in a lease agreement as to eviction against the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was held to be void.

31. *Mohamed* v *Alaga & Co*, (1999) 3 All ER 699 (CA).

32. *Tenet Homes & Resorts (P) Ltd* v *Ernakulam*, AIR 2001 Ker 279.

33. *Fateh Singh* v *Sanwal Singh*, (1878) 1 All 751.

appearance of the accused. This purpose is definitely defeated by an agreement of the above sort. A contract to indemnify the surety against his liability is illegal for the same reason.[34]

The debt of an agricultural borrower in respect of his agricultural land became discharged by virtue of certain statutory provisions. Subsequent to that, the same land was sold wherein the discharged debt was also treated as a part of the consideration. The transaction was held to be unlawful as it would have defeated the policy of relieving agricultural borrowers from debt burdens. The fact that only a part of the consideration had the effect of defeating law was not considered to be material because the transaction was for one inseparable consideration.[35]

Where a statute provides penalty for an act, it is implicit that the statute intends to forbid that act.[36]

*Law of Friendly Country*

An agreement which defeats the law of a friendly country would be equally void. An illustration is *Ragazzoni* v *K.C. Sethia*.[37]

> 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. DENNING LJ said: "... if two people knowingly agree together to breach the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement."[38]

Another illustration is *Foster* v *Driscoll*.[39] Here the agreement was to buy whisky in Great Britain and to smuggle it into the United States against the law of that country. The Court of Appeal held the agreement to be illegal. It involved the commission of an offence in a foreign and friendly country and so a breach of international comity. It did not matter that the parties had not succeeded in their attempt and they could have lawfully taken their goods to another country.

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34. *Sunder Singh* v *Kishen Chand*, (1889) Punj Rec 1, p 1; *relying on* STEPHEN J in *Wilson* v *Strugnell*, 9 QBD 551. *See* also *Dula Raj* v *Akhey Raj*, AIR 1952 Ajm 38; *Laxmanlal* v *Mulshanker*, (1908) 32 Bom 449, and *Kishanlal* v *Bahawar Lal*, (1955) 1 SCR 439: AIR 1954 SC 500.
35. *Kommineni Seetharamaiah* v *K. Punnaiah*, (1996) AIHC 4384 AP.
36. *Nutan Kumar* v *2nd Addl District Judge, Banda*, AIR 1994 All 298, letting of premises without allotment or release order in violation of UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.
37. (1956) 2 QB 490.
38. *See* his Lordship's judgment at pp. 51[illegible]-15. For the effect of a transfer in violation of land ceilings, see *Jambu Rao Kattappa Ki[illegible]ori* v *Neminath Appaya*, (1968) 3 SCR 706, 711: AIR 1968 SC 1[illegible]
39. (19[illegible] [illegible]P Rep 1[illegible] KB 470 CA.

*Innocent Violations*

Where the violation of a home or foreign law would not be an affront to public conscience, enforcement may be allowed. Such a possibility was recognised by the Court of Appeal in *Howard* v *Shirlstar Container Transport Ltd.*[40]

> The owner of an aircraft agreed to pay the plaintiff for successfully removing his aircraft from Nigerian territorial airspace. The plaintiff did so without permission of Nigerian authorities and landed it in Ivory Coast. The plaintiff did so under the belief that there was imminent danger to life in Nigeria. The Ivory Coast Government returned the aircraft to Nigerian authorities. But the plaintiff sued for his fee.

He was allowed to recover. He had done the job of removing and safe landing and since his fee was payable on completion of the flight out of Nigeria, he had earned his fee. As for the illegality involved, the court said that although the court would not normally enforce a contract which would enable a plaintiff to benefit from his criminal conduct, since to do so would be an affront to the public conscience, there are circumstances where it would be wrong to disqualify a plaintiff from recovering, even though his claim was derived from conduct which constituted a statutory offence. One such circumstance is where the plaintiff commits a criminal act in order to escape danger to his life. Accordingly, although the plaintiff's claim would otherwise be unenforceable in English courts because his breach of Nigerian air traffic control regulations was central to the performance of his contract, the public conscience would not be affronted if the contract was enforced against the defendant because the plaintiff's conduct was designed to free himself and his wireless operator from pressing danger.[41]

Where a deposit of money was taken in excess of the Post Office Monthly Income Rules, 1987 and interest paid on it, recovery of such interest amount from the depositor was not allowed. There was nothing immoral or against public policy. There was only the technical violation of a rule which it was in the hands of the Central Government to waive or to alter.[42]

*Scope of the term "Law"*

"Law" in this connection means the rules of law for the time being in force in India and includes Hindu and Muslim laws. The Bombay High Court, for example, held in a case[43] that according to the 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. Similarly, accepting a son in adoption in consideration of a sum of money is unlawful.[44]

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40. (1990) 3 All ER 366 CA.
41. The court applied the decisions in *Euro-Diam Ltd* v *Bathurst*, (1988) 2 All ER 23; *St John Shipping Corpn* v *Joseph Rank Ltd*, (1956) 3 All ER 683 and approved *Thackwell* v *Barclays Bank plc*, (1986) 1 All ER 676.
42. *Rajat Kumar Rath* v *Govt of India*, AIR 2000 Ori 32; *Thirumalai* v *Gommathi Ammal*, 2000 AIHC 1000 (Mad), gift under marriage being not void at the time, allowed to be retained. *M.A. Jabbar* v *LIC House Building Employees Society*, (2000) 1 Andh LT 385, entering into an agreement without obtaining prior approval of the Registrar of Cooperative Societies was held to be not opposed to public policy.
43. *Abdul Piroj Khan Nobab* v *Hussenbi*, (1904) 6 Bom LR 728.
44. *Narayen* v *Gopalrao*, (1922) 24 Bom LR 414; *Eshan Kishore* v *Haris Chandra*, (1874) 13 BLR App 42. *See* also *Neminath Annayya* v *Jamboorao*, AIR 1966 Mys 154, where the court

*Money and Property involved in Transactions Defeating Law*

The Supreme Court considered this part of Section 23 in *Surasaibalini Debi* v *Phanindra Mohan Mazumdar*.[45]

> The plaintiff, an employee of the Court of Wards, started the business of running a boarding house. The rules of service prohibited him from engaging in any trade or business. The premises were leased nominally in the name of his father-in-law, but the management and finance was the concern of the plaintiff. The business ran for quite a few years. The plaintiff fell ill and had to leave Calcutta for some time. He transferred the business wholly to his father-in-law on the understanding that on his return, the father-in-law would hand back the business and would also account for its profits. The plaintiff came back but his father-in-law refused to oblige him.

The plaintiff brought an action to recover back his business. The defendant contended that the business was illegal because it defeated the service rules and also the Income Tax Act. The Supreme Court held that the service rules were not statutory and, therefore, their violation did not render the business illegal. The only other question was the evasion of income tax. On this point, AYYANGAR J found that the law undoubtedly was that where a *benami* transaction is entered into for the evasion of taxes, the law would not give its help to either party and would leave them where they are.[46] In such cases, recovery is possible only if either the illegal purpose has not been carried out[47] or the plaintiff has not to rely upon the illegal transaction.[48] The plaintiff had left the business in the hands of his father-in-law on account of his illness and not because of the illegality. His action was to enforce his ownership interest and for this purpose it was not necessary for him to rely on the illegal transaction. Accordingly, he was allowed to recover the possession of his business.[49]

Money sent from abroad through unauthorised channels has been allowed to be recovered.[50]

*Agreement to evade Taxes*

An agreement between the partners of a firm to conceal income in certain respects so as to evade income tax has been held to be unlawful.[51]

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allowed specific performance of an agreement for the purchase of land beyond the ceiling fixed by an Act.

45. (1965) 1 SCR 861: AIR 1965 SC 1364.
46. Relying upon *Emery* v *Emery*, (1959) Ch 410; *Miller* v *Karlinski*, (1945) 62 TLR 85 and *Alexander* v *Rayson*, (1936) 1 KB 169. Apart from this, *benami* transactions are so common in India that there is no illegality in itself, See *Kedar Nath Matani* v *Prahlad Rai*, (1960) 1 SCR 681: AIR 1960 SC 213.
47. So ruled by the Privy Council in *Petherpermal Chetty* v *Muniandi Servai*, (1908) 351 A, 98 and *Guru Narayan* v *Sheo Lal Singh*, (1918) 46 IA 1 (PC).
48. So held by the Privy Council in *V. Sardar Ali* v *Sajan Singh*, (1900) AC 167 (PC) and by the Court of Appeal in *Bowmakers* v *Barnet Instruments*, (1945) 1 KB 65 CA.
49. For another case of the same kind see *Lachoo Mal* v *Radhey Shyam*, (1971) 1 SCC 619: (1971) 3 SCR 693: AIR 1971 SC 2213. *See* also *Shyam Sunder* v *Kedar Mal*, (1988) 1 Raj LR 484, where a licensed vehicle (truck) was being operated in partnership and it fell to the share of one partner on dissolution of the partnership, such partner was allowed to recover without going into the question of the legality or illegality of the firm.
50. *Abdul Jabbar* v *Abdul Muthaliff*, AIR 1982 Mad 12. The recipient constructed a rice mill with the money; the mill was allowed to be recovered.
51. *Ram Sewak* v *Ram Charan*, AIR 1962 All 177

*Undercutting of Statutory Privileges*

A term in a contract of carriage requiring that notice of loss must be given within 30 days of the arrival of the goods has been held by the Supreme Court to be contrary to and defeating Section 10 of the Carriers Act, 1865, which prescribes a period of six months for the purpose.[52]

### 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.[53] In another case, there were two decree-holders against the 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 have got if the sale had been competitive. Accordingly, the plaintiff could not recover anything from the defendant.[54] Similarly, an agreement to defraud creditors, or to give fraudulent preference to a creditor[55] or to defraud revenue authorities,[56] or investors in a company,[57] are illegal.

"Intention to deceive" seems to be necessary for an agreement to fall in this category. A decision of the English Court of Appeal, however, shows that the same result may follow where one of the parties had no such intention, but made himself an innocent instrument of fraud at the suggestion of the other party.[58]

> A shipowner informed the shipper that the barrels containing the orange juice were old and frail and that some were leaking and, therefore, a clean bill of lading could not be granted. The shipowner, however, issued a clean bill

52. *M.G. Bros* v *Prasad Textiles*, (1983) 3 SCC 61. Since the purpose of bribery is to defeat law, it would also fall under the section. *Gulab Chand* v *Kudilal*, (1966) 3 SCR 623: AIR 1966 1734. As to when certain unfair clauses in a Govt. contract would defeat the normal legal rights of contractors, see *V. Raghunadha Rao* v *State of AP*, (1988) 1 Andh LT 461. The clauses in question were an attempt to relieve the State of its liability and the court said that a State is not free to impose arbitrary or unjust clauses in a public contract.
53. *Atamal Ramoomal* v *Deepchand Kessurmal*, AIR 1939 Sind 33; *Mallalien* v *Hodgson*, (1851) 16 QB 629. *Indian Hotels Co Ltd* v *Bhaskar Moreshwar Karve*, (1993) Cri LJ 3370 Bom, sale of a company's property at a throw-away price may be of fraudulent nature and, therefore, against public policy. *Munesh* v *Anasuyamma*, AIR 2001 Kant 355, a document containing compromise of marital proceedings on which the wife's signature was forged was against law and, therefore, could not be the basis of any matrimonial remedy.
54. *Ram Nath Misra* v *Rajendranath Sanyal*, 142 IC 525: (1933) 8 Luck 233. *See* also *Manika Moopanar* v *Periya*, 164 IC 31: AIR 1936 Mad 541; *Kedar Nath Motani* v *Prahlad Rai*, (1960) 1 SCR 439, 447: AIR 1960 SC 213, 216.
55. Note 1 above and see *Ramlal Misra* v *Rajendra Nath Sanyal*, AIR 1933 Oudh 124.
56. *Alexander* v *Rayson*, (1936) 1 KB 169.
57. *Beghie* v *Phosphate Sewage Co Ltd*, (1876) 1 QBD 679.
58. *Brown Jenkinson & Co* v *Percy Dalton (London) Ltd*, (1957) 2 QB 621: (1957) 3 WLR 403: (1957) 2 All ER 846. *Naraindas* v *Bhagwandas*, (1993) MPLJ 1005, deliberate statement of incorrect facts resulting in exercise of jurisdiction which otherwise would not have been exercised, fraud on statute.

after a promise of indemnity from the sender. The bill stated that the barrels were shipped in good order and condition. On arrival at the destination, the contents of the barrels had suffered considerable leakage and the shipowner had to make good the loss thus caused to the buyer of the barrels. The shipowner then sought to enforce the indemnity against the sender.

It was held by a majority of two against one that the indemnity bond was not enforceable. MORRIS LJ stated the effect of the agreement thus: If you make a false representation that the goods have been received in good order when you know that they are not so and which will deceive endorsees of the bill, we will indemnify you against consequences. Thus, the shipowner had made himself a vehicle not merely for conveyance of goods but also for carrying a false representation. This made the whole scheme unlawful disentitling him from relying upon any part of it. The argument that it was a common practice of the shipowners was shelved by the court by saying that it may explain why he did what he did, but not make an unlawful thing lawful.[59] Where the parties to a contract conspired to defraud an insurance company by agreeing to an inflated estimate for repair work in order to claim a larger sum, it was held that the contract was vitiated by illegality. The legitimate part of the claim could not be separated from the illegal portion because it was a single indivisible arrangement, it could not be enforced.[60]

An agreement between two bidders not to bid against each other with an understanding that the successful bidder would convey half the property to the other, has been held to be not against public policy.[61]

### 4. Injurious to person or property

An agreement between two persons to injure the person or property of another is unlawful. In the same way, if the object of an agreement is such that it involves or implies injury to the person or property of another,[62] the agreement is unlawful and void. A person borrowed a sum of 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.[63] Similarly, a bond to pay an exorbitantly high rate of interest, in case, the borrower left the lender's

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59. *See* further *Kedar Nath Matani* v *Prabhat Rai*, (1960) 1 SCR 861: AIR 1960 SC 213; *Immani Appa Rao* v *G. Ramalingamurthi*, (1962) 3 SCR 739: AIR 1962 SC 370: (1962) 2 MLJ 101.

60. *Taylor* v *Bhail*, The Independent, Nov 20 (1995) CA. An agreement to defraud taxing authorities was not allowed to be cancelled at the instance of a person who was stranger to the agreement, *Boni Manchershaw Mistry* v *Keshawani Coop Housing Society*, (1993) 2 Bom CR 301.

61. *Sujan Singh* v *Mokham Chand*, AIR 1983 P&H 180; *Hari* v *Naro*, (1894) 18 Bom 342; *Doorga Singh* v *Sheo Pd*, (1889) 16 Cal 194; *Mohd Meera* v *S. Vijaya*, (1900) 23 Mad 227: 27 IA 17. As for creation of monopolies, *see* under S. 27, *infra*.

62. An agreement to construct a railway line on a land to be acquired for the purpose does not involve injury to person or property. *Union of India* v *Philips Construction*, (1980) 1 Ker LT 42 Case No. 78. *Narayanan* v *Rajamany*, (1995) 2 Ker LT 351, it is not necessary that the intention to cause injury should be expressly mentioned in the agreement. It is enough that the object can be discerned from the agreement or from other materials even if by implication.

63. *Ram Sarup* v *Bansi Mandar*, (1915) 42 Cal 742.

service, has been held to be void.[64] An agreement to commit a crime or a civil wrong, for example, to assault or beat a person[65] or to deceive him[66] or to publish a libel against him,[67] all fall in this category.

*Fruits of Crime*

Law does not help a person to recover anything under his own crime. "The fruits of a crime are irrecoverable."[68] No person is allowed to benefit from his own crime.[69] It is on this principle that a person is not permitted to participate in a succession which he has brought about through murder.[70] An insured person committed suicide to enable his representatives to get the insurance money, but they were not allowed to recover. It was an attempt to confer a benefit through his own crime.[71] This brought about an undeserved punishment of the representatives. The position was, therefore, changed by the Suicide Act, 1961 [English]. The principle was again applied to prevent a person, who had taken out a policy in respect of liability for bodily injury caused by accident, from recovering anything for liability for death caused by him though involuntarily but as a result of an unlawful and violent attack.[72] Criticising such results, it has been observed in Cheshire and Fifoot:[73]

> "The principle that no benefit can accrue to a criminal from his own crime, however, must obviously not be pushed too far. Nowadays, there are many statutory offences, some of them involving no great degree of turpitude, which rank as crimes, and it has several times been doubted whether they are all indiscriminately affected by the rule of which the *Beresford* case is an example."[74]

**5. Immoral**

The law does not allow an agreement tainted with immorality to be enforced. Consequently, every agreement the object of or consideration for which is immoral, is unlawful. What is "immoral" depends upon the standards of morality prevailing at a particular time and as approved by the courts. But certain kinds of acts have been regarded as immoral since times immemorial and will perhaps always be so regarded.

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64. *Ibid.* See also *Satish Chandra* v *Kashi Sahu*, (1918) 3 Pat LJ 412: 46 IC 418: cf. *Kanakal* v *Pambayan*, AIR 1927 Mad 531: 101 IC 39.
65. *Allen* v *Rescous*, (1677) 2 Lev 174: 1 Freem KB 433.
66. *Brown Jenkinson & Co Ltd* v *Percy Dalton (London) Ltd*, (1957) 2 QB 621.
67. *Clay* v *Yates*, (1856) 1 H&N 73: 25 LJ Ex 237.
68. Cheshire and Fifoot, LAW OF CONTRACT, 333 (9th edn by Furmston, 1976).
69. *Cleaver* v *Mutual Reserve Fund Life Assn*, (1892) 1 QB 147; *Crippen, in the estate of*, (1911) p 108.
70. *Giles* v *Giles*, (1972) Ch 544: (1971) 3 All ER 1141, a woman killing her husband.
71. *Beresford* v *Royal Insurance Co Ltd*, (1937) 2 KB 197: (1917) 2 All ER 243; affirmed on appeal, 1938 AC 586: (1938) 2 All ER 602. The position in India is different. Here suicide is not a crime and therefore payment under an insurance policy is not against public even if the claim arises by reason of suicide. *Scottish Union & National Ins Co* v *Roushan Jahan*, (1945) 20 Luck 194: AIR 1945 Oudh 152.
72. *Gray* v *Barr*, (1970) 2 QB 626: (1970) 2 All ER 702; *affirmed*, (1971) 2 QB 554: (1971) 2 All ER 940.
73. LAW OF CONTRACT, 335 (9th edn by Furmston, 1976).
74. Recovery would, for example, be allowed to the victim of a motor accident even if intentionally induced.

*Interference in Marital Relations*

One such act is interference with marital relations. Thus, where a married woman was given money to enable her to obtain divorce from her husband, the lender promising to marry her subsequently, it was held that the money could not be recovered.[75] Similarly, a promise to marry a married woman after the death of her husband or after she obtains divorce from him is immoral. In the same way, a promise by a married man to marry a woman after the death of his wife or after obtaining divorce from her is illegal. But if she does not know the man to be married, she can bring an action for breach.[76] In *Fender* v *St John Mildmay*[77] the House of Lords had to face a difficult case on this point.

> The defendant, who was a married man at the time, met the plaintiff at a nursing home where she was a nurse. He told her that he was unhappy with his wife and later asked her whether, if his wife divorced him, she would marry him after the divorce. She consented and thereupon sexual relations took place between them. The wife petitioned for a divorce on the ground of this adultery and a decree *nisi* was pronounced.[78] The defendant then promised to marry the plaintiff as soon as the decree was made absolute. But he committed breach of this promise by marrying another woman. The plaintiff sued him.

The claim was resisted on the ground of immorality, but she was held entitled to recover. What is immoral is interference with marital status, whereas, in the present case, "after decree *nisi* the bottom has dropped out of marriage: nothing but a shell is left". Accordingly, the circumstances which lead to mischief were absent here.

*Dealings with Prostitutes*

Dealings with prostitutes have always been regarded as immoral. "If articles are sold or something is hired to a prostitute for the purpose of enabling her to carry on her profession, neither the price of the articles sold nor the rent of the thing hired can be recovered."[79] "If a woman takes a house in order to live in it as the mistress of a man and to use it for that purpose, and the landlord at the time when the lease is executed knows that it is taken for that purpose, the landlord cannot recover the rent."[80]

*Illegal Cohabitation*

A promise to pay for past sexual immorality or illegal cohabitation has been held in England to be enforceable if under seal. If it is not under seal, it cannot be

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75. *Baivijli* v *Nansa Nagar*, (1885) 10 Bom 152; *Roshun* v *Muhammad*, (1887) Punj Rec No. 46.
76. *Shaw* v *Shaw*, (1954) 2 QB 429; *Wilson* v *Carnley*, (1908) 1 KB 729. *See* Anson, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, pp. 321-22, 22nd edn (1964); Smith and Thomas, A CASE BOOK ON CONTRACT, 4th edn (1969), p 510; *Spiers* v *Hunt*, (1908) 1 KB 720. Actions for breach of promise of marriage are no more maintainable in England.
77. (1938) AC 1.
78. Decree *nisi* is made abosolute after six months and then final divorce takes place. In the meantime the martial status continues.
79. *Pearce* v *Brookes*, (1866) LR 1 Ex 213: 14 LT 788; *Upfill* v *Wright*, (1911) 1 KB 506; *Bholi Baksh* v *Gulia*, (1876) Punj Rec No 64; *Gangamma* v *Kupammal*, AIR 1939 Mad 139; *Allah Baksh* v *Chunia*, (1877) Punj Rec No 26.
80. BUCKNILL J in *Upfill* v *Wright*, (1911) 1 KB 506; *Chogalal* v *Piyari*, (1908) 31 All 58. The landlord may, however, recover if he did not know the purpose. *Sultan* v *Naner*, (1877) Punj Rec No 64.

enforced as past consideration is no consideration.[81] The Allahabad High Court allowed a woman to recover arrears of allowance promised to her for past cohabitation.[82] But in a subsequent decision, the same High Court has held that where cohabitation is adulterous, that is to say, where either party is married, whether past or future, it will not support a promise. Adultery is not merely immoral, but is also illegal.[83] Contrary views have also been expressed. "In *Husseinali Casan* v *Dinbai*,[84] MACLEOD CJ and CRUMP J held that a contract which was immoral at the time, and, therefore, could not support an immediate promise to pay, did not become innocent by merely being past consideration. There can be no difference whether *A* says to *B*: 'I will give you Rs. 1000 a month if you live with me for a year,' or 'I will give you Rs 1200 because you have lived with me for a year'." The consideration, therefore, for past cohabitation is unlawful as being immoral or opposed to public policy.[85]

A promise to pay for future cohabitation is unenforceable. A promise to pay for past cohabitation for the purpose of securing the continuance of the cohabitation is also unenforceable. Where a promise was given for past cohabitation "with a view that she may continue in my service", it was held to be opposed to public policy.[86] But a promise to pay for past cohabitation only is enforceable even if the circumstances do not rule out the continuance of the cohabitation.[87]

The principles which have thus crystallised from the various High Court decisions have been approved by the Supreme Court in *D. Nagaratnamba* v *Kunuku Ramayya*.[88] Certain properties were gifted in consideration of past cohabitation. The Supreme Court found that the properties belonged to the joint family, which the *Karta* had no power to gift and, therefore, the gift was void. But apart from this, BACHAWAT J recognised past cohabitation as a good consideration. The Rajasthan High Court has put the same thing on more rational basis.[89] A gift deed was executed by a person in favour of a woman with whom he had adulterous cohabitation. Holding the gift deed to be enforceable, the court said that the word "object" as used in Section 23 means purpose or design. Past cohabitation, even if adulterous, is no longer the object of the gift. It only supplies a motive. Gift is a transfer without consideration. Hence, no question of unlawful consideration can arise.

### *Dancing Girls*

A help given or promised to a dancing girl is not tainted with immorality.[90]

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81. *Beaumont* v *Reeves*, (1846) 8 QB 483.
82. *Dhiraj Kuer* v *Bikramji Singh*, (1831) 3 All 787.
83. *Alice Mary Hill* v *William Clarke*, (1905) 27 All 266. Patna High Court has expressed a similar view. See *Godfrey* v *Parbati*, AIR 1938 Pat 308.
84. AIR 1924 Bom 135. *See* also *Kiesendas* v *Dhondu*, (1920) 44 Bom 542.
85. *Per* ANANTANARAYAN CJ in *Manicka Gounder* v *Muniammal*, AIR 1968 Mad 392; *Subhash Chandra* v *Nousadbai*, AIR 1982 MP 236 (past cohabitation).
86. *Alice Mary Hill* v *William Clarke*, (1905) 27 All 266.
87. So held in *B. V. Rama Rao* v *Jayamma*, AIR 1953 Mys 33.
88. (1968) 1 SCR 43: AIR 1968 SC 253.
89. *Pyare Mohan* v *Narayani*, AIR 1982 Raj 43. The Calcutta High Court held in *Sandhya Chatterjee* v *Salil Chandra Chatterjee*, AIR 1980 Cal 244 that there is nothing immoral in the agreement of a husband to provide separate residence to his wife. *Thirumal Naidu* v *Rajammal*, AIR 1968 Mad 201 and *Krishna Aiyer* v *Balammal*, (1911) ILR 34 Mad 398.
90. *Khubchand* v *Beram*, (1888) 13 Bom 150.

*"Immorality" to be limited to Sex outside Marriage*

The scope of the word "immoral" has been explained by the Supreme Court in *Gherulal* v *M. Maiya*.[91] SUBBA RAO J (afterwards CJ) said:

> The case-law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitations, promises in regard to marriage for consideration or contracts facilitating divorce are held to be void on the ground that the object is immoral.

The learned judge pointed out that the word "immoral", being a very comprehensive one, must be given restricted meaning and it has been restricted to mean sexual immorality. Accordingly, the court held that a wagering, agreement could not be regarded as immoral.

**6. Public Policy**

An agreement is unlawful if the court regards it as opposed to public policy. The term "public policy"[92] in its broadest sense means that sometimes the courts will, on considerations of public interest, refuse to enforce a contract.[93] The normal function of the courts is to enforce contracts; but considerations of public interest may require the courts to depart from their primary function and to refuse to enforce a contract.[94]

*Observations in English law about Public Policy*

The circumstances in which a contract is likely to be struck down as one opposed to public policy are fairly well-established in England. "...[S]o a contract of marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or the assisting of the King's enemies, are all unlawful things" on the ground of public policy.[95] The ordinary function of the courts is to rely on the well-settled heads of public policy and to apply them to varying situations.[96] If the contract in question fits into one or the other of these pigeon-holes, it may be declared void.[97] The courts may, however, mould the well-settled categories of public policy to suit new conditions of a changing world.[98] But may a court invent a new head of public policy? According to Lord HALSBURY, the categories of public policy are closed.[99] "I deny", he said, "that any court can invent a new head of public policy". "From time to time judges of the highest reputation

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91. (1959) 2 SCA 342.
92. The subject of public policy has been considered in a number of learned articles and essays. *See* generally Lord Wright, LEGAL ESSAYS AND ADDRESSES; Winfield, *Public Policy in the English Common Law*, 42 Har LR 76-102 (1928).
93. *Thomson-CSF* v *National Airport Authority of India*, AIR 1993 Delhi 252, grant of Government contracts, national interest demands that national contractors should be preferred if they are equally equipped.
94. *See* Lord WRIGHT in *Fender* v *St John Mildmay*, (1938) AC 1, at p 38.
95. Earl of HALSBURY LC in *Janson* v *Driefontein Consolidated Mines Ltd*, (1902) AC 484.
96. *See* SUBBA RAO J (as he then was) in *Gherulal* v *Mahadeodas*, (1959) 2 SCA 369.
97. ASQUITH J in *Monkland* v *Jack Barclay Ltd*, (1951) All ER 714, 723.
98. Lord WRIGHT in *Fender* v *John Mildmay*, (1938) AC 1, 723.
99. *See* PARKE B in *Egerton* v *Brownlow*, (1853) 4 HLC 1, 123: 10 ER 359, 408.

have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field."[1] For example, a judge protesting against public policy in an early case, said, "it is a very unruly horse, and when once you get astride it, you never know where it will carry you".[2] A few other opinions may be cited. " 'Public policy' is a vague and unsatisfactory term."[3] "Certain kinds of contracts have been held void at common law on this ground—a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy."[4] " 'Public policy' is always an unsafe and treacherous ground for legal decisions, and in the present case it would not be easy to say on which side the balance of convenience would incline."[5] Yet the rule exists. In the words of Lord ATKIN, "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inference of a few judicial minds".[6]

*Indian cases adopting English view*

"The Indian cases also adopt the same view."[7] The following words of SUBBA RAO J (afterwards CJ) in *Gherulal* v *Mahadeodas*[8] enshrine the present position of the doctrine of public policy in India:

> The doctrine of public policy may be summarised thus: Public policy or the policy of the law is an illusive concept; it has been described as an "untrustworthy guide", "variable quality", "unruly horse", etc.; the primary duty of a court of law is to enforce a promise which the parties have made and to uphold the sanctity of contract which forms the basis of society; but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord ATKIN describes that something done contrary to public policy is a harmful thing; but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just like any other branch of common law, it is governed by precedents; the principles have been crystallised under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not

1. Lord ATKIN in *Fender* v *John Mildmay*, (1938) AC 1.
2. BORROUGH J in *Richardson* v *Mellish*, (1824) 2 Bing 229, 252.
3. PARKE B in *Egerton* v *Brownlow*, (1853) 4 HLC 1, 123.
4. CAVE J *Mirams, Re*, (1891) 1 QB 594, 595. JESSEL MR in *Printing & Numerical Registering Co* v *Sampson*, (1875) LR 19 Eq 462, 465.
5. Lord DAVY in *Janson* v *Driefontein Consolidated Mines*, (1902) AC 484, 500.
6. In *Fender* v *St. John Mildmay*, (1938) AC 1.
7. *Per* SUBBA RAO J (as he then was) in *Gherulal* case, AIR 1959 SC 781: (1959) 2 SCA 369. The learned Judge cited the following cases: *Srinivas Das Lakshmi Narayan* v *Ram Rattandas*, ILR (1920) 6 Bom 20; *Bhagwant Genuji* v *Gangabisan Ram Gopal*, ILR 1914 Bom 71; *Gopi Tihadi* v *Gokhei Panda*, ILR 1953 Cut 558. *Indian Oil Corpn Ltd* v *Raj Unocal Lubricants*, (1997) 2 Mah LJ 281. public policy connotes some matter which concerns public good and public interest. *See* also *Transocean Shipping Agency P Ltd* v *Black Sea Shipping*, AIR 1998 SC 707, appointment of a foreign arbitrator and application of foreign laws, but enforcement of the award in India was held to be not *ipso facto* opposed to public policy of India. The matter was under the Foreign Awards (Recognition and Enforcement) Act, 1961 (now repealed by the Arbitration and Conciliation Act, 1996).
8. AIR 1959 SC 781: (1959) 2 SCA 342, 370.

closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

Explaining the scope of the expression "public policy" and the role of the judge, C. REDDY J of the Andhra Pradesh High Court observed:[9]

> The twin touchstones of public policy are advancement of the 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, an agreement having tendency to injure public interest or public welfare is opposed to public policy.[10]

### *Surrender of Rights*

A wife who is entitled to maintenance can give up her right in consideration of a lump sum payment, but the surrender of the right to claim revision of the amount in the context of rising prices would be opposed to public policy.[11]

### *Marriage of Minor Girl*

Where the consideration for a contract of sale was the expenses of the marriage of a minor girl, the arrangement was held to be opposed to public policy, being in violation of the Child Marriage Restraint Act.

### *Payment out of Black Money*

The Delhi High Court has held that a contract for the sale of goods whose tenor shows that the price was intended to be paid out of black money is not opposed to public policy and is, therefore, valid and enforceable.[12] The contract involved transfer of goods and payment of price and neither is opposed to public policy, nor can be said to be designed to hoodwink the revenue. And even if it could be so said, the seller who had delivered his goods, could always call for payment out of the innocent money of the buyer. An agreement to exclude the land of a company from notified urban areas has been held to be not against public policy.[13]

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9. *Ratanchand Hirachand* v *Askar Nawaz Jung*, AIR 1976 AP 112.
10. *Rattan Chand Hira Chand* v *Askar Nawaz Jung*, (1991) 3 SCC 67. Refund of sales tax money already collected under various sales transactions would be a breach of trust with the people and a violation of public policy and, therefore, cannot be allowed as an article of incentive to new industry. *Amrit Banaspati Co Ltd* v *State of Punjab*, (1992) 2 SCC 411: AIR 1992 SC 1075. There is nothing wrong essentialy in providing for the appointment of an arbitrator from among employees of the department. *Vijay Singh Amar Singh* v *Hindustan Zinc Ltd*, AIR 1992 Raj 82.
11. *Muniammal* v *Raja*, AIR 1978 Mad 103. *Bhaskar Tanhaji Dhokrat* v *Parwatbai*, (1996) 1 Bom CR 311, a custom to the effect that legal right to maintenance would become surrendered would be contrary to law if it is destructive of those rights without alternative security.
12. *Anand Prakash* v *Oswal Trading Agency*, AIR 1976 Del 24.
13. *Associated Cement Cos Ltd* v *State of Rajasthan*, AIR 1981 Raj 133. The court discusses the concept of public policy in general. *T.T. Augustine* v *Changanacherry*, AIR 1982 Ker 307, raffles are not opposed to public policy.

*Grabbing of Privileges by Extraneous Influences*

A sale of seats in a public institution, e.g., a medical college, is equally opposed to public policy. The Supreme Court has held that charging of capitation fee in consideration of admission to educational institutions is illegal and impermissible as it amounts to denial of citizen's right to education and is arbitrary and violative of Article 14 of the Constitution.[14] The Madras High Court did not permit the recovery of a sum of money paid to a person to enable him to procure a seat in a medical college. Any attempt to pervert selection by merit is highly injurious to public interest.[15] Money paid to a public officer to procure a mining right was also not permitted to be recovered.[16] Money promised to a person to get the promisor declared as the heir of a wealthy *Nawab* has been held to be not recoverable.[17] The fulfilment of the promise involved influencing statesmen for private gain, which is the same thing as corruption. Money promised to be paid to a person for using his influence for obtaining a Government order in favour of a manufacturer for supply of spare parts, or to secure a mining right are in the same category.[18] A contract between *A* and *B* for wielding influence with the Government authorities to secure a decision in favour of *B* has been held by the Supreme Court to be opposed to public policy.[19] Money paid under such a contract is not allowed to be recovered.[20]

*Price Escalation Clauses*

On account of price instabilities, it has become usual to allow suppliers and project contractors the benefit of price adjustment where the market price increases to such an extent that it would be unreasonable to ask anybody to go on performing at the originally reserved prices. The Development Authorities can make such adjustments according as the market of selling plots or houses fluctuates. If an Authority is forced under a court order to pay more compensation for acquisition, it can recoup from allottees with whom the deal is still not finalised. The Authority can also categorise the beneficiaries of its services, for example, into auction-purchasers and allottees. Demanding more price from allottees only does not constitute a discrimination. The allottees may be further categorised into economically stronger or weaker sections. Lesser prices from weaker sections does not in itself violate the constitutional guarantee of equality.[21]

*Agreements contrary to Public Policy of Friendly Foreign State*

The public policy of a friendly foreign country where the agreement in question has to be performed can be taken into account while enforcing the agreement in England. This principle was laid down by the court of Queen's Bench Division in

14. *Mohini Jain* v *State of Karnataka*, (1992) 3 SCC 666.
15. *N.V.P. Pandian* v *M.M. Roy*, AIR 1979 Mad 42.
16. *Kuju Collieries* v *Jharkhand Mines*, (1974) 2 SCC 533: AIR 1974 SC 1892; *Sita Ram* v *Radha Bai*, AIR 1968 SC 534.
17. *Ratanchand Hirachand* v *Askar Nawaz Jung*, AIR 1976 AP 112.
18. *Kuju Collieries Ltd* v *Jharkhand Mines*, (1974) 2 SCC 533: AIR 1974 SC 1892; *Sita Ram* v *Radha Bai*, AIR 1968 SC 534.
19. *Rattan Chand Hira Chand* v *Askar Nawaz Jung*, (1991) 3 SCC 67.
20. *Montefiore* v *Menday Motor Components Co Ltd*, (1918-19) All ER Rep 1188.
21. *Vipul Rai Sharma* v *Ludhiana Improvement Trust*, AIR 1992 P&H 42.

*Lemenda Trading Co Ltd* v *African Middle East Petroleum Co Ltd*[22] An oil company in England wanted renewal of a supply contract with the Qatar National Oil Company. For this purpose, it entered into an agreement with the plaintiff company which undertook to bring about the renewal by using their influence with the officers of the Qatar and this, in return, for a commission on oil supplies. Such commission was against the public policy under the law of Qatar. The supply was renewed and an action was commenced in England to recover the agreed commission. The court said that recovery would not be allowed. The public policy of a friendly foreign State cannot, of course, of itself prevent the enforcement of a contract in England, but even so, an English court would not enforce a contract related to a transaction which is contrary to English public policy founded on general principles of morality and the same public policy is applicable in the friendly foreign country where the contract was to be performed so that the contract would not be enforceable under the law of that country, because in such circumstances the international comity combined with the English domestic public policy would militate against enforcement. Since a contract for the use of personal influence in return for money in circumstances where the person to be influenced is likely to be unaware of the pecuniary motive involved is contrary to public policy in both England and Qatar, such contract would not be enforced in England.[23] The court cited the following passage from the judgment of HALSBURY LC:[24]

> "Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it."

*Alienation of Land by Member of Depressed Class*

A portion of land was assigned by the Government to a depressed class member in fulfilment of its Constitutional obligation under Article 39(*b*). The grant was subject to the specific condition that the land would not be alienated. Because of the violation of this condition and because of the public policy implication, the alienation of the land was held to be of no effect.[25]

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22. (1988) 1 QBD 513.

23. The court noted *Norman* v *Cole*, (1800) 3 ESP 253: 170 ER 606, money paid for using the influence of the recipient for securing pardon for murder not allowed to be recovered back; *Montefiore* v *Menday Motor Components Co Ltd*, (1918) 2 KB 241: (1918-19) All ER Rep 1188, a claim for commission for procuring from the Government a loan to be used for manufacturing aircraft components, not allowed.

24. *Missouri Steamship Co, Re*, (1889) 42 Ch D 321, 336. The court also cited *Kaufman* v *Gerson*, (1904) 1 KB 591, (1904-7) All ER Rep 896. In that case: "A Frenchman coerced a Frenchwoman into signing a contract in France by the threat that if she refused to sign he would prosecute her husband for a crime of which he was accused." The contract was valid by French law, but an action brought for its breach in England was dismissed on the ground that to enforce it "would contravene what by the law of this country is deemed an essential moral interest". Presumably, therefore, an English court would apply the rule that has been laid down in the United States of America and would refuse to enforce any contract which tended to promote corruption in the public affairs of a foreign country, however irreproachable such conduct might be in the view of the foreign law as noted in Cheshire, Fifoot and Furmston, LAW OF CONTRACT, pp. 370-371.

25. *Papaih* v *State of Karnataka*, AIR 1997 SC 2676. In *Paresar* v *Municipal Board, Mt. Abu*, (1997) AIHC 1887 Raj, regularisation of encroachment colonies for 10 years with restriction on alienation, not against public policy. Presumption that State decisions are in public interest and for public good. *Jaipur Development Authority* v *Daulat Mal Jain*, (1997) 1

*Chitty*

The conduct of a *chitty* in violation of Acts enacted in the interest of uniformity of practices was held to be not opposed to public policy within the meaning of S. 23. The cheques issued under the scheme were found to be issued for payment of legally enforceable debts. The dishonour of such cheques amounted to an offence under S. 138 of the Negotiable Instruments Act, 1881.[26]

*Heads of Public Policy*

1. TRADING WITH ENEMY

"The King's subjects cannot trade with an alien enemy, i.e. a person owing allegiance to a Government at war with the King, without the King's licence."[27] "It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imparts a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of Crown, is illegal".[28] "The doctrine applies to all contracts which involve intercourse with the enemy or tend to assist the enemy, even though no enemy be a party to the contract."[29]

2. TRAFFICKING IN PUBLIC OFFICES

An agreement by which it is intended to induce a public officer to act corruptly is contrary to public policy. An agreement, for example, by which a sum of money was provided to a charity on the condition that latter would procure a knighthood for the plaintiff was held void and the money irrecoverable.[30] Similarly, an agreement to provide money to a member of Parliament to influence his judgment is void.[31] Sale of public offices, that is, appointments in consideration of money, are also against public policy. The sale of the office of a Shebait has been held invalid.[32] Charging of capitation fee for admission to prestigious educational institutions is

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SCC 35, allottee of land after acquisition, subsequent sale of that land to others described as sub-awardees or nominees was held to be opposed to public policy.

26. *Nadarajan* v *Nadarajan*, (1999) 2 Ker LT 512.
27. Lord MACNAGHTEN in *Janson* v *Driefontein Consolidated Mines*, (1902) AC 484, 499.
28. *Espostio* v *Bowden*, 110 RR 822, 823.
29. *Badische Co, Re*, (1921) 2 Ch 331, 373. For Indian authorities see: *Banghy Abdul Razak* v *Khandi Rao*, 40 IC 851, 852; *Soorthingjee* v *Mohd Nasruddin*, 40 IC 526; *Nissim Issac Bakhoor* v *Haji Sultan Ali*, 28 IC 433; *R.K. Motishaw* v *Mercantile Bank of India*, 37 IC 258; *Wolf & Sons* v *D.K. & Co*, (1920) 44 Bom 631.
30. *Parkinson* v *College of Ambulance Ltd*, (1925) 2 KB 1.
31. *Marshall* v *Baltimore & Ohio R.R. Co*, reported from U.S. (1853) 16 Howard 314. There should be a clear proof of illegal intention. See *Manindra Chandra Nandi* v *Aswini Kumar*, AIR 1921 Cal 185 and *Shiv Saran Lal* v *Keshav Pd*, AIR 1917 Pat 92.
32. *Narsima* v *Anantha Bhattas*, (1881) 4 Mad 391; cf. *Mancharan* v *Pran Shanker*, (1882) 6 Bom 298. *See* also *Rappa Gurkul* v *Dorasami*, (1882) 6 Mad 76; *Wahid Ali* v *Ashraf Hussain*, (1882) 8 Cal 732 and *Anjaneyalu* v *Venue Gopal Rice Mills*, (1922) 45 Mad 620, in all of which sale of religious offices was disapproved. For other illustrations of sale of public appointments see *Ranjit Singh* v *Ramlal*, AIR 1951 MB 113; *Ledu* v *Hiralal Bose*, (1915) 29 IC 625; *Samintha Aiyar* v *Mathusami Pillai*, (1907) 30 Mad 530, where an agreement to induce a public servant to retire was struck down; *Pattulal* v *Raj Narain*, AIR 1931 All 428; *Syed Shah Nasihuddin* v *Syed Shah Salihuddin*, AIR 1957 Pat 659; *Karuppiah Pillai* v *V. Ponnu*, AIR 1933 Mad 768. Where managing agents were induced to take a partner by bribe the agreement was held void. *Gulabchand* v *Kudailal*, AIR 1966 SC 1734.

contrary to public policy. The Supreme Court has described it as unreasonable, unjust and unfair.[33]

3. INTERFERENCE WITH ADMINISTRATION OF JUSTICE

A contract, the object of which is to interfere with the administration of justice, is obviously opposed to public policy. It may take any of the following forms:

(*a*) *INTERFERENCE WITH THE COURSE OF JUSTICE.*—Any agreement which obstructs the ordinary process of justice is void.[34] An agreement to delay the execution of a decree,[35] and a promise to give money to induce a person to give false evidence,[36] have been held void. An extreme illustration is an agreement to perform "puja" to secure success to the defendant in a litigation, which was held void.[37]

(*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. "You shall not make a trade of a felony."[38] "No court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the judges and put it in the hands of the private individuals."[39] However, the law allows compromise agreements in respect of compoundable offences.[40] 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 *Narasimha Raju* 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 to arbitration in

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33. *Mohini Jain* v *State of Karnataka*, (1992) 1 SCC 666.
34. FRY LJ remarked in *Windhill Local Board of Health* v *Vint*, (1890) 45 Ch D 351, 366 that "we cannot give effect to the agreement, the consideration of which is diverting the course of justice".
35. *Nand Kishore* v *Kunj Beharilal*, AIR 1933 All 303.
36. *Ko Pa Ta* v *Azimulla*, AIR 1940 Rang 73. *Adhiraja Shetty* v *Vinil Bhatia*, AIR 1914 Mad 366.
37. *Sali Bhagwan Das Shastri* v *Raja Ram*, AIR 1927 All 406.
38. Lord WESTBURY in *Williams* v *Bayley*, (1866) 1 HL 200, 220. *See* also *Keir* v *Leeman*, (1846) 9 QB 371, 392; (1844) 6 QB 308, where at pp. 316 and 322 Lord DENMAN LC cited the principle laid down by WILMOT CJ in *Collins* v *Blantern*, (1767) 2 Wils 341 that a contract to withdraw a prosecution for perjury, and consent to give no evidence against the accused is founded on an unlawful consideration. *Newar Marble Industries P Ltd* v *Rajasthan SEB*, (1993) Cri LJ 1191 Raj, compounding the offence of theft of energy, held to be against public policy.
39. MUKHERJI J in *Sudhindra Kumar* v *Ganesh Chandra*, (1939) 1 Cal 241, 250.
40. *See* Section 345, CrPC and Sections 213-14, IPC. For illustration see *Amir Khan* v *Amir Jan*, (1898) 3 CWN 5, compromise for an assault; *T.A. Meenakshi Sundermal* v *V.K. Subramania Ayyar*, AIR 1955 Mad 369, compromise with the leave of the court where the law allows it.
41. (1963) 3 SCR 687: AIR 1963 SC 107. *See* also *Marai Packiam* v *Valliammal*, (1989) 2 Mad LJ 461, criminal proceedings which cannot be compromised without court permission; *John Jacob* v *Joseph* , (1990) 1 Ker LT 75 where the court observed that a document executed by parties to settle the disputes between them and thereby to bring peace and good neighbourly relations can, under no stretch of imagination, be considered as an agreement to stifle litigation.

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 alleged that the reference to arbitration was the result of an agreement to stifle prosecution.

GAJENDRAGADKAR J (afterwards CJ) held the agreement to be opposed to public policy. He said: "If a person sets the machinery of criminal law into action on the allegation that the opponent has committed a non-compoundable offence and by the use of the coercive criminal process, he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy". The learned judge referred to the decision of the Privy Council in *Bhowanipur Banking Corporation Ltd* v *Durgesh Nandani Dassi*,[42] where a mortgage was executed by the respondent as a part of the consideration for a promise by the bank to withdraw criminal proceedings instituted by it against the mortgagor's husband and the bond was held invalid, notwithstanding that the debt itself was real and valid. Lord ATKIN observed:

> To insist on reparation as a consideration for promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interest of justice, and must not seek his own advantage.

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 Poulc* v *Catholic Union Bank*.[43]

> 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.

GAJENDRAGADKAR CJ did not agree with the contention that the agreement involved any idea of stifling prosecution. The agreement was entered into before the complaint was filed, and so, it would be unreasonable to suggest merely from the sequence of subsequent events that the documents in question was executed with the object of stifling the criminal prosecution.

Approving cases of this kind in its decision in *Union Carbide Corpn* v *Union of India*,[44] the Supreme Court pointed out the distinction between "motive" and "consideration" for withdrawing a prosecution. "Where dropping of the criminal proceedings is a motive for entering into the agreement—and not its consideration—the doctrine of stifling of prosecution is not attracted. Where there is also a pre-existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability.[45] Where

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42. AIR 1941 PC 95. In *Majibar Rahman* v *Muktashed Hossein*, ILR (1913) 40 Cal 113 CHAPMAN J remarked at p 118 that a promise to withdraw from a prosecution in a case, the compromise of which is expressly forbidden by the CrPC is void.
43. (1964) 7 SCR 745: AIR 1965 SC 166. To the same effect is *R. Sivaram* v *T.A. John*, AIR 1975 Ker 101, where price was accepted from an employee who committed theft of articles.
44. (1991) 4 SCC 584: AIR 1992 SC 248, 288.
45. Citing *Adhikanda Sahu* v *Jogi Sahu*, AIR 1922 Pat 502; *Deb Kumar Roy Choudhury* v *Anath Bandhu Sen*, AIR 1931 Cal 421 where it was held that a contract for payment of money in

withdrawal of a prosecution is the motive but not the object or consideration of the contract, public policy is not affronted. The settlement of the Bhopal gas disaster was, therefore, valid."

An agreement not to appear as a witness is void.[46]

(*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."[47] "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".[48] "Agreements by which a stranger advances money for maintenance of litigation with a view to obtaining an unconscionable gain are called champertous agreements."[49] In *Harilal Nathalal Talati* v *Bhailal Pranlal Shah*[50] the Division Bench of the Bombay High Court dealt with an agreement in which a person had agreed to give half share of the property to the financier, valued at Rs 30,000 from such property as he might get whether by a suit or by private settlement or in any other manner from his father's estate. The court held that the agreement was extortionate and unconscionable and opposed to public policy. An agreement which provided that the financier should get 3/4 of the property was not regarded as reasonable or fair.[51] 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.[52] 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.[53] On the other hand, in *Ram Swarup* v *Court of Wards*,[54] which went up to the Privy Council, the agreement provided that the financier should bear all the expenses of the case and in return therefore get a three-anna

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respect of a criminal prosecution was permissible, was not by itself opposed to public policy; *Babu Harnarian Kapur* v *Babu Ram Swarup Nigam*, AIR 1941 Oudh 593.

46. *State of UP* v *Kapildeo Shukla*, (1972) 3 SCC 504: AIR 1973 SC 494: 1972 SCC (Cri) 597.
47. *Neville* v *London Express*, (1910) AC 368.
48. *Hutley* v *Hutley*, (1873) LR 8 QB 42, *per* BLACKBURN J. *Kamrunnisa* v *Pramod Kumar Gupta*, AIR 1997 MP 106, agreement to finance litigation on the condition that the entire share of the decretal property would go to the financier, held, extortionate and against equity and justice, could not be enforced specifically. *Rajesh Vatsavaya Venkata Subhadrayymma Jayatpati Bhadur Guru* v *Poosapati Venkatapati Guru*, AIR 1924 PC 124 to the effect that champerty by itself does not make the agreement unlawful. *Rajah Mokham Singh* v *Rajah Rup Singh*, (1892-93) 20 Ind App 127, champerty becomes opposed to public policy if the agreement is not just and equitable.
49. *Khaja Moinuddin Khan* v *S.P. Ranga Rao*, AIR 2000 AP 344 at p 346. The court cited the observation of the Privy Council that the Indian law of champerty could not be the same as prevailed in England. In *Ram Coomar Coondoo* v *Chunder Kanto Mookerjee*, (1876-77) 4 Ind App 23, their Lordships again emphasised that the English concept was not applicable in toto in India.
50. AIR 1940 Bom 143.
51. *Nuthaki Venkataswami* v *Katta Nagi Reddy*, AIR 1962 AP 457. Similarly a Single Judge of the Allahabad High Court in *Babu Ram* v *Ram Charan Lal*, AIR 1934 All 1023 dealt with an agreement which provided for 50% share for the financier and held that the suit was opposed to public policy. In *Vatsavaya Venkata* v *Poosapati Venkatapati*, AIR 1924 PC 162: (1925) 52 IA 1, where the agreement was found to be champertous but the amount actually spent by the financier was allowed to be recovered by creating a charge in his favour on the proceeds.
52. *Fischer* v *Kamla Naicker*, (1860) 8 MIA 170; *Bhagwat Dayal* v *Devi Dayal*, (1908) 35 IA 48.
53. *Nuthahi Venkataswami* v *Katta Nagi*, AIR 1962 AP 457.
54. (1940) Lah 1 (PC).

share of the immovable property recovered provided that it should be increased to four annas, should the case go to the Privy Council, the agreement was held to be valid. Similarly, agreements to pay 3/6th share;[55] 1/4th share[56] and 1/8th share[57] have been upheld. But an agreement to pay 1/6th part of the property to be inherited has been held to be unlawful. The estate being very vast, even 1/6th would net 3 lakh rupees for the promisee and this is exorbitant.[58] An agreement to pay to the financier 40% of the value of the property in question or its sale proceeds was held to be of champertous nature.[59] Where the property forming the subject-matter of litigation is agreed to be sold to the financier, the mere fact that the consideration for the sale is inadequate, may not render the agreement champertous.[60]

An agreement by a client to pay his lawyer according to the result of the case is against public policy. "It is professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or remuneration a share of the property sued or other matter in litigation upon the successful issue thereof."[61] An agreement for solicitor retainership on the basis that the solicitors' standard remuneration would be paid on successful cases and there would be 20% reduction of their fee for lost cases has been held to be champertous. Neither the amount not paid, could be recovered, nor the fee amounts already paid could be claimed back. The court said that a contingency fee which is contrary to public policy is not confined to a direct or indirect share of the spoils but it includes a differential fee dependent on the outcome of the litigation.[62]

### 4. Marriage Brokage Contracts

An agreement to procure the marriage of a person in consideration of a sum of money is called marriage brokage contract. Such agreements are void. A typical illustration would be an agreement for the sale of a girl.[63] The custom of paying bride price to the parents of a girl is well-known in India. According to decisions of the Punjab,[64] Calcutta[65] and Madras[66] High Courts, an agreement to pay money to the parent of a minor to induce him to give the minor in marriage is void. 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.[67]

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55. *Venkata Sabharayamma* v *Venkata Pathi Raju*, 48 Mad 230 (PC) (1924).
56. *Ramanamma* v *Viramma*, AIR 1931 PC 100.
57. *Rajah Mokham Singh* v *Rajah Rup Singh*, (1893) 15 IA 352 (PC).
58. *Ratanchand* v *Askar Nawaz Jung*, AIR 1976 AP 112.
59. *Khaja Moinuddin Khan* v *S.P. Ranga Rao*, AIR 2000 AP 344.
60. *Unnao Commercial Bank* v *Kailash Nath*, AIR 1955 All 393; *Bhagat Dayal* v *Devi Dayal*, (1908) 35 IA 48.
61. *Kothi Jairam* v *Vishvanath*, AIR 1925 Bom 470. *"G" Senior Advocate, Re*, (1955) 1 SCR 490: AIR 1954 SC 557; *Rattan Chand Hira Chand* v *Askar Nawaz Jung*, (1991) 3 SCC 67, promise to pay out of the proceeds of the property, if recovered.
62. *Aralra Poatato Co Ltd* v *Taylor Joynson Garrett*, (1995) 4 All ER 695.
63. *Girdhari Singh* v *Neeladhar Singh*, (1972) 10 All LJ 159; *Gopi Tihadi* v *Gokhei Panda*, AIR 1954 Ori 17.
64. *Wazarimal* v *Rallia*, (1889) Punj Rec No. 128.
65. *Baldeodas* v *Mohamaya*, (1911) 15 CWN 447.
66. *Kalavangunta* v *Lakshmi Narain*, (1909) 32 Mad 185.
67. *Ganpata* v *Lahana*, AIR 1928 Nag 89; *Somphtala* v *Gansuri*, AIR 1937 Pat 330; *Gopikrishna* v *Janah Pd*, AIR 1951 Pat 519.

An attempt to make gain of material nature out of a marriage would be equally opposed to public policy.

> When a father or other guardian of a boy or girl has to betroth his ward, his primary and only consideration ought to be happiness and welfare of the child. The stipulating for a monetary payment for himself is an incentive to the parent or other guardian to have regard to other considerations than the child's happiness in marrying him or her into another family. Such an agreement would clearly be invalid.[68]

A decision of the Orissa High Court provides a suitable illustration:[69]

> The defendant proposed the marriage of his widowed niece to the plaintiff and offered to give her gold and jewels and land. The marriage took place, but the defendant refused to fulfil the rest of his promise.

The court observed:

> We would like to make it clear at the outset that if gifts or presents to the groom or the bride are made voluntarily it cannot be attacked as anything immoral or opposed to public policy. But if pecuniary gain is made the consideration of marriage, it is bound to be condemned as reprehensible to all sense of decent morals. In the present case, monetary gain was the sole consideration for the marriage between the two.[70]

Inter-caste marriage arrangements have been held to be valid.[71]

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 *B.N. Ganguly*[72] that a 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 ground is an exploitation and every ruthless exploitation is against public policy. The Allahabad High Court distinguished this case in *Jagat Bahadur* v *District Supply Officer, Allahabad*[73] where the contract was for the allotment of a fair price shop for distribution of foodgrains and it contained a clause for termination of the agreement and withdrawal of the privilege without assigning any reasons. The same was held to be neither opposed to public policy nor violative of

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68. *Per* FARRAN CJ in *Dholidas* v *Fulchand Chhagan*, 22 Bom 658.
69. *A. Suryanarayan Murthi* v *P. Krishna Murthy*, AIR 1957 Ori 125.
70. MOHPATRA J who relied upon *Venkata Krishnayya* v *Lakshmi Narayana*, 32 Mad 185 (FB); *Baldeo Das* v *Mohmayya Pd*, 15 Cal WN 447. For a reappraisal of the concept of public policy as it affects insurance claims and the principle that no one should benefit from his own wrong, *see* John Shand, *Unblinkering the Unruly Horse: Public Policy in the Law of Contract*, (1972-A) Camb LJ 144. *See* also Goodhart, ENGLISH LAW AND THE MORAL LAW, p 10 and Devlin, THE ENFORCEMENT OF MORALS, pp. 43-44.
71. *Amirchand* v *Ram Rattanchand*, 1903 Punj Rec No. 50.
72. (1986) 3 SCC 156: AIR 1986 SC 1571. In its judgment in *Sethani* v *Bhana*, AIR 1993 SC 956, the Supreme Court held that where a sale deed of her property was executed by an old, illiterate and blind tribal woman in favour of the person on whom she was dependent till death, the donee would have to prove bona fides of the transaction.
73. AIR 1990 All 113. The Allahabad High Court in *Shyam Gas Co* v *State of UP*, AIR 1991 All 129, did not allow gas agency to be terminated with one month notice.

Article 14 of the Constitution. A person aspiring for the grant of a fair price shop is perfectly free not to enter into such a contract because he has all the opportunities of trading in the free foodgrain market. His position cannot be compared with that of an employee.[74]

In reference to the conduct of public financial institutions holding shares in companies, it has been held by the Supreme Court that a surreptitious transfer of a bulk of shares in one company without caring to see whether it would result in the creation of a monopoly adverse to public interest, if it is done with a mala fide intention, the deal would be illegal.[75]

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.[76]

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 unconsionable if the power is exercised for legitimate causes.[77]

In the opinion of the Karnataka High Court[78] in order to attract Section 23 of the Act, it is not necessary that the contract should be tainted with illegality. It would be enough if it contains terms which are so unfair and unreasonable that they shock the conscience of the court. But this general observation has been held to be not applicable where a guarantor agrees not to claim the benefit of Sections 133, 134, 135, 139 and 141 of the Act which give to the guarantor certain protective rights. Such rights being variable with the consent of the surety, there is no violation of the Act if he agrees not to claim any of those rights.[79]

## VOID AGREEMENTS

Giving the meaning of a void agreement, the Act says in Section 2(*g*):

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

The following types of agreement are declared to be void:

(1) Agreements of which consideration and objects are unlawful in part [S. 24];

(2) Agreements without consideration, [S. 25];

(3) Agreements in restraint of marriage, [S. 26];

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74. *See* further, *Delhi Transport Corpn* v *DTC Mazdoor Congress*, 1991 Supp (1) SCC 600: AIR 1991 SC 101, where a term in a contract of employment that a permanent worker was removable without inquiry was held to be opposed to public policy. *Pomal Kanji Govindji* v *V.K. Purohit*, (1989) 1 SCC 458: AIR 1989 SC 436, taking advantage of the oppressed and depressed people.

75. *N. Parthasarthi* v *Controller of Capital Issues*, (1991) 3 SCC 153, arising out of the L & T mega issue.

76. *Bihar State Electricity Board* v *Green Rubber Industries*, (1990) 1 SCC 731, 740: AIR 1990 SC 699.

77. *National Fertilisers* v *Puran Chand Nangia*, AIR 2001 SC 53.

78. *City Municipal Council* v *C. Ramu*, ILR 1989 Kant 2138 and *Suresh Mahajan* v *Myveneers*, ILR 1990 Kant 2910.

79. *T. Raju Shetty* v *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 the operation of S. 133 could not be ousted. *Followed* in *Central Bank of India* v *Multi Block P Ltd*, AIR 1997 Bom 109, where it was held that waiver of surety's rights under Sections 133, 134, 135, 139 and 141 was not against public policy.

(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]; and
(8) Agreements to do impossible acts, [S. 56].

**Agreements in which a part of consideration or object is unlawful.**

**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 manufacturer 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 object of *A's* promise, and the consideration for *B's* promise, being in part unlawful.

The working philosophy behind the provision was stated by WILLES J in these words:[80]

> Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them whether the illegality be created by statute or by common law, you may reject the bad part and retain the good.

The section comes into play when a part of the consideration for an object or more than one objects of an agreement is unlawful. The whole of the agreement would be void unless unlawful portion can be severed without damaging the lawful portion. A promises to pay a fixed sum of money on monthly basis to a married woman for living in adultery with the promisor, which is unlawful, and for keeping his house, which is lawful, the whole agreement was held to be void because it was impossible to apportion the single lump sum between the lawful object and the unlawful one.[81] A licence was granted to a person for sale of opium and *ganja* with this restriction that he would not take any partner in the *ganja* business without the permission of the collector. Without such permission he admitted a partner into the whole business on receiving from him a fixed sum as his share of capital. Differences arose between them. The new entrant filed a case for dissolution and refund of his money. His claim was not allowed. The court said that "it is impossible to separate the contract or to say how much capital was advanced for the opium and how much for the *ganja*".[82] A Municipal Corporation granted to a contractor for a lump sum the licence to collect toll from pilgrims and vehicles and animals. It had no power to authorise collection of fees from pilgrims. The whole transaction was held to be void.[83]

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80. *Pickering* v *Illfracombe*, 1868 LR 3 CP 235, 250.
81. *Alice Mary Hill* v *William Clark*, (1905) 27 All 266.
82. *Gopalrao* v *Kallappa*, (1901) 3 Bom LR 164.
83. *Saundatti Yellama Municipality* v *Shripadbhat*, (1932) 57 Bom 278: 55 Bom LR 163: AIR 1953 Bom 132. *See* also *Tong Kheng Bros* v *Anuarul Aini*, (1990) 2 CLJ 715 High Court, Penang, an agreement to lease a licensed forest contract and its sawmill, held to be unlawful, such transfer being possible only with prior written approval.

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 handover 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 severed from that part under which he promised to handover 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.[84]

A prohibition of forward transactions in securities was held to be not applicable upon that part of the transaction which was for ready delivery (spot delivery), this part being separable from the other part.[85]

**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.[86]

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 restraint was imposed upon either of the two widows for remarriage. "All that was provided was that if a widow elected to remarry, she would be deprived of her rights."[87] Similarly, agreements that upon remarriage, the widow would lose the right to maintenance[88] and upon the husband marrying a second wife, the first would get the right to divorce him, have been upheld.[89]

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84. *Poonoo Bibi* v *Fyaz Buksh*, (1874) 15 BLR App 5. *See* also *LIC of India* v *Devendroppa*, AIR 1987 Kant 199, where a part of the consideration violated S. 77 of the Companies Act, 1956; *Central Inland Water Transport Corpn* v *B.N. Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571: (1986) 60 Comp Cas 797 where the Supreme Court pulled out the objectionable terms from a contract of service.
85. *BOI Finance Ltd* v *Custodian*, AIR 1997 SC 1952.
86. *Lowe* v *Peers*, (1768) 4 Burr 2225; *Moharrum Ali* v *Aysha Khatun*, (1915) 19 CWN 1226, where a condition in a marriage arrangement that if the husband married another woman, the first wife would divorce him was upheld; *Jamila Khatun* v *Abdul Rashid*, AIR 1939 Lah 165; *Latafatunnissa* v *Shaharbanu Begam*, AIR 1932 Oudh 108.
87. *Rao Rani* v *Gulab Rani*, ILR 1942 All 810; *relying* upon *Muhammad Hasan* v *Navi Jeham*, (1912) 10 All LJ 185.
88. *Latafatunnissa* v *Shaharbanu Begam*, AIR 1932 Oudh 108.
89. *Badu* v *Badarnessa*, (1919) 29 CLJ 230.

**Restraint of trade [S. 27]**

**27. Agreement in restraint of trade void.**—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

**Exception 1.—Saving of agreement not to carry on business of which goodwill is sold.**—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.

Freedom of trade and commerce is a right protected by the Constitution of India. Just as the Legislature cannot take away individual freedom of trade, so also the individual cannot barter it away by agreement. "The principle of law is this: 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."[90] "Every man should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit."[91] Section 27, therefore, declares in plain terms that: Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is, to that extent, void.

**All restraints covered whether partial or general**

*Madhub Chander* v *Raj Coomar*[92] is the first case in which the scope of the section came up for consideration 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 plaintiff sued him for the money contending that the restraint in question was only partial as he was restrained from exercising his profession only in one locality and that such restraints had been upheld in English law. COUCH J, however, held the agreement to be void and laid down:

> The words "restrained from exercising a lawful profession, trade or business", do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some place.[93]

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90. *Per* JAMES V.C. in *Leather Cloth Co* v *Lovsont*, (1869) LR 9 Eq 345, 354: 39 LJ (Ch) 86: 21 LT 661.
91. Lord MACMILLAN in *Vancouver Malt & Sake Brewing Co Ltd* v *Vancouver Breweries Ltd*, AIR 1934 PC 101.
92. (1874) XIV Bengal Law Reports 76.
93. *Per* MOOKERJEE and CANDRUFF JJ in *Shaikh Kalu* v *Ram Saran Bhagat*, (1909) 13 CWN 388: 1 IC 94. Similar opinions have been expressed in *Carew & Co Ltd* v *North Bengal Sugar Mills Co*, ILR (1951) 2 Cal 386, 388-89.

The learned judge 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, he concluded, that it was intended to prevent not merely a total restraint but also a partial restraint.

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." Thus, an agreement to close a mill for 3 months in a year,[94] and an agreement that one party would sell beef for 14 days in a month and the other for the rest of the month,[95] have been held void.

*Developments in English law*

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.*[96]

> The case involved a 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 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 held as unreasonable and, therefore, void. Lord MACNAGHTEN laid down: "The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and, therefore, void. That is the general rule. But there are exceptions. Restraint of trade... may be justified by the special circumstances of a particular case. The only justification is that the restriction should be reasonable—reasonable in reference to the interest of the parties and reasonable in reference to the public interest. The restriction should be so framed and guarded as to afford adequate protection to the party in whose favour it is imposed while at the same time it is in no way injurious to the public."[97]

*General principle in India and England same*

Thus both in England and in India the general principle is the same, namely, that all restraints of trade whether partial or total, are void.[98] The only difference is that

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94. *Khemchand Manekchand* v *Dayaldas Bassarmal*, AIR 1942 Sind 114.
95. *Mohammad* v *Ona Mohd Ebrahim*, AIR 1922 Upper Burma 9. *See* also *Harikrishna Pillai* v *Authilachmy Ammal*, AIR 1916 Lower Burma 51.
96. (1894) AC 535.
97. *Ibid.* at p 565.
98. *See*, for example, Chitty on CONTRACT (GENERAL PRINCIPLES), 21st Edn., pp. 481-82, where the learned writer says that "all contracts in restraint of trade are *prima facie* void, unless they are reasonable. For Indian authority *see* PIGOT and MCPHELSON JJ in *Nur Ali Dubash* v *Abdul Ali*, ILR (1892) 19 Cal 765, 773, where the learned judges observed: "Section 27 of the Indian Contract Act does away with the distinction between partial and total restraints of trade."

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. To the extent to which these exceptions are an embodiment of the situations in which restraints have been found reasonable in England, the two laws are identical and not "widely dissimilar".[1] The English law may be a little more flexible as the word "reasonable" enables the courts to adapt it to changing conditions. As Lord WILBERFORCE remarked in *Esso Petroleum Co Ltd* v *Harper's Garage (Stourport) Ltd*[2] "the classification (of agreements in restraint of trade) must remain fluid and the categories can never be closed". The following passage in a judgment of the Supreme Court[3] shows the effect of absence of the test of "reasonableness":

> "The question of reasonableness of restraint is outside the purview of Section 27 of the Contract Act and need not be gone into. Therefore, the present case has to be proceeded on the basis that an enquiry into reasonableness of the restraint is not envisaged by Section 27. On that view, instead of being required to consider two questions[4] as in England, the courts in India have only to consider the question whether the contract is or is not in restraint of trade."

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1. As was, for example, observed by MOOKERJEE and CARNDUFF JJ in *Shaikh Kalu* v *Ram Saran Bhagat*, (1909) 8 CWN 388, 392. The learned Judges said that as a result of the decision in the *Nordenfelt case* "the rule as embodied in Section 27 of the Indian Contract Act presents an almost startling dissimilarity to the most modern phase of the English rule on the subject".
2. (1968) AC 269: (1967) 1 All ER 699: (1967) 2 WLR 871.
3. *Gujarat Bottling Co Ltd* v *Coca Cola Co*, (1995) 5 SCC 545: (1995) 84 Comp Cas 618.
4. The following passage in the judgment of the Supreme Court (*ibid.*) explains the position of two questions under English law: "Under the common law in England traditionally the doctrine of restraint of trade applied to covenants whereby an employee undertakes not to compete with his employer after leaving the employer's service and covenants by which a trader who has sold his business agrees not thereafter to compete with the purchaser of the business. The doctrine is, however, not confined in its application to these two categories but covenants falling in these two categories are always subjected to the test of reasonableness. The general principle once applicable to agreements in restraint of trade has consequently been considerably modified by later decisions in England. The rule now is that restraints, whether general or partial, may be good if they are reasonable and any restraint on the freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A covenant in restraint of trade must be reasonable with reference to the public policy and it must also be reasonably necessary for the protection of the interest of the covenantee and regard must be had to the interests of the covenantor. Contracts in restraint of trade are prima facie void and the onus of proof is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect the interest of the covenantee and if this onus is discharged the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the contract. The court has to decide, as a matter of law, (*i*) whether a contract is or is not in restraint of trade, and (*ii*) whether, if in restraint of trade, it is reasonable. Instead of segregating two questions, (*i*) whether the contract is in restraint of trade, (*ii*) whether, if so, is it "reasonable", the courts have often fused the two by asking whether the contract is in "undue restraint of trade" or by a compound finding that it is not satisfied that this contract is really in restraint of trade at all but, if it is, is it reasonable." Another aspect of this case was, that one of the terms of the agreement with the company was that its shareholders would not transfer their shares during the currency of the agreement. This was held to be not hit by S. 27 because shareholders were not parties to the agreement and the company had no means to prevent them from selling their shares.

*"Profession, Trade or Business"*

But the Indian courts have not been rendered entirely sterile in the matter.[5] 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,[6] 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. On the other hand, the Allahabad High Court in *Pothi Ram* v *Islam Fatima*[7] upheld as valid a restrictive covenant on the ground that the activity restrained was not in the nature of "profession, trade or business".

> Two landlords in the same neighbourhood, in order to avoid competition, agreed that a market for sale of cattle shall not be held on the same day on the lands of both of them.

The High Court said: "It seems to us that a landlord who in return for tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising trade or business of selling cattle. He is only a landholder and an agreement on his part not to use the land on a certain day for a certain purpose does not amount to restraint of 'profession, trade or business'."

The strange contrast in these two cases is that while letting out land for commercial purposes is not a "profession, trade or business", the performance of religious services is.

The Madras High Court took the lead provided by the Allahabad High Court and came to the conclusion that submission of tenders for the purpose of obtaining a contract is not "a trade or calling".[8]

> A postal authority invited tenders for licence for carrying mails. 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.

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.[9] 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.[10] But, it is submitted with respect, that the decision is not an authority for the proposition that the collusion agreement between the bidders is itself valid and enforceable. In the United States such agreements have been held illegal.[11]

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5. *See*, for example, *Sandhya Organic Chemicals P Ltd* v *United Phosphorus Ltd*, AIR 1998 Guj 177, where the court observed that the principles of English common law can be used where the statutory provisions cannot be understood without the aid of English law, but not beyond that.
6. *Rewashankar Saniji* v *Vedji*, AIR 1951 Kutch 56.
7. AIR 1915 All 94.
8. *Mohd Isack* v *Daddapaneni*, AIR 1946 Mad 289.
9. The court relied upon the opinions expressed by the Bombay High Court in *Hari Balkrishna* v *Naro Moreshwar*, ILR (1893) 18 Bom 342 and by the Privy Council in *Mohd Mira Rowther* v *Savvasi Vijya Roghunanda*, ILR 23 Mad 227.
10. *Ibid.*
11. *See* RESTATEMENT OF THE LAW OF CONTRACT, Ch. 18, p 1002, where the rule is thus stated:

When the Madras High Court faced a problem of this kind again in a subsequent case,[12] it reluctantly held that "the precedents are far too numerous to be got over, even if one should be disposed to disagree with the underlying reasoning therein". The facts were that on an auction sale of 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.[13]

All these matters should now be taken in the light of the provision in S. 33(*i*)(*jb*) of the Monopolies and Restrictive Trade Practices Act, 1969 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.

Now by the virtue of this clause, such collusive agreements can be held to be void unless they are necessary in public interest within the meaning of Section 38. The clause is wide enough to cover cases of secret agreements as to participation in an auction according to pre-planned terms. Though collusive tendering has not been specifically included in the clause, it is likely to be covered by the wide ambit of the clause because it is often difficult to distinguish an auction from a tender when secret bids are invited in the shape of tenders.[14] For example, in *Perfect Circle Victor Ltd* case[15] the Commission issued cease and desist orders against three respondents manufacturing gaskets who were acting in concert by quoting the same or identical prices against tenders floated by the Director General of Supplies and Disposals.

*Knock-out Agreements*

In United Kingdom, the 'knock-out' agreements are covered by the Auctions (Bidding Agreements) Act, 1927. The Act provides that if any dealer agrees to give or gives or offers any gift or consideration to any other person as an inducement or reward for abstaining or having abstained from bidding at a sale by auction, either

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"A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stiffle competition, if illegal". Illustration 1 given in the Restatement is as follows: "*A* and *B* attending an auction of curious, make mutual promises by which each agrees to refrain from bidding for specified articles in order that the other may acquire them too cheaply. The agreement is illegal." Illustration 4 comes very close to the facts of the Madras case: "*A* advertises for bids for the construction of a building. *B*, a contractor, promises $ 1000 each to *C* and *D* if they will refrain from bidding. They do so. The bargains are illegal."

12. *Pattipati Ramalingaiah* v *Nagulanganta Subbarami*, AIR 1951 Mad 390. *See* further *Warner Bros Rec Inc* v *Rollgreen*, (1975) 2 WLR 816: (1975) 2 All ER 105, CA.

13. Following this, it has been held by the P & H High Court in *Sujan Singh* v *Mokhan Chand*, AIR 1983 P&H 180, that an agreement between two bidders not to bid against each other with an understanding that the successful bidder would convey half the property to the others is not against public policy.

14. Sachar Committee's recommended clause included tenders also. The recommended clause was: "An agreement or arrangement between two or more persons to tender for supply or purchase of goods or services at prices or on terms agreed or arranged between them".

15. RTP Enquiry, 120 of 1984, 24-4-1988. Similarly, in *Excel Industries Ltd*, (1988) 1 Comp LJ 53, three respondents who were major manufacturers of aluminium phosphide quoted identical rates in response to tenders floated by Food Corporation of India and reduced the rates by an identical amount during negotiations, the Commission passed cease and desist orders.

generally or for any particular lot or if any person agrees to accept or accepts or attempts to obtain from any dealer any such gift or consideration as aforesaid, he shall be guilty of offence under the Act. There is no special provision relating to collusive tendering or bidding in the Restrictive Trade Practices Act, 1976. But it seems clear that such bid agreements fall within Sections 6(1)(*a*) and 11(2)(*a*) of the Restrictive Trade Practices Act, 1976, as relating to the prices to be quoted for goods or services.[16] The agreement by which parties confer authority upon an association, or an individual, to adjust prices which they are to quote are also within these provisions.

In USA the practice of collusive tendering attracts the general provision of Section 1 of the Sherman Act which provides that every contract, combination or conspiracy in restraint of trade or commerce is illegal.

*Restrictions for Long Period*

The principle of the *Nordenfelt* case was applied by the House of Lords in *McEllistrim* v *Ballymacelligott*[17] where an agreement contained in the rules of a society by which a former member agreed that for an unlimited time he would sell all the milk he produced to a creamery run by the society was held to be invalid. The doctrine of restraint of trade has been reconsidered by the House of Lords in *Esso Petroleum Co Ltd* v *Harper's Garage*.[18] In this case, their Lordships struck down an exclusive dealing agreement because it extended to a period of twenty-one years, which was unreasonable. A five-year period would have been held to be reasonable.

> In holding that the doctrine applied to exclusive dealing agreements they opened up the possibility that it might be extended to every sort of contract because all contracts must need involve a restraint of some sort. They said that the doctrine applied only if a man contracted to give up some existing freedom which he had.[19]

*Restrictions in Lease*

Restrictions contained in a lease agreement as to the uses to which the premises can be put and what business would be done and in what name and style have been held to be not violative of Section 27.[20]

**Exceptions**

There are two kinds of exceptions to the rule, those created by statutes and those arising from judicial interpretation of Section 27.

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16. The report of the UK Monopolies Commission noted that any communication of prices between competitors and still more any adjustment of the amounts of tenders by arrangement between bidders would frustrate the purpose of the system of tendering. Since such tenders cease to be independent offers as they are held out to be, the practices are *prima facie* contrary to public interest.
17. (1919) AC 548.
18. (1968) AC 269.
19. *See* J.D. HEYDON, *The Restraint of Trade Doctrine reviewed*, 89 LQR 292. *See* also *Alec Lobb (Garages) Ltd* v *Total Oil G.B. Ltd*, (1983) 1 All ER 944 Ch D, where exclusive dealing agreement for an extended period of 21 years was held void as unreasonable restraint of trade however great the justification for the rest of the transaction which was found to be valid.
20. *Vidya Wati* v *Hans Raj*, AIR 1993 Del 187.

*Statutory Exceptions*

*1. Sale of Goodwill*

The only exception mentioned in the proviso to 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 difficult 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 customers."[21] Therefore, some restriction on the liberty of the seller becomes necessary. Indeed, the restriction is the only "means by which a saleable value is given to the goodwill of a business".[22] Far from being adverse to public interest, the restriction, by giving a real marketable value to the goodwill of a business, operates as an additional inducement to individuals to employ their skills and capital in trade and thus tend to the advantage of public interest.[23]

*MEANING OF GOODWILL.*—There should be a real goodwill to be sold. "Goodwill" being an abstract property, is not easy to define. In the words of Lord ELDON:

> The goodwill which has been the subject of sale is nothing more than the probability that the old customer will resort to old place.[24]

But in the opinion of Lord MACNAGHTEN, as expressed in a subsequent case, goodwill means much more than this:

> Often it happens that goodwill is the very sap and life of the business, without which the business would yield little or no profits. It is the whole advantage, whatever it may be, of the reputation and connection of firm, which may have been built up by years of honest work or gained by lavish expenditure of money.[25]

These opinions were adopted by the Judicial Committee in an appeal from a decision of the Calcutta High Court.[26]

> The plaintiff and the defendant were carrying on business as carriers of passengers by boats. The plaintiff sold his business to the defendant for a sum

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21. Lord MACNAGHTEN in *Trego* v *Hunt*, (1896) AC 7, 23 citing PLUMBER VC in *Harrison* v *Garder*, (1819) 2 Mad 219.
22. *D.W. Achuterlonie* v *Charles Bell*, (1868) 4 Mad HCR 77, 79.
23. *Ibid. See* also Lord PEARCE and Lord WILBERFORCE in *Esso Petroleum Co Ltd* v *Harper's Garage*, (1967) 1 All ER 699.
24. *Cruttwell* v *Lye*, 17 Ves 335, 346 cited by Lord HERSCHELL in *Trego* v *Hunt*, (1896) AC 7, 16.
25. *Ibid.*, pp. 23-24.
26. *Parasullah Malik* v *Chandrakanta Das*, (1917) 21 CWN 979. In appeal *Chandrakanta Das* v *Parasullah*, ILR (1930) 48 Cal 1030 PC.

of money and agreed to abstain from carrying on a boat business there for a period of three years.

The suit was brought to recover the promised sum. Allowing the plaintiff's action Lord HALDANE said: "Their Lordships entertain no doubt that what took place was the sale of goodwill within the meaning put on the expression in such cases as *Trego v Hunt*."

Where the aim of an agreement is prevention of competition, it will be void even if its nakedness is concealed behind the "imposing façade of a sale" of goodwill. An attempt of this kind was in evidence in *Vancouver Malt & Sake Brewing Co v Vancouver Breweries Ltd.*[27]

A company was licensed to manufacture liquor and beer but it confined its business to produce only "sake", a Japanese liquor made from rice. Its only customer was the Government. It entered into an agreement with another wine and beer manufacturing company by which it sold its business and goodwill of manufacturing wine and beer, but not the right to produce sake.

The agreement was held to be devoid of any content. "The only business in which it was engaged was the brewing of sake, and the goodwill of its licence so far as relating to sake was expressly excluded from sale. It had no goodwill to sell so far as regards the brewing of beer. Nothing has been sold. It is simply a case of the appellant undertaking to the respondent in consideration of a sum of money that it will not for 15 years carry on a particular branch of business. If there was any sale, it was a sale by the appellant of its liberty to brew beer and a purchase by the respondent of protection against the possible competition of the appellant in the brewing of beer." Lord MACMILLAN then referred to the judgment of Lord Chancellor BIRKENHEAD in *McEllistrim v Ballymacelligott Cooperative Agricultural & Dairy Society*,[28] that "the respondents were not entitled to be protected against mere competition", and continued to say that "covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, and have been found justified because they were reasonably necessary to render that transaction effective.

*LIMITS OF RESTRAINT.*—The agreement has to specify the local limits of the restraint. The seller can be restrained 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 which the goodwill is effectively enjoyed and the price paid for it.[29]

The seller can only be restrained from carrying on a similar business and also only for such period for which the business sold is actually carried on either by the buyer or by any person deriving title to the goodwill from him.

### 2. *Partnership Act*

There are four provisions in the Partnership Act which validate agreements in restraint of trade. Section 11 enables partners during the continuance of the firm to

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27. AIR 1934 PC 101.
28. (1919) AC 548, 563 HL.
29. See *Damodar Laxman Lele v Kashinath Waman Lele*, (1906) 9 Bom LR 312; *Dev Sharma v Laxmi Narain*, AIR 1956 Punj 49.

restrict their mutual liberty by agreeing that none of them shall carry on any business other than that of the firm.[30] Section 36 enables them to restrain an outgoing partner from carrying on a similar business within a specified period or within specified local limits. Such agreement shall be valid if the restrictions imposed are reasonable. A similar agreement may be made by partners upon or in anticipation of dissolution by which they may restrain each other from carrying on a business similar to that of the firm.[31]

It is necessary for the validity of a restraint under Section 36 or 54 that—

(1) the agreement should specify the *local limits or the period of* restraint, and

(2) the restriction imposed must be reasonable.[32]

An agreement by a retiring partner not to carry on similar business on the land belonging to him and adjoining the factory of the firm, has been held to be reasonable and binding on the persons buying the land from him.[33]

*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.[34] Thus, there are combinations of ice manufacturers,[35] grain merchants, sugar producers,[36] etc. The primary object of such associations is to regulate business and not to restrain it. Combinations of this kind are often desirable in the interest of trade itself and also for the promotion of public interest. 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,"[37] even if there is incidental deprivation of trade liberty. But the courts would not allow a restraint to be imposed disguised as trade regulations. Thus, an agreement between certain persons to carry on business with the members of their caste only,[38] and an agreement to restrict the business of a sugar mill within a zone allotted to it, have been held void.[39] 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 Ltd* v *Kulok Mfg Co Ltd.*[40]

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30. See *Daulat Ram* v *Dharam Chand*, AIR 1934 Lah 110, where two ice factory owners constituting a partnership agreed that only one factory will be worked at a time and its profits distributed among them. The restraint was held to be justified.
31. Section 54, Partnership Act.
32. See *Krishnarao* v *Shankar*, (1954) 56 Bom LR 973, where DESAI J, explained the rules as to reasonableness of restrictions at pp. 978-79; *Premji Damodar* v *L.V. Govind Jai & Co*, AIR 1943 Sind 197; *Dev Sharma* v *Laxmi Narain*, AIR 1956 Punj 49.
33. *Hukmi Chand* v *Jaipur Ice and Oil Mills*, AIR 1980 Raj 155.
34. *Bom Ice Co* v *S.B. Fraser & Co*, (1904) 6 Bom LR 23.
35. *Bhola Nath Shankar Das* v *Laxmi Narain*, (1931) 29 All LJ 84.
36. *Carew & Co Ltd* v *North Bengal Sugar Mills*, ILR (1951) 2 Cal 386.
37. *Municipal Committee* v *Kaluram Hiralal*, AIR 1944 Nag 73. *See* also *Haribhai* v *Sharaf Ali*, ILR (1897) 22 Bom 861; *Kuber Nath* v *Mahaliram*, (1922) 26 ILR All 587.
38. *Vaithelinga* v *Saminada*, ILR (1872) 2 Mad 44.
39. *Carew & Co Ltd* v *North Bengal Sugar Mills*, ILR (1951) 2 Cal 386.
40. (1959) Ch 108: (1958) 2 WLR 858: (1958) 2 All ER 65.

> Both companies were engaged in manufacturing similar products involving technical processes in which the employees were likely to acquire 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.

Though the agreement was between two employers who were dealing at arm's length and on equal terms, it was held to be void. It prohibited the appointment of any person by any one company or the other who had been in the service of one or the other for any period, however short, and in any capacity, however humble. The ban was applicable as much to an unskilled manual labourer who might have been employed even for a single day as to a highly skilled and long-term employee, as much to a dismissed servant as to one who might have resigned; as much to a lay employee as to one who might have acquired confidential knowledge.

Agreements as to regulation of prices and output are generally upheld as valid. Thus in a Bombay case:[41]

> 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 the agreement against Section 27, it was allowed.

Referring to the other part of the agreement, which fixed uniform rates, FARREN CJ said that an agreement of this description whereby traders agree amongst themselves to sell their wares at a fixed price, or labourers so agree to labour only at the stipulated wage have in the English courts usually been held void. But CANDY J disagreed with him. He believed that the apparent object was to prevent competition.[42]

The question again arose in *S.B. Fraser & Co* v *Bombay Ice Mfg Co.*[43]

> An agreement between certain ice manufacturers fixed the minimum price for sale of ice, the proportion of the manufacture which each was to bear and of profits which each was to receive, some of them were restrained from selling at Poona and some others at steamers.

RUSSEL J held that the agreement was not within the terms of Section 27, the whole object being to regulate business and not to restrain it.[44]

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41. *Haribhai* v *Sharaf Ali*, (1897) 22 ILR Bom 861.
42. At p 868. The learned Judge quoted that speech of Lord COLERIDGE in *Mogul Steamship Co* v *McGregor Gow & Co*, 21 QBD 553, "it seems it was no more in restraint of trade than if two tailors in a village agreed to give their customers five per cent in their bills on Christmas on condition of their customers dealing with them and them only". Followed by the Allahabad High Court in *Kubernath* v *Mohate Ram*, (1912) 26 ILR All 587. Now this has to be taken in the light of the provisions of the Monopolies and Restrictive Trade Practices Act, 1969 which provides in S. 33(1)(*d*) that price fixation for goods or service is deemed to be a restrictive trade practice unless it is saved by S. 38 of that Act which permits certain restrictions in public interest.
43. (1904) 29 ILR Bom 107.
44. The learned Judge cited a number of decisions from the United States in which it has been held that competition is not always a public benefaction. *See* at pp. 30-31 of 6 Bom LR 1904.

Finally, the Allahabad High Court faced the problem in *Bhola Nath Shankar Das* v *Lachmi Narain*.[45]

> The rules of an association of traders and weighmen provided that members shall not deal with outsiders, the penalty for breach being fine and expulsion. The legality of the association was attacked on the ground that its objects and methods were unlawful as it aimed at the creation of a monopoly by shutting out all competition and was a defiance of the spirit of Sections 23 and 27.

Rejecting this contention, SEN J quoted Baron ALDERSON in *Hilton* v *Eckersley*[46] as saying: *"prima facie* it is the privilege of a trader in a free country in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice."[47]

2. *Solus or Exclusive Dealing Agreements*[48]

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. Indeed "in one sense, every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade for, if *AB* agrees to sell goods to *CD*, he precludes himself from selling them to anybody else".[49] 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;[50] an agreement by a person to sell all the salt manufactured by him to a firm for five years;[51] an agreement by a person to send all the mica produced by him to the plaintiffs, and not to send them to any other firm, nor to keep any in stock[52] and an agreement by a buyer of goods for Calcutta market, not to sell them in Madras, have all been held to be outside the scope of Section 27 and therefore valid. Such negative stipulations do not have the effect of restraining the manufacturer. "On the contrary, he is encouraged to exercise his business because he is assured of a certain market for the products of his labour."[53]

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45. (1931) 29 All LJ 84.
46. 6 E&B 47.
47. At p 87 of the All LJ. *See* also *Municipal Committee, Khurai* v *Kaluram Hiralal*, AIR 1944 Nag 73.
48. *See* Peter G. Whiteman, *Agreements in Restraint of Trade*, (1966) 29 Mod L Rev 77, where agreements of this kind are considered. Also *see* a note in (1967) 2 Juridical Rev 170-71; *Mac Iyntyre* v *Cleveland Petroleum Co*, (1967) SLT 95.
49. HANDLEY J in *Mackenzie* v *Striramiah*, ILR (1890) 8 Mad 472, 474.
50. *Carliles Nephews & Co* v *Ricknauth Buckermull*, ILR (1882) 8 Cal 809.
51. *Mackenzie* v *Striramiah*, (1890) 8 Mad 472.
52. *Subha Naidu* v *Haji Badsha Sahib*, ILR (1902) 26 Mad 168.
53. *Abdul Karim* v *Seikh Dubar*, AIR 1937 Oudh 445. *See* particularly the judgment of S.R. DAS GUPTA J in *Carew & Co* v *North Bengal Sugar Mills*, ILR (1951) 2 Cal 386 where all such cases are collected. *See* also the judgment of MOOKERJEE and CARNDUFF JJ in *Shaikh Kalu* v *Ram Saran Bhagat*, (1908) 8 CWN 888, where they have cited a large number of instances of such cases from the United States.

But where a manufacturer or supplier, after meeting all the requirements of a buyer, has surplus to sell to others, he cannot be restrained from doing so.[54] The buyer cannot restrain the seller from dealing with others unless he can acquire the whole stock during the period of the agreement. But even so the court may not countenance the agreement particularly where the buyer intends to corner or monopolise the commodity so that he may resell at his own price or where he binds the seller for an unreasonable period of time. Thus, in *Shaikh Kalu* v *Ram Saran Bhagat*:[55]

> 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 products to *R. S.*, and to his heirs and not to sell the same to any one else.

Holding the agreement void under Section 27, the court said: "It bound the manufacturers from generation to generation; it was unrestricted both as to time and place; it was oppressive; it was intended to create a monopoly."[56]

The House of Lords has held that twenty-one-year period of exclusive dealing would be unreasonably long. The case before their Lordships was *Esso Petroleum Co* v *Harper's Garage (Stourport) Ltd.*[57]

> Esso Co had an agreement with two garages which was to bind one for about four and a half years and the other for 21 years. During this period they had to buy the whole of their requirements from Esso and to operate the garages in accordance with Esso co-operation 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.

The House of Lords unanimously held that the agreement fell within the sphere to which the doctrine of restraint applies and the period of 21 years being not reasonable, it was void, but the tie with the other garage for four years and five months was reasonable. Lord PEARCE laid down:

> The doctrine does not apply to ordinary commercial contracts for the regulation and promotion of trade during the existence of the contract provided that any prevention of work outside the contract viewed as a whole is directed towards absorption of the parties' services and not their sterilisation. Sole agencies are a normal and necessary incident of commerce, and those who desire the benefit of a sole agency must deprive themselves the opportunities of other agencies. So too, in the case of a film star who may tie himself to a company in order to obtain from them the benefits of stardom.[58]

Where a contract is reasonable and fair at the beginning, but circumstances have arisen which show that it is being enforced by one party in a manner which is prejudicial to the interest of the other, the courts will hold the agreement to be

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54. *Har Bilas* v *Mahadeo Pd.* AIR 1931 All 539.
55. (1908) 8 CWN 388.
56. *Ibid.*, at p 396. *See* also *Abdul Karim* v *Seikh Dubar*, AIR 1937 Oudh 445
57. (1968) AC 269: (1967) 1 All ER 699.
58. *Gaumont British Picture Corpn Ltd* v *Alexander*, (1936) 2 All ER 1686; *Warner Bros Picture Inc* v *Nelson*, (1937) 1 KB 209: (1936) 3 All ER 160. See *Restrictive Trade Practices*, 87 LQR 481: (1937) 35 Mod LR 651; Rudolf Graupner, *Sole Distributorship Agreements*, (1969) 18 ICLQ 879.

unenforceable, though not void or invalid. This opinion has been expressed by the Court of Appeal in *Shell U.K. Ltd* v *Lostock Garages*.[59]

> A petrol pump was tied to Shell for a period which the court found to be reasonable. Subsequently, on account of a sharp rise in petrol prices sales suffered and in order to counteract this, some of the petroleum companies encouraged their pumps to cut prices. The Shell Company did not do so, but instead adopted a support plan to compensate their pumps for losses suffered by them in selling at competitive prices. This support plan did not apply to Lostock because his sales had not suffered to the extent contemplated by the support plan. Lostock attempted to get supplies from other companies and an injunction was sought against him. No injunction was, however, granted.

Lord DENNING MR first remarked that "it is now settled beyond doubt that a solus agreement is a contract in restraint of trade. As such it comes within that special class in which the courts can investigate the terms of the contract and see whether they are fair and reasonable. If they are unfair and unreasonable, the courts may refuse to enforce them". His Lordship found that there was nothing unreasonable in the contract, it being only for five years. "At that time the parties did not anticipate that circumstances would arise in which Shell would subsidise neighbouring garages to such an extent as to force Lostock to trade at a loss. That contingency was so improbable and extravagant that it would not invalidate the tie at the time it was made." His Lordship then laid down that the court should not enforce a covenant in restraint of trade if circumstances afterwards arise in which it would be unreasonable or unfair to enforce it.

An agency for sale of the goods of a German company in India which carried a term restraining the Indian company from selling goods for 5 years after the termination of the contract was held to be not enforceable.[60] An agreement of this kind was okayed by the Supreme Court where it was confined to the currency of the agreement. The case before the court was *Gujarat Bottling Co Ltd* v *Coca Cola Co*.[61]

An agreement for grant of franchise by Coca Cola Co to Gujarat Bottling Co to manufacture bottle sell and distribute beverages under trade marks held by the franchiser contained the negative stipulation restraining the franchisee to "manufacture, bottle, sell, deal or otherwise be concerned with the products, beverages of any other brands or trade marks/trade names during subsistence of this agreement including the period of one year's notice". It was held that the negative stipulation was intended to promote the trade. Moreover, operation of the stipulation was confined only to subsistence of the agreement and not after termination thereof. Hence stipulation could not be regarded as in restraint of trade.[62]

The court proceeded as follows:

> "A stipulation in a contract which is intended for advancement of trade shall not be regarded as being in restraint of trade. Similarly, except in cases where the contract is wholly one-sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the

59. (1977) 1 All ER 481, CA.
60. *Taprogge Gesellschaft MBH* v *IAEC India Ltd*, AIR 1988 Bom 157.
61. (1995) 5 SCC 545: (1995) 84 Comp Cas 618.
62. The court referred to S. 2(*a*) of the Monopolies and Restrictive Trade Practices Act, 1969.

period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract."

"There is a growing trend to regulate distribution of goods and services through franchise agreements providing for grant of franchise by the franchiser on certain terms and conditions to the franchisee. Such agreements often incorporate a condition that the franchisee shall not deal with competing goods. Such a condition restricting the right of the franchisee to deal with competing goods is for facilitating the distribution of the goods of the franchiser and it cannot be regarded as in restraint of trade.

The agreement in question in this case was an agreement for grant of franchise by Coca Cola to GBC to manufacture, bottle, sell and distribute the various beverages for which the trade marks were acquired by Coca Cola. It was thus, a commercial agreement whereunder both the parties have undertaken obligations for promoting the trade in beverages for their mutual benefit. The purpose of the negative stipulation contained in the agreement was that GBC will work vigorously and diligently to promote and solicit the sale of the products/beverages produced under the trade marks of Coca Cola. This would not be possible if GBC were to manufacture, bottle, sell, deal or otherwise be concerned with the products, beverages or any other brands or trade marks/trade names. Thus, the purpose of the said agreement is to promote the trade and the negative stipulation seeks to achieve the said purpose by requiring GBC to wholeheartedly apply to promote the sale of the products of Coca Cola. Moreover, since the negative stipulation is confined in its application to the period of subsistence of the agreement and the restriction imposed therein is operative only during the period the agreement is subsisting, the said stipulation cannot be held to be in restraint of trade so as to attract the bar of Section 27 of the Contract Act."

### 3. *Restraints upon Employees*

*RESTRAINTS 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; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained."[63] 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*:[64]

> *A* agreed to become assistant for three years to *B* who was a physician and 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.

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63. *Herbert Morris Ltd* v *Saxelby*, (1916) 1 AC 688, 714, *per* Lord SHAW.
64. 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.

But he was restrained from doing so during the period of three years. FARRAN CJ explained the principle thus:

> An agreement of this class does not fall within Section 27. If it did, all contracts of personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for anyone else than the person with whom he so agrees.[65]

The principle was applied by KANIA AG CJ (as he then was) of the Bombay High Court in *V.N. Deshpande* v *Arvind Mills Ltd.*[66]

> The defendant took employment as a weaving master in a mill and agreed not to serve in that capacity for three years for anyone else in any part of India.

An injunction was granted to restrain him in terms of the agreement.[67]

*RESTRAINTS AFTER TERMINATION OF EMPLOYMENT.*—But an agreement to restrain a servant from competing with his employer after the termination of employment may not be allowed by the courts. Thus, in *Brahmaputra Tea Co* v *E. Scarth*,[68] where an attempt was made to restrain a servant from competing for five years after the period of service, the court observed:

> Contracts by which persons are restrained from competing, after the term of their agreement is over, with their former employers within reasonable limits, are well known in English law, and the omission to make any such contract an exception to the general prohibition contained in Section 27 indicates that it was not intended to give them legal effect in this country.[69]

The principles thus established have been approved by the Supreme Court in *Niranjan Shanker Golikari* v *Century Spinning & Manufacturing Co Ltd.*[70]

> 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 arrangements from its employees. The defendant was appointed for a period of five years, the condition being 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 defendant was accordingly restrained from serving anywhere else during the currency of the agreement.

> The evidence is clear that the appellant has torn the agreement to pieces only because he has been offered a high remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued

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65. ILR (1898) 23 Bom 103. *See* for further study: J. Finch, *Restraint Clauses in General Medical Practitioner's Partnership*, 132 New LJ 27.
66. AIR 1946 Bom 423. *See* also *Lalbhai D. & Co* v *Chittaranjan*, AIR 1966 Guj 189.
67. The Ag. Chief Justice reviews at pp. 425-28 all the leading English cases on the subject. For other illustrations see *Pragji* v *Pranjiwan*, (1903) 5 Bom LR 878; *Madras Rly Co* v *Rust*, (1890) 4 Mad 18; *Subha Naidu* v *Haji Badshah*, (1902) 26 Mad 168; *Burn & Co* v *Mc Donald*, (1909) 36 Cal 354; *Niranjan Shankar Golikari* v *Century Spinning & Mfg Co*, AIR 1967 SC 1098, a restraint during five years' term of service, held reasonable.
68. ILR (1885) 11 Cal 545.
69. MADONNEL and MAC PHERSON JJ at pp. 549-50.
70. (1967) 2 SCR 378: AIR 1967 SC 1098.

against him is restricted as to time, the nature of employment and as to area and cannot therefore be said to be too wide or unreasonable or unnecessary for the protection of the interest of the respondent company.

The learned judge distinguished the case from the decision of A.N. RAY J (as he then was) of the Calcutta High Court in *Gopal Paper Mills Ltd* v *Surendra K. Ganesh Das Malhotra*[71] where an injunction to enforce a negative covenant during the period of employment was refused as the agreement was for a period of twenty years and its terms were also unconscionable. SHELAT J said:

> The period of contract there was as much as 20 years and the contract gave the employer an arbitrary power to terminate the service without notice... such a contract would clearly be held void as being one-sided.

In England the position of such restrictive covenants has been described to be "still an uncertain field". Lord WILBERFORCE observed in the *Esso Petroleum* case:

> Certain contracts of employment, with restrictions appropriate to their character against undertaking other work during their currency may be acceptable. Here too, however, if it is found that the restriction is purely limitative or sterilising, it may be subject to examination.

*PROTECTION OF TRADE SECRETS.*—One of the principles is that a master is not entitled to restrain his servant after the termination of employment from offering competition, but he is entitled to reasonable protection against exploitation of trade secrets.[72] In *Mason* v *Provident Clothing Co*[73] the House of Lords did not allow an employer to restrain his canvasser for a period of three years after the termination of his service. Viscount HALDANE LC pointed out that capacity for canvassing is a natural gift and not due to special training provided by the employee.

> Had they been content with asking him to bind himself not to canvass within the area where he had actually assisted in building up the goodwill of their business, or in an area restricted to places where the knowledge which he had acquired in his employment could obviously have been used to their prejudice, they might have secured a right to restrain him within these limits.

On the other hand, in *Fitch* v *Dewes*[74] the House of Lords allowed a covenant by which a solicitor's clerk was restrained from practising within 7 miles of the city,

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71. AIR 1962 Cal 61. The Court cited *W.H. Milsted & Sons Ltd* v *Hamper Ross & Glendining Ltd*, (1927) WN 233.

72. *See* the judgment of YOUNGER LJ in *Attwood* v *Lamont*, (1920) 3 KB 571: (1920) All ER Rep 55.

73. (1913) AC 724: (1911-13) All ER Rep 400, HL. *See* also *Marshall* v *N.M. Financial Mgt Ltd*, (1995) 4 All ER 785. In this case, a sales agent was working on the condition that for one-year period after the termination of employment he would not become an independent intermediary or become employed in any direct or indirect competitor. This was held to be an invalid restraint of trade. It was far wider than was really necessary for protecting the employer's clientage. The restriction was preventive of competition over a much wider range than was necessary. The employer was permitted to forfeit his arrears of commission. *Sandhya Organic Chemicals P Ltd* v *United Phosphorus Ltd*, AIR 1998 Guj 177, an 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. *Certact Ptc Ltd* v *Tang Stew Choy*, (1991) 3 Current LJ 2269 High Court, Singapore, list of suppliers and customers is property of employer, employee can be restrained from using such trade secrets and confidential information.

74. (1921) 2 AC 158: (1921) All ER Rep 13, HL. A restraint upon a ladies hairdresser that she

it being reasonably necessary for protecting the interest of both parties. But in no case the court would allow covenants against competition. In *Attwood* v *Lamont*[75] the employer was running several departments in connection with tailoring *etc.* and the employee was the superintendent only of the tailoring department. The agreement with him was that after ceasing to be an employee he would not engage himself within 10 miles in any of the business being run by the employer in addition to tailoring. The Court of Appeal held the agreement not only to be unnaturally wide but also in restraint of competition. YOUNGER LJ cited the following passage from the speech of Lord PARKER in *Morris* v *Saxelby*:[76]

> The reason and the only reason for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of the trade connection or in the nature of trade secrets, for the protection of which such a restraint, is, having regard to the duties of an employee, reasonably necessary. Such a restraint has never been upheld, if directed only to the prevention of competition or against the use of the personal skill and knowledge acquired by the employee in his employer's business.

In a subsequent case:[77]

> The defendants were employed by the plaintiffs as agents for debt collection for the city of Birmingham. A clause of the agreement provided: "For a period of six months after the determination of employment the defendants would not solicit business from any person, firm or companies who shall at any time have been a client." The defendants left and started a debt collection agency of their own. The plaintiff prayed for an injunction.

It was held that the injunction would not be granted, for the covenant was far too wide and was an unreasonable restraint of trade, since it extended to the whole area of the plaintiffs' operation whereas the defendants were employed in Birmingham alone.

Similarly, in a Canadian case:[78]

> 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 obtained 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.[79]

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should not work after the termination of her employment at a competitive place for 12 months and within half a mile of the place, has been held to be reasonable. *Marion White Ltd* v *Francis*, (1972) 1 WLR 1423.

75. (1920) 3 KB 571: (1920) All ER Rep 55.
76. (1916) 1 AC 688, 710.
77. *Financial Collection Agencies Ltd* v *Batey*, The Times, May 1973: (1973) New LJ 469.
78. (1971) 23 DLR (3rd) 632, Ontario Court of Appeal.
79. For a discussion of the subject and case *see* Poonuswami, *Public Interest and Restrictive Trade Practices in India*, (1963) Indian Yearbook Intll. Affairs 256-280. *See* also *John*

A restriction, even when otherwise justified, for a period of five years was held to be unreasonable in the case of an employee who earned only a modest wage.[80] A rule in the terms of employment providing that in case a servant took employment with a competitor his pension benefits would be forfeited has been held to be void.[81]

*AGREEMENT BETWEEN EMPLOYERS.*—An agreement between two employers that neither would employ any person who had been the other's employee within a period of 5 years has been held to be void as it imposed too wide and unreasonable restriction upon freedom of employment.[82]

*EFFECT OF PREMATURE REMOVAL.*—A restriction of this kind will cease to be effective against an employee who has been prematurely removed without his fault.[83] The Supreme Court also pointed out that a restraint beyond the term of service would be *prima facie* void and that the only ground on which it could be justified is by bringing it within the scope of the exception, that is, by showing that it is necessary for the protection of the employer's goodwill. The court further said that even if such a restraint is valid, it will only apply after the expiry of the term in its natural course, and not when the employee is wrongfully dismissed earlier. It could also apply if the employee left his service earlier. But leaving a service is different from premature termination. The restraint clause became inapplicable.[84]

**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".[85] Thus, any clause in an agreement providing that neither party shall have the right to enforce the agreement by legal proceedings is void.[86] An arrangement may, however, stipulate that there is no intention to contract, or that it is only a gentleman's agreement. In such a case, no action is possible under the agreement.[87]

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.

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*Michael Design Plc.* v *Cooke*, (1987) 2 All ER 332 CA, an injunction against ex-employee soliciting customers during the period of restraint.

80. *M. & S. Drapers* v *Reynolds*, (1957) 1 WLR 9: (1956) 3 All ER 814.
81. *Bull* v *Pitney Bowes Ltd*, (1967) 1 WLR 273: (1966) 3 All ER 384. *Provident Financial Group plc* v *Hayward*, (1989) 3 All ER 298 CA, an injunction was not to be granted where the defendant did not have any relevant confidential information of the plaintiffs which would be of use to the rival company and there was no real prospect of serious or significant damage to the plaintiffs from the defendant working as financial controller for the rival company for the short period which remained of his contract.
82. *Kores Mfg Co Ltd* v *Kolok Mfg Co Ltd*, (1959) Ch 108: (1958) 2 WLR 858: (1958) 2 All ER 65.
83. *Superintendence Co of India Ltd* v *K. Murgai*, (1981) 2 SCC 246: AIR 1980 SC 1717.
84. A parallel English authority is *General Billposting Co* v *Atkinson*, (1909) AC 118.
85. HALSBURY'S LAWS OF ENGLAND, Vol 9, 352.
86. See *Baker* v *Jones*, (1954) 1 WLR 1005.
87. *Rose & Frank* v *Crompton*, (1925) AC 445.

(2) An agreement which limits the time within which the contract rights may be enforced.

**28. Agreements in restraint of legal proceedings void.**—[88][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

(*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.**—[89]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.[90]

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88. *Subs.* by Act 1 of 1997, S. 2.

89. The second clause of Exception 1 to S. 28 was *repealed* by the Specific Relief Act, 1877 (1 of 1877), S. 2 and Sch. I. The clause is, however, printed here in italics, because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

90. *Cf.* the Arbitration Act, 1940 (10 of 1940) and the Companies Act, 1956 (1 of 1956), S. 152.

**Restriction on legal proceedings**

Explaining the section, GARTH CJ of the Calcutta High Court observed in *Coringa Oil Co* v *Keogler*:[91]

> 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.

The right to appeal does not come within the purview of the section. A party to a suit may agree not to appeal against the decision.[92]

*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. According to the Limitation Act, 1963, 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. Thus, a clause in a policy of life insurance declaring that "no suit to recover under this policy of life insurance shall be brought after one year from the death of the assured" was held void.[93] Similarly, clauses in the standard fire insurance policy of the insurer curtailing limitation to 12 months of the occurrence of the event or 3 months of the rejection of the claim by the insurer were not permitted to be invoked to bar the claim filed within three years.[94] 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 the time when the cause of action accrues was held valid, the court saying that the effect of the agreement was not to limit the time but to provide for the surrender of rights if no action was brought within that time.[95] The case has been adversely criticised.[96] But that view seemed to have been affirmed by the Supreme Court in *Vulcan Insurance Co* v *Maharaj Singh*,[97] where the court observed that "it has been repeatedly held that such a clause is not hit by Section 28 and is valid". This was further affirmed in *National*

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91. (1876) 1 Cal 466, 468-69.
92. See *Munshi Amir Ali* v *Inderjit Koer*, (1871) 9 Bengal LR 460, a decision of the Privy Council before the Contract Act was passed. It has been followed by the Allahabad High Court in *Anant Das* v *Ashburner & Co*, (1876) 1 All 267.
93. *Ma Ywest* v *Chin Mutual Life Ins Co Ltd*, 91 IC 622, but cf. *Hirabhai Harotam* v *Manufacturers Life Ins*, 16 IC 1001: (1912) 14 Bom LR 741.
94. As contemplated by Art. 44(*b*) of the Limitation Act, 1963. See *Harshad Coop Marketing Society Ltd* v *United India Fire and Gen Ins Co Ltd*, AIR 1992 Bom 341. *New India Assurance Co* v *Food Corpn of India*, (1996) 1 Mad LJ 265, notice issued within six months as required, filing of suit within three years thereafter, held, within time.
95. *Hirabhai* v *Manufacturers Life Ins*, 16 IC 1001: (1912) 14 Bom LR 791.
96. See *Baroda Spinning & Weaving Co Ltd* v *Satyanarain Marine & Fire Ins Co*, (1914) 38 Bom 344. *See* the judgment of SCOTT J at pp. 348, 353. *See* also *New Asiatic Ins Co* v *B.S. Cooperative Bank*, AIR 1966 Pat 69, where a clause requiring notice of loss within ten days was upheld.
97. (1976) 1 SCC 943: AIR 1976 SC 287; *Baroda Spg & Wvg Co* v *Satyanaranynan Marine & Fire Ins Co*, (1913) 15 Bom LR 948.

*Insurance Co* v *Sujir Ganesh Nayak & Co.*[1] The clause in question provided that "in no case whatsoever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or damage unless the claim is the subject of pending action or arbitration". The claimant notified to the insurer the fact of strike which caused loss but did not commence proceedings within the stipulated time. The court reversed the decision of the Kerala High Court and held that the clause was valid and its operation had ended the plaintiff's claim.[2]

A suit was filed 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.[3]

**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.

*Forfeiture and Surrender of Rights*

Cases of this sort have been distinguished from those which provide for surrender or forfeiture of rights if no action is 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.[4]

The clause was held valid. Similarly, a clause that the company shall not be liable if no suit were brought within 12 months after the occurrence of the loss;[5] and a clause in a bill of lading providing that "in any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless a suit is brought within one year after the delivery of the goods,[6] have been upheld. The reason why clauses of this kind have been allowed is that the extent of loss or damage can be measured with a certain amount of accuracy when the matters are fresh. "Lapse of time in such cases may

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1. AIR 1997 SC 2049: (1997) 4 SCC 366: (1997) 89 Comp Cas 131. *See* also *Food Corpn of India* v *New India Ass Co*, (1994) 3 SCC 324: AIR 1994 SCW 1827, where the nature of the restriction in S. 28 was considered in the context of the restrictive clauses.
2. The Kerala decision is reported in AIR 1996 Ker 49. Reasons for not permitting shorter period of limitation than that prescribed by the Limitation Act, 1963 were explained in *Muni Lal* v *Oriental Fire & General Ins Co Ltd*, (1996) 1 SCC 90: AIR 1996 SC 642: (1996) 86 Comp Cas 60.
3. *State of AP* v *United India Ins 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 Lal* v *Oriental Fire & Gen Ins Co Ltd*, (1996) 1 SCC 90, prohibiting prescription of shorter limitation than prescribed by the Limitation Act, 1963.
4. *Girdharilal* v *Eagle Star Ins Co*, (1923) 27 CWN 955.
5. *Ghose* v *Reliance Ins*, 11 Rang 475; *Ruby General Ins Co* v *Bharat Bank*, AIR 1950 EP 852; *Pearl Ins Co* v *Atma Ram*, AIR 1960 Punj 236.
6. *Haji Shakoor Gany* v *Hinde & Co*, AIR 1932 Bom 330.

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."[7]

The Jammu and Kashmir High Court extended the same principle to Government contracts. In a case before it:[8]

> A clause in a Government contract provided that the President of India shall be discharged from all liability under the contract unless an arbitration or a suit is commenced within six months from the expiration of the period.

The clause was held to be valid. Explaining the distinction between extinction of rights and limitation of time, the court said:[9]

> 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 specified event occurs.
>
> What Section 28 forbids, is not extinguishment of the rights or liabilities of a party to a contract on the happening of a specified event, but the limiting of the time within which a party may enforce his rights. It is obvious that a party will have no right to enforce, if the rights have already been extinguished under the contract. In such a case, there can be no question of the time for the enforcement of the rights being limited. What happens is that the right itself ceases to exist.

Where the need for reduction of time to sue has already been taken care of by a statute, there cannot be further reduction. Under Section 10 of the Carriers Act, 1865 notice of loss or damage must be given within six months, otherwise the right to sue is lost. A contract 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.[10]

### *"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.[11] An

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7. KAPUR J in *Ruby General Ins Co* v *Bharat Bank*, AIR 1950 EP 352. Another pre-amendment case is *HP Horticultural Produce Marketing and Processing Corpn Ltd* v *United India Insurance Co*, AIR 2000 HP 11, the right to sue was lost because the suit was not filed within the stipulated period of 12 months from the date of rejection of the claim.
8. *Prithvi Nath Malla* v *Union of India*, AIR 1962 J&K 15.
9. Followed, *Kasim Ali* v *New India Ins Co*, AIR 1968 J&K 3 Q. *See* also *Governor-General in Council* v *Badri Das Gauri Dutt*, AIR 1951 All 702. A clause in bank guarantee that action should be filed within 6 months of expiry of the guarantee, held, it was not available after the expiry of 6 months. *Kerala Electric and Allied Engg Co* v *Canara Bank*, AIR 1980 Ker 151, following *State of Maharashtra* v *M.N. Kaul*, AIR 1967 SC 1634. The 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. Held, that the right to refer ceased after 28 days. But in *Rajasthan Handicrafts Emporium* v *American World Airways*, AIR 1984 Del 396, a clause in an airway bill that "no action shall be commended" after certain time was held to be void. It was not a mere forfeiture clause.
10. *M.G. Bros Lorry Service* v *Prasad Textiles*, (1983) 1 SCC 61: AIR 1984 SC 15.
11. *Raigarh Jute and Textile Mills Ltd* v *New Haryana Transport Co*, (1994) MPLJ 626, parties by mutual agreement choosing one out of several courts having jurisdiction to try the suit, is not against public policy.

illustration of partial restriction is the decision of the Calcutta High Court in *Continental Drug & Co Ltd* v *Chemoids & Industries Ltd.*[12]

> 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.

Holding the clause to be valid and binding, LAHIRI J said:

> If there are two courts which are equally competent to try the suit, an agreement between the parties that the suit should be instituted in one of those two courts cannot be said to be an absolute restriction on the right of taking legal proceedings. It has been established by a long line of judicial decisions that such an agreement does not contravene the provisions of Section 28 if the chosen court has jurisdiction to try the suit under ordinary law.[13]

This has been affirmed by the Supreme Court in *Hakam Singh* v *Gammon (India) Ltd.*[14] The court laid down:[15]

> It is not open to the parties by agreement to confer jurisdiction on a court which it does not possess under the Civil Procedure Code.[16] But where two

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12. AIR 1955 Cal 161. Where the selection of the forum is valid, that forum cannot be excluded from entertaining the suit only because the amount involved is paltry six hundred rupees. *East India Hat Co* v *Prakash Roadlines P Ltd*, (1986) 2 Punj LR 39 Del. The court applied the principles laid down in *Globe Transport Corpn* v *Triveni Engg Works*, (1983) 4 SCC 707: (1984) 86 PLR 259 SC and *Snehal Kumar* v *Economic Transport Orgn*, AIR 1975 Guj 72. *Thakral & Sons* v *Indian Petro Chemical Corpn Ltd*, AIR 1994 Delhi 226, out of three jurisdictions, agreement restricted to one, valid. *Chowksi & Co* v *Bansiram Kartar Chand*, 2000 AIHC 2621 (Raj) no explicit clause in the contract excluding jurisdiction.

13. The learned Judge cited: *Acharatlal Kesavlal Mehta & Co* v *Vijaram & Co*, AIR 1925 Mad 1145; *Raghavayya* v *Vasudevayya*, AIR 1944 Mad 47; *Tilakram Chaudhari* v *Kodumal Jethanand*, AIR 1925 Bom 175; *A. Milton & Co* v *Ojha Automobile Engineering Co*, AIR 1931 Cal 279. *See* further cases cited at p 418 of Ponnuswami and Puri, CASES AND MATERIALS ON CONTRACT. A contract providing for jurisdiction of Dhanbad courts only has been held to be binding. The excluded court cannot consider the balance of convenience. *Ganpatrai Agarwal* v *Fertiliser Corpn*, AIR 1984 Cal 35.

14. (1971) 1 SCC 286: AIR 1971 SC 740: (1971) 3 SCR 313.

15. (1971) 3 SCR 316-17: (1971) 1 SCC 288. A consignment note signed neither by the consigner nor consignee and containing a clause on the back excluding the jurisdiction of all the courts except one was held to be not binding. There was no proper notification. *Road Transport Corpn* v *Kirloskar Bros*, AIR 1981 Bom 299. A lottery ticket containing at the reverse in small print conditions about jurisdiction, held not binding as there was no proper notice. *Special Secy Govt of Rajasthan* v *Venkataramana Seshiyer*, AIR 1984 AP 5. However, parties can opt for any available jurisdiction and exclude others. *Globe Transport Corpn* v *Triveni Engg Works*, (1983) 4 SCC 755; *All Bengal Transport Agency* v *Hare Krishna Banik*, AIR 1985 Gau 7, a contract of carriage allowing the sender only one jurisdiction out of several available under CPC, held valid. *Kumuo Agarwal* v *Fertiliser Corpn of India*, AIR 1985 Cal 89, contract provided for jurisdiction of Gorakhpur courts. Held, action could lie only at Gorakhpur. The court may however relieve a party from clauses where the court finds that jurisdiction permitted by the agreement is so inconvenient that it would be oppressive, inequitable and unfair for the party. *Patnaik Industries* v *Kalinga Iron Works*, AIR 1984 Ori 182. Parties' choice of forum under an arbitration agreement does not violate S. 28. *Indian Rare Earths Ltd* v *Unique Builders Ltd*, AIR 1987 Ori 30 where a clause that the courts of Maharashtra only would have jurisdiction has been held to be valid and not vague or uncertain. *See* also *Biswanath Chowdhary* v *U.P. Forest Corpn*, AIR 1986 Cal 334, a clause that suits would be filed at Lucknow was held to be binding and an action allowed at Calcutta on balance of convenience was revoked. *Economic Transport Orgn* v *United India Ins Co*, 1986 Ker LT 220: (1986) 2 TAC 25, mere delivery of a printed document does not constitute a contract so as to exclude jurisdiction.

16. Relied upon in *Patel Roadways Ltd* v *Prasad Trading Co*, (1991) 4 SCC 270: AIR 1992 SC

courts or more have under the Code of Civil Procedure jurisdiction to try a suit, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act.[17]

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 a convenient one, i.e. available at reasonable expense and not inaccessible.[18]

It is necessary that serious terms of this nature must be specifically brought to the notice of the parties whose rights are sought to be curtailed.[19] Something more must be done than merely printing the terms on consignment documents.[20] The law

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1514 so as to hold that if the carrier has a subordinate office at the place where the goods were delivered for transport and the cause of action also arose there because the goods were destroyed by fire at that place, an action would lie only there and not at the company's head office as provided in the contract because the courts there would have had no jurisdiction.

17. The principle enunciated in this case can also be seen at work in the following cases: *L.T. Societa* v *Lakshminarayanan*, AIR 1959 Cal 669, a bill of lading provided that all requests for compensation to be submitted at the place of discharge and indicated two other places for claims, held valid; *M.B.T. Co Madras* v *A.N. Rao*, (1968) 1 Andh WR 424, forwarding note providing for one jurisdiction; *S Manuel Raj & Co* v *J. Manilal & Co*, AIR 1963 Guj 148, a contract entered through correspondence specifying an exclusive place of jurisdiction; *E.I.D. Parry (India) Ltd* v *Savani Transport*, AIR 1980 AP 30, only Bombay jurisdiction left open; *Hasani Stores* v *Larsen & Tubro Ltd*, 1961 KLT 314, Bombay jurisdiction in a contract note; *Sri Prasad Industrials* v *Savani Transports P Ltd*, 1978 Ker LT 248, Head office which was at Bombay, only jurisdiction allowed; *Jafko Engineers* v *Kerala State SSI Corpn*, 1979 Ker LT 206; *Patel Bros* v *Vadilal*, AIR 1959 Mad 227, where the printed terms as to Bombay jurisdiction were held to be not binding because proper notice of the terms was not given to the other party; *C. Satyanarayana* v *L. Narsimham*, AIR 1968 AP 330, where also the printing did not become a part of the contract; *Kanpur Sugar Supply* v *Harsukh*, AIR 1971 All 502, mere printing on bills of exchange and letters that the transactions would be "subject to Rajkot Courts only" did not have the effect of an agreement on the point; *G.P. Venkataraju* v *Palukri*, AIR 1975 AP 32; *Surajmall* v *Kaling Iron Works*, AIR 1979 Ori 126, a statement on purchase order as to jurisdiction, not binding; *Jagannath* v *Nanakkal*, 1972 MP LJ 981, printed heading on sale of goods documents as to jurisdiction, no agreement; *Secretary, U.S. Coop Soc* v *Sheth Bros*, 1983 Ker LT 652, whether printed words on top of the document as to jurisdiction amount to agreement. *Prakash Roadlines P Ltd* v *HMT Bearing Ltd*, AIR 1999 AP 106, contract of carriage, agreement providing for jurisdiction at a place where no jurisdiction otherwise existed, held not binding.

18. *E.I.D. Parry (India) Ltd* v *Savani Transport*, AIR 1980 AP 30; *Globe Transport Corpn* v *Triveni Engg Works*, (1983) 4 SCC 707; *ABC Laminart P Ltd* v *A P Agencies, Salem*, (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, town 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. *Burn Standard Co Ltd* v *Oil and Natural Gas Corpn Ltd*, AIR 2000 Cal 283, a clause in a bank guarantee provided for exclusive jurisdiction of the courts at the place where the contract and the guarantee were executed. An application for stay of enforcement could not be filed at any other place. *Rajaram Maize Products* v *MP Electricity Board*, AIR 1999 MP 44, the contract provided for settlement of disputes only at place 'J' which was one of the possible jurisdictions. A suit filed at another place was held to be not proper though the cause of action had arisen at that place.

19. *Road Transport Corpn* v *Kirloskar Bros Ltd*, AIR 1981 Bom 299.

20. *Oriental Fire & General Ins Co* v *New Suraj Transport Co*, AIR 1985 All 136. Thus where the consignment note was not even signed by the booking party or his agent, the consignor was not bound by a printed term about the exclusive jurisdiction. *South Eastern Roadways* v *United India Insurance Co Ltd*, AIR 1991 Ker 41. Provisions relating to exclusion of the

requires that before making a person bound by any such term (a clause in a consignment note as to exclusive jurisdiction) it must be proved that the same was brought to the knowledge of the consignor in such a way that it should seem to be the result of a mutual assent.[21] Where a consignment way bill contained the words "subject to Calcutta jurisdiction", the court ignored it since it was not one to which the plaintiff assented.[22] Where the original contracting party, i.e., the consignor has been adequately informed, it will be a question of fact in each case whether the parties subsequently acquiring his rights will also be bound by the notified terms. The carrier would have no opportunity of knowing about him and much less of giving him any notice. A Bench of the Andhra Pradesh High Court, therefore, came to the conclusion that the consignee to whom the booking documents are indorsed to enable him to obtain delivery at the destination would also be bound by the terms.[23] If the original party is not bound by those terms, neither would be those who acquire their rights under the document.[24] Following these principles in another case, the Andhra Pradesh High Court came to the conclusion that a term as to the place of suit was not binding on the insurer who had paid out the consignee and who was then suing the carrier for the negligent loss of the goods unless it could be proved that the insurer too was made or was otherwise aware of the terms.[25]

An agreement made subject to the jurisdiction of a stated court would not have the effect of ousting the jurisdiction of other courts.[26]

**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 agreement between the parties to refer disputes to arbitration is perfectly valid.[27] Thus in *Coringa Oil Co* v *Koegler*:[28]

> A clause in an agreement that all disputes would be referred to arbitration of two competent London brokers and their decision would be final, was held valid.

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jurisdiction of courts are very strictly construed. The exclusion is not to be readily inferred and, therefore, must either be explicitly expressed or clearly implied. *Bismillah* v *Janeshwar Pandit*, (1990) 1 SCC 207, 210: AIR 1990 SC 540. In the matters of international trade and the choice of forum see *British India Steam Navigation Co Ltd* v *Shanmughavilas Cashew Industries*, (1990) 3 SCC 481.

21. *Road Transport Organisation of India* v *Barunai Powerloom Weavers' Coop Society Ltd*, (1994) 84 Cal LT 174.
22. *Grandhi Pitchaiah Venkatraju & Co* v *Palukuri Jagannadham & Co*, AIR 1975 AP 32. To the same effect is *Road Transport Corpn* v *Kirloskar Bros*, AIR 1981 Bom 299 The court said that it is for the carrier to plead and prove that the print on the receipt was brought to the notice of the consignor and that he had agreed to and accepted the same.
23. *Rajarao* v *A P T Co*, (1969) 2 APLJ 151.
24. *Special Secy, Govt of Rajasthan* v *Venkatramana Seshaiyer*, AIR 1984 AP 5, a term as to jurisdiction in a lottery ticket, held not binding on a buyer of the ticket.
25. *East India Transport Agency* v *National Insurance Co*, AIR 1991 AP 53 FB.
26. *Cheema Enterprises* v *Mayor Enterprises*, AIR 1998 Gau 86.
27. *See* HARRIES J in *Gaindalal* v *Rameshwar Das*, 171 IC 584.
28. (1876) 1 Cal 466.

GARTH CJ said:[29]

> If a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law, that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the courts, but the latter branch of the stipulation would be void because by that the jurisdiction of the courts would be naturally excluded.

The right to proceed against the arbitrator's award, for example, to have it set aside, cannot be excluded by contract.[30]

A provision in a contract that the decision of the conservator of forests shall be final[31] and a clause in a contract of insurance that arbitration would be a condition precedent for any action against the company, have been held to be valid.[32] An arbitration clause remains binding even where the contract has ended by breach or otherwise. It is, therefore, theoretically possible that a contract may come to an end, and that arbitration agreement may not. It is also possible that the arbitration clause may not be valid but the rest of the contract may be valid.[33] It has been held by the Supreme Court that expressions any dispute "arising out of" or "concerning" or "in connection with", or "in consequence of" or "relating to" this contract, are sufficiently wide to compel parties to refer even this matter to arbitration whether the contract is itself valid.[34]

A clause providing for arbitration and declaring that the Arbitration Act would not apply was held to be void. The arbitration clause was held to be valid. The part which excluded the application of the Arbitration Act being severable from the rest of the agreement was alone struck down.[35] A contract clause provided that the right to claim arbitration would come to an end after the expiry of 90 days from the date of intimation of the final bill being ready for payment. The matter was raised within the designated time. The award did not contain a decision on merits. It was held that the right of the contractor to seek arbitration remained alive. The award was set aside. The arbitrator was asked to decide the claim of the petitioner on merits.[36]

Where the head office of the institution was situate at Delhi and the contract provided for resolution of disputes by arbitration, an interim relief obtained by filing a suit at Chennai was held to be an abuse of the judicial process and, therefore,

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29. (1876) 1 Cal 466-68.
30. For other illustrations see *Ganges Manufacturing Co* v *Indra Chand*, (1906) 33 Cal 1169; *Burla Ranga Reddi* v *Kallpalli*, (1883) 6 Mad 368; *Aghore Nath Banerjee* v *The Calcutta Tramway Co Ltd*, (1885) 11 Cal 322.
31. *Mukteshwar Singh* v *State of Bihar*, AIR 1979 Pat 40; *Satish Kumar* v *Surinder Kumar*, AIR 1970 SC 833.
32. *National Insurance Co* v *Calcutta Dock Labour Board*, AIR 1977 Cal 492.
33. *Jawahar Lal Burman* v *Union of India*, (1962) 3 SCR 769: AIR 1962 SC 378.
34. *Khardah Co Ltd* v *Raymon & Co*, (1963) 3 SCR 183: AIR 1962 SC 1810. *See* also *Union of India* v *A.L. Rallia Ram*, (1964) 3 SCR 164: AIR 1963 SC 1985, where it was held that an arbitration agreement would not be binding if in violation of statutory provisions.
35. *Rajasthan Housing Board* v *Engineering Projects (India) Ltd*, AIR 2000 Raj 200; *Universal Petrochemicals Ltd* v *Rajasthan State Electricity Board*, AIR 2001 Cal 102, an agreement cannot overide the application of statutory provisions.
36. *J.K. Anand* v *Delhi Development Authority*, (2001) 92 Delhi LT 598; *Hindustan Construction Corpn* v *Delhi Development Authority*, (1999) 77 Delhi LT 165 (Delhi).

against public policy. A suit could be instituted only at the place of the registered office.[37]

2. *Reference of Existing Question to Arbitration*

This exception saves contracts to refer to arbitration questions that have already arisen.[38] Where the parties agreed to refer their disputes to arbitration, they were held to be bound to do so. The fact that the arbitrators were situated in a foreign country could not by itself be enough to nullify the arbitration when the parties accepted the arrangement with their eyes wide open and willingly. More so when the parties appointed arbitrators and participated in proceedings.[39]

**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 a 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*) *A* agrees to sell to *B* "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(*e*) *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.

(*f*) *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.[40]

The reason why certainty is necessary appears from the following statement of the House of Lords:[41]

> It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, and that promises and performances to be rendered by each party are reasonably certain.

An interesting illustration *is Guthyng* v *Lynn*.[42] A horse was bought for a certain price coupled with a promise to give £ 5 more if the horse proved lucky. The

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37. *National Council of YMCAs of India* v *Dr C. Raja Singh Warrior*, (1999) AIHC 885 (Mad).
38. See *Union of India* v *Kishorilal*, (1960) 1 SCR 493: AIR 1959 SC 1362, where a contract is valid, the arbitration clause is binding.
39. *Atlas Export Industries* v *Kotak & Co*, (1999) 7 SCC 61.
40. See *Dhanrajmal Gobindram* v *Shamji Kalidas & Co*, AIR 1961 SC 1285: (1961) 3 SCR 1320, 1035.
41. *Scammel* v *Ouston*, (1941) AC 251, 268-69 *per* Lord WRIGHT.
42. (1831) 2 B Ad. 232.

agreement was held to be void for uncertainty. The court has no machinery to determine what luck, bad 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[43] or clause'[44] or at such price as should be agreed upon between the parties,[45] 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.

*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.[46] In the words of Anson:[47]

> The law is generally anxious to uphold the contract wherever possible lest it should incur the reproach of being the destroyer of bargains;[48] but the court must be satisfied that the parties have in fact concluded a contract and not merely agreed to contract in the future.

The decision of the House of Lords in *May & Butcher* v *R*[49] laid 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 void for uncertainty. Lord BUCKMASTER remarked: "It has long been a well-recognised principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undecided is no contract at all.... It is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined." The law requires for the making of a good contract a concluded bargain, "and a concluded contract is one

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43. *Scammel* v *Ouston*, (1941) AC 251.
44. *Bishop & Baxter* v *Anglo-Eastern Trading Co*, (1944) KB 12; *British Electrical & Associated Industries* v *Matley Pressing Ltd*, (1953) 1 WLR 280.
45. *May & Butcher* v *The King*, (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 an appointing authority but the identity of such authority was not indicated nor it was capable of being made out, agreement void.
46. *Punit Beriwala* v *Suva Sanyal*, AIR 1998 44 Cal, a sum of money paid in advance for purchasing property on terms to be finalised. No such finalisation having taken place for bringing about a registered sale-deed, the court ordered refund of the earnest money. *Leisure Complex* v *Malaysia Credit Finance Berhad*, (1994) 1 Current LJ 185 (Malaysia), a recommendation to the board of directors that an oral proposal should be accepted, did not amount to acceptance.
47. LAW OF CONTRACT, 25 (23rd edn by Guest, 1972). *See*, for example, *Union of India* v *Philips Construction*, (1988) 1 Ker LT 42 (Case No. 78), where the agreement was for the construction of a railway line and the contractor was not allowed to run away from it by saying that the land was yet to be acquired, particularly when the Government was prepared to give him the benefit of extended time.
48. Quoting Lord TOMLIN in *Hillas & Co* v *Arcos. Ltd*, (1932) 147 LT 503, 512. *See* R.A. SAMEK, *Requirement of Certainty of Terms in the Formation of Contract*, 48 Can BR 233.
49. (1934) 2 KB 17, n.

which settles everything to be settled and leaves nothing to be settled by agreement between the parties".

Thus, if the execution of a further contract is a condition or term of the bargain, no contract arises because the law does not recognise a contract to enter into a contract.[50] This view finds further support in the decision of the Court of Appeal in *Courtney* v *Tolaini*.[51]

> A property owner and a property developer-cum-building contractor sat together to arrange a collaboration between them. The contractor wrote a letter to the owner that he was willing to introduce persons who would finance the development of the site and that his own interest was only in the building work. The letter concluded that if a successful arrangement was made with the financiers introduced by him, the owner will enter into negotiations for a fair and reasonable building contract. The negotiations broke down because of a disagreement as to the price. The owner then entered into building contracts with others while still using those very sources of finance.

The contractor sued for the breach of the contract which had either been made or was contracted to be made. The Court of Appeal did not accept his case. Price is a very important term of every contract and the parties in this case neither could agree upon it nor lay down any means by which it could be ascertained. Lord DENNING emphasised that there could neither be a contract to enter into a contract nor a contract to negotiate.

> *P* contracted to purchase supplies of propane from *D* and voluntarily offered to pay a higher price "on the understanding that they would be able to renegotiate a new contract for the following year based on economic value at that time". *D* did not reply to *P*'s letter but did bill *P* at a higher price in accordance with *P*'s offer. *D* refused to renew *P*'s contract. *P* claimed for breach of contract and, in the alternative that *D* received excess payment in trust to the use of *P*. It was held that no binding contract regarding the renegotiation of the original contract ever came into existence. A fundamental term was to fix the price in terms of "economic value" which had a different meaning to each party. Therefore, there was no acceptance by *D* of *P*'s offer. *P* was entitled to recover the amount of overpayment.[52]

### *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

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50. Lord PARKER in *Van Hotsfeldt Wildenburg* v *Alexander*, (1912) 1 Ch 284, 288-289.
51. (1975) 1 All ER 716. *See* also *Keshavlal* v *L.T. Mills*, (1959) SCR 213: AIR 1958 SC 512 where the contract provided for extension of time in such manner that the whole contract would become uncertain.
52. *Hidrogas* v *Great Plains Devp Co of Canada*, (1972) 5 WWR 22 All Sup. ct. *See* also *Radhakrishna Sivadutta Rai* v *Tayeballi Dawoodbhai*, 1962 Supp (1) SCR 81: AIR 1962 SC 538, bought and sold notes differed in contents. No contract resulted. *Nircon Developments P Ltd* v *Zohrabai Fakhruddin*, (1998) 1 Bom CR 153, agreement for sale of land without prior sanction of I.T. authorities, vital entries like names, amounts and places still in blank, held no agreement and no specific enforcement. *Old World Hospitality P Ltd* v *India Habitat Centre*, (1997) 73 Delhi LT 374, a complete agreement in all respects, agreement over all the essential terms. *B.D.A. Ltd* v *State of UP*, AIR 1995 All 277, renewal of agreement for assignment of trade to be on terms agreed by mutual consent, did not create any obligation upon either party for renewal.

out by the following two decisions. One of them is that of the House of Lords in *Hillas & Co* v *Arcos Ltd.*[53]

> 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.

The agreement was, however, allowed to be enforced. The dealing for the previous year indicated the intention to have a similar dealing and also made it unnecessary for the particulars to be repeated.

The other case is *Mallozzi* v *Carapelli.*[54]

> 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. There was a definite agreement that the port of discharge would be settled by mutual agreement and it was this agreement which the seller had broken.

In a similar case before a Canadian court[55] a motor vehicle dealer was negotiating with his manufacturer for shifting his agency to larger premises. As a part of these negotiations the manufacturer undertook to absorb the dealer's losses till their new arrangement was concluded. How the losses would be absorbed was not stated. Even so the agreement was held to be binding. How the losses would be absorbed was the manufacturer's concern and not that of the dealer. The manufacturer had committed himself to a definite obligation.

With this should be contrasted the case[56] in which a sum of money was deposited with a car dealer for purchasing a used car which the depositor was ultimately unable to buy. The parties then agreed that the dealer should hold the amount till the depositor was able to buy a car at a stated price or more. The depositor then sought refund of his deposit and was allowed. The type of car, the time of purchase, the mode of finance were all uncertain and these uncertainties prevented the parties from being bound. A document for sale of certain lands provided that the sale and purchase agreement was to be signed on or before the specified date and it was to incorporate all the terms of the sale and other usual terms and conditions and that if the agreement was not signed by the cut-off date, the amount of deposit was to be refunded. The court said that the document did not mature into a contract. No specific enforcement of the sale could be ordered.[57]

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53. (1932) All ER Rep 494.
54. (1975) 1 Lloyd's Rep 229.
55. *MacIver* v *American Motors*, (1976) 70 DLR (3d) 473 (Man CA).
56. *Dwinell* v *Custom Motors*, (1975) 12 NSR (2d) 524 (S.C. App. Div).
57. *Kam Mah Theatre* v *Tan Lay Soon*, (1994) 1 Current LJ 1 "The correspondence between the parties after the date of the document was relevant for finding out whether there was any contract at all, *Hussey* v *Horne-Payne*, (1879) 4 App Cas 311 at 316. The question whether the parties have entered into contractual relationship with each other essentially depends

*Partial Uncertainty: "Capable of being made certain"*

Where only a part or a clause of the contract is uncertain, but the rest is capable of bearing a reasonably certain meaning, the contract will be regarded as binding. 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.[58]

In a contract for the purchase of land, the price was payable in three phases and the land was also to be released for further construction in three phases. The contract was held to be void by reason of uncertainty as to which part of the land was to be released in the successive phases. Should the power be vested in the purchaser, the vendor might be seriously prejudiced by the manner in which the power was exercised. In the absence of any express term as to how the land to be included in each phase was to be selected, the contract was void for uncertainty.[59] But in a contract for sale of "one acre of front land", out of a tract of 5 acres, the contract was held to be not uncertain, it being possible to find out what was the meaning of the parties by the words "front land".[60] A person wished to purchase corn feed pellets and his brokers carried out negotiations with a seller through intermediary brokers. There were various telex messages pursuant to which the seller contended that a binding contract had been concluded, but the buyer contended that many points had still to be settled. The court said that the parties were *ad idem* as to the main terms of the proposed contract and it was perfectly possible for parties to make an interim agreement for the sale of goods which required further negotiations to iron out the less important details of the transaction.[61] Where an agreement provided that a property in joint names should be sold at a price agreed between the owners, and if not sold within six months, should be placed at auction, it was necessary to imply a term that the agreed price should be a reasonable price. The contract was clear and workable in its existing form.[62] Where the vital terms of the contract like the price and the area of land and the time for completion of sale were all fixed, the Supreme Court held that the mere fact that the mode of payment of the price was not settled did not render the contract to be ineffective.[63] Where a contract for the sale of bearing springs over a course of time

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upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they have been negotiating including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing, the proper construction of the writing against the background will answer the question." Cited by the court from the Privy Council decision in *Daiman Development* v *LCT Mathew*, (1981) 1 Malaya LJ 56 at 58.

58. *Nicolene Ltd* v *Simmonds*, (1953) 1 QB 543: (1953) 2 WLR 717: (1953) 1 All ER 882. *Mayban Finance* v *Aik Soon Auto*, (1994) 1 Current LJ 273 (Malaysia), no discount rates were stated, received money on discount, the contract having been acted upon with knowledge that discount rates would have to be settled by agreement, contract binding, no uncertainty.
59. *Bushwall Properties Ltd* v *Vortex Properties Ltd*, (1976) 2 All ER 283. *Dwinell* v *Custom Motors*, (1975) 12 NSR (2d) 524 (S.C. App. Div). Similarly, an agreement to pay when the party is in a position to pay has been held to be void for uncertainty. *Pushpabala Ray* v *LIC*, AIR 1978 Cal 221.
60. *Kandamath Cine Enterprizes P Ltd* v *John Philipose*, AIR 1990 Ker 188.
61. *Pagnan Spa* v *Feed Products*, (1987) 2 Lloyd's Rep 601 CA.
62. *Miller* v *Lakefield Estates*, The Daily Telegraph, May 8, 1988 CA.
63. *Kollipara Sriramulu* v *T. Awasthanarayana*, (1968) 3 SCR 387: AIR 1968 SC 1028: (1969) 1 MLJ 6. Also see *Dhanrajamal Gobindram* v *Shamji Kalidas & Co*, (1961) 3 SCR 1020:

gave latitude to the seller as to quantity of delivery in each instalment, it did not make the agreement uncertain.[64] In a case before the Allahabad High Court, the facts and decision appear from the following passage:[65]

> The terms of the agreement were that the tenant was to construct a sitting place and instal a new gate and deduct the cost from rent which was enhanced from Rs. 5 to Rs. 11-8-0 per month. The cost of construction was not known to the parties at the time, but it is obvious that they agreed that the entire cost, whatever the amount, would be adjusted against rent. The agreement was, therefore, capable of being made certain and did in effect become certain when the constructions were completed and the amount spent was known. The purpose of Section 29 is to ensure that the parties should be aware of the precise nature and scope of their mutual rights and obligations.

*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 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, since the vendor is not obliged under such an agreement to conclude a contract with the purchaser. He would not be able to know when he can withdraw from on-going negotiations. The court cannot also be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations.[66]

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AIR 1961 SC 1285: 64 Bom LR 169 where it was held that a sale agreement subject to the usual *Force Majeure clause* was not void for vagueness. *State of Maharashtra* v *Saifuddin*, (1994) 2 Bom CR 277, for the purposes of concluding a building and engineering contract, the terms of the tender must be thorough and must give a clear picture to the contractor.

*See* also *Uttam Singh Duggal* v *Hindustan Steel Ltd*, AIR 1982 MP 206, where the court held that deposit by a contractor of insurance bonds instead of Government securities which was put under consideration did not prevent the contract from arising; the fact that penalty for delayed completion could be on the basis of total cost or cost of the incomplete part as may be decided by the head office and difficulties of interpretation do not make the agreement uncertain.

*H.G. Krishna Reddy* v *M.M. Thimmial*, AIR 1983 Mad 169, a receipt executed by the vendor and handed over to the vendee in payment of price of land, the receipt saying that a regular agreement would be executed on a stamp paper, this did not amount to a concluded contract. *See* Franceworth, *Disputes over Omission in Contracts*, 68 Col LR 860.

64. *Jamna Auto Industries* v *Union of India*, AIR 1984 Del 235. *See* further *Remington Rand of India* v *Sohanlal*, AIR 1984 Cal 158, tenancy on the basis of market rent, which the court found to be ascertainable, held not uncertain.

65. *Chandra Sheikhar* v *Gopi Nath*, AIR 1963 All 248; *see* also *Sobhat Dei* v *Devi Phal*, (1972) 3 SCC 495, not void for uncertainty; *Kovuru Kalappa Devara* v *K.K. Mitter*, ILR 1945 Mad 521: AIR 1945 Mad 10, agreement to pay a certain sum after two years with interest and deductions to be agreed upon, void. *Govt of AP* v *N. Choudhary*, (1993) 2 Andh LT 391 FB, a panel of arbitrators cannot be set aside only because there are more than one officers belonging to the designated post. *Samina Venkata Suroswara Sarma* v *Messala Kota M*, AIR 1999 AP 440, sale of premises within stipulated time, tenants to be evicted within that time, failure to do so but efforts being made, did not make the agreement uncertain and void.

66. *Walford* v *Miles*, (1992) 1 All ER 453 HL. Their Lordships approved the decision of the Court of Appeal in *Courtney & Fairbairn Ltd* v *Tolaini Bros (Hotels) Ltd*, (1975) 1 All ER 716 (p. 224 above).

*Option for Renewal of Tenancy*

An option for renewal of a tenancy or lease is an enforceable option.[67] 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.[68]

**Wagering agreements [S. 30]**

Section 30 deals with wagering agreements.

**30.** 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 towards 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.

**Requirements of definition**

Section 30 only says that "agreements by way of wager are void". The section does not define "wager". SUBBA RAO J[69] in *Gherulal* v *Mahadeo*[70] said:

> Sir William Anson's definition of "wager" *as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event*[71] brings out the concept of wager declared void by Section 30 of the Contract Act.

The most illustrative definition of "wager" is that given by HAWKINS J in *Carlill* v *Carbolic Smoke Ball Co*[72]

A wagering contract is one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent on the determination of that event, one shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential

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67. *See*, for example, *Caltex (India) Ltd* v *Bhagwan Devi Madodia*, AIR 1969 SC 495, an option of renewal of lease not exercised in time.
68. *Aboobacker Keyi* v *Govindan Sons*, (1990) 2 KLT 551.
69. Afterwards CJ.
70. (1959) 2 SCA 342.
71. Italicised by the author.
72. (1892) 2 QB 484, 490.

to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, it is not a wagering contract.[73]

This statement has the merit of bringing out all the essential features that make a transaction a wager.

### 1. *Uncertain Event*

The first thing essential to wager is that the performance of the bargain must depend upon the determination of an uncertain event. A wager generally contemplates a future event; but it may even relate to an event which has already happened in the past, but the parties are not aware of its result or the time of its happening.[74]

### 2. *Mutual Chances of Gain or Loss*

The second essential feature is that upon the determination of the contemplated event each party should stand to win or lose. If there are no such mutual chances of gain or loss, there is no wager. Thus, in *Babasaheb* v *Rajaram*:[75]

> Two wrestlers agreed to play a wrestling match on 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. 1,125 out of the gate money. The defendant failed to appear in the ring and the plaintiff sued him for Rs. 500.

It was held that the agreement could not be looked upon as one of wagering in law. "It is of the essence of wager that each side should stand to win or lose according to the result of the uncertain event."[76] In the present case neither side stood to lose according to the result of the wrestling match. "The stakes did not come out of the pockets of the parties, but had to be paid from the gate money provided by the public."[77] The prize would not have been recoverable if it was to be subscribed by the competitors themselves.[78] Accordingly, where each of the parties deposited £ 200 with a stakeholder to abide the issue of a walking match and the loser was to forfeit his £ 200,[79] and where each party deposited £100 to abide the result of a billiard match,[80] the agreements were held to be of wagering nature. In contrast to it the transaction in *Carlill* v *Carbolic Smoke Ball Co* was held to be not a wager. The company had no chance of winning, neither Mrs Carlill any chance of losing.[81]

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73. This statement has been cited with approval in a number of cases in India. *See* for example, *Jethamal* v *Nevatia & Co*, AIR 1962 AP 350, 352.
74. *See* Anson's PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 22nd edn by A.G. Guest, (1964), 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 edn (1964) 232, where it is said that "wager may relate to past, present or future events".
75. AIR 1931 Bom 264.
76. BARLEE J quoted this definition from *Sassoon* v *Tokersey*, (1913) 28 Bom 616.
77. MADGAVKAR J quoted from *Shoolbred* v *Roberts*, (1899) 2 QB 560, *per* PHILLIMORE J at p 265.
78. *See* PHILLIMORE J *ibid.*
79. *Diggle* v *Higge*, (1877) 2 Ex D 422.
80. *Shoolbred* v *Roberts*, (1899) 2 QB 560.
81. (1892) 2 QB 484. *See* also *Ellesmere* v *Wallace*, (1929) 2 Ch 1.

A chit fund does not come within the scope of "wager". It is no doubt true that some chance gain may come to some of the members, but none of them stands to lose his money, for his periodical deposits are refunded to him at the end of the scheme. This was so held by the Madras High Court in *Narayana Ayyangar* v *K. Vallachami Ambalam*.[82] RAMESAM J said:

> It is true that in most chit fund transactions, no subscriber loses the money he has contributed; and so long as getting back the actual amount of subscription is assured, the interval of time, however long it may be, is immaterial.

The transaction being valid, a member was allowed to recover his subscriptions when the organisers refused to run the scheme up to the promised schedule.

*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 other. "If one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager."[83]

*4. No other Interest in the Event*

Lastly, neither party should have any interest in the happening of the event other than the sum or stake he will win or lose. This is what marks the difference between a wagering agreement and contract of insurance. Every contract of insurance requires for its validity the existence of insurable interest. An insurance effected without insurable interest is no more than a wagering agreement and, therefore, void.[84] "Insurable interest" means the risk of loss to which the assured is likely to be exposed by the happening of the event assured against. In a wager, on the other hand, neither party is running any risk of loss except that which is created by the agreement itself.[85]

Whether an agreement is of a wagering nature depends upon the substance and not the words of the agreement.[86] The real object of the parties must be discovered.

> It makes no difference that there was real intention to part with the goods. If a horse of £ 100 is to be sold and the buyer and seller agree that upon one event the price shall be nothing and upon another £ 200, that is a wager though there be real intention of selling the horse.[87]

The facts of the case[88] in which the above passage occurs were that a seller and buyer disagreed as of certain goods paid on a former occasion. They mutually agreed that one price would be payable if the buyer was correct and another price would be paid if the seller was correct. The seller's memory proved better but he

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82. (1927) ILR 50 Mad 696 (FB).
83. BIRDWOOD J in *Dayabhai Tribhovandas* v *Lakshmichand*, (1885) 9 Bom 358, 363.
84. See *Alamia* v *Positive Govt Security Life Assurance Co*, (1898) 23 Bom 191; *Kathama Natchair* v *Dora Singa*, (1875) 2 IA 169.
85. *See* BLACKBURN J in *Wilson* v *Jones*, (1867) 2 Ex 139. *See* also *Manishankar* v *Alliam Und Stuttagarter Life Ass Bank Ltd*, 193 IC 155.
86. *See* the decision of the Privy Council in *Ismail Lebbe* v *Bartlett & Co*, 199 IC 574 (PC) an appeal from Ceylon.
87. Lord CAMPBELL CJ in *Rourke* v *Short*, 119 ER 717. *See* also *Brogden* v *Marriott*, (1836) 8 Bing (HC) 88: 5 LJ (CP) 302.
88. *Rourke* v *Short*, (1856) 5 E & B 904.

could not recover anything from the buyer as the court held the arrangement to be of wagering nature.

*Speculative Transactions*

An agreement to settle the difference between the contract price and market price of certain goods on a specified day has been repeatedly held to be a wager. But, as transactions of this kind are always expressed in the form of an agreement for the sale or purchase of goods, it often becomes difficult to ascertain the real object of the parties. Yet the intention of the parties is the only deciding factor, for the Privy Council ruled in 1901 in an appeal from Burma[89] under Section 30 of the Contract Act that "where the circumstances as to contracts for sale, purchase and delivery of goods are such as to warrant the legal inference that the parties never intended any actual transfer, but only to pay or receive differences, the contracts must be deemed to be by way of wager".[90] "Thus, there must be from the outset a common intention of both the parties to make and accept no delivery and to deal only in differences. From the mere fact that the delivery of the goods was not taken, no inference can be drawn that the contract was a wagering contract."[91] If it is intended and is possible that the goods contracted for can be delivered then the mere fact that in certain circumstances either party would be liable to make good to the other the difference in price, cannot make it a wager.[92]

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.[93] Their Lordships said:

> Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts. The capital of the company was a trifle more than a lakh of rupees. The cost of goods would be that amount multiplied by five hundred fold. It is possible for traders to contemplate transactions so far beyond their basis of trade but it is very unlikely. In point of fact, they never completed nor were they called on to complete any one of the ostensible transactions. The rational inference is that neither party ever intended completion.[94]

Similarly, where a contract was made for the sale of certain goods in a market where such goods never appeared, it was held that the common intention was to wager.[95]

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89. *Kong Yee Lone & Co* v *Lowjee Nanjee*, (1901) 28 IA 239.
90. MUKARJI J's summing upon the ratio of the above Privy Council decision in *Badridas Kothari* v *Meghraj Kothari*, AIR 1967 Cal 25.
91. *Hagami Lal* v *Bhuralal*, AIR 1961 Raj 52.
92. *Buddalal* v *Shrikisan*, AIR 1961 MP 57. The principle laid down by the Privy Council has been adopted by the Supreme Court in *Gherulal Parekh* v *Mahadeodas*, (1959) 2 SCA 342, 248 where SUBBA RAO J (as he then was) says that the law on the subject is well-settled. *See also* p 350. *Bullion and Grain Exchange Ltd* v *State of Punjab*, (1961) 1 SCR 668: AIR 1961 SC 268, an example of speculation. *Morgan Grenfell & Co Ltd* v *Welwyn Hatfield, (Islington London BC)*, (1995) 1 All ER 1, one of the interest rates in swap cases, where the court held that transactions entered into by way of business under the Financial Services Act, 1986 (English) are out of the scope of wagering transactions.
93. *Kong Yee Lone & Co* v *Lowjee Nanjee*, (1901) 28 IA 239: 29 Cal 461.
94. *Kong Yee Lone & Co* v *Lowjee Nanjee*, (1901) 28 IA 239: 29 Cal 461.
95. *Doshi Talakshi* v *Sha Ujamsi Velsi*, (1899) 24 Bom 227. *See* also *J.H. Jod* v *Lakshmidas*, (1892) 16 Bom 441; *Eshoor Doos* v *Venkattasubba Rau*, (1895) 18 Mad 306; *Motilal* v *Govindram*, (1906) 30 Bom 83.

In another Privy Council decision, delivery orders having been issued which could have been converted into actual delivery if a party so desired, it was held that the transaction could not be described as a wager.[1] Similarly, where out of a large number of transactions, the court found that on occasions delivery of goods was made and accepted, making it difficult to know beforehand which way a particular transaction was going to end, the intention to wager was held to be not established.[2] In an Andhra Pradesh case,[3] a *pucca addatia,* whom the court found to be an independent contractor and not an agent, received orders from his principal to purchase certain goods. He contracted to do so but subsequently settled the difference with the seller and claimed the loss and his commission from the principal. The court said:

> The circumstances do not warrant the inference that the plaintiff intended to deliver or the defendant intended to take delivery of the wagon of groundnut oil. In fact the defendant had no shop or godown at Adoni and is not even a resident of the place.

Accordingly, no action lay for the enforcement of the transaction.[4]

### 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:[5]

> Two persons entered into wagering transactions in shares and one became indebted to the other. A promissory note was executed for the payment of that debt.

The note was held to be not enforceable.[6] A subsequent substituted agreement of the same consideration, namely, the amount won on a wager, is also not enforceable.[7] In other words, a new promise to pay money won upon a wager is equally void.[8] Similarly, money deposited with a person to enable him to pay to the party winning upon a wager cannot be recovered. The winner cannot recover the money, but before it is paid to him, the depositor may recover from the

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1. *Sikdevdoss Ramprasad* v *Govindoss Chathurbujdoss & Co*, (1928) 55 IA 32: AIR 1928 PC 30; also see *Dunichand Rataria* v *Bhuwalka Bros Ltd*, (1955) SCR 1071: AIR 1955 SC 182; *Bashir Ad* v *Govt of AP*, AIR 1970 SC 1089.
2. *Arjunsa* v *Mohanlal Harakchand*, AIR 1937 Nag 345. An interest rate swap agreement under which one party was to pay fixed interest and the other floating interest, although inherently speculative by nature, has been held to be not a wagering agreement, *Morgan Grenfell & Co* v *Welwyn Hatfield District Council*, (1995) 1 All ER 1.
3. *T.G. Lakshmi Narayana* v *N.V. Nanjaiah Chetty*, AIR 1965 AP 136.
4. Compare with *Kishanlal* v *Bhanwarlal*, AIR 1954 SC 500.
5. *Badridas Kothari* v *Meghraj Kothari*, AIR 1967 Cal 25.
6. MUKHERJI J reviews at p 28 all the earlier authorities.
7. The question has been settled after some controversy by the House of Lords in *Hill* v *William Hill*, (1949) 2 All ER 452.
8. *See*, for instance, the speech of Viscount SIMON in the above case. The same is true of Indian law as SUBBA Rao J (as he then was) in *Gherulal* v *Mahadeo*, (1959) 2 SCA 342 said that "the legal position in India is not different". At p 360.

stakeholder.[9] But where the money has already been paid over it, cannot be recovered back.[10]

*Collateral Transactions*

It has been laid down by the Supreme Court, following previous authorities, in *Gherulal Parekh* v *Mahadeo Das*[11] 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,[12] and, therefore, the transactions collateral to the main transaction are enforceable. "Accordingly an agent who paid the losses on wagering transactions was allowed to recover the amount paid by him from his principal."[13] Similarly, in another case, "the plaintiff who lent money to the defendant to enable him to pay off a gambling debt was given a decree to recover the same from the defendant".[14] "Where two partners entered into a contract of wager with a party and one partner had satisfied his own and his co-partner's liability under the contract, the Nagpur High Court[15] held that the partner who paid the amount could legally claim the other partner's share of the loss.[16] Similarly, the Supreme Court held in *Gherulal Parekh* v *Mahadeo*[17] that a partnership to enter into for wagering transactions is not illegal under Section 23 of the Act and therefore a partner who has paid the losses on wagering transactions may 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.[18]

**2. Crossword competitions and lottery**

"If skill plays a substantial part in the result and prizes are awarded according to the merits of the solution, the competition is not a lottery. Otherwise it is."[19] 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.[20] But where prizes depend upon a chance, that is a lottery.[21] The Madhya Pradesh High Court has characterised lotteries as wager. An agreement for payment of prize

9. See *Ratnakalli Guranna* v *Vachalipu*, AIR 1923 Mad 434.
10. *See* BOWEN LJ in *Bridger* v *Savage*, 1955 LR 15 QB 363, 367.
11. (1959) 2 SCA 342: AIR 1959 SC 781.
12. This was so held as early as 1883 in *Pringle* v *Jafar Khan*, ILR (1883) 5 All 443.
13. *Shibo Mal* v *Lachman Das*, ILR (1901) 23 All 165.
14. *Beni Madho Das* v *Kaunsal Kishore Dhusar*, ILR (1900) 22 All 452.
15. *Mohd Gulam Mustafa Khan* v *Padamsi*, AIR 1923 Nag 48.
16. The above passages have been quoted from the speech of SUBBA RAO J (as he then was) in *Gherulal Parekh* v *Mahadeo Das*, (1959) 2 SCA 342, 360.
17. *Ibid.* Agent's right to commission is collateral. *Kishan Lal* v *Bhanwar Lal*, (1955) 1 SCR 439: AIR 1954 SC 500.
18. Section 30 (Exception).
19. Lord HEWARD CJ in *Cole* v *Odhams Press*, (1936) 1 KB 416.
20. *Moore* v *Elphick*, (1945) 2 All ER 155.
21. *Boucher* v *Rowsell*, (1947) 1 All ER 870.

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.[22] 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 due permission from the State Government.

## ILLEGAL AND VOID AGREEMENTS

The Contract Act draws distinction between an agreement which is only void and the one in which the consideration or object is also unlawful. "Section 23 points out in what cases the consideration of an agreement is unlawful, and in such cases the agreement is also void, that is, not enforceable at law."[23] Sections 25 to 30 refer to cases in which the agreement is only void, though the consideration is not necessarily unlawful. An illegal agreement is one which is actually forbidden by the law; but a void agreement may not be forbidden, "the law may merely say that if it is made, the courts will not enforce it".[24] Thus, every illegal contract is also void, but a void contract is not necessarily illegal. However, the distinction is not always clear.

### Main transaction void in either case

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 delivered or some payment made, it cannot be recovered back.

### No action under main transaction

As laid down by the Supreme Court:

> The principle of public policy is this: *ex dolo mala non oritur actio.* No court will lend its aid to a man who found his cause of action upon an immoral or an illegal act. If the cause of action appears to arise *ex turpe cause,* or the transgression of a positive law, there the court says that he has no right to be assisted.[25]

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22. *Subhash Kumar Manwani* v *State of MP,* AIR 2000 MP 109. The court cited the decision in *Shekhar Chand Jain* v *Ramnarayan Gond,* (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,* (1918) 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 *BR Enterprises* v *State of UP,* AIR 1999 SC 867: (1999) 31 JT (SC) 431, 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 it the status of trade or profession.

23. See *Pringle* v *Jafar Khan,* ILR (1883) 5 All 443, 445. *Cited* by the Supreme Court in *Gherulal* v *Mahadeo,* (1959) 2 SCA 342, 361-62.

24. Sir William Anson's PRINCIPLES OF THE ENGLISH LAW OF CONTRACT, 20th edn (1952), p 205, *cited* by SUBBA RAO J (as he then was) in *Gherulal* v *Mahadeo,* supra at p 351.

25. *Kedarnath Motani* v *Prahlad Rai,* (1960) 1 SCR 861, 870, 871: AIR 1960 SC 213, 217; *Koteswar Vittal Kamath* v *K.R. Baliga & Co,* (1969) 1 SCC 255, 265: (1969) 3 SCR 40: AIR 1969 SC 504.

Thus, "a guilty party has no right of action on an illegal contract".[26] A person who contracted to hire a premises, unknown to the landlord, for holding a meeting for blasphemous purpose, was not allowed to sue the landlord for breach of contract when the latter, on learning the real purpose, refused to give the premises.[27] Money lent for an illegal purpose is irrecoverable.[28] A renewed promise to pay an illegal debt will be equally tainted by the illegality.[29] In such cases the law leaves the parties where it finds them. "The court will help neither party. 'Let the estate lie where it falls'."[30] Where a person paid a sum of money to a charitable organisation and promised to pay more if a knighthood was procured which never materialised, he could not recover back the money.[31] Where a contract is lawful in its inception, but is performed in an unlawful manner, no recovery may be allowed. Thus, 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.[32]

"When it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take an objection and that too, whether or not the parties take or waive the objection. It is, therefore, open to the court even without a pleading to consider the question whether the agreement relied on or proved in the case is immoral."[33]

**Exceptions**[34]

**1. Where the Contract is 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. "But if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action." In that case,[35] a debtor executed a transfer to deceive his creditors, but before any creditor could be deceived, he repented and sought to recover back the property, which he was allowed to do. It seems that the repentance of the debtor was due to the failure of his design. After executing the transfer he had summoned a meeting of his creditors to effect a compromise, but the creditors did not turn up. In subsequent

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26. R.S. Sim and Powell-Smith, CASEBOOK ON CONTRACT, 2nd edn (1972), 32.
27. *Cowan* v *Milbourn*, (1867) 36 LJ Ex 24. For a more recent illustration see *Courch & Lees* v *Haridas*, (1971) 3 All ER 172: (1972) 1 QB 158 CA.
28. *C.H.T. Ltd* v *Ward*, (1963) 3 All ER 835: (1965) 2 QB 63 CA, money lent for betting purposes.
29. *Hill* v *William Hills (Park Lane) Ltd*, (1949) 2 All ER 452 HL.
30. AYYANGAR J in *Surasaibalini Debi* v *Phanindra Mohan Majumdar*, (1965) 1 SCR 861: AIR 1965 SC 1364.
31. *Parkinson* v *College of Ambulance*, (1925) 2 KB 1.
32. *Ashmore, Benson, Pease & Co Ltd* v *A.V. Dawson Ltd*, (1973) 2 All ER 856: (1973) 1 WLR 828; *Jagannath Tewari* v *Gopi Prasad*, (1983) 31 Bihar Law Journal Rep 17, where rent paid over and above controlled rent with full knowledge could not be recovered back.
33. *Kotharaju Narayana Rao* v *Tekumalla Ramachandra Rao*, AIR 1959 AP 370.
34. The three exceptions to the principle as established by cases are stated by the Supreme Court in *Sitaram Agarwal* v *Radha Bai*, (1968) 1 SCR 805, 810: AIR 1968 SC 533, 537.
35. MELLISH LJ in *Taylor* v *Bowers*, (1876) 1 QBD 291, 300. *See* also *Shanta Agarwal* v *Baldota Bros*, (1971) LXXVI Bom LR 156. Black money allowed to be recovered, and *Anand Prakash* v *Oswal Trading Agency*, AIR 1976 Del 24.

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.[36] This seems to emerge from *Bigos* v *Bowstead*[37] 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. PRITCHARED J stated the effect of the authorities in the following words:

> The defendant and the plaintiff were *in pari delicto,* which means that they were equally guilty. The law is that the court will help a person who repents, provided his repentance comes before the illegal purpose has been substantially performed.

The learned judge then pointed out that the present case showed frustration, not repentance.

Where money is paid to a person to induce him to commit a crime, can it be recovered before he does anything to commit the crime? In such cases, the answer will depend upon the degree of criminality. It is suggested in Anson:

> It seems highly unlikely that the court will allow any *locus poenitentiae* at all in the most serious cases of moral reprehensibility, as for example, where money is paid to another to commit murder.[38]

The parties' conduct and relative moral capability could be relevant in determining whether, as a matter of public policy, the court would take notice of the illegality. On the facts of the case the court disregarded the plaintiff's illegality because he had an unanswerable claim against the defendant for fraudulent misrepresentation and because the defendant's own more culpability greatly outweighed that of the plaintiff's.[39]

Where a person transferred some of his shares to his son without receiving any price for the purpose of defeating his creditors and the son refused to return the shares to the father, the latter was allowed recovery. The court said that one of the major exceptions to the *pari delicto* rule arises where the transferor repents before the transaction is carried into effect. In this case, the illegal purpose was to defraud the creditors but no creditor could be defrauded. Accordingly, it was not too late for the father to change his mind and recover the shares from his son.[40]

### 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. This possibility may arise in three situations:

> First, 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.

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36. See *Kearley* v *Thomson*, (1890) 24 QBD 742.
37. (1951) 1 All ER 92. An illegality cannot be waived by private agreement, *Warman Sriniwas Kim* v *Ratilal*, 1959 Supp (2) SCR 217: AIR 1959 SC 689.
38. THE LAW OF CONTRACT (23rd edn by Guest, 1972), 359.
39. *Saunders* v *Edwards*, (1987) 2 All ER 651.
40. *Tribe* v *Tribe*, (1995) 4 All ER 236 CA.

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.[41]

One illustration is the decision of the Privy Council in *Mistry Amar Singh* v *Kulubya*.[42] 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 party pleaded illegality. Allowing the action, their Lordships quoted the following passage from the judgment of Lord MANSFIELD in *Browning* v *Morris*:[43]

> But where contracts or transactions are prohibited by positive statutes for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not *in pari delicto;* and in furtherance of those statutes, the person injured may bring his action and defeat the contract.

Where one of the parties was induced by a fraud to make payments under a contract, which, unknown to him was of champertous nature,[44] and where an agent of an insurance company fradulently induced a woman to take out an illegal insurance,[45] in either case the payments were allowed to be recovered back. The result would have been otherwise if no fraud was involved.[46] Where payment was made in advance for purchasing a paddy crop not knowing that a control order was being violated, it was allowed to be recovered.[47] Where additional payment was made to a creditor to induce him to accept a scheme of compromise because his acceptance would have influenced the other creditors, the debtor was allowed to recover back the same.[48] The court said:

> It is said that both parties are *in pari delicto.* It is true that both are *in delicto,* because the act is a fraud upon the other creditors, but is not *par delictum,* because, one has the power to dictate, the other no alternative, but to submit.[49]

Payments obtained by a person in breach of his fiduciary duty can also be recovered back even if the transaction involved illegality. Thus, a lawyer would be bound to refund the money obtained by him from his client under a champertous agreement.[50] In an export transaction, the goods were falsely invoiced to enable the buyer to evade import tax. The consignment was stolen. The insurer's attempt to escape liability because of the illegality involved did not succeed. There was no deception towards the insurer, nor was the insurance claim based upon the illegal contract.[51]

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41. *See* also *Fakir Chand Seth* v *Dambarudhar Bania*, AIR 1987 Ori 50.
42. (1963) 3 All ER 499: (1964) AC 142 PC.
43. (1778) 2 Comp 790, 791.
44. *Reynell* v *Spryel*, (1852) 1 De GM & G 660.
45. *Hughes* v *Liverpool Victoria Legal Friendly Society*, (1916) 2 KB 482.
46. *Horse* v *Peal Life Assurance Co*, (1904) 1 KB 558.
47. *Fakir Chand Seth* v *Dambarudhar Bania*, AIR 1987 Ori 50.
48. *Alkinson* v *Denby*, (1861) 6 H & N 778; *affirmed* (1862) 7 H & N 934.
49. *Ibid.*, at p 936.
50. *Thomas, Re*, (1894) 1 QB 742.
51. *Euro-Diam* v *Bathurst*, (1988) 2 WLR 517 CA.

The Supreme Court refused to interfere in a matter of rent fixation because it was found that whatever rent the parties were paying and accepting was the result of their voluntary understanding. "There is no element of compulsion or exploitation and both parties have by consensus contravened the provisions of law for their mutual advantage."[52]

### 3. Where recovery possible without relying on illegal contract

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.[53] In *Mistry Amar Singh* v *Kulubya*[54] where the action was to recover possession of property leased out in violation of a statute, their Lordships of the Privy Council observed:

> He would have presented his claim without being under any necessity of setting up the unlawful agreements in his plaint. He required no aid from the illegal transaction in order to establish his case. It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy.

Similarly, machine tools delivered under an illegal sale were allowed to be recovered.[55] 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. The Supreme Court of India applied this principle in *Surasaibalini Debi* v *Phanindra Mohan Majumdar*[56] 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. In a case before the Privy Council on appeal from Malaya:[57]

> The plaintiff purchased a lorry from the defendant and operated it on his own account. But it had to be registered in the defendant's name because only he had a haulage licence in respect of it. The defendant snatched the lorry from the plaintiff without the latter's consent and the plaintiff sued him to recover back his possession.

The action was allowed. Lord DENNING said:

> Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out; and on that account it

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52. *Budhwanti* v *Gulab Chand Prasad*, (1987) 2 SCC 153: AIR 1987 SC 1484, per NATRAJAN J.
53. *BOI Finance Ltd* v *Custodian*, (1997) 10 SCC 488: AIR 1997 SC 1952: (1997) 89 Comp Cas 74.
54. (1963) 3 All ER 499.
55. *Bowmakens Ltd* v *Barnet Instruments Ltd*, (1944) 2 All ER 579: (1945) KB 65, CA.
56. (1965) 1 SCR 861: AIR 1965 SC 1346. *See* also *Saudagar Chaudhary* v *Bipati*, AIR 1986 Pat 211, recovery allowed without bringing in the unlawful agreement. Followed in *Ghanshyambhai* v *Babubhai*, 1984 Guj LH 247, so as to allow a landlord to sue for eviction of a tenant who entered premises by paying additional consideration in violation of an Act. *Tinsley* v *Milligan*, (1993) 3 All ER 65 HL, held by a majority that where a property is transferred by one person to another in pursuance of an unlawful purpose, the transferor can recover back the property under the doctrine of resulting trust and without having to rely on the transaction which is illegal. See *Tribe* v *Tribe*, (1995) 4 All ER 236 where this assumption was tested, and a father who transferred his shares without receiving any price to his son to defeat creditors was allowed to take back the shares.
57. *Singh* v *Ali*, (1960) AC 167 PC.

was effective to pass the property in the lorry to the plaintiff. There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers the property to the other in pursuance of the conspiracy—then, as soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property which has been transferred by one to the other remains vested in the transferee, notwithstanding its illegal origin. The reason is because the transferor, having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it—he cannot throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality—it has no power to do so.[58]

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*[59], a book having been printed, the printer refused to print the dedication because it was libellous, it was held that the painter could recover on *quantum meruit* basis for the work done by him.

## 4. 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 the 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 given to enable a person to smuggle, will also be tainted with the same illegality and the money will be irrecoverable.[60] But if the main transaction is only void, its collateral transaction will remain enforceable. Thus, in *Gherulal Parekh* v *Mahadeo Das*[61], the Supreme Court allowed a partner to recover from his co-partner his proportionate indemnity for losses suffered by him in entering into wagering transactions on behalf of the firm, wagering being only void.

The Supreme Court has also 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.[62] The court, however, took care to point out that the doctrine would not be attracted when there is no element of compulsion or exploitation and both parties have by consensus contravened the

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58. His Lordship cited *Scrafe* v *Morgan*, (1838) 4 M & W 270; *Mucklesston* v *Brown*, (1801) 6 Ves 52 and its recent application by the Court of Appeal in *Bowmakers Ltd* v *Barnet Instruments Ltd*, (1945) KB 65: (1944) 2 All ER 579. *See* further *Belvoir Finance Co Ltd* v *Stapleton*, (1971) 1 QB 210: (1970) All ER 664, CA.
59. (1856) 25 LJ Ex 237: (1856) 1 H & N 73: 108 RR 461.
60. See *C.H.T. Ltd* v *Ward*, (1963) 3 All ER 835, money lent for betting was held to be irrecoverable, *Chandra Shrinivasa Rao* v *Kerrapati Raja Ram Mohan Rao*, AIR 1952 Mad 579, money given for an illegal marriage, not recoverable.
61. AIR 1959 SC 781: (1959) 2 SCR 406. As to the validity of agency for entering into *badla* transaction see *Pratap Nopaji* v *Kotrike Venkata Setty*, AIR 1975 SC 1223.
62. *Mohd Simudin* v *Misri Lal*, (1986) 2 SCC 378: AIR 1986 SC 1019.

provisions of law for their mutual advantage. Following this, the Supreme Court did not allow adjustment for an amount which the tenant had been paying in addition to the standard rent. There was no evidence of any compulsion.[63]

### 5. Severance

Where an agreement is only partly illegal, the court will enforce the part which is not illegal provided that it is severable from the rest of the agreement.[64] Where a partnership was created in a truck and route permit which amounted to a part sale of both, the court held that the whole agreement was vitiated, although it was only the sale of permit which was illegal but that was not severable from the rest of the agreement.[65] A contract to provide money to a person to enable him to establish his share in an estate in return for a promise to pay back the money and also a share in the amount that would be recovered from the 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.[66]

In many cases of contracts relating to trade or legal proceedings the courts knock out the objectionable clause of the agreement and allow the rest to be enforced. For example, Section 27 says that the agreement shall be void to that extent, i.e., to the extent of unreasonable restraint. In *Nordenfelt* v *Maxim Nordenfelt Guns & Ammunition Co Ltd*[67] that part of the contract was held to be not binding which imposed unreasonable restraint. Similarly, in two cases[68] relating to separation deeds between a husband and wife which imposed restraint upon legal proceedings, the Court of Appeal struck out the restraining part. In one of them,[69] DENNING LJ explained the basic principles:

> In solving this problem, a useful analogy may be drawn from covenants in unreasonable restraint of trade. Such covenants offend public policy just as the covenants of a wife may do. They are not "illegal ", in the sense that a contract to do a prohibited or immoral act is illegal. They are invalid and unenforceable. The law does not punish them. It simply takes no notice of them. They are void, not illegal.[70] The presence of a void covenant of this kind does not render the deed totally ineffective. The party can sue on the other covenants of the deed... if he can sever the good from the bad;[71] even to the extent of getting full liquidated damages for a breach of the good part.[72] So also, the other party, that is, the party who gave the void covenant, and is not bound by its restraints can himself sue on the covenants in his favour, save only when his void covenant forms the whole, or

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63. *Budhwanti* v *Gulab Chand Prasad*, (1987) 2 SCC 153: AIR 1987 SC 1484.
64. *See* S. 24 (supra) where a provision is made for the effect of partial illegality of consideration.
65. *Ghulam Ahmed* v *Mohd Iqbal*, AIR 1970 J&K 165; *N. Peddanna Ogeti* v *S. Setty & Sons*, AIR 1954 SC 26.
66. *Ratton Chand Hira Chand* v *Askar Nawaz Jung*, (1991) 3 SCC 67.
67. (1894) AC 535. *See* also *Esso Petroleum Co* v *Harper's Garage*, (1975) 2 WLR 779: 1 All ER 968 PC.
68. *Goodinson* v *Goodinson*, (1954) 2 All ER 255: (1954) 2 QB 118; *Bennet* v *Bennet*, (1952) 1 All ER 413: (1952) KB 249 CA.
69. The second case cited above.
70. His Lordship here cited *Price* v *Green*, (1847) 16 M & W 346: 16 LJ Ex 108 and *Joseph Evans & Co* v *Heathcote*, (1918) 1 KB 418: (1918-19) All ER Rep 279 CA.
71. *Goldsoll* v *Goldman*, (1914) 2 Ch 603: 84 LJ Ch 63; on appeal (1915) 6 Ch 292: (1914-15) All ER Rep 257 CA.
72. *Goodinson* v *Goodinson*, (1954) 2 All ER 255: (1954) 2 QB 118.

substantially the whole consideration for the deed.[73] If the void covenant goes only to part of the consideration, so that it can be ignored and yet leave the rest of the deed a reasonable arrangement between the parties, then the deed stands and can be enforced in every respect save in regard to the void covenant.[74]

Applying these principles to the facts, the Court of Appeal held that the wife's covenant not to sue was the only consideration she gave for the husband's promise of annuity, the whole of the agreement became void.

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.[75]

In another case,[76] 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.[77]

To secure the performance of a contract for purchase of shares, guarantee and mortgage were provided by way of additional security. They turned out to be illegal. Since they were collateral and, therefore, severable, the main transaction remained enforceable.[78]

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73. *Wyatt* v *Kreglingar & Fernau*, (1933) 1 KB 793: (1933) All ER Rep 349 CA.
74. His Lordship added: That seems to be the explanation of *Bishop* v *Kitchiny, Kearney* v *Whitehavan Colliery Co*, (1868) 38 LJ QB 203 and *Czarnikow* v *Roth, Schmidt & Co*, (1922) 2 KB 478: (1922) All ER Rep 45 CA. If the cases on a wife's covenant are examined, it will be found that they depend on the same distinction.
75. *Aition* v *Spickermann*, (1976) 2 WLR 556: (1976) 1 All ER 497.
76. *Goodinson* v *Goodinson*, (1954) 2 QB 48: (1954) 2 WLR 1121: (1954) 2 All ER 255.
77. *See* also *Bennet* v *Bennet*, (1952) 1 QB 249: (1952) 1 All ER 413, CA.
78. *Carney* v *Herbert*, (1985) 1 All ER 438 PC. *BOI Finance Ltd* v *Custodian*, (1997) 2 Bom CR 655 SC, notified persons under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, a transaction for transfer of shares, falling partly within the category of transfer by notified persons, rest of the transaction being severable is valid.