8
Discharge of Contract

Modes of discharge

After the formation of a contract, the next stage is reached, namely, the fulfilment of the object the parties had in mind. When the object is fulfilled, the liability of either party under the contract comes to an end. The contract is then said to be discharged. But "performance" is not the only way in which a contract is discharged. A contract may be discharged:

(1) by performance;[1]

(2) by Impossibility of Performance;[2]

(3) by Agreement;[3] and

(4) by breach.[4]

PERFORMANCE OF CONTINGENT CONTRACTS

Definition

The expression "contingent contracts" is defined in Section 31 of the Contract Act:

31. "Contingent contract" defined.—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay *B* Rs 10,000 if *B's* house is burnt. This is a contingent contract.

Conditional contract

It is a sort of a conditional contract and the condition is of uncertain nature. A contract which is subject to a certain or an absolute type of condition cannot be regarded as a contingent contract. A contract, for example, to pay a sum of money on the expiry of a time or on the death of a person is not a contingent contract because these events are of a certain nature. The time or the person in question will definitely expire and the money will become payable. When the condition is of uncertain nature, then only the contract can be regarded as truly contingent. For example, a contract to pay a sum of money on the destruction of a premises by fire, is a contingent contract, for that contingency may or may not happen. From this

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1. Chapter IV of The Contract Act deals with performance of contracts, Sections 37 to 67. Section 56.
2. Section 58.
3. Sections 62 to 67.
4. Sections 39 and 73. Expiry of the period of limitation for enforcement of rights and obligations under a contract is not a mode of discharge recognised by the Contract Act. Lapse of time does not put an end to rights and obligations under the contract, *Mahadeo Nathuji Patil* v *Surajbai Khushal Chand Lakkad*, (1994) Mah LJ 1145.

point of view, all contracts of insurance, are contingent contracts.[5] Ordinarily, therefore, a contingent contract will contemplate a future event. But a contract may also relate to an event which has already happened and the only thing uncertain being that the parties do not know which way it happened.

Contingency to be collateral to contract

The section emphasises that the contingency contemplated by the contract must be collateral to the contract. It means that a contract has already arisen or a subsisting contract is there, but its performance cannot be demanded unless the contemplated event happens or does not happen. Such a contract has to be distinguished from a proposal which does not result in a contract unless the condition is first fulfilled. For example, an offer to pay a sum of money on the discovery of a missing dog is not a contract at all. It becomes a contract only when the dog is searched out and then it is no more contingent. On the other hand, a contract to pay a sum of money on the loss of a ship is a contingent contract. The contract is already there and is not to arise on loss, but the performance can be demanded only on the loss of the ship. A contract to pay a sum of money in return for some work or labour is also not contingent, although no wages can be demanded without performing the work first. In an agreement for sale of land, the condition was that the sale deed would be executed after the seller obtained permission for use of the land as village land. It was held that the contract was not contingent. It was specifically enforceable. The suit filed within three years after obtaining permission was not time barred.[6]

A contract to buy land which is under dispute made with a party to the dispute and to become operative if he wins the case, is a contingent contract, its performance being wholly dependent upon the result of the litigation. *A*, whose property was attached, contracted to sell the same to *B* and undertook to apply to the court for the approval of the sale. *A* did apply to the court in the performance of his undertaking, but the court rejected his application. Thereupon *A* sold the land to *C*. *B* sued him for the land. It was held that the contract of sale to *B* was a contingent contract, being subject to the approval of the court, and that approval having not been given, the contingency did not happen and hence its performance could not be demanded.[7] A contract to sell a piece of agricultural land which was the subject-matter of the ongoing consolidation proceedings was held to be of contingent nature because nobody could tell beforehand to whom the land might become allotted. It was not enforceable until and unless the consolidation would leave the land in the hands of the seller.[8]

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5. *Chandulal* v *CIT*, (1967) 1 SCR 921, 925: AIR 1967 SC 816, 818. For another example, see *Valiammal Rangarao* v *Muthu Arunaswamy*, (1982) 3 SCC 508 where the court said that a motivated interpolation in a solemn document completely vitiates the document. Commission payable on success of litigation, this part was held to be a contingent contract. *N. Peddanna Ogeti Balayya* v *S. Setti Sons*, AIR 1954 SC 26. A contract of life insurance is also a contingent contract. See *Commr of Excess Profits Tax* v *Ruby Gen Ins Co*, 1957 SCR 1002: AIR 1957 SC 669; *Chandulal Harijivandas* v *CIT*, (1967) 1 SCR 921: AIR 1967 SC 816: 63 ITR 627.
6. *Rojasara Ramjibhai* v *Jani Narottamdas*, (1986) 3 SCC 300: AIR 1986 SC 1912
7. *Dalsukh* v *Guarantee Ins Co*, AIR 1947 PC 182. *See* further *Krushna Chandra Patnaik* v *Biswantha Agarwalla*, (1990) 69 Cut L & T 529, the requirement of renewal of a lease does not make it a contingent lease.
8. *Tirthanand Singh* v *Sk Zer Mohammad*, (2001) 2 BLJR 1499 (Pat).

Contingency depending upon will of a person

A contract will be no less contingent where the happening or non-happening of the contingency depends upon the will of a party. A contract the performance of which depends upon the promisee's marriage is a contingent contract, though his marriage is a contingency exclusively within his control. A situation of this kind was before The Madras High Court in *Secretary of State for India* v *A.J. Arathoon*.[9] The case involved supply of timber to a Government Department. The timber was to be approved by the superintendent of a factory. He did not approve the timber actually supplied. The supplier sued the Government for breach of contract contending that the timber corresponded with its description in the contract and, therefore, it should have been approved. There are two possible approaches to the solution of a problem of this kind. One is to regard the contract as absolute subject only to approval, in which case the court should be able to see whether the goods answered their description in the contract and the rejection being arbitrary, it should be set aside. An argument in the support of this approach is that if goods can be rejected arbitrarily at one's own pleasure and sweet-will, then it can as well be said that there is no contract at all. The so-called contract would reduce itself to this that the Government would buy if the Superintendent so likes. This can hardly be described as a contract. Hence, to give some meaning to the contract, it would be necessary to hold that approval should not be arbitrarily refused.

The second possible approach is to regard the contract as contingent. The fact of approval being collateral to the performance of the contract, its performance could not be demanded till such approval. The trial court adopted the first approach. It felt that the Superintendent being himself a party to the contract, his decision could be biased and, therefore, his decision should not be final. But the Madras High Court rejected this approach and followed the other approach of regarding the contract as contingent. The contingency was not fulfilled and hence there was no question of any action for breach.

The position would be different where the goods have already been supplied and the only thing that the contract says is that buyer shall pay when he is in a position to pay. This is not a contingent contract. The liability to pay has already arisen. The making of payment at one's ease was only a personal concession and it would have been an abuse of this concession to prolong the payment for an unreasonable time. Hence, the money was payable within reasonable time.

A contract for sale of goods prescribing the condition that the goods would be inspected before despatch was held to be a firm contract. The import of materials pursuant to such a contract was valid.[10]

Contingency to be condition precedent

Generally, the condition which is collateral to the performance of a contract is a condition precedent, that is, it has to be satisfied first and then performance can be demanded. It has to be distinguished from a condition subsequent, namely, a condition which has to be satisfied after the formation of the contract. Where, for example, a person applied for shares in a company subject to his being appointed as a cashier in the company, it was held that shares could not be allotted to him

9. (1879) 5 Mad 173.
10. *Collector of Customs* v *Rakesh Press*, (1997) 10 SCC 457.

without first making him a cashier. On the other hand, where the application for shares was subject to the condition that the applicant would pay nothing until the company paid dividends, the contract was held to be not a contingent contract. A valid contract had arisen already; only the payment under it was deferred to the fulfilment of a condition. Where a person agreed to transfer his vehicle and permit, it was held to be a valid contract and not contingent or incomplete only because permission under the Motor Vehicles Act was necessary. He becomes bound to sign papers for applying for transfer.[11]

Similarly, where a valid contract has arisen but is liable to be defeated on the happening of some subsequent condition, it will not be a contingent contract. Where, for example, certain land is sold subject to a condition of repurchase on the happening of some event, it is not a contingent contract. The Supreme Court has laid down that a contract, stipulating that on the day of the redemption of the mortgaged house by the plaintiff, the defendant would execute a sale deed of the house in favour of the plaintiff, is a typical illustration of a contingent contract within the meaning of Section 31.[12]

A contract for the sale of an unspecified share in property; the sale deed to be executed on actual partition of the property has been held to be not a contingent contract and is, therefore, capable of specific enforcement.[13]

Where enforcement depends upon happening of an event [S. 32]

32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) *A* makes a contract with *B* to buy *B's* horse if *A* survives *C*. This contract cannot be enforced by law unless and until *C* dies in *A's* lifetime.

(b) *A* makes a contract with *B* to sell a horse to *B* at a specified price, if *C*, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until *C* refuses to buy the horse.

(c) *A* contracts to pay *B* a sum of money when *B* marries *C*. *C* dies without being married to *B*. The contract becomes void.

The section lays down two basic principles. First, a contract to do an act on the happening of a future uncertain condition cannot be enforced unless and until that event happens.[14] Second, if the happening of that event has become impossible, the

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11. *Khawaza Bux* v *Mirza Mohd Ismail*, AIR 1984 All 83.
12. *Ramzan* v *Hussaini*, (1990) 1 SCC 104: AIR 1990 SC 529. *Baij Nath* v *Ansal & Saigal Properties P Ltd*, AIR 1993 Delhi 285, agreement to sell a flat on 13th floor if sanctioned by the State. No sanction. Specific enforcement could not be ordered even if the builder constructed a hall at the 13th floor by keeping height within Regulations.
13. *Harbakhsh Singh Gill* v *Ram Rattan*, AIR 1988 Punj 60.
14. On the happening of the requisite contingency, specific performance of the contract can be demanded. *Rojasara Ramjibhai* v *Jani Narottam Das*, (1986) 3 SCC 300: AIR 1986 SC 1912. Followed in *Anjali Das* v *Bidyut Sarkar*, (1992) 1 Cal LT 166, sale subject to approval by the cooperative society in accordance with its by-laws.

contract becomes void. The illustrations appended to the section clarify both the principles. An option to buy shares of a bank if and when the bank is converted into a financial corporation is a contingent contract of this kind, namely, which is to be performed on the happening of a future uncertain event.[15]

The contract would also not be enforceable where the event does not happen in the way contemplated by the contract. Where a car was insured against loss in transit, the car was damaged without being put in the course of transit, the insurer was held to be not liable.[16] Once the event has happened, the contingent contract ripens into an absolute one.[17]

When performance depends upon non-happening of an event [S. 33]

33. Enforcement of contracts contingent on an event not happening.—Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

Where the performance of a contract depends upon the non-happening of an event, naturally the parties have to wait till the happening of that event becomes impossible. When such circumstances come to pass as show that the event can no more happen then only the performance of the contract can be demanded. The illustration appended to that section makes the sense of the section clear. An agreement to sell land provided that the earnest money would be returned in case the land is notified for acquisition. Unknown to the parties the land was already under notification. The contract became impossible of performance and, therefore, void on declaration under S. 6 of the Land Acquisition Act.[18]

Events linked with human conduct (S. 34)

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

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15. *Jethamal* v *R.N. Kapoor*, AIR 1956 Bom 74.
16. *V.P. Desa* v *Union of India*, AIR 1958 MP 297.
17. *N.P.B. Kotta* v *S. Sethi*, AIR 1954 SC 26, 28; *Bashir Ahmad* v *Govt of AP*, AIR 1970 SC 1089, 1092. Where the contingency was neither pleaded nor put in argument at the trial stage, the same was not allowed to be raised in appeal. *R. Velammal* v *R. Daivasigamani*, AIR 1993 Mad 100. Here the contract was that if one kind of scheduled property could not be sold, another property of the same kind would be given, but that other turned out to be encumbered, it was held that if the purchaser was willing to take it with encumbrances, specific performance would be ordered.
18. *Gian Chand* v *Gopala*, (1995) 2 SCC 528.

Illustration

A agrees to pay *B* a sum of money if *B* marries *C*. *C* marries *D*. The marriage of *B* to *C* must now be considered impossible, although it is possible that *D* may die, and that *C* may afterwards marry *B*.

When the event for which the parties are waiting is linked with the future conduct of a person, that is to say, where the contract is enforceable if a certain person is to act in a certain way, the event shall be considered to have become impossible if that person does something which makes it impossible that he should act in that way in any definite time or without further contingencies being fulfilled. For example, in *Frost* v *Knight*,[19] the defendant promised to marry the plaintiff on the death of his father. While the father was still alive, he married another woman. It was held that it had become impossible that he should marry the plaintiff and she was entitled to sue him for the breach of the contract. Similarly, where a person promised to sell certain land to the plaintiff within a certain time, but sold to another within that time, it was held that the performance had become impossible or was possible only upon the further contingency of the defendant buying back the land in order to perform his contract with the plaintiff.

Where there was a written agreement to buy the benefits of plaintiff's invention if it was approved by the engineer, it was held that there was no concluded contract because the invention was not approved by the engineer.[20]

35. When contracts become void, which are contingent on happening of specified event within fixed time.—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced, which are contingent on specified event not happening within fixed time.—Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) *A* promises to pay *B* a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) *A* promises to pay *B* a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreements contingent on impossible events, void.—Contingent agreements to do or not to do anything, if an impossible event

19. 1872 LR 7 Exch 111.
20. *Pym* v *Campbell*, (1856) 6 E&B 370.

happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) *A* agrees to pay *B* 1000 rupees if two straight lines should enclose a space. The agreement is void.

(b) *A* agrees to pay *B* 1000 rupees if *B* will marry *A's* daughter *C*. *C* was dead at the time of the agreement. The agreement is void.

These provisions are self explanatory.

PERFORMANCE OF CONTRACTS

Section 37 says that "the parties to a contract must either perform or offer to perform, their respective promises...." Thus, each party is bound to perform his obligation under the contract, unless the performance is dispensed with or excused under the provisions of the Contract Act, or of any other law.[21] Section 37 which lays down the obligation to perform proceeds as follows:

37. Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representative of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) *A* promises to deliver goods to *B* on a certain day on payment of Rs 1000. *A* died before that day. *A's* representatives are bound to deliver the goods to *B*, and *B is* bound to pay Rs 1000 to *A's* representatives.

(b) *A* promises to paint a picture for *B* by a certain day, at a certain price. *A* dies before the day. The contract cannot be enforced either by *A's* representatives or by *B*.

Tender of performance [S. 38]

The promisor, must, therefore, offer to perform his obligation under the contract to the promisee. This offer is called "tender of performance".[22] It is then for the

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21. Section 37. Performance may be dispensed with, for example, by agreement (S. 62) or it may be excused under Section 56 by supervening impossibility of performance. See *State of UP* v *Hindustan Aluminium Corpn*, (1979) 3 SCC 229, where the State Electricity Board's order dispensed with the need of performing a contract for supply of electricity. *Manni Devi* v *Ramayan Singh*, AIR 1985 Pat 35, if performance is to be claimed from legal heirs they must be substituted. *Dumraon Industries P Ltd* v *State of Bihar*, AIR 1992 Pat 83, Government supply without formal contract, part payment on supplier's quoted rates, held, whole amount payable on that basis. Writ filed to recover, objectionable; but no objection taken at early stage, alternative remedy of money suit time-barred at the stage of objection, objection overruled.

22. A party who promised to sell property on obtaining permission from Income Tax Authorities was not excused from offering performance by saying that he could not manage the clearance certificate. The contract remained alive and enforceable. The buyer had been put in possession of a part of the premises. The seller could not be allowed to take advantage of his own wrong. *Raghunath Rai* v *Jogeshwar Prashad Sharma*, AIR 1999 Delhi 383. An agreement deferring payment of a part of the price and also deferring delivery till the balance price is paid was

promisee to accept the performance. If he does not accept, "the promisor is not responsible for non–performance, nor does he thereby lose his rights under the contract". In other words, the tender of performance, if rejected by the other party, excuses the promisor from further performance and entitles him to sue the promisee for breach of the contract. Thus, a tender of performance is equivalent to performance. This is the effect of Section 38.

38. Effect of refusal to accept offer of performance.—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non–performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions—

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

A contracts to deliver to *B* at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, *A* must bring the cotton to *B's* warehouse, on the appointed day, under such circumstances that *B* may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

The tender of performance, in order to have his effect, must fulfil the following conditions:

1. Tender of performance must be Unconditional [S. 38(1)]

The tender of performance must be unconditional. A tender becomes conditional when it is not in accordance with the terms of the contract. For example, a tender of an amount less than what is due under the contract is not an effective tender.[23]

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held to be nonetheless an agreement of sale. *Travancore Rubber & Tea Co Ltd* v *CIT*, (2000) 3 SCC 715: AIR 2000 SC 1980: (2000) 243 ITR 158. The obligation of the parties to perform continues till the contract is determined according to its terms, *Bihar SEB* v *Umi Special Steel Ltd*, (2000) 8 SCC 560.

23. *Haji Abdul Rahman* v *Haji Noor Mohammad*, (1891) 16 Bom 141; *Watson & Co* v *Dhonendra Chunder Mookherjee*, (1877) 3 Cal 6; *Bank of Mysore* v *B.D. Naidu*, AIR 1954 Mys 168. Formal tender of purchase price is not necessary to demand specific performance. See *International Contractors Ltd* v *Prasanta Kumar Sur*, (1961) 3 SCR 579: AIR 1962 SC

2. *The tender of performance must be made at proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.*

Often the time and place of performance are fixed by the parties in their contract. The tender of performance must be made within the time and at the place so fixed. If it is so made, the promisor is under no further responsibility,[24] if the tender is not accepted. This was established as early as (1843) in *Startup* v *Macdonald*:[25]

> The defendant bought of the plaintiff ten tons of linseed oil to be delivered within the last 14 days of the month of March. The plaintiff tendered on the last of the fourteen days at 9 o'clock at night. The defendant refused to accept owing to the lateness of the hour.

He was held liable for the breach as the jury found that, though the hour was unreasonable, yet there was time for the defendant to have taken in and weighed the goods before midnight. He should, therefore, have accepted the tender and "then no doubt, the contract would have been literally performed".

Where in an international trade contract, the agreement was that payment should reach on 14th of the month, the court held that the defendant should have waited before repudiating the contract up to midnight of 14th.[26]

Further, the tender must be made under such circumstances that the other party gets a reasonable opportunity of ascertaining whether the person making the tender is able and willing to fulfil the whole of his obligation under the contract. If the tenderer has to deliver something to the promisee, the latter must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. In other words, the goods tendered must be of the contract description, otherwise the tender is not valid.[27] If there are several joint promisees, it is not necessary for the promisor to offer performance to every one of them. A tender made to any one of them has the same legal consequences as a tender to all of them.[28]

In the case of an obligation to pay a debt, the mere fact that the payment was tendered and refused does not discharge the debtor from his liability to pay the debt.[29] This principle of old standing has been indorsed by the Supreme Court in a case[30] where the debtor had the right on paying back his loan to recover vacant possession of his premises, and his tender having been refused, it was held that he

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77. Where the highest figure ascertained through tenders was found to be low and, therefore, a meeting of all the tenderers was called so as to give them an opportunity of revising their figures, the acceptance of the best figure thus obtained was held to be not arbitrary. *Food Corporation of India* v *Kandhenu Cattle Feed Industries*, AIR 1993 SC 1601.

24. See *Arunchelam Chetty* v *Krishna Iyer*, 90 IC 481.
25. (1843) 64 RR 810: 12 LJ Ex 477: (1843) 6 Man & G 693.
26. *Afovos Shipping Co* v *R. Pagnan*, (1982) 1 Lloyd's Rep 562 (CA).
27. See *Carlos Federspial & Co* v *Charles*, (1957) Lloyd's Rep 230 and *Moore & Co Ltd & Land & Co, Re*, (1921) 2 KB 519: (1921) All ER Rep 199.
28. Section 38, *last para*. See *Alcon Constructions* v *Board of Trustees*, AIR 1982 Goa 9.
29. *Dixon* v *Clark*, (1847) 16 LJ CP 237: 136 ER 919.
30. *Vidya Vati* v *Devi Das*, (1977) 1 SCC 293. *See* also *Renusagar Power Co* v *General Electric Co*, (1984) 4 SCC 679.

was not discharged from his obligation to pay before he could recover his possession.

Obligation to return Security Documents on Payment

A loan transaction was brought to an end by repayment. It then becomes the duty of the lender to return the security documents. He was not allowed to retain them on the ground that some litigation was pending between the parties.[31]

Obligation to return security money on rejection of bid

Where a bid was rejected after an unreasonable period of two years and only then the security deposit was refunded, the court directed payment of interest at 12% p.a.[32]

By whom contracts must be performed [S. 40]

40. Person by whom promise is to be performed.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it.

Illustrations

(*a*) *A* promises to pay *B* a sum of money. *A* may perform this promise, either by personally paying the money to *B*, or by causing it to be paid to *B* by another; and if *A* dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(*b*) *A* promises to paint a picture for *B*. *A* must perform this promise personally.

41. Effect of accepting performance from third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

If there is something in the contract to show that personal performance was intended, then the contract will have to be performed by the promisor himself. Sometimes the nature of the promise is an indication by itself that the promisor must perform personally. This usually happens in cases where the use of the personal skill of the promisor is involved, for instance, a contract to paint, sing or marry and contracts of technical nature. In such cases the death of the promisor puts an end to the contract. The promise cannot be enforced against his legal representatives, neither can they enforce the promise.[33]

Ordinarily, however, the rule as laid down in Section 37 is that "promises bind the representatives of the promisors in case of the death of such promisors before performance". Thus, unless a contrary intention appears from the contract, a promise can be enforced against and also by the legal representatives of the seller or the buyer. There is nothing personal in the sale of goods or payment of price.[34] "When a

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31. *Eco Ceramics* v *Karnataka State Financial Corpn*, AIR 2001 Kant 167: (2001) 4 Kar LJ 463.
32. *Shanker Lal* v *State of Rajasthan*, AIHC 2548 (Raj).
33. *See* Section 37, noted above.
34. *Yaman* v *Changi*, (1925) 49 Bom 862: 27 Bom LR 1261. *A.R. Venkatasami Naicker* v *A.R.V. Jaganathan*, (1998) 1 Mad LJ 600, suit for specific performance of a contract of sale, the legal

promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."[35]

"There is some English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor. In India, however, the words of Section 41 of the Contract Act leave no room for doubt that when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor."[36]

PERFORMANCE OF JOINT PROMISES

According to English law, if one of the several joint promisors dies, the rights and liabilities under the contract devolve upon the surviving joint promisors. The representatives of the deceased promisor neither obtain any rights nor assume any liability, unless they are the representatives of the last surviving promisor.[37] This rule may some time cause injustice, inasmuch as the creditor loses the security of the solvency of a promisor. Section 42 of the Contract Act, therefore, lays down a different rule:

Devolution of liabilities

42. Devolution of joint liabilities.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representatives jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

According to this section joint promisors must, during their joint lives, fulfil the promise. And if any of them dies, his representatives must, jointly with the surviving promisors, fulfil the promise and so on. On the death of the last survivor, the representatives of all of them must fulfil the promise. But this is subject to any private arrangement between the parties. They may expressly or impliedly prescribe a different rule.

Another important aspect of joint promises is codified in Section 43.

Joint and several

43. Any one of joint promisors may be compelled to perform.—When two or more persons make a joint promise, the promisee may, in the absense of express agreement to the contrary, compel any (one or more) of such joint promisors to perform the whole of the promise.

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representatives of the defendant, (who died during pendency), could be brought on record unless there was contrary intention in the contract.

35. Section 41.

36. *Kapur Chand Godha* v *Mir Nawab Himayalikhan Azamjah*, (1963) 2 SCR 168, 179: AIR 1963 SC 250, 254.

37. This is, of course, subject to the statutory modifications. For example, the Partnership Act makes the estate of a deceased partner liable for debts incurred up to the date of his death. *See* Section 9 of the (English) Partnership Act, 1890 and the decision of the House of Lords in *Kendall* v *Hamilton*, (1879) 4 App Cas 504.

Each promisor may compel contribution.—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(*a*) *A*, *B* and *C* jointly promise to pay *D* 3000 rupees. *D* may compel either *A* or *B* or *C* to pay him 3000 rupees.

(*b*) *A*, *B* and *C* jointly promise to pay *D* the sum of 3000 rupees. *C* is compelled to pay the whole. *A* is insolvent, but his assets are sufficient to pay one-half of his debts. *C* is entitled to receive 500 rupees from *A's* estate, and 1250 rupees from *B*.

(*c*) *A*, *B* and *C* are under a joint promise to pay *D* 3000 rupees. *C* is unable to pay anything and *A* is compelled to pay the whole. *A* is entitled to receive 1500 rupees from *B*.

(*d*) *A*, *B* and *C* are under a joint promise to pay *D* 3000 rupees. *A* and *B* being only sureties for *C*. *C* fails to pay. *A* and *B* are compelled to pay the whole sum. They are entitled to recover it from *C*.

This section lays down three rules:

Any one Compellable to Perform

Firstly, when a joint promise is made, and there is no express agreement to the contrary, the promisee may compel any one or more of the joint promisors to perform the whole of the promise.[38] "*A*, *B* and *C* jointly promise to pay *D*, 3000 rupees. *D* may compel either *A* or *B* or C to pay him 3000 rupees".[39]

Right of Contribution

Secondly, a joint promisor who has been compelled to perform the whole of the promise, may require the other joint promisors to make an equal contribution to the performance of the promise, unless a different intention appears from the agreement.[40] *A*, *B* and *C* are under a joint promise to pay *D*, 3000 rupees. *D*

38. Para 1, Section 43. *Rama Shanker Singh* v *Shyamlata Devi*, (1969) 2 SCR 360, 362-63: AIR 1970 SC 716, 717; *Mukund Das Raja Bhagwan Das* v *State Bank of Hyderabad*, (1970) 2 SCC 766: AIR 1971 SC 449.

39. Illustration (*a*) to Section 43. See *Rama Shanker Singh* v *Shyamlata Devi*, (1969) 2 SCR 360: AIR 1970 SC 716, contribution between lessees. The court cannot say that its judgment should be enforced against one joint promisor in the first instance and against other thereafter. *Mukund Das Raja Bhagwan Das* v *State Bank of Hyderabad*, (1970) 2 SCC 766: (1971) 2 SCR 136: AIR 1971 SC 449.

40. Para 2, Section 43.

recovers the whole amount from *A*. *A* may require *B* and *C* to make equal contributions.

Sharing of Deficiency

Thirdly, if any one of the promisors makes a default in such contribution, the remaining joint promisors must bear the deficiency in equal shares.[41] *A*, *B* and C are under a joint promise to pay *D*, 3000 rupees. *C* is unable to pay anything. The deficiency must be shared by *A* and *B* equally. If *C's* estate is able to pay one-half of his share, the balance must be made up by *A* and *B* in equal proportions.[42]

The first rule is at variance with the English Common Law. Referring to the English rule as laid down in *King* v *Hoare*[43] and *Kendall* v *Hamilton*[44] STRACHEY CJ of the Allahabad High Court said:

> As explained in those judgments the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co-contractors joined as defendants in any suit to enforce the joint obligation.

But Section 43 allows an action to be brought against any one of the joint promisors without impleading the others as defendants. Suppose now that the creditor sues only one joint promisor, can he subsequently sue the others? According to English Law he cannot. What is the position in India? According to STRACHEY, CJ there is no such bar in the words of Section 43 and, therefore, a subsequent suit against other promisors should be allowed to proceed.[45] Pollock and Mulla observe: "the reasoning of STRACHEY CJ seems to us conclusive."[46] But some other High Courts have disallowed such actions.[47]

Release of One Joint Promisor

The creditor is also given the right to release anyone of the joint promisors from his liability and this does not discharge the others from their liability. Section 44 is as follows:

44. Effect of release of one joint promisor.—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

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41. Para 3, Section 43.
42. *See* illustration (*b*) and (*c*). These provisions as to contribution do not apply to contributions between mortgagors. *Kedar Lal Seal* v *Hari Lal Seal*, 1952 SCR 179: AIR 1952 SC 47.
43. (1844) 13 M & W 494: 67 RR 664.
44. (1879) 4 App Cas 504.
45. *Mohd Askari* v *Radhe Ram Singh*, (1900) 22 All 307, 311-12.
46. THE INDIAN CONTRACT ACT, (1957), p 311.
47. *See*, for instance, Calcutta High Court's decision in *Hemendro Coomar Mullick* v *Rajendro Lall*, (1878) 3 Cal 353. *See* also *Luckmidas Khimji* v *Purshotam Haridas*, (1882) 6 Bom 700; *Neelratan Mukhopadhya* v *Cooch-Bihar Loan Officer*, (1941) 1 Cal 171, where different views have been explained.

This also marks a departure from the English Common Law, according to which a discharge of one joint promisor amounts to a discharge of all, unless the creditor expressly preserves his rights against them.

Joint Promisees [S. 45]

Devolution of joint rights is governed by almost the same kind of principles as the devolution of joint liabilities. When a promise is made to more than one person jointly, the right to claim performance rests with all of them jointly. If anyone of them dies, it rests with his legal representatives jointly, with the survivors and after the death of the last survivor, with the representatives of all jointly. Section 45 is as follows:

45. Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5000 rupees, lent to him and *B* and *C*, promises *B* and *C* jointly to repay them that sum with interest on a day specified. *B* dies. The right to claim performance rests with *B's* representative jointly with *C* during *C's* life, and, after the death of *C*, with the representatives of *B* and *C* jointly.

The Supreme Court has held that where a joint promisee refuses to join as a co-plaintiff, he should be taken on record as pro-forma defendant. The court cannot compel any person to be a plaintiff if he does not want to be so.[48]

Time and place for performance (Ss. 46-50)

46. Time for performance of promise, where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

47. Time and place for performance of promise, where time is specified and no application to be made.—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

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48. *Johar Roy* v *Premji Bhimji*, (1977) 4 SCC 562. *Jose* v *Joseph*, (1993) 2 Ker LJ 712, devolution on legal representatives of the right to sue.

Illustration

A promises to deliver goods at *B's* warehouse on the 1st January. On that day *A* brings the goods to *B's* warehouse, but after the usual hour for closing it, and they are not received. *A* has not performed his promise.

48. Application for performance on certain day to be at proper time and place.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question "what is a proper time and place" is, in each particular case, a question of fact.

49. Place for performance of promise, where no application to be made and no place fixed for performance.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to *B* on a fixed day. *A* must apply to *B* to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. Performance in manner or at time prescribed or sanctioned by promisee.—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) *B* owes *A* 2000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A's* credit, and this is done by *C*. Afterwards, and before *A* knows of the transfer, *C* fails. There has been a good payment by *B*.

(b) *A* and *B* are mutually indebted. *A* and *B* settle an account by setting off one item against another, and *B* pays *A* the balance found to be due from him upon such settlement. This amounts to a payment by *A* and *B*, respectively, of the sums which they owed to each other.

(c) *A* owes *B* 2000 rupees. *B* accepts some of *A's* goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) *A* desires *B*, who owes him Rs 100, to send him a note for Rs 100 by post. The debt is discharged as soon as *B* puts into the post a letter containing the note duly addressed to *A*.

Where no Time Specified and Performance is to be without Application

The first principle as laid down in Section 46 is that where the promisor is to perform without any application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. The

explanation to the section says that "what is a reasonable time" is, in each particular case, a question of fact.[49]

Unreasonably long delay cannot be regarded as reasonable. Thus, where a person undertook to discharge the debt of another but no time of payment was fixed, it was held that the offer of payment after three years was too late. That amounted to breach. A contract to keep a ship insured was held to have been broken although there was only a delay of three days. In the case of a ship much can happen in three days. But in a contract of sale of shares two months' time was held to be reasonable for completing it.

Usual Business Hours

The second general principle is stated in Section 47. Where the promisor has undertaken to perform without any application from the promisee, but the day of performance is fixed, the promisor may perform the promise during the usual business hours of the day and at the place where such promise ought to be performed. Since only the day of performance is stated but not the place, the promise should be performed at the place where its nature demands, that is, where it ought to be performed. In a promise, for example, to deliver goods at the buyer's warehouse, the tender of performance must be made at that place. The promisor should bring the goods at that place during the usual business hours. If he brings the goods after the business hours and they are not received, it cannot be said that the promise has been performed. Where the day fixed for performance happens to be a public holiday, then under the Negotiable Instruments Act, performance should be offered a day before. But in other cases much depends on the usages of the particular trade. If such usage allows performance on the next succeeding day, it will be quite reasonable to offer performance on that day.

Application for Performance to be at Proper Place and Time

The third general principle is to be found in Section 48. Where the day of performance is fixed, but the promisor has not to perform without application from the promisee, it is the duty of the promisee to apply for performance at proper place and within the usual business hours. The explanation to the section says that "what is a proper time and place" is a question of fact in each case.

Application for Reasonable Place of Performance

The fourth general principle is in Section 49. When a promise is to be performed without any application by the promisee, and no place is fixed for performance, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place. The illustration appended to the section supposes a case in which there is a contract to supply a quantity of jute on a fixed day. The seller must apply to the buyer to appoint a reasonable place for the performance of the promise and then to perform the promise at such place. A pronote executed at a particular place stated that it would be payable at that place or at any place in India. The payee settled at some

49. The passing of a decree does not wipe out the responsibility of the promisor to offer performance within reasonable time. ***Hungersford Investment Trust Ltd*** v ***Haridas Mundhra***, (1972) 3 SCC 684: AIR 1972 SC 1826.

other place and demanded payment from there. It was held that under Section 49 it was the duty of the debtor to seek his creditor and to pay him there.[50]

Time and Manner of Performance, Promisee's Choice

The next general principle is stated in Section 50. The section leaves the whole question as to the time and manner of performance upon the choice of the promisee. It says that the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. The illustrations appended to the section deserve to be noted. If a person owes another a sum of money and the creditor tells him to pay the amount into his account in a bank, which is done. Afterwards, before the creditor comes to know of the fact of payment, the bank fails, so that the creditor does not get the benefit of the payment. Even so the debtor is discharged from his liability. Where two persons are mutually indebted and they agree to set off their debts against each other, the balance being paid off by one to the other. Both stand discharged from their respective liability. Where the creditor accepts goods from the debtor in payment, the debtor stands discharged to the extent of the value of the goods. Where the creditor desires the debtor to send the money by post, the debtor will be discharged as soon as he posts a properly addressed and stamped letter containing the money.[51]

Performance of reciprocal promises [Ss. 51–54]

When a contract consists of an exchange of promises, they are called reciprocal promises. Section 2(*f*) say that "promises which form the consideration or part of the consideration for each other, are called reciprocal promises.[52] When such promises have to be simultaneously performed, the promisor is not bound to perform unless the promisee is ready and willing to perform his promise. This principle is laid down in Section 51.

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(*a*) *A* and *B* contract that *A* shall deliver goods to *B* to be paid for by *B* on delivery.

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50. *L.N. Gupta* v *Tara Mani*, AIR 1984 Del 49.

51. See *CIT* v *Ogale Glass Works*, (1955) 1 SCR 185: AIR 1954 SC 429, a cheque posted as desired by the promisor. *See* also *Union of India* v *Radha Kissan Agarwal*, (1969) 1 SCC 225: (1969) 2 SCR 28: AIR 1969 SC 762. The responsibility of posting a dividend warrant is satisfied when the warrant is posted. *H.P. Gupta* v *Hiralal*, (1970) 1 SCC 437: 1970 SCC (Cri) 190: 1970 SCR 788: AIR 1971 SC 206. Payment may be made by entries in books of account. *Narayandas Shreeram Somani* v *Sangli Bank Ltd*, (1965) 3 SCR 777: AIR 1966 SC 170: (1965) 35 Comp Cas 596.

52. See *Radhakrishna S. Rai* v *T. Dawoodbhai*, 1962 Supp (1) SCR 81, 96: AIR 1962 SC 538; *Jiwan Lal* v *Brij Mohan Mehra*, (1972) 2 SCC 757: AIR 1973 SC 559. No separate consideration has to be shown in such cases because such promises constitute the consideration for each other, *Varghese Paul* v *Narayanan Nair*, (1999) 2 Ker LT 571.

A need not deliver the goods, unless *B* is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless *A* is ready and willing to deliver them on payment.

(b) *A* and *B* contract that *A* shall deliver goods to *B* at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless *B* is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless *A* is ready and willing to deliver the goods on payment of the first instalment.

In a contract, for example, for the sale of goods on payment of price, the seller need not deliver the goods unless the buyer is ready and willing to pay for the goods on delivery. Similarly, the buyer need not pay unless the seller is ready and willing to deliver the goods on payment. If the price is to be paid in instalments and the first instalment is payable on delivery, the seller need not deliver unless the buyer is ready and willing to pay the first instalment and the buyer need not pay the instalment unless the seller is ready and willing to deliver the goods.

The order in which reciprocal promises must be performed may be fixed by the contract and the order so fixed must be followed. But where the order is not expressly fixed, they will have to be performed in the order which the nature of the transaction admits. The relevant provision is Section 52.

52. Order of performance of reciprocal promises.—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) *A* and *B* contract that *A* shall build a house for *B* at a fixed price. *A's* promise to build the house must be performed before *B's* promise to pay for it.

(b) *A* and *B* contract that *A* shall make over his stock-in-trade to *B* at a fixed price, and *B* promises to give security for the payment of the money. *A's* promise need not be performed until the security is given, for the nature of the transaction requires that *A* should have security before he delivers up his stock.

Order of Performance

In a case before the Allahabad High Court:[53]

> The defendant took a lease of land from the Municipality of a town on condition that he pays Rs 630 for levelling charges and possession was to be delivered after levelling. The question arose whether the sum was to be paid before or after the levelling. The agreement was silent on the point.

And therefore, the court held that "in the ordinary course of business work is not usually paid for before it is done. It is the custom in some cases for payment to be

53. *Hashman* v *Lucknow Improvement Trust*, (1927) 101 IC 847. *See* also *K. Abdulkhader* v *State*, (1993) 2 Ker LJ 977, failure on the part of the Government to pay for a part of the completed works in accordance with the agreement, delay on the part of the contractor was held to be attributable to that default.

made in instalments as the work progresses but the person for whom a work is done is not expected to pay the entire cost in advance without an express agreement to that effect".

Section 53 lays down the principle that where one of the parties to reciprocal promises prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

53. Liability of party preventing event on which contract is to take effect.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non–performance of the contract.

Illustration

A and *B* contract that *B* shall execute certain work for *A* for a thousand rupees, *B* is ready and willing to execute the work accordingly, but *A* prevents him from doing so. The contract is voidable at the option of *B;* and, if he elects to rescind it, he is entitled to recover from *A* compensation for any loss which he has incurred by its non-performance.

Liability of Party Preventing Performance

The same result would follow where the obstruction to performance is caused by the inadequacy of the machinery or material supplied by one of the parties. For example, in a case before the Privy Council,[54] where in order to get his mine cleared of a rock, the defendant had to supply a crusher. The crusher supplied was too inadequate for the job. This was held to be such an obstruction to performance as enabled the contractor to recover his expenses and loss of profits. Similarly, in a case before the Supreme Court,[55] a bidder to whom a coal mine was knocked down was allowed to have refund of his deposit when the coal commissioner refused to permit him to take the coal to U.P., any such restriction being not present in the terms of the auction.

Where the nature of the reciprocal promises is such that one cannot be performed or its performance cannot be claimed unless the other party performs his promise in the first place, then if the latter fails to perform, he cannot claim performance from the other, but must make compensation to him for his loss. Section 54 incorporates this principle.

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54. *Kleinert* v *Abosso Gold Mining Co,* (1913) 59 Sol. Jo. 45, on appeal from the Supreme Court of Gold Coast.
55. *Har Prasad Choubey* v *Union of India,* (1973) 2 SCC 746. *Uberoi Mohinder Singh* v *State of Haryana,* (1991) 2 SCC 362, where in a contract for Yamuna quarrying, the contractor was prevented from performing his part because of the failure of the Flood Control Deptt. to give no objection and, therefore, it was held that the contractor was entitled to refund of his deposit money.

54. Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(*a*) *A* hires *B's* ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by *A*, *B* receiving a certain freight for its conveyance. *A* does not provide any cargo for the ship. *A* cannot claim the performance of *B's* promise, and must make compensation to *B* for the loss which *B* sustains by the non-performance of the contract.

(*b*) *A* contracts with *B* to execute certain builders' work for a fixed price. *B* supplying the scaffolding and timber necessary for the work. *B* refuses to furnish any scaffolding or timber, and the work cannot be executed. *A* need not execute the work, and *B* is bound to make compensation to *A* for any loss caused to him by the non-performance of the contract.

(*c*) *A* contracts with *B* to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and *B* engages to pay for the merchandise within a week from the date of the contract. *B* does not pay within the week. *A's* promise to deliver need not be performed, and *B* must make compensation.

(*d*) *A* promises *B* to sell him one hundred bales of merchandise, to be delivered next day, and *B* promises *A* to pay for them within a month. *A* does not deliver according to his promise. *B's* promise to pay need not be performed, and *A* must make compensation.

Effect of one Party's Default

Another illustration is the Supreme Court decision in *Nathulal* v *Phoolchand*:[56]

> The plaintiff was the owner of a ginning factory constructed on agricultural land and nominally held in the name of his brother. He sold the factory to the defendant who paid half the price at once and was put in possession, the balance being payable on a fixed date. The buyer defaulted in paying up on that date and the seller rescinded the contract and brought an action for possession.

SHAH J speaking for himself and HEGDE J held that the nature of the contract required that the seller should have his own name recorded as the owner and obtained permission of the State Government for transfer of the agricultural land before he could claim the final payment:

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56. (1969) 3 SCC 120: (1970) 2 SCR 854: AIR 1970 SC 546. *Vegi Venkateswara Rao* v *Vegi Venkatarama Rao*, AIR 1998 AP 6, in a suit for specific performance of a reciprocal promise, the party seeking relief has to show that he was ready and willing to do his part of the contract. Following, *Vairavan* v *Kannappa*, AIR 1925 Mad PC 91; *Tan Ab Boon* v *Johre State*, AIR 1936 PC 236; *Abdullah Bey* v *Tenenbaum*, AIR 1934 PC 91.

If, therefore, under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligation by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is to be performed by him earlier. So long as Nathulal (seller) did not carry out his part of the contract, Phoolchand could not be called upon to pay the balance of the price.[57]

The offer to perform a reciprocal promise in different terms than contemplated by the contract, for example, offer of payment before the time fixed, is not valid performance so as to demand performance from the opposite side.[58]

Under a contractual arrangement one party (respondent) was to supply to the other (appellant) TV signals and the other was to supply them to cable operators after decoding. The other party informed the supplier that it was discontinuing the service to cable operators because of non-payment by them and that it would also not be able to pay to the supplier. Because of this the supplier stopped sending the signals. The supplier subsequently brought an action for damages for the unexpired period of the agreement which was not used by the appellant. The court said that S. 54 would not help the supplier. He acquiesced in the act of the appellant and stopped sending signals. He had the full right to rescind the contract and bring an action for breach, but he did not adopt this course.[59]

Where the contractor had to submit a bank performance guarantee within a certain time, and only then the other party could be called upon to perform his part of the contract, but he failed to do so and the letter of credit submitted by him was also conditional, it was held that since the other party had not ended the contract, it remained alive for the benefit of both parties. There was no breach and no dispute. This aspect was not referable to arbitration.[60]

Promises Comprising of Legal and Illegal Parts

57. Reciprocal promise to do things legal and also other things illegal.—Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and *B* agree that *A* shall sell *B* a house for 10,000 rupees, but that, if *B* uses it as a gambling house, he shall pay 1,50,000 rupees for it.

The first set for reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

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57. (1969) 2 SCC 120, 124: (1970) 2 SCR 854, 859. Followed in *Chandnee Widya Vati* v *C.H. Katial*, AIR 1964 SC 978, where also the condition for sale of plots was that the vendor should obtain planning permission from the Government within two months. *Bishambar Nath Agarwal* v *Kishan Chand*, AIR 1998 All 195, the seller of land subject to ceiling permission must obtain such permission first before asking for payment.
58. *Vidya Vati* v *Devi Das*, (1977) 1 SCC 293.
59. *Jabalpur Cable Network P Ltd* v *ESPN Software India P Ltd*, AIR 1999 MP 271.
60. *State Trade Corpn of India Ltd* v *Marpro Ltd, UK*, (2000) 86 Delhi LT 361.

The second set is for an unlawful object, namely, that *B* may use the house as a gambling house, and is a void agreement.

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and *B* agree that *A* shall pay *B* 1000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.[61]

TIME FOR PERFORMANCE [S. 55]

Sometimes the parties to a contract specify the time for its performance. Ordinarily it is expected that either party will perform his obligation at the stipulated time. But if one of them fails to do so, the question arises what is the effect upon the contract. Section 55 contains the answer.

55. Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential.—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Factors which make time of essence

According to this section, "if the intention of the parties was that time should be the essence of the contract", then a failure to perform at the agreed time renders the

61. See *BOI Finance Ltd* v *Custodian*, (1997) 89 Comp Cas 74: (1997) 25 Corpt LA 115, when the void part can be separated from the valid, the latter does not become void.

contract voidable at the option of the opposite party. "Time is generally considered to be of the essence of the contract in the following three cases:

(1) Where the parties have expressly agreed to treat it as of the essence of the contract;

(2) Where delay operates as an injury;

(3) Where the nature and necessity of the contract requires it to be so construed, for example, where a party asks for extension of time for performance."[62]

The well known authority is *Bhudra Chand* v *Betts*.[63]

> The plaintiff stipulated with the defendant to engage his elephant for the purpose of *Kheda* operations (to capture wild elephants). The contract provided that the elephant would be delivered on the 1st October, 1910; but the defendant obtained an extension of time till the 6th October and yet did not deliver the elephant till the 11th. The plaintiff refused to accept the elephant and sued for damages for the breach.

He was held entitled to recover as the parties intended that time should be of the essence of the contract. "This conclusion is confirmed by the circumstance that the defendant obtained an extension of the time; if the time were not of the essence of the contract, he need not have asked for extension of time."[64]

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62. *See* R.K. PRASAD J, *Orissa Textile Mills Ltd* v *Ganesh Das*, AIR 1961 Pat 107. Unless the contract prescribes a time for performance, there is no question of any particular moment of time being regarded as of the essence of the contract, *D. S. Thimmappa* v *Siddaramakka*, (1996) 8 SCC 365: AIR 1996 SC 1960. The mere fact of time being mentioned with a statement that delay would have to be compensated does not of itself make time of the essence, non-performance on the stipulated date did not give the party the right to treat the contract as ended and forfeit earnest money. *Thakorlal V. Patel* v *Syed Badruddin*, (1993) 1 Guj LR 28. The court said (at p 35): "The language of the agreement must show in most unmistakable terms that the intention of the parties was to make their rights to depend upon the observation of the time-limit. Intention may also be inferred from the nature of the property to be sold and the conduct of the parties and the surrounding circumstances at or before the contract and not what takes place after the contract has been entered into. Even where the parties have expressly provided that time is of the essence of the contract, other provisions may exclude the inference that the completion of the work by a particular date was intended to be fundamental, for example, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine for every day or week the work remains unfinished, such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of the contract." The court picked up these observations from the decision of the Supreme Court in *Gomathinayagam Pillai* v *Palaniswami Nadar*, AIR 1967 SC 868. *Vaiman* v *K.S. Vidyanandam*, AIR 1996 Mad 353, sale of immovable property with no stipulation that time was of the essence, there was stipulation for completion within six months failing which the advance paid was not to be returned. The court said that this would not make time of the essence. Recovery of property allowed by order of specific performance.

63. (1915) 22 Cal LJ 566: 33 IC 347.

64. MOOKERJEE J at p 567. Followed in *C.C. of India* v *S.S. Corpn*, AIR 1970 Cal 321. A contract containing provisions for extension of time in certain circumstances often has the effect of reducing the value of time of performance. *Abdulkhader* v *Plantation Corpn of Ker Ltd*, 1982 KLT 928. Where delay is due to the conduct of the party who has to supply material, penalty for delay cannot be imposed. *Oil and Natural Gas Commission* v *S.S. Agarwala & Co*, AIR 1984 Gau 11.

In business matters time generally of essence

Businessmen attach Importance to Time

The matter depends upon the intention of the parties. Even where "a specific date is mentioned for the completion of the contract,[65] one has not to look at the letter but at the substance of the agreement in order to ascertain the real intention of the parties".[66] "In commercial contracts time is ordinarily of the essence of the contract."[67] This is so because the business world requires certainty[68] and also because "merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance".[69] Thus, in a contract to supply imported goods in October or November;[70] in a contract for the purchase of chassis for a diesel truck to be supplied within two months[71] and in an auction purchase, where the price was to be paid within 15 days,[72] time was held to be of the essence of the contract. Similarly, in a contract for the sale or purchase of goods the prices of which fluctuate rapidly in the market, the time of delivery and of payment are considered to be of the essence. Thus, in *Mahabir Prasad Rungta* v *Durga Datt*[73] the Supreme Court held on the facts of the case that time of payment was of the essence of the contract. The facts of the case were that a transporter contracted to transport coal from a colliery to the railway station. The colliery-owner had to keep the road in repair and to arrange for petrol. He had also to pay for the work done on the 10th of the next month. It was alleged that these things were not done in time and, therefore, the transporter could not go on with his work. The transporter rescinded the contract and brought an action for damages. It was held that in commercial transactions time is ordinarily of the essence of the contract. In this contract the time of payment and of arranging other things was particularly such an important condition of the contract that Section 55 of the Contract Act could be invoked by the aggrieved party and he was entitled to rescind the contract. HIDAYATULLAH J stated the effect of the agreement in these words: In commercial transactions time is ordinarily of the essence, and in the agreement, with which we are concerned, the payment of bills by a particular date was expressly mentioned. The intention obviously was that Durga Datt would receive payments for work executed as soon as the amounts became due. Rungta did not pay these amounts either within 10th of the following month or even

65. Hence it becomes a mixed question of law and fact. *Municipal Corpn of Delhi* v *Jagan Nath Ashok Kumar*, (1987) 4 SCC 497: AIR 1987 SC 2316.
66. See *Sachidananda* v *G.P. & Co*, AIR 1964 Ori 269. *State of Karnataka* v *Coimbatore Premier Constructions*, (1988) 1 Kar LJ 249, where though time was described as of the essence, additional work allotted to the contractor was more extensive than the main work, the stipulated time lost its character of being essential.
67. *China Cotton Exporters* v *B.R.C. Mills*, AIR 1961 SC 1295. Followed in *Peeco Hydraulic P Ltd* v *East Anglia Plastics (India) Ltd*, (1987) 1 Cal LT 551, sale of machinery, commercial deal, time of essence.
68. *Hitkari Motors* v *Attar Singh*, AIR 1962 J&K 10.
69. Lord CAIRNS in *Bowes* v *Shand*, (1877) 2 AC 455, 463.
70. *China Cotton Exporters* v *B.R.C. Mills*, AIR 1961 SC 1295.
71. *Hitkari Motors* v *Attar Singh*, AIR 1962 J&K 10.
72. *Duriakannoo* v *Servana*, AIR 1963 Mad 468. *See* also *American Pipe Co* v *State of UP*, AIR 1983 Cal 186, where time of payment was held to be not of the essence.
73. AIR 1961 SC 990: (1961) 3 SCR 639, 645: (1961) 1 MLJ 142 SC.

within a reasonable time after the presentation of the bills. In addition to this there were difficulties of the road being in a bad state during the rainy season. The clause as to road-repair itself showed that the parties realised that there might be hindrance to the trucks, if the road was not repaired. The case is thus covered by Section 55 of the Indian Contract Act, and Durga Datt was entitled to rescind the contract, when the very important condition of the agreement was broken by Rungta.

Construction Contracts

Time schedule in a construction contract is likely to be of the essence because construction is a commercial service. Where 24 months' time was given to the builder with a stipulation that if he failed to deliver within the stated time, he would pay 10% per annum of the purchase price measured by the period of delay, time was held to be of the essence entitling recovery of the stipulated amount.[74] Similarly, where a builder's commitment with a bank was that he would make their building ready within six months, but could not do so, the bank was allowed to terminate the contract. The fact that the bank exercised this right after about two months after the expiry of the stipulated time did not amount to an extension of time.[75]

Sale Transactions

The courts would have to see on the facts of each case involving a sale transaction whether time factor was essential to performance or not. In a contract of sale of goods, the time of shipment is of the essence. There is a considerable authority in support of this rule and it has been recognised and accepted in *Bowes* v *Shand*[76] where in a contract of sale of rice to be shipped at Madras during March or April, 1874, by a ship of the name of Rajah of Cochin, the stipulation in regard to shipment was held to be a condition of the contract and the contract was held to be not satisfied by shipment a month earlier, that is, in February.[77] A contract for sale of goods required fifteen days' loading notice. The court regarded it as a condition of the contract. The courts require precise compliance with stipulations as to time whenever the circumstances of the case indicate that that would fulfil the intention of the parties and that, in general, time is of the essence in mercantile contracts.[78]

Another leading Supreme Court authority is *China Cotton Exporters* v *Bihari Lal Ramchandra Cotton Mills Ltd.*[79] The appellants who carried on import business at Bombay contracted to supply to the respondent mill a quantity of Italian staple fibre cotton. The shipment was to take place in October or November. The contract concluded by the remark: "This contract is subject to import licence and therefore the shipment date is not guaranteed". A part of the goods were supplied and accepted, but the rest were not supplied in the time mentioned. The buyer wanted to avoid the contract on this ground. It was held that in spite of the remark that

74. *Chye Fook* v *Teh Teng Seng Realty*, (1989) 1 Mal LJ 308 IPOH HC.
75. *United Commercial Bank* v *Jawaharlal Mill*, (1989) 2 Cal LJ 246; citing *Ram Kalpa Kundu* v *Kushinath Dutta*, 54 Cal WN 690; *Paper Sales Ltd* v *Chokhani Bros*, AIR 1946 Bom 429, forbearance to sue not amounting to waiver.
76. (1877) 2 AC 455 HL.
77. To the same effect is *Asmone & Son* v *Cox & Co*, (1899) 1 QB 436 IA.
78. *Bungo Corpn, New York* v *Trader Export S.A. Panama*, (1981) 1 WLR 71.
79. AIR 1961 SC 1295.

shipment date was not guaranteed, time was of the essence and the buyer was entitled to avoid the contract. DAS GUPTA J said: Remembering, as we must, that in commercial contracts time is ordinarily of the essence of the contract and giving the word "therefore" its natural grammatical meaning, we must hold that what the parties intended was that to the extent that delay in obtaining licence stands in the way of keeping to the shipment date, October/November, 1950, this shipment date was not guaranteed, but with this exception, October-November, 1950, was guaranteed. The sellers contended that the parties were mentioning only one of the many reasons which might cause delay in shipment and the conjunction "therefore" was used only to show the connection between one of the many reasons—by way of illustration and a general agreement that the shipment date was not guaranteed. We do not consider this explanation of the use of the word "therefore" acceptable. If the parties intended that quite apart from delay in obtaining import licence, shipment date was not guaranteed, the natural way to expressing such intention would be to say: "The contract is subject to import licence and the shipment date was not guaranteed." The ordinary rules of grammar would not use the word "therefore" in such a context except to mean that only to the extent that delay was due to delay in obtaining import licence, shipment time was not guaranteed.

The delay in this case was due to the failure of the seller's own supplier to supply in time. This cannot be a defence unless it was a condition of the contract that the goods would be supplied only when received from the sources of supply. In a similar case before the Gujarat High Court:[80]

> The undertaking was to ship by a particular ship in August, 1954. The plaintiff failed to ship in August and on their request the defendants extended the time to September 10. The plaintiffs failed to make good their default even within the extended time and, therefore, the defendants finally repudiated the contract. The plaintiff sued them for breach.

BHAGWATI J, following the above-noted Supreme Court decision, held that the time of shipment was of the essence and it were the plaintiff and not the defendants who were guilty of breach.

An application for extension of time does not take effect unless accepted and the fact that an extension for a week was offered would not amount to a waiver within the meaning of Section 63 of the right to insist upon the stipulated time.

There was a contract for the sale of red oxide of quality and quantity stipulated within 45 days, the time was described to be as of the essence. There were provisions for repudiation on default and also for liquidated damages and penalty. Considering these terms as also the commercial nature of the contract, the time was held to be as of the essence.[81]

Land and Property Dealings

In a contract for the sale of land or immovable property, the Supreme Court has laid down that "it would normally be presumed that time was not of the essence of

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80. *Wasoo Enterprises* v *J.J. Oil Mills*, AIR 1968 Guj 57.

81. *Venkatswara Minerals* v *Jugalkishore*, AIR 1986 Kant 14. *See* further *Devender Singh* v *State of UP*, AIR 1987 All 306, where an application for extension of time was rejected after a long gap, the contractor was not allowed compensation for the waiting period. In hire-purchase transactions time of payment of hire instalments is of the essence.

the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence".[82] Intention of the parties can be ascertained from factors like nature of the property agreed to be sold, the possibility of price fluctuation, the need for entering into the contract, conduct of the parties before, at the time of and subsequent to the contract and other surrounding circumstances. A declaration that the stipulated time shall be of the essence would have to be taken in the light of other provisions and such other factors may either exclude or strengthen the inference that time was to be of the essence.[83]

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82. *Gomathinayagam Pillai* v *Palaniswami Nadar*, (1967) 1 SCR 227, 231-32: AIR 1967 SC 868, 871; *Govind Prasad Chaturvedi* v *Hari Dutt Shastri*, (1977) 2 SCC 539: AIR 1977 SC 1005; followed in *MR Marattukulam* v *Hemchand*, (1988) 2 Ker LT 166; *Ram Kishan Das* v *Bhavi Chand Sharma*, AIR 1988 Del 20. An observation to the same effect in *Hashmuddin* v *Kishan Lal Narang*, 1986 All LJ 693, the court pointing out that mere seeking of extension of time for obtaining sale-deeds would not make time to be of the essence; *C. Susheela* v *Chanda Patwari*, (1990) 1 Andh LT 359, sale of immovable property. In *Jamshed Kodaram Irani* v *Burjorji Dhunjibhai*, ILR 40 Bom 289: AIR 1915 PC 83, it was pointed out that the principle underlying Section 55 did not differ from those which obtain under the law of England as regards contracts for sale of land. *Haridas Sood* v *Narinder Singh*, AIR 1984 Del (NOC) 320; *Ved Prakash Gupta* v *Shishu Pal Singh*, AIR 1984 All 288. Delay was caused due to non-availability of material, it was brought to the notice of the other party, but no reply was received. Held, could not impose penalty for default. See *Oil and Natural Gas Commission* v *Shyam Sunder*, AIR 1984 Gau 11. A contract for sale of land merely mentioning the time of registration held, time to be of no essence. *Ram Kishan Das* v *Bhavi Chand Sharma*, AIR 1988 Del 20. In a contract for the sale of plots of land, 30 months' time was reserved by the seller for obtaining planning permissions, that was considered to be a sufficiently long period to disentitle the vendor from seeking any further time. *Chan Kin* v *Chareen Realty Development*, (1989) 1 Mad LJ 62 IPOH (HC); *Lekhchand* v *Rebello Raj*, (1990) 1 Ker LJ 678. Similar consequences followed where 3 months' time was available for getting things approved and the same was not done. *Mohamed Nazran* v *Al-Ekhwan Construction*, (1991) 3 Current LJ 2324, High Court, Singapore. *E.S. Rajan* v *R. Mohan*, (1995) AIHC 3218 Kant, the mere fact that time for performance is specified does not make it of the essence of the contract. Certain acts may be of such a nature that they may or may not be completed within the specified time. *Padmakuty* v *K. N. Malinathan*, (1998) AIHC 1001 Ker, time is not of the essence in sale of immovable property. Specific enforcement of sale agreement at the instance of buyer allowed. Also to the same effect, *Tatavarthi Jagamadham* v *A. Radhakrishnan*, (1997) 6 Andh LD 261 DB. *Jayalakshmi* v *Anilkumar*, (1996) AIHC 4353 Ker, in a sale of immovable property, the performance of the contract was dependent upon the fulfilment of certain requirements, and, therefore, it was held that the time reserved for completion of the transaction could not be of the essence of the bargain. *Thakorlal V. Patel* v *Syed Badruddin*, (1993) 1 Guj LR 28, where there are similar observations about importance of time in real estate matters. The court cited Lord CAIRNS in *Tilley* v *Thomas*, (1867) 3 Ch A 61 as saying that "the court of equity will relieve against, and enforce specific performance notwithstanding a failure to keep the dates assigned by the contract either for completion, or for the steps towards completion, if it can do justice between the parties and if (as Lord Justice TURNER said in *Roberts* v *Berry*, (1853) 3 De G M and G 284), there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances, which would make it inequitable to interfere and nullify the legal right". *Gurdeep Singh* v *Amiya Kumar Datta*, (1993) MPLJ 854, time not of the essence in immovable property transactions. *Samina Venkata Sureswara Sarma* v *Meesala Kota M*, AIR 1996 AP 440, payment and eviction linked with time, but payment made after that time and eviction not made for vacant possession even after that time, time of no essence. *Bhagwan Singh* v *Teja Singh*, AIR 1995 P&H 64, land purchased from rehabilitation department, date for execution of sale deed specified, vendor had to obtain certain certificates, time not of the essence.

83. *Kochappu* v *Somasundaram Chettiar*, (1991) 1 Ker LJ 525. In an agreement to sell immovable property, a part payment was to be made within a specified time and this the purchaser was not willing to make except upon further conditions, time was held to be of the

Where in an agreement for sale of immovable property, there was no mention originally of the time of performance being of the essence and the buyer was ready and willing and had already paid two instalments, it was held that a unilateral attempt on the part of the vendor to make time as of the essence was improper.[84] As against this, a contract provided that the balance amount has to be paid and sale deed registered within a particular time and in no case the time would be extended. But the vendee failed to pay. The vendor gave him notice giving ten days further time for payment of the balance amount failing which the agreement would stand cancelled. Even so, the vendee failed to keep the date of payment. The vendor served on him the final notice of cancellation. The Court said that the time of payment was of the essence. The defaulting vendee was not entitled to ask for specific performance.[85]

Construction Activity

In a joint venture agreement, one of the clauses was that the defendants were to perform certain formalities within 5 years, and that, on failure to do so, the agreement was to become null and void. Neither any approval was obtained within that time, nor sanction of the building plan. The defendants could not start the construction within time. The court said that the provision in the contract for penalty and extension of time was of no use. The contract had ended by the efflux of time.[86]

Right of Renewal and other Personal Privileges

But the renewal of a lease is something different from sale of immovable property. This was pointed out by the Supreme Court in *Caltex (India) Ltd* v *Bhagwan Devi Marodia*:[87]

> In this case, the lessee of a petrol pump had to apply for the renewal of the lease within a time fixed by the contract. He was late by ten days in his application for renewal. And the landlord refused to renew.

The court held that the time so fixed was of the essence of the bargain. Equity would not relieve him of the consequences of his own neglect:

> An option for the renewal of a lease, or for the purchase or repurchase of a property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse. The reason is that the renewal is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time

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essence. Specific enforcement was not allowed. *Chand Rani* v *Kamal Rani*, AIR 1993 SC 1742. *Shakuntla Devi* v *Mohanlal Amrit Raj Jain Market*, AIR 1994 Raj 259, sale of immovable property, prescribed time for registration was held to be not of the essence particularly when the date was extended from time to time.

84. *Swarnam Ramachandran* v *AC Jayapalan*, AIR 2000 Bom 410, the vendee had paid the instalments and was ready to pay the balance money without seeking indefinite extension of time. *C. Nazeer Ahmed* v *S. Iahan Ara*, (2001) 2 Kar LJ 288 (DB), in a sale of real estate the period within which the remaining amount was to be paid was specified, the court found nothing in the stipulation to suggest that the same was fundamental to the completion of the transaction.

85. *Vatsavayi Venkata Suryanarayanama Raju* v *Metta Veerabhadra Rao*, (1999) 1 Andh LD 308.

86. *R.K. Apartments P Ltd* v *Aruna Bahree*, (1999) 77 Delhi LT 193 (Delhi).

87. (1969) 2 SCR 238: AIR 1969 SC 405. In *Gobind Prasad Chaturvedi* v *Hari Dutt Shastri*, (1977) 2 SCC 539: AIR 1977 SC 1005, reserving two months' time on payment of earnest money if the property was not purchased within that time, the time was held to be of essence.

limited for the purpose. In such cases relief is not given in equity save upon the ground of unavoidable accident, fraud, surprise, ignorance (not wilful) or inequitable conduct on the part of the lessor precluding him from refusing to give the renewal.[88]

Agreement of Reconveyance

Similarly, a stipulation in a contract of sale of property that the buyer would reconvey the property to the seller if the latter refunded the consideration within a stipulated time, would constitute the time schedule to be of the essence and the right of reconveyance would be lost if the time is missed.[89]

For this reason, in respect of contracts relating to reconveyance of immovable property, the principle laid down in *Ali Mama* v *Flora Sassoon*,[90] that time factor is normally not of the essence does not apply.

Completion of Term

A licence was granted to run a telephone booth in a central bus terminus. The grant was for a limited period. At the time of the limited period allotment, the allottee made no grievance. On the expiry of the term the Corporation invited fresh bids. The existing licencee's challenge to this procedure was held to be not tenable.[91]

Sale of Shares

A transaction for sale of shares is of commercial nature. The time of completion of the transaction is likely to be an important factor. Where the agreement was for the sale of shares of unquoted private companies trading in a volatile sector, it was held that if a completion date had been named in the agreement, that would have

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88. Compare with *Sambhunath* v *Sushma Sinha*, AIR 1980 Cal 5. A property was transferred with a condition of reconveyance and that if reconveyance was not done within a certain time, the clause would become nullified, held, that some delay in repayment taking place was not to deprive the plaintiff of his right of reconveyance. *Kamal Rani* v *Chand Rani*, AIR 1980 Del 188, in a contract for sale of land, the vendor wanted payment to be made within a week, but on the insistence of the vendee, 10-day period was agreed upon. The vendee offered the money after 10 days. The vendor refused. The remedy of specific performance was not allowed.

89. *Anwaruniśa* v *Daulat Rai*, AIR 1988 Pat 229; *K.M. Jose* v *D. Anantha Bhat*, AIR 1987 Kant 173, an agreement for purchase of land on advance payment of Rs 20,000, the next payment of Rs 5000 to be within a stipulated time and the transaction to be finalised within 6 months thereafter, the time of payment was held to be as of the essence but not the time of execution. *Bismillah Begum* v *Rahmatullah Khan*, AIR 1998 SC 970, where also the right to seek reconveyance was lost because of the expiry of time. The court cited with approval the Federal Court decision in *Shanbhusham Pillai* v *Annalakshmi Ammal*, AIR 1950 FC 38 where it was held that in contracts relating to reconveyance of property, time factor has always been held to be of the essence of the contract. Citing HALSBURY'S LAWS OF ENGLAND, 165, Article 281 (Vol 3, 3rd edn), to the effect: "An option for renewal of lease, or for purchase or repurchase of property, must in all cases be exercised strictly within the time limited for the purpose, otherwise it will lapse." Quoted with approval in *Hare* v *Nicoll*, (1966) 2 QB 130, 145. A similar statement of law is to be found in FOA'S GENERAL LAW OF LANDLORD AND TENANT, 310, Article 453 (8th edn); also in HILL AND REDMAN'S LAW OF LANDLORD AND TENANT, 54 (14th edn). To the same effect, *Babu Ram* v *Indra Pal Singh*, (1998) 6 SCC 358; AIR 1998 SC 3021. *Jaganatha Padyachi* v *Elumalai*, 2000 AIHC 168 (Mad), agreement of reconveyance, right to be exercised within five years, not allowed to be exercised thereafter.

90. AIR 1928 PC 4051.

91. *G. Gurunadha Reddy* v *AP Road Transport Corpn*, AIR 1999 AP 179.

been of the essence. Therefore, as soon as the scheme was prepared and completion could take place, it was open to the party to give notice to the other to complete the transaction specifying a reasonable time for completion. Thus, where time would have been of the essence if specified, there one party can make time of the essence by serving a reasonable notice upon the other to complete.[92]

Time of Reporting

A singer agreed to perform at a threatre for a certain season and to be present at least six days before the commencement of the engagement. But he reported only two days before. The theatre owner sought to put an end to the contract. But he was not allowed to do so. It was only a breach of a warranty and not of a term or condition which touched the substance of the contract. Hence, the plaintiff could only recover compensation for loss, if any, suffered by him.[93]

Non-commercial Matters

"In cases other than commercial contracts the ordinary presumption is that time is not of the essence of the contract."[94] Accordingly, "in a contract for the sale of immovable property, time would not be regarded as of the essence unless it is shown that the parties intended so."[95]

Consequences of Failure

Section 55 further declares that "if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such things at or before the specified time". It means that the innocent party will have to accept performance even if it is delayed. He does not have the right to reject. But he may sue the other party for any loss caused by the delay. In an Andhra Pradesh case,[96] there was some delay on the part of a contractor to supply to the State Electricity Board certain goods by the prescribed date and the court, finding no evidence whatsoever of the parties' intention to regard time as of essence, held that the Board was bound to accept delayed deliveries.

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92. *British and Commonwealth Holdings plc* v *Quadrex Holdings*, (1989) 3 All ER 492 CA.
93. *Bettini* v *Gye*, (1874-80) All ER Rep 242.
94. *Lucknow Automobiles* v *Replacement Parts Co*, AIR 1940 Oudh 443. See also *Mohanlal* v *Gyaniram Agarwal*, AIR 1935 Nag 111.
95. *Mulla Badruddin* v *Tufail Ahmed*, AIR 1963 MP 31. *See* also *Hindustan Construction* Co v *State of Bihar*, AIR 1963 Pat 255 on appeal, AIR 1999 SC 3710; (1998) 8 SCC 436; 1999 AIR SCW 3747. This has been affirmed by the Supreme Court in *Gomathinayagam Pillai* v *Palaniswami Nadar*, AIR 1967 SC 868. SHAH J (afterwards CJ) reviews authorities on the sale of land. *See* also *Narayanswami* v *Dhanakoti*, AIR 1967 Mad 220. In construction contracts also time is generally of the essence. Since construction involves several factors, one of which may operate to cause delay, the contract often contains fenced-round provisions for extension. This does not diminish the importance of the time of completion. It remains of the essence unless extended. See *N.N. Chowdhary* v *Hindustan Steel Works*, AIR 1934 AP 110. The mere fact, however, that the contract provides a penalty for delay is not sufficient in itself to show an intention to make time as of the essence. *Gomathinayagam Pillai* v *V.P. Nadar*, (1967) 1 SCR 227; AIR 1967 SC 868; *K. Abdulkhadar* v *Plantation Corpn of Kerala*, AIR 1983 Ker 1; *Hind Construction Contractors* v *State of Maharashtra*, AIR 1979 SC 720, where the plaintiff pleaded that time was not of the essence and the defendant did not specifically deny it, held, time not important. *K. Kallaiah* v *Ninegegowda*, AIR 1982 Kant 93.
96. *A P State Electricity Board* v *Patel and Patel*, AIR 1977 AP 172.

Where, on the other hand, the time of performance is of the essence of the contract, any delay will render the contract voidable at the option of the other party. He may reject the performance and immediately sue for the breach. But he may at his option accept the delayed performance. If he does so he cannot afterwards recover compensation for the delay, "unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so".[97] Delay by itself does not put an end to the contract.[98] In a case before the Supreme Court,[99] in a building contract time was described to be of the essence of the contract. The contractor was given the facility to seek extension of time in advance on reasonable grounds, failing which a penalty was payable for each day of default. These stipulations were construed by the court as not making time to be of the essence. The contractor's application for extension was rejected and, on his failure to complete the works within the specified time, the Department rescinded the contract. The rescission was not approved by the Supreme Court. Some further period should have been allowed to the contractor telling him that the extended time would be of the essence and that it would neither be extended, nor excusable on payment of fine. Then only it would have been possible to rescind the contract.

In a contract for sale of land the vendor wanted payment to be made within a week, but on the insistence of the vendee, 10 days' period was agreed upon. The

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97. *State of AP* v *Associated Engg. Enterprises*, AIR 1990 AP 294, accepted site for construction out of time without giving notice of intention to sue for consequences of delay, no compensation was recoverable. *Raj Kumar Bahal* v *FCI*, AIR 1990 Raj 64, notice of the intention to sue given to the sub-contractor was held to be good notice. Section 55 (3rd para). See *Shiv Ispat* v *Indus Valley*, AIR 1984 Del 405. A contract fixed time for supply and entitled the buyer to reject if not offered within seven days of the time fixed. The buyer extended the time. Deliveries were offered within the extended time. The buyer was held to be wrong in rejecting them. *Bazpur Coop Sugar Factory* v *S.M. Agarwal*, AIR 1984 All 174, buyer insisting upon supplies even after the expiry of the period, he cannot say that time was of the essence. *Sind Biscuits Mfg Co* v *Delight Engg Works*, 1984 All LJ 964, where delayed supply of machinery was accepted without protest and, therefore, no claim for damages was entertained afterwards. *Gujrat Agro Oil Enterprises Ltd* v *Arvind H. Pathak*, AIR 1993 Guj 47, notice under this section not given for delay in deliveries. *Superintending Engineer* v *K. Bapiraju*, (1997) 4 Andh LD 701: (1997) 5 Andh LT 146 AP, Government delayed in handing over site but even so the contractor went on working without protest. This amounted to waiver of his right. His claim for compensation for delay and the arbitrator's award for it were held to be unjustified and without jurisdiction. *State of Orissa* v *Durga Enterprisers*, AIR 1995 Ori 207, time specified of supply for material, though there was power to extend, the application of the supplier for extension was not attended to, time remained of essence. The contract was not enforceable against the Government.

98. *Jain Mills and Electrical Stores* v *State of Orissa*, AIR 1991 Ori 117.

99. *Hind Construction Contractors* v *State of Maharashtra*, (1979) 2 SCC 70; *K. Kattaiah* v *Ninegegowda*, AIR 1982 Kant 93; *Arosan Enterprises Ltd* v *Union of India*, (1999) 9 SCC 449, a contract described time to be of the essence but also provided for extension of time. The seller sought extension. The effect of silence on the part of the buyer was that the application for extension was not accepted. Without evidence of any renewed date, the court could not determine what was the future date of performance. There cannot be any presumption about extension. It has to be fixed or refixed in categorical terms. In this case the contract was for supply of imported sugar. The buyer gave no response to the seller's request for extension, nor rescinded the contract. The effect was that the buyer lost the right to insist upon time to be of the essence.

vendee offered money after ten days. The vendor refused. The court allowed no remedy to the vendee.[1]

IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION

Initial impossibility [S. 56]

Section 56 first lays down the simple principle that "an agreement to do an act impossible in itself is void". For example, an agreement to discover a treasure by magic, being impossible of performance, is void.[2]

Subsequent impossibility [S. 56]

The second paragraph of Section 56 lays down the effect of subsequent impossibility of performance. Sometimes the performance of a contract is quite possible when it is made by the parties. But some event subsequently happens which renders its performance impossible or unlawful. In either case the contract becomes void. Where, for example, after making a contract of marriage, one of the parties goes mad, or where a contract is made for the import of goods and the import is thereafter forbidden by a Government Order, or where a singer contracts to sing and becomes too ill to do so, the contract in each case becomes void.[3]

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(*a*) *A* agrees with *B* to discover treasure by magic. The agreement is void.

(*b*) *A* and *B* contract to marry each other. Before the time fixed for the marriage, *A* goes mad. The contract becomes void.

(*c*) *A* contracts to marry *B*, being already married to *C*, and being forbidden by the law to which he is subject to practise polygamy. *A* must make

1. *Kamal Rani* v *Chand Ram*, AIR 1980 Del 188.
2. Illustration (*a*) to Section 56.
3. Illustration (*b*), (*d*) and (*e*) to Section 56. *Chamanlal Jain* v *Arun Kumar Jain*, AIR 1996 Delhi 108, a compromise for dissolving partnership converted into decree, not allowed to be challenged on the ground that the partnership had already frustrated. *Raj Kumar Gupta* v *Des Raj*, AIR 1995 HP 107, sale of agricultural land, sanction from Government, not possible because of subsequent change of law, frustration.

compensation to *B* for the loss caused to her by the non-performance of his promise.

(d) *A* contracts to take in cargo for *B* at a foreign port. *A's* Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) *A* contracts to act at a theatre for six months in consideration of a sum paid in advance by *B*. On several occasions *A* is too ill to act. The contract to act on those occasions becomes void.

General principle of judicial non-interference

In the first-known English case of *Paradine* v *Jane*[4] it was pointed out that subsequent happenings should not affect a contract already made:

> There the defendant had taken an estate on lease from the plaintiffs. The defendant was dispossessed of it by alien enemies for some time and, therefore, refused to pay the rent for the period of dispossession.

It was held that "when the party by his own contract creates a duty, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; though the land be surrounded or gained by the seas, or made barren by wildfire, yet the lessor will have his whole rent".[5]

In the subsequent case to *Taylor* v *Caldwell*[6] BLACKBURN J laid down that the above "rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied.

> In this case, the defendants had agreed to let the plaintiffs the use of their music hall between certain dates for the purpose of holding a concert there. But before that first day on which a concert was to be given, the hall was destroyed by fire without the fault of either party.

The plaintiffs sued the defendants for their loss. It was held that the contract was not absolute, as its performance depended upon the continued existence of the hall. It was, therefore, "subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of thing without default of the contractor".

With this decision began the struggle between the two principles, namely, the principle of sanctity of contract which supports the principle of absolute liability and the principle that a contract be discharged when the shared contractual assumption has been destroyed by change of circumstances.[7]

Frustration

In the above case the performance of the contract had become physically impossible because of the disappearance of the subject-matter. But the principle is not confined to physical impossibilities. It extends also to cases where the performance of the contract is physically possible, but the object the parties had in

4. King's Bench, (1647) Aleyn 26: 82 ER 897.
5. *See* also *Matthey* v *Curling*, (1922) AC 180.
6. Queen's Bench, (1863) 3 B&S 826: 122 ER 309.
7. *See* S. H. Goo, (1996) JBL 223 reviewing Professor Treitel's book, FRUSTRATION AND FORCE MAJEURE, (1994 edn).

mind has failed to materialise. The well-known coronation cases of which *Krell* v *Henry*[8] is one, illustrates this:

> The defendant agreed to hire from the plaintiff a flat for June 26 and 27, on which days it had been announced that the coronation procession would pass along that place. A part of the rent was paid in advance. But the procession having been cancelled owing to the King's illness, the defendant refused to pay the balance.

It was held that the real object of the contract, as recognised by both contracting parties, was to have a view of the coronation procession. The taking place of the procession was, therefore, the foundation of the contract. The object of the contract was frustrated by non-happening of the coronation and the plaintiff was not entitled to recover the balance of the rent.[9]

Thus, the doctrine of frustration comes into play in two types of situation, first, where the performance is physically cut off, and, second, where the object has failed. The Supreme Court of India has held that Section 56 will apply to both kinds of frustration. Referring to the section, B.K. MUKHERJEA J of the Supreme Court observed in *Satyabrata* v *Mugneeram*[10] as follows:

> This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do.[11]

Explaining the concept "frustration of the contract" in *Cricklewood Property Ltd* v *Leighton's Investment Trust Ltd*[12] VISCOUNT SIMON LC said that it means "occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the contract". To the same effect is the following statement of Lord WRIGHT:[13]

> The word frustration is here used in a technical legal sense. It is a sort of shorthand: it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say, not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance.

This principle was applied by TEJA SINGH J of the Punjab High Court in *Parshotam Das* v *Batala Municipal Committee*.[14]

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8. (1903) 2 KB 740, CA.
9. *See* McElory and Williams, *The Coronation Cases*, 4 Mod LR 241.
10. AIR 1954 SC 44: 1954 SCR 310.
11. These principles have been *affirmed* by the Supreme Court in *Dhruv Dev* v *Harmohinder Singh*, AIR 1968 SC 1024, where SHAH J (afterwards CJ) held that the doctrine does not apply to completed transfers.
12. (1945) AC 221: (1945) 1 All ER 252, 42.
13. In *Twentsche Overseas Trading Co Ltd* v *Uganda Sugar Factory Ltd*, AIR 1945 PC 144.
14. AIR 1949 EP 301, 304.

A Municipal Committee leased out certain tonga stands to the plaintiff for Rs 5000. But no tonga driver came forward to use the stand throughout the year and the plaintiff could not realize anything. He sued for the refund of his money.

It was held that "the plaintiff obtained the lease and the committee granted the same to him on the assumption that the tonga stands would be used by drivers and the plaintiff would recover fees from them, but for reasons which both sides could not help the drivers did not use the stands, the doctrine of frustration applied with full force".

A contract for sale of land for non-agricultural use was held to have frustrated when the application for such use was rejected by the authorities.[15]

Commercial hardship

The alteration of circumstances must be "such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree".[16] This makes the court rather cautious in discharging parties from their contract. An illustration in line is the decision of the Calcutta High Court in *Sachindra Nath* v *Gopal Chandra*.[17]

The plaintiff let certain premises to the defendant for a restaurant at somewhat higher rent. The defendant agreed to pay high rent because the British troops were stationed in the town and a clause in the agreement specially provided that "this agreement will remain in force so long as British troops will remain in this town". After some months, the locality was declared out of bounds to the British troops.

The question was whether this frustrated the contract. HENDERSON J relied upon the above cited passage of Lord LOREBURN and held that though it was possible that the defendant would not have paid such a high rent apart from the expectation of deriving high profits from the British troops, that was not sufficient to make out a case of frustration.

A situation like this has been described as one of commercial hardship, which may make the performance unprofitable or more expensive or dilatory, but is not sufficient to excuse performance, for it does "not bring about a fundamentally different situation such as to frustrate the venture".[18] The doctrine of frustration or impossibility does not apply to a situation so as to excuse performance "where performance is not practically cut off, but only rendered more difficult or costly.[19]

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15. *Naimudin I. Bharmal* v *Charotar Gramoddhar Sahakari Mandli Ltd*, (1997) 1 Guj LR 547.
16. *Per* Lord LOREBURN in *F.A. Tamplin Steamship Co* v *Anglo-Mexican Petroleum Products Co* (1916) 2 AC 397. *Cited* by HENDERSON J of the Calcutta High Court in *Sachindra Nath Basu* v *Gopal Ch Ghose*, AIR 1949 Cal 240.
17. *Ibid.*
18. *See* Anson's LAW OF CONTRACT (22nd edn by Guest, 1964), p 459, considering the *Suez Canal* cases, viz, *Tsakiroglou & Co Ltd* v *Noblee Thort GmbH*, (1962) AC 73; *Ocean Tramp Tanker Corporation* v *V/O Saufracht (The Engenia)*, (1964) 2 WLR 114.
19. *Per* THOMAS J in *Megan* v *Updike Grain Corpn*, United States Circuit Court of Appeals, (1938) 94 F. 2d. 551, collected from Shepherd and Wellington, CONTRACT AND CONTRACT REMEDIES, CASES AND MATERIALS (4th edn 1957), pp. 718, 721.

Such cases may not fall within the purview of Section 56 and this is amply shown by the Privy Council decision in *Harnandrai Fulchand* v *Pragdas*.[20]

> By a contract in writing the plaintiff bought of the defendants a number of *dhotis* to be manufactured by specified mills and to be delivered as and when the same may be received from the mills. The sellers delivered only part of the goods owing to the mills failing to perform their contract with the defendants as they were engaged in fulfilling certain Government contracts. The defendants pleaded frustration.

The Privy Council held that the adventure was not frustrated, as the stipulation as to delivery did not make delivery by the mills a condition precedent. It was a simple case of breach. "The closing or even the destruction of the mills would not affect a contract between third parties, which is in terms absolute."[21]

"It was suggested that the words "as and when the same may be received from the mills", should be construed as if they were "if and when the same may be received from the mills". This is to convert words, which fix the quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all, and virtually make a new contract. The words certainly regulate the manner of performance, but they do not limit the sale to such goods as the mills might deliver."

The principle of this case was followed by the Supreme Court in *Ganga Saran* v *Ram Charan Ram Gopal*.[22]

> A contract was made for supplying certain bales of cloth manufactured by the New Victoria Mills, Kanpur. The contract added: "We shall go on supplying goods to you of the Victoria Mills as soon as they are supplied to us by the said mills." The mill failed to supply the goods to the sellers and, therefore, the sellers pleaded frustration.

But they were held liable:

> "The agreement does not seem to us to convey the meaning that the delivery of the goods was made contingent on their being supplied to the respondents by the Victoria Mills. We find it difficult to hold that the parties ever contemplated the possibility of the goods not being supplied at all. The words "prepared by the Mills" are only a description of the goods to be supplied, and the expression "as soon as they are prepared" and "as soon as they are supplied to us by the said Mills", simply indicate the process of delivery."[23]

It was accordingly held that the contract was neither contingent under Section 32, nor did it fall within the second paragraph of Section 56.[24]

To the same effect is the decision of the Madras High Court in *Samuel Fitz & Co* v *Standard Cotton Co*.[25]

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20. (1922) 15 IA 9, on appeal from the High Court at Bombay: 25 Bom LR 537: AIR 1923 PC 54.
21. (1922) 15 IA 9, on appeal from the High Court at Bombay; 25 Bom LR 537: AIR 1923 PC 54, 13, *per* Lord SUMNER.
22. 1952 SCR 36: AIR 1952 SC 9.
23. FAZAL ALI J 1952 SCR 36, 37: AIR 1952 SC 9, 11.
24. A person who contracts to supply has to assure his stock. His inability to replenish his stock is his problem and not that of the contract. *Standard Chemicals Co P Ltd* v *Palakol Cooperative Sugars Co Ltd*, (1988) 25 Reports 60.
25. AIR 1945 Mad 291.

The defendants placed an order with the plaintiffs for the supply of tapestries of certain kind, making it clear that they intended to sell them in Australia. But the Australian Government prohibited the import of such goods. The defendants lost their market and, therefore, cancelled their order.

In an action for breach of contract, HORWILL J held that the courts should not read into a contract an implied term that the enforceability of the contract was dependent upon the ability of the purchaser to find customers for the goods. "We are unable to say that the foundation of the contract was that these goods should be resold by the defendants to their clients in Australia."[26]

Similarly, a contract by a Hindu father to give his daughter in marriage to the plaintiff was held by the Bombay High Court to be not frustrated simply because the girl had expressed her unwillingness to marry the plaintiff. The defendant had to pay damages for the breach.[27] In the same way, where the performance of a contract for the sale of grain was made more difficult by Government restrictions on sale and storage imposed subsequently;[28] a contract given by an authority to a contractor of the right to collect tolls at the *ghats* of a bridge and the Government subsequently prohibited the traffic of foodgrains over the bridge resulting in loss to the plaintiff;[29] the temporary suspension of traffic on a bridge owing to breakdown;[30] in a contract to supply a ship, the increase in shipping rates;[31] in a contract for the sale of land, the local officer's insistence that State permission for the transfer should be obtained;[32] the workers of toddy shops going on strike after the contractor had obtained by bidding at an auction the licence to run the shops;[33] in a contract for supply of machinery, the failure of the source from which the supplier sub-contracted to purchase;[34] failure to supply the contracted quantity in assorted variety of eucaplyptus firewood owing to the forest, which was under the supplier's lease, not helping him up to the requisite quantity, aggravated further by shortage of labour and transport facility in the area, all these were things which the contractor should have considered before giving his commitments;[35] and, therefore, in all these cases the performance was held not to have become impossible. "Disappointed expectations do not lead to frustrated contracts."[36]

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26. AIR 1945 Mad 291, 293.
27. *Purshotamdas Tribhovandas* v *Purshotamdas Mangaldas*, (1896) 21 ILR Bom 23. *See* CANDY J's judgment at pp. 31-33; see also *Amarnavi Perumal* v *Sabapathi*, ILR 1952 Mad 253.
28. *Sahas Karam* v *Nath Mal*, AIR 1951 Ajm 65; *See* also *Gurdit Singh* v *Secy of State*, AIR 1931 Lah 347.
29. *President of District Board* v *Santhappa Naik*, (1925) 86 IC 362.
30. *Sankaran* v *District Board, Malabar*, AIR 1934 Mad 85.
31. *Karl Ettlinger* v *Chagandas & Co*, (1915) 40 ILR Bom 301. *See* also *Ramanada* v *T.S.A. Hamid*, AIR 1963 Pat 94.
32. *G.G. Patel* v *Gulam Abbas*, (1977) 3 SCC 179.
33. *State of Kerala* v *Paily Chandy*, 1984 Ker LT 260.
34. *MTU Asia Pte. Ltd* v *Brightside-Woh Hup*, (1989) 1 Mal LJ 10 High Court of Singapore.
35. *Gwalior Rayon Silk Mfg (Wvg) Co* v *Shri Andavar & Co*, AIR 1991 Ker 134.
36. Lord SIMONDS in *Davis Contractors Ltd* v *Fareham Urban District Council*, (1956) AC 696, 715, *cited by* Punjab High Court in *Pearl Cycle Industries* v *A.N. Kaul*, AIR 1964 Punj 482. Licensing of a trade subsequent to contract is not frustration. *Mohanlal* v *Grain Chambers Ltd*, AIR 1968 SC 772. A contract to run toddy shop, strike by toddy tappers and suppliers, Section 56 not applied. *State of Kerala* v *Paily Chandy*, AIR 1984 (NOC) 70 Ker. With this should be contrasted *Punj Sons P Ltd* v *Union of India*, AIR 1986 Del 158, where the material

Specific grounds of frustration

"The principle of frustration of contract, or of impossibility of performance is applicable to a great variety of contracts. It is, therefore, not possible to lay down an exhaustive list of situations in which the doctrine is going to be applied so as to excuse performance. The law upon the matter is undoubtedly in process of evolution."[37] Yet the following grounds of frustration have become well-established.

1. Destruction of Subject-Matter

The doctrine of impossibility applies with full force "where the actual and specific subject-matter of the contract has ceased to exist".[38] "*Taylor* v *Caldwell*[39] is the best example of this class." There, a promise to let out a music hall was held to have frustrated on the destruction of the hall. Another illustration is *Howell* v *Coupland*.[40]

> The defendant contracted to sell a specified quantity of potatoes to be grown on his farm, but failed to supply them as the crop was destroyed by a disease.

Delivering the judgment of the Court of Appeal, MELLISH LJ said:

> Suppose the potatoes had been fully grown at the time of the contract, and afterwards the disease had come and destroyed them; according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. . . . Here there was an agreement to sell and buy two hundred tons out of a crop to be grown on a specific land, that it is an agreement to sell what may be called specific things; therefore neither party is liable if the performance becomes impossible.

A parallel decision under Section 56 is that of the Madras High Court in *V.L. Narasu* v *P.S.V. Iyer*[41] where a contract to exhibit a film in a cinema hall was held to have become impossible of performance when on account of heavy rains the rear wall of the hall collapsed killing three persons and its licence was cancelled until the building was reconstructed to the satisfaction of the chief engineer. The owner was

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in question (hot dip tin) was neither available in the market, nor the Government made any arrangement for supplying it, the contractor was released from his responsibility of supplying to the Government milk containers quoted with that material. *C. T. Xavier* v *P. V. Joseph*, AIR 1995 Ker 140, delay in construction of godowns for Food Corpn, clause for extension of time was there, no evidence that the Corpn would not have taken the godowns even if provided late, this cannot be described as impossibility so as to enable any party to get rid of the contract. *C J International Hotel Ltd* v *NDMC*, AIR 2001 Delhi 435, a licence land for hotel premises taken at an open auction, the licencee was not allowed to say that licence fee should be reduced because the project was not economically viable. The Authority was not restrained from taking any coercive action.

37. *See* A.L. Corbin *Recent Developments in Contracts*, 50 Harv LR 549, 465-466 (1937).
38. *See* McCARDIE J in *Blackburn Bobbin Co* v *T.W. Allen & Sons*, (1918) 1 KB 540, where the learned judge formulates a list of the grounds of frustration as warranted by the authorities.
39. 3 B&S 826: 122 ER 30.
40. (1876) 1 QBD 258 (CA).
41. ILR 1953 Mad 831.

under no liability to reconstruct the hall and even if he did reconstruct and it took him some time, by that time the film would have lost its appeal.[42]

The same result followed where a ship ran aground.[43] The result would also be the same where the subject-matter of the contract though intact has ceased to be available to the parties. Thus, where a ship was chartered for twelve months to run from April to April and before it could be delivered, it was requisitioned and was released only in September, the House of Lords held that the charterparty had frustrated, for a September to September term was not contemplated by the parties.[44] Where the parties can still perform their main obligation despite the fact that the subject-matter has gone out of their hands, frustration may not follow. Thus, where a ship was chartered for five years and three years after that, it was requisitioned by the Government, the latter paying more money than the freight agreed between the parties, it was held that the contract was not frustrated. The charterer was bound to pay the freight and that he could still pay and, therefore, he was entitled to collect the money from the Government.[45] Similarly, an agency for dealing with the goods "manufactured or sold" by the principal was not frustrated when the principal's factory was destroyed, for the agent could still deal with the goods sold by the principal.[46]

In a contract for carriage of goods by sea, the vessel sank with cargo. There was evidence to show that the vessel started taking in water. When the vessel was discovered to be tilting, the water in the bilge was pumped out but no action was taken to go to the nearest port to have the vessel berthed and the condition of the vessel checked. Instead of that, after pumping out water, the vessel attempted to continue on its course. The court said that the sinking of the vessel could not be described as an inevitable accident. Reasonable care had not been taken to prevent the sinking of the vessel. The defence of frustration failed.[47]

2. *Change of Circumstances*

A contract will frustrate "where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated.[48] KAPUR J of the Punjab High Court in *P.D. Mehra & Sons* v *Ram*

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42. *See* the judgment of VENKATARAMA AYYAR J
43. *Jackson* v *Union Marine Insurance Co Ltd*, (1874) LR 10 CP 125: (1874-80) All ER Rep 317.
44. *Bank Line Ltd* v *Arthur Capel & Co*, (1919) AC 435: (1918-19) All ER Rep 504, HL. *See* also *WJ Tatem Ltd* v *Gamboa*, (1939) 1 KB 132 KB, where also the seizure of the ship and its return after some time and the charterer then returning the ship to the owners, the charterer was held not liable to pay hire charges for the period of seizure.
45. *Tampling S.S. Co Ltd* v *Anglo-Mexican Petroleum Products Co Ltd*, (1916) 2 AC 397: (1916-17) All ER Rep 104, HL.
46. *Turner* v *Goldsmith*, (1891) 1 QB 544: (1891-4) All Rep 384 (CA).
47. *Ghee Seng Motor* v *Ling*, (1994) 1 Current LJ 382 (Malaysia). For another example see *State of Kerala* v *Govindan Ponuamma*, AIR 1997 Ker 302. In this case, Section 56 was held to be not applicable to a factual situation where a person bidding for taking of supplies of *arrack* knew at the time that there were irregularities in supplies. His refusal to take the material when available was held to be a breach on his part. He could not defend himself by saying that he had rescinded the contract.
48. Viscount MAUGHAM in *Joseph Constantine Steamship Line Ltd* v *Imperial Smelting Corpn Ltd*, (1941) 2 All ER 165, where his Lordship referred to different types of situations in which frustration may occur.

Chand Om Prakash[49] explained the principle thus: "It is clear that if there is entirely unanticipated change of circumstances the question will have to be considered whether this change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult or hazardous. If that be the case, the change of circumstances not having been brought about by the fault of either party, the courts will not enforce the contract." In that case:

> *A* contracted to supply to *B* certain classes and quantities of American piece goods. The contract was *c.i.f.* Karachi. The goods arrived there after some delay. *B* refused to accept on the ground that both the qualities and quantities offered for delivery were not according to the particular contract. *A* called upon *B* to refer the dispute to the nominated arbitrator who was residing at Karachi. Then came partition which 'made it impossible for non-Muslims to go to Karachi.

Holding that the contract was not thereby frustrated, the court said:

> If it was necessary for the parties to go to Karachi and to take witnesses there, the performance of the arbitration agreement would have been rendered impossible. But, as going to Karachi was not necessary, the change of circumstances did not have a material effect on the contract.[50]

As against it, where a ship was chartered to load a cargo but on the day before she could have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the scheduled time, the House of Lords held that frustration had, in fact, occurred in the circumstances.[51]

But "there is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because, on account of an uncontemplated turn of events, the performance of the contract may become onerous".[52] "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made."[53] The Supreme Court laid down this principle in *Alopi Parshad & Sons Ltd* v *Union of India*.[54]

> The plaintiffs were acting as the agent to the Government of India for purchasing *Ghee* for the use of army personnel. They were to be paid on cost

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49. AIR 1952 Punj 34, 38. Thus, a normal change of circumstances, such as price rise, does not frustrate the contract. *Continental Construction Co Ltd* v *State of MP*, (1988) 3 SCC 82, 87: AIR 1988 SC 1166.
50. At p 88. This was so held by the same judge in *Rama Nanda* case, AIR 1951 Simla 189, where the contract was discharged for that reason.
51. *Joseph Constantine Steamship Line Ltd* v *Imperial Smelting Corpn Ltd*, (1941) 2 All ER 165: (1942) AC 154. *See* also *Gurdarshan Singh* v *Bishan Singh*, AIR 1963 Punj 49; cf. *Ram Pratap Mahadeo Pd* v *S.S. Works Ltd*, AIR 1964 Pat 250, where the parties had full knowledge of the difficult conditions of performance.
52. *Alopi Parshad & Sons* v *Union of India*, (1960) 2 SCR 793, 806-7: AIR 1960 SC 588, 593-94, SHAH J.
53. *Ibid.*
54. Note 45.

basis for different items of work involved. The performance was in progress when the Second World War intervened and the rates fixed in peace time were entirely superseded by the totally altered conditions obtaining in war time. The agents demanded revision of rates but received no replies. They kept up the supplies. The Government terminated the contract in 1945 and the agents claimed payment on enhanced rates.

But they could not succeed. "*Ghee* having been supplied by the agents under the terms of the contract, the right of the agents was to receive remuneration under the terms of that contract."

Law has to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion what could have been reasonably expected by the parties and make performance so crushing to the contractor as to border virtually on impossibility, the law would have to offer relief to the contractor in terms of price revision. The Supreme Court has recognised this in *Tarapore & Co* v *Cochin Shipyard Ltd.*[55]

> In this case there is no room for doubt that the parties agreed that the investment of the contractor (for import of equipment and know-how, in foreign exchange) would be two crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon an agreed fact situation, and that situation ceases to exist, the agreement, to that extent, becomes irrelevant or otiose. The rates payable to the contractor were related to the investment of Rs 2 crores by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to him to make a claim for compensation.[56]

Another case of commercial hardship of this kind was before the House of Lords in *Davis Contractors Ltd* v *Fareham Urban District Council.*[57]

> There was a contract to build certain houses for a council for a fixed price and to be completed within eight months. Bad weather and labour strikes intervened and it took twenty-two months to complete and at a cost much more than the contract price. The contractor claimed that the contract was discharged on account of inordinate delay and, therefore, he should be paid on *quantum meruit* basis, that is, his actual costs should be paid.

But the House of Lords did not agree with him. Lord RADCLIFFE, after reviewing the authorities and anthology of circumstances in which frustration is deemed to occur, observed:

> So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become impossible of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. "The data for decision are, on the one hand, the terms and conditions of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events

55. (1984) 2 SCC 680.
56. *Ibid.* at p 715.
57. (1956) 2 All ER 145: (1956) AC 696, HL.

which have occurred."[58] It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. If this is the law, the appellants' case seems to be a long way from a case of frustration.

Where there was a 400% escalation of prices owing to a war as compared with the original prices on which certain transformers were undertaken to be supplied on a firm basis, the contract was held to have ended.[59]

Where the possibility of alteration of circumstances was within the contemplation of the parties at the time of the contract, they can hardly complain of any such alteration.[60] Thus, where a railway company accepted goods for transport and happened to convey them to a wrong destination, which on account of partition fell in Pakistan and the railways could not bring them back into India, they were not permitted to plead frustration to their liability to pay for the loss of the goods.[61] MEHAR SINGH J said:

> When the defendant accepted the goods, there was no such legal impediment, and since the date of partition was known at that time, such a contingency cannot be said to be outside the contemplation and foresight of the parties.

The learned judge, with respect, should not have taken support of the fact "that there was no such legal impediment at the time", for in applying the doctrine of frustration the courts have to go by the impediments arising subsequently. The decision is, however, just because it was the railway's own fault that the goods were carried to a wrong point.

3. *Non-occurrence of Contemplated Event*

Sometimes the performance of a contact remains entirely possible, but owing to the non-occurrence of an event contemplated by both parties as the reason for the contract, the value of the performance is destroyed.[62] *Krell* v *Henry*[63] is an apt illustration. There, a contract to hire a room to review a proposed coronation procession was held to have frustrated when the procession was postponed. For this result to follow it is necessary that the happening of the event should be the foundation of the contract. This is shown by *Herne Bay Steam Boat Co* v *Hutton*[64] which also arose from the postponement of the coronation. The Royal Naval Review was proposed to be held on the occasion. The defendant chartered a steamboat for two days "to take out a party of paying passengers for the purpose of viewing the

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58. *Quoting* Lord WRIGHT from *Denny, Mott & Dikson Ltd* v *James B. Fraser & Co Ltd*, (1944) AC 265: (1944) 1 All ER 678, HL.
59. *Essan Engg Co Ltd* v *Fertilizers and Chemicals (Travancore) Ltd*, AIR 1991 Mad 158.
60. See *S. Vedantacharya* v *Highways Department by South Arcot*, (1987) 3 SCC 400 where the Highway Deptt. was not permitted to absolve itself from responsibility for an accident on the ground of the heavy rain and flood, there being nothing to show what preventive measures were taken anticipating such rain and flood.
61. *Union of India* v *Chanan Shah Mahesh Dass*, AIR 1955 Pepsu 51.
62. *See* Williston ON CONTRACTS, S. 1935. *Cited by* BRICE J in *Wood* v *Bartolino*, SC of New-Mexico (1944); collected from Shepherd & Wellington, CONTRACTS AND CONTRACT REMEDIES: CASES AND MATERIALS, (4th edn 1957) 705.
63. (1903) 2 KB 740: (1900-3) All ER Rep 20.
64. (1903) 2 KB 683 (CA): (1900-3) All ER Rep 145.

naval review and for a day's cruise round the fleet". But the review was cancelled and the defendant had no use of the ship. Yet he was held liable to pay the unpaid balance of the hire less the profit which the plaintiff had made by the use of the ship in the ordinary course. VAUGHAN WILLIAMS LJ said:

> I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he should be relieved of his bargain. So in the present case it is sufficient to say that the happening of the naval review was not the foundation of the contract.[65]

4. Death or Incapacity of Party

"A party to a contract is excused from performance if it depends upon the existence of a given person, if that person perishes" or becomes too ill to perform. Thus, where the nature or terms of a contract require personal performance by the promisor, his death or incapacity puts an end to the contract. *Robinson* v *Davison*[66] is the well-known authority.

> There was a contract between the plaintiff and the defendant's wife, who was an eminent pianist, that she should play the piano at a concert to be given by the plaintiff on a specified day. On the morning of the day in question she informed the plaintiff that she was too ill to attend the concert. The concert had to be postponed and the plaintiff lost a sum of money.

The plaintiff's action for breach of contract failed. The court said that under the circumstances she was not merely excused from playing, but she was also not at liberty to play, if she was unfit to do so. The contract was clearly subject to the condition of her being well enough to perform:

> The whole contract is based on the assumption of the continuance of life, and on the conditions which existed at the time. That assumption is made by both; it is really the foundation of the contract. It does not require close reasoning to prove that if the foundation fails, the whole contract must fail. Here the foundation was wanting for there was on Mrs Davison's part an entire and total incapacity to do the thing contracted for.

In another case:[67]

> A person entered into service as manager for ten years, and undertook not to undertake any professional engagement without the consent of the employer. Before the expiry of ten years he was called up for military service. After the war he undertook professional engagements and was sued by the employer for breach of contract.

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65. *See also* the speech of ROMER LJ and Sir Frederick Pollock, 20 LQR 4, where it is observed that: "In point of fact the fleet was still there as STIRLING, LJ observed, and, as the writer of these lines can bear witness, it was well worth seeing without the review." For a critical contrast of this case with *Krell* v *Henry*, see 4 MLR 241, 254. Under an agreement the defendant allowed the plaintiff to store goods in the cold storage cooling chamber of a particular unit, performance being conditional upon continuous power supply, the plaintiff knew that there was no generator set with the unit, goods damaged due to failure of power supply. Defendant not liable for such damage, *State of Assam* v *Mukunda Oja*, AIR 1997 Gau 113.

66. (1871) LR 6 Exch 269: 40 LJ Ex 172: 24 LT 755 (1861-73) All ER Rep 699.

67. *Morgan* v *Mansur*, (1947) 2 All ER 666 : (1948) 1 KB 184.

It was held that the contract of service had frustrated when his services were requisitioned for military purposes and thereafter he was free from the covenants of the contract.

APPLICATION TO INDUSTRIAL RELATIONS.—The application of the doctrine of frustration to industrial relations was examined by the (English) National Industrial Relations Court in *Marshall* v *Harland & Wolff Ltd.*[68]

> *M* was in a company's employment since 1946. In 1969 he fell ill and did not attend till April 1971 when the company retrenched him after giving usual benefits. *M* had still to undergo an operation before he could resume work.

Even so it was held that the contract of service had not frustrated. The President of the court pointed out that in considering whether further performance has become impossible, regard must be had to the terms of the employment, the nature of the illness, its duration and prospects of recovery, and the period of past employment:

> Where the contract provided for sick pay, there could not be frustration if the employee appeared likely to return to work within the period in which sick pay was payable. Where the employee occupied a key post which had to be filled on a permanent basis if his absence was prolonged, it was easier to infer frustration if the employee was one of the many in the same category. Again, a relationship of long standing was not so easily destroyed as one which had but a short history.
>
> The present contract provided that no wages were payable during sickness. It was not the company's policy to dismiss employees on the ground of sickness. There was no medical evidence that *M* was permanently incapacitated or as to how long he would be away from work. In those circumstances, there was no ground for holding that further performance of his obligation in the future would be either impossible or a thing radically different from that which he had accepted under his contract of employment. Accordingly, the contract had not frustrated.

In a similar case before the Court of Appeal:[69]

> *S* was employed as a works manager under a five-year contract. After two years he became ill and was absent from work for five months. The employer terminated the employment after four months of absence and *S* sued for breach of contract.

It was held that a five-year term contract of service could not be deemed to have frustrated by five months' illness.

5. *Government or Legislative Intervention*

A contract will be dissolved when legislative or "administrative intervention has so directly operated upon the fulfilment of the contract for a specific work as to transform the contemplated conditions of performance".[70] Thus, where a vendor of land could not execute the sale-deed because he ceased to be the owner by operation

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68. (1972) 2 All ER 175: (1972) 1 WLR 899.
69. *Storey* v *Fulham Steel Works Co Ltd,* (1907) 24 TLR 89.
70. *See* McCARDIE J in *Blackburn Bobbin Co* v *T.W. Allen & Sons,* (1918) 1 KB 540. His Lordship cites the following authorities; *Metropolitan Water Board* v *Dick Kerr & Co,* (1918) AC 119; *Brewster* v *Kitchell,* (1697) 1 Salk 198.

of law, it was held that the contract had become impossible of performance.[71] In another case, a contract by the State to give a monopoly was held to have become void on the enforcement of the Constitution.[72] Similarly, a contract between certain parties for the sale of the trees of a forest was discharged when the State of Rajasthan forbade the cutting of trees in the area.[73] A well-known English authority is *Metropolitan Water Board* v *Dick Kerr & Co Ltd.*[74]

> By a contract made in July 1914, a firm of contractors contracted with a Water Board to construct a reservoir to be completed within six months. But by a notice issued under the Defence of the Realm Acts, the contractors were required to cease work on their contract and they stopped the work accordingly. They claimed that the effect of the notice was to put an end to the contract.

The House of Lords held that the interruption created by the prohibition was of such a character and duration so as to make the contract when resumed a different contract from the contract when broken off, and that the contract had ceased to be operative.[75]

But an intervention of a temporary nature which does not uproot the foundation of the contract will not have the dissolving effect. This is shown by the decision of the Supreme Court in *Satyabrata Ghose* v *Mugneeram Bangur & Co.*[76]

> The defendant company started a scheme for the development of a tract of land into a housing colony. The plaintiff was granted a plot on payment of earnest money. The company undertook to construct the roads and drains necessary for making the lands suitable for building and residential purposes and as soon as they were completed, the purchaser was to be called upon to complete the conveyance by payment of the balance of the purchase money. But before anything could be done, a considerable portion of the land was requisitioned by the State during the Second World War for military purposes.

The company attempted to cancel the contract on the ground that by reason of the supervening events its performance had become impossible. MUKHERJEA J held that the contract was not frustrated. The learned judge said: "Undoubtedly the commencement of the work was delayed but was the delay going to be so great and of such a character that it would totally upset the basis of the bargain and commercial object which the parties had in view? The requisition orders, it must be remembered, were, by their very nature, of a temporary character..."[77]

> If there was a definite time-limit agreed to by the parties within which the construction work was to be finished, it could be said with perfect propriety that delay for an indefinite period would make the performance of the contract

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71. *Shiam Sunder* v *Durga*, AIR 1966 All 185.
72. *H.R. & G. Industries* v *State of Rajasthan*, AIR 1964 Raj 205.
73. *Man Singh* v *Khazan Singh*, AIR 1961 Raj 277.
74. (1918) AC 119; (1916-17) All ER Rep 122.
75. *See* also *Czarnikow* v *Centrala Handlu etc.*, (1978) 3 WLR 274, HL, the contract of a Government Monopoly Corporation ended on ban of exports.
76. AIR 1954 SC 44; 1954 SCR 310.
77. *Ibid.* p 49. *See* also *Hagami Lal* v *Bhuralal*, AIR 1961 Raj 52. Followed in *Mugneeram B. & Co* v *Gurbachan Singh*, AIR 1961 SC 1523.

impossible within the specified time and this would seriously affect the object and purpose of the venture. But where there is no time-limit whatsoever in the contract, nor even an understanding between the parties on that point and when during the war the parties could naturally anticipate restrictions of various kind which would make the carrying out of these operations more tardy and difficult than in times of peace, we do not think that the order of requisition affected the fundamental basis upon which the agreement rested or struck at the roots of the adventure.

The effect of an administrative intervention has to be viewed in the light of the terms of the contract, and, if the terms show that the parties have undertaken an absolute obligation regardless of administrative changes, they cannot claim to be discharged. This has been so held by the Supreme Court in *Naihati Jute Mills Ltd v Khyaliram Jagannath*:[78]

> There was an agreement to purchase raw jute to be imported from East Pakistan (now Bangladesh). The buyer was to supply the import licence within November, failing which it was to be supplied within December at the pain of a little more price and if he failed in December he was to pay the difference between the contract and market prices. The buyer applied for a licence which was refused because he had stock in his mill sufficient for two months. He applied again. He was advised this time that the rules had been changed and to obtain a licence he must show that he had used an equal quantity of Indian jute. Thus the buyer failed to supply the licence and was sued for breach. He pleaded frustration caused by the change in Government policy.

But he was held liable. SHELAT J pointed out that if the Government had completely forbidden imports, Section 56 would have applied. But the policy of the Government was that the licensing authority would scrutinise the case of the each applicant on its own merit. Referring to the terms of the contract, the learned judge said:[79]

> These clauses clearly indicate that the appellants were conscious of the difficulty of getting the licence in time. The question would depend upon whether the contract which the appellants entered into was that they would make their best endeavours to get the licence or whether the contract was that they would obtain it or else be liable for breach of that stipulation. There is nothing improper or illegal for a party to take upon himself an absolute obligation to obtain a permit or a licence and in such a case if he took the risk, he must be held bound to his stipulation.

The Learned Judge relied upon the following observation of Lord SUMNER in *Bank Line Ltd* v *Capel (A) Co Ltd*[80]: "Where the contract makes provision (that is, full and complete provision, so intended) for a given contingency, it is not for the court to import into the contract some other different provisions for the same contingency called by different name."

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78. AIR 1968 SC 522: (1968) 1 SCR 821.
79. *Ibid.* at p 528; (1968) 1 SCR 830.
80. (1919) AC 535, 555.

Where the intervention makes the performance unlawful, the courts will have no choice but to put an end to the contract. This kind of situation was before the Supreme Court in *Boothalinga Agencies* v *V.T.C. Poriaswami Nadar*.[81]

> The defendant had a licence to import chicory for manufacturing coffee powder. The licence was subject to the condition that he would use it only in his factory. He agreed to sell the whole shipload. Before the arrival of the ship, the sale of such imported goods was banned.

The contract was accordingly held to have become void. "It was, however, argued on behalf of the respondent that, in any event, the appellant could have purchased chicory from the open market and supplied it to the respondent in terms of the contract." RAMASWAMI J rejected this argument:

> Under the contract the quality of chicory to be sold was the chicory of specific description—"Egberts chicory, packed in 495 wooden cases, each case containing 2 tins of 56 lb nett". It is manifest that the contract was for the sale of certain specific goods and it was not open to the appellant to supply chicory of any other description.[82]

6. *Intervention of War*

Intervention of war or warlike conditions in the performance of a contract has often created difficult questions. The closure of the Suez Canal following the Anglo-French war with Egypt, for instance, interrupted the performance of many contracts. One such case was *Tsakiorglou & Co Ltd* v *Noblee & Thorl GmbH*.[83] The following statement of facts was given by Lord REID:

> The appellants agreed to sell to the respondents three hundred tons of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was *via* Suez Canal. Shipment was to be in November/ December, 1956, but, on November 2, 1956, the Canal was closed to traffic and it was not reopened until the following April. It is stated that the appellants could have transported the goods *via* the Cape of Good Hope. The appellants refused to ship goods *via* the Cape. The question now is whether by reason of the closing of the Suez route, the contract had been ended by frustration.

The appellant's argument was that it was an implied term of the contract that shipment should be via Suez. But it was held that such a term could not be implied. The customary or usual route via the Suez Canal being closed, the appellants were

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81. (1969) 1 SCR 65: AIR 1969 SC 110. *Asstt Commr of Income Tax* v *A. K. Menon*, (1996) 6 Bom CR 564, penalties and interest under the Income Tax Act not allowed to be levied on a person who could not pay tax amount in advance because of restrictions imposed upon him under the Special Court (Trial of Offences Relating to Transactions in Securities), Act, 1992.
82. AIR 1969 SC 118. *See* also *Jagadish Prasad Pannalal* v *Produce Exchange Corpn Ltd*, ILR (1944) 2 Cal 41; *Malikarjunappa* v *Siddalingappa*, (1973) 3 SCC 180: AIR 1973 SC 190. Frustration does not apply to licences. See *Sunnam Satish* v *State*, AIR 1980 AP 18. An auction for the sale of trust property was held to have been frustrated on a stay order being issued by a court. *H.E.H. The Nigam* v *Jewellery Trust*, (1979) 4 SCC 602: AIR 1980 SC 17. Contracts for export of silver were deemed to have ended with the ban on export of silver. *Union of India* v *C. Damani & Co*, 1980 Supp SCC 707: AIR 1980 SC 1149. Frustration by the Government taking over an oil concession. *B.P. Exploration Co* v *Hunt (No. 2)*, (1979) 1 WLR 783. Frustration by the court staying the performance of a contract. *Shanti Vijay & Co* v *Princess Fatima Fouzia*, (1979) 4 SCC 602.
83. (1962) AC 93: (1961) 2 All ER 179: (1961) 2 WLR 633.

bound [by the Sale of Goods Act, 1893, Section 32(2)] to ship the groundnuts by a reasonable and practical route and, though the appellants might be put to greater expense by shipping the groundnuts via the Cape of Good Hope, that did not render the contract fundamentally or radically different, and there was not, therefore, frustration of the contract.[84]

If the intervention of war is due to the delay caused by the negligence of a party, the principle of frustration cannot be relied upon.[85]

If there are more than one ways of performing a contract and the war cuts off only one of them, the party is still bound to perform by the other way, however inconvenient or expensive. This appears from the decision of the Privy Council in *Twentsche Overseas Trading Co Ltd* v *Uganda Sugar Factory Ltd.*[86] There was a contract for supplying "Krupps" steel rails. The rest of the facts appear from the following words of Lord WRIGHT:

> The appellant claimed that the rails specified under the contract were to be rails manufactured by a German firm and by that firm only. On this they based their claim to be excused from their failure to deliver the goods because to do so would have involved a dealing with alien enemies due to the outbreak of World War II and hence the performance of the contract became impossible and illegal.

Their Lordships held that it was not open to the supplier to invoke the doctrine of frustration. There was nothing in the contract which called for the rails to be obtained from Germany only. The reference to "Krupps" did not indicate a source of supply, but merely a specification of the rails. There were many other sources of supply, and the contract left the supplier with a free hand in the matter.

In a case before the Patna High Court,[87] the further performance of a contract of life insurance had become impossible because the insurer was a German company and on the outbreak of war its business was closed by the Government of India and the disposal of pending policies was handed over to a firm of chartered accountants: The assured was accordingly allowed to recover the money paid by him under the policy. In a Calcutta case, a contract of carriage by river was intercepted by the enemy seizing the boat along with cargo during hostilities between India and Pakistan. The court allowed the carrier the plea of impossibility.[88]

7. *Application to Leases*

ENGLISH CASES.—The question whether the doctrine of frustration applies to a lease of land is not yet finally settled in England. In the leading case of *Crickelwood Property & Investment Trust Ltd* v *Leighton's Investment Trust Ltd*[89] which came before the House of Lords, the decision was unanimous that on the facts of the case, irrespective of any controversy, frustration would not have arisen because a lease for

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84. *See* also *Ocean Tramp Tanker Corpn* v *V/O Sovfracht, (The 'Eugenia')*, (1964) 3 WLR 114, which is another *Suez case* of the same kind; *F.A. Steamship Co Ltd* v *Anglo-Mexican Petroleum Products Co Ltd*, (1916) 2 AC 397.
85. *Gambhirmal* v *Indian Bank Ltd*, AIR 1963 Cal 163.
86. AIR 1945 PC 144.
87. *A.F. Ferguson & Co* v *Lalit Mohan Ghose*, AIR 1954 Pat 596.
88. *Basanti Bastralaya* v *River Steam India Navigation Co*, AIR 1987 Cal 271.
89. (1945) AC 221: (1945) 1 All ER 252.

99 years cannot be said to have been upset by a few years' disturbance, but contradictory opinions were expressed.

> A building lease was executed for ninety-nine years, more rent being payable after erection of buildings. But before any could be erected and while the lease had still 90 years to run, building activity was suspended by the Government because of the war.

Viscount SIMON LC said:

> The lease at the time had more than ninety years to run, and though we do not know how long the present war, and the emergency regulations which have been made necessary by it, are going to last, length of the interruption so caused is presumably a small fraction of the whole term. Here, the lease itself contemplates that rent may be payable although no building is going on, and I cannot regard the interruption which has arisen as such as to destroy the identity of the arrangement or to make it unreasonable to carry out the lease according to its terms as soon as the interruption in building is over.

But his Lordship was not prepared to accept the view that because a lease is more than a contract and amounts to an estate, therefore, it can never end prematurely by frustration, for example, where the subject-matter of the lease is swallowed by some vast concussion of nature or buried in the depth of the sea. "Suppose, for example", his Lordship continued, "that legislation were subsequently passed which permanently prohibited private building in the area, or dedicated it as an open space forever, why should this not bring to an end the currency of a building lease, the object of which is to provide for the erection on the area, for the combined advantage of the lessor and lessee of buildings which it would now be unlawful to construct."

Referring to the previous authorities, Viscount SIMON LC characterised it as erroneous to suppose that there is authority binding on the House of Lords to the effect that a lease cannot in any circumstances be ended by frustration. In *Matthey* v *Curling*.[90]

> There was the demise of a house for twenty-one years. The lesser had to keep the building in repair, to insure and in case of any destruction by fire *etc.* to expend the insurance money in rebuilding. In 1918 the military authorities took possession of the premises and remained in possession until the expiry of the lease. In February, 1919, the house was destroyed by fire and in March the terms of the lease expired. It was held by the House of Lords affirming the majority decision of the Court of Appeal, (ATKIN LJ having dissented) that the lessee was liable both for repairs and for rent even during the period of dispossession.

Commenting upon this case, Viscount SIMON LC said: "The decision there was that requisitioning by the Government was no answer to a claim on the covenant for rent, any more than ouster by a trespasser would be: the remedy of the tenant was against the Government for compensation . Equally, destruction by fire, after the Government had requisitioned the place, left the tenants still liable on his covenant to deliver up in proper condition, for the tenant could have covered the risk by

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90. (1922) 2 AC 180: (1922) All ER Rep 1, HL.

insurance. His Lordship also pointed out that the Court of Appeal was mistaken about *Matthey* v *Curling* as a clear authority that the doctrine of frustration cannot be applied to a demise of real property. His Lordship quoted with approval the statement from the dissenting judgment of ATKIN LJ in which his Lordship said that there is no legal absurdity in implying a term that a lease shall be determined absolutely on the happening of an event which in an ordinary contract works as a frustration. Lord WRIGHT also expressed the same view. But Lords RUSSEL and GODDARD expressed the contrary view. Lord RUSSEL proceeded as follows:

> A lease is much more than a contract. It creates and vests in the lessee an estate or interest in the land, a chattel interest, it is true, but a vested estate or interest nonetheless As was said by LUSH J in *London & Northern Estates Co* v *Schlesinger*[91]: "It is not correct to speak of this tenancy as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this Order (the lessee being a German was ordered not to stay in the premises during the war) disqualified him from personally residing in the flat it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion, it continues vested in him still...."[92]
>
> When a contract is frustrated it is because what is called the "venture" or "undertaking" which the parties have contracted to engage in, can no longer be carried out. The court in such circumstances declares the contract to be no longer binding on the parties. That is the end of the matter. But when a lease is in question, it is the lease which is the "venture" or "undertaking" upon which the parties have embarked. The contractual obligations thereunder of each party are merely obligations which are incidental to the relationship of landlord and tenant created by the demise and which necessarily vary with the character and duration of the particular lease. It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord and tenant—circumstances which might afford a defence to a claim for damages for their breach—but the lease would remain."
>
> The position would, therefore, seem to be that unless the matter is decided by the House of Lords, the decisions of the Court of Appeal represent the law and their effect is that "the doctrine is excluded in the case of a lease".[93]

In the still subsequent case of *National Carriers Ltd* v *Panalpina (Nothern) Ltd*[94] the House of Lords have reiterated that the doctrine of frustration was in principle applicable to leases, though the cases in which it could properly be applied were likely to be rare. Restating the basis of the application of the doctrine of frustration, their Lordships said that the frustration of a contract occurs when the nature of the outstanding rights and obligations are so significantly damaged by some supervening event from what the parties could reasonably have contemplated at the time of the execution that it would be unjust to hold them to the performance.

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91. (1916) 1 KB 20: (1914-15) All ER Rep 593.
92. This dictum was approved by Lord ATKINSON in *Whitehall Court* v *Ettlinger*, (1920) 1 KB 680: (1918-19) All ER Rep 229.
93. This view is expressed in Cheshire and Fifoot's LAW OF CONTRACT, 552 (8th edn 1972).
94. (1981) 2 WLR 45 HL.

Quite naturally, such a change in the rights and obligations under a lease is likely to be of rare occurrence. The facts of the case were:

> A warehouse was demised to the defendant for a period of ten years. The premises were not to be used for any other purpose than warehousing unless it was with the lessor's consent. The only vehicular access to the warehouse was by a street which the local authority closed because of the dangerous condition of a derelict Victorian warehouse opposite to that demised to the defendants. The period between the closure of the street and its reopening after demolition of the Victorian-warehouse was likely to be about 20 months. During that period the demised warehouse was rendered unless for the defendants' purposes. They refused to pay any further rent as they claimed that the lease had frustrated.

But they were held liable. The nature of the transaction and the obligations created by it had not significantly changed. Having regard in particular to the likely length of continuance of the lease after the interruption of user in relation to the term originally granted, on the facts the defendants had failed to raise a triable issue as to the applicability of the doctrine of frustration.

INDIAN CASES.—In India the question was considered by the Supreme Court in *Raja Dhruv Dev Chand* v *Raja Harmohinder Singh*,[95] where SHAH J (afterwards CJ) at once observed: "Authorities in the courts in India have generally taken the view that Section 56 of the Contract Act is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease".[96]

> It was one of the cases arising out of the partition of the country into India and Pakistan. The lease in question was that of an agricultural land for one year only. The rent was paid and the lessee was given possession. Before the land could be exploited for any crops, came partition which left the land in Pakistan and the parties migrated to India. The action was to recover the rent paid.

But no such recovery was allowed. SHAH J who spoke on behalf of himself and RAMASWAMI and MITTER JJ pointed out that completed transfers are completely outside the scope of Section 56.

In a case before the Allahabad High Court,[97] the roofs of a premises which was leased out collapsed owing to their dilapidated condition and heavy rains and required new construction, that was not taken to be a frustration of the lease.

On the other hand, where on account of an event beyond the parties' control, the lessor is not able to transfer possession to the lessee, the lessee would be entitled to take back his rent. This was so held by the Punjab High Court in *Gurdashan Singh* v *Bishen Singh*.[98] To this extent the Supreme Court approved the decision, but the observation of the High Court that "the broad principle of frustration of contracts applies to leases" was rejected, SHAH, J saying: "We are unable to agree with that observation." The learned judge continued:

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95. AIR 1968 SC 1024: (1968) 3 SCR 339.
96. The learned judge referred to the following authorities: *Abdul Hashem* v *Balahari Mondal*, AIR 1952 Cal 380; *Tarabhai Jivanlal* v *Padamchand*, AIR 1950 Bom 89; *Alanduraippa Koil Chithakaddu* v *T.S.A. Hamid*, AIR 1963 Mad 194 and *Sri Amuruvi Perumal Devaasthanam* v *Sebapathi Pillai*, AIR 1962 Mad 132.
97. *Shyam Kumari* v *Ejaz Ahmad*, AIR 1977 All 376.
98. (1962) 2 Punj 5 (FB).

Under a lease of land there is a transfer of right to enjoy that land. If any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let out, because of fire, tempest, floods, violence of any army or a mob, or other irresistible force, the lease may at the option of the lessee be avoided. This rule is incorporated in Section 108(C) of the Transfer of Property Act. Where the property leased is not destroyed or rendered substantially and permanently unfit, the lessee cannot avoid the lease because he does not or is unable to use the land for purpose for which it is let out to him.[1]

In the subsequent case of *Sushila Devi* v *Hari Singh*,[2] the Supreme Court held that:

In the instant case there is no concluded contract since no deed was written or registered. It was an agreement to lease and that came within the scope of Section 56. There was frustration of the contract as the parties could not go to Pakistan to give or take possession.[3]

The Jammu and Kashmir High Court allowed in *Hari Singh* v *Dewani Vidyawati*[4] the recovery of rent paid in advance under a lease which could not be completed on account of partition. The recovery was allowed under Section 65 as benefits received under a contract which became void.

Theories of frustration

Many possible explanations have been put forward as a justification for the doctrine of frustration as a part of the law of contract. Two theories are most well-known.

1. Theory of Implied Term

The theory of implied term was explained by Lord LOREBURN in *F.A. Tamplin Steamship Co Ltd* v *Anglo-Mexican Petroleum Products Co Ltd*[5] in these words:

A Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. . . . It is in my opinion the true principle, for no Court has absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted. . . . Were the altered conditions such that, had they thought of them, they would have taken their chances of them, or such that as sensible men they would have said: 'If that happens, of course, it is all over between us'?

This explanation of the doctrine of frustration has been constantly cited in a large number of decisions. But it has also been criticised as something unreal. For

1. *See* also *Mahadev Prasad Shaw* v *Calcutta Dyeing & Cleaning Co*, AIR 1961 Cal 70.
2. (1971) 2 SCC 288: AIR 1971 SC 1956.
3. (1971) 2 SCC 288: AIR 1971 SC 1956 at pp. 291-92.
4. AIR 1960 J&K 91.
5. (1916) 2 AC 397, 408.

instance, Lord WRIGHT said in a case:[6] "To my mind the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation." "The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment. I find the theory on the basis of the rule in the pregnant statement of Lord SUMNER that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands".[7] In another case[8] his Lordship said: "In ascertaining the meaning of the contract and its application to the actual occurrences, the court has to decide, not what the parties actually intended but what as reasonable men they should have intended. The court personifies for this purpose the reasonable man."

2. *Just and Reasonable Solution*

In a subsequent case[9] DENNING LJ attempted to explain the doctrine of frustration on a different basis. He said: "The court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation. The day is done when we can excuse an unforseen injustice by saying to the sufferer 'it is your own folly, you ought not to have passed that form of words, you ought to have put in a clause to protect yourself'. We no longer credit a party with the foresight of a Prophet or his lawyer with the draftsmanship of a Chalmers." But this statement was not approved when the case went before the House of Lords. The observation of Lord LOREBURN that "no court has an absolving power", was re-emphasised. Viscount SIMON said: "The principle remains the same. Particular applications of it may greatly vary and theoretical lawyers may debate whether the rule should be regarded as arising from implied term or because the basis of the contract no longer exists. In any view it is a question of 'construction' as Lord WRIGHT pointed out in *Constantine* case[10] and as has been repeatedly asserted by other masters of law."[11]

Theories not Applicable in India

Referring to the theories B.K. MUKHERJEA J of the Supreme Court said in *Satyabrata* case:[12]

> These differences in the way of formulating legal theories really do not concern us so long as we have statutory provision in the Indian Contract Act. In deciding cases in India, the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in Section 56 of the Contract Act, taking the word 'impossible' in its practical and not literal sense. It must be borne in mind, however, that Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

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6. *Denny, Mott & Dickson Ltd* v *James B. Fraser & Co Ltd*, (1944) AC 265, 275.
7. Quoting Lord SUMNER from *Hirji Mulji* v *Cheong Yue S.S. Co Ltd*, (1926) AC 497: (1926) All ER Rep 51 (PC).
8. *Joseph Constantine Steamship Line Ltd* v *Imperial Smelting Corpn Ltd*, (1942) AC 154, 185.
9. *British Movietonews Ltd* v *London & District Cinemas Ltd*, (1951) 1 KB 190.
10. (1942) AC 154.
11. (1922) AC 166, 184.
12. AIR 1954 SC 44, 48.

Effects of frustration

"It is well-settled that if and when there is frustration the dissolution of the contract occurs automatically. It does not depend, as does rescission of a contract, on the ground of repudiation or breach, or on the choice or election of either party. It depends on the effect of what has actually happened on the possibility of performing the contract."[13]

1. Frustration Should not be Self-Induced

Explaining the principle that frustration should not be self-induced, Lord WRIGHT said in *Maritime National Fish Ltd* v *Ocean Trawlers Ltd.*[14]

> The essence of 'frustration' is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of the Lord SUMNER in *Bank Line Ltd* v *Arthur Capel & Co.*[15] What he says is: "I think it is now well-settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration."

In *Maritime National Fish Ltd* v *Ocean Trawlers Ltd*[16] the facts were:

> The appellants hired the respondents' trawler, called the *"St. Cuthbert"* to be employed in fishing industry only. Both parties knew that the trawler could be used for that purpose only under a licence from the Canadian Government. The appellants were using five trawlers and, therefore, applied for five licences. Only three were granted and the Government asked the appellants to name three trawlers and they named trawlers other than the *St. Cuthbert*. They then repudiated the charter and pleaded frustration in response to the respondents' action for the hire.

The Judicial Committee of the Privy Council held that the frustration in this case was the result of the appellants' own choice of excluding the respondents' ship from the licence and, therefore, they were not discharged from the contract.[17]

In another similar case, the contract was to export 1500 tons of sugar beet pulp pellets with a further option for the same quantity. The sellers obtained an export licence for 3000. They also contracted with another buyer to supply him 1500. But the Government refused to grant any further licence. They shipped the whole agreed quantity to the first buyer.[18] They were now left with the export licence for 1500 only, but were under two obligations, one to supply 1500 to the first buyer under the option

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13. *Per* Lord WRIGHT in *Denny, Moch & Dickson Ltd* v *James B. Fraser & Co.* (1944) AC 265, 274. Cited by MUKHERJEA, J in *Satyabrata* case, AIR 1954 SC 44, 49.
14. (1935) AC 524 (PC). A seller of immovable property who could not complete the sale because of his own failure to apply for permission for sale was not permitted to resort to the defence of impossibility. *Hashmuddin* v *Kishan Lal Narang*, 1986 All LJ 693.
15. (1919) AC 435.
16. (1935) AC 524 (PC). *See* also *Hirji Mulji* v *Cheong Yue Steamship Co.* (1926) AC 497, where Lord SUMNER quotes from Lord BLACKBURN in *Dahl* v *Nelson, Donkin & Co.* (1881) 6 App Cas 38, 53 who refers to "frustration" as being a matter "caused by something for which neither party was responsible"; and again he quotes BRETT J's words which postulate as one of the conditions of frustration that it should be "without any default of either party".
17. Followed in India in *Jwala Pd* v *Jwala Bank*, AIR 1957 All 143 and considered: *V.L. Narasu* v *Iyer*, AIR 1953 Mad 831.
18. AIR 1954 SC 44, 48.

given to him and other under the contract with the second buyer for the same quantity. As a face saving device they apportioned the supply between the two buyers giving about half to either. The second buyer sued for breach of contract.[19] The suppliers pleaded frustration. They were held liable. The Court of Appeal found no legal authority justifying the proposition that where a seller has a legal commitment to *A* and a non-legal commitment to *B* and he can honour the obligation to *A* or to *B* but not to both, he is justified in partially honouring both obligations.[20] The court referred to the principle stated in the American Uniform Commercial Code[21] that in such a situation the seller may allocate supplies in any manner which is reasonable and fair, but found no basis for importing the principle into English law. There is, however, an English authority to the effect that if the seller had been under a legal duty, he would have been justified in making fair apportionment. The court said that when a supplier has many contracts to fulfil, but only has enough of the goods to fulfil one of them, then, if he reasonably appropriates what he has to that one, he can rely on *force maejeure* as to others. Thus, there is no principle of law preventing one party to a contract taking advange of its own acts to defeat the other's rights unless the party is in breach of duty in so acting. Where the defendant company having the right to do so and lawfully exercising that right, sold its subsidiary with the result that the employees' stock options lapsed, the defendant company was held not liable for the lapse because it was under no duty not to sell its subsidiary.[22]

In order to attract the principle that a party is not entitled to rely on his own act in not fulfilling a condition subsequent and thereby bringing a contract to an end, the act has to amount to a breach of duty owed to the other party under the contract. If a term cannot be implied into a contract that a party would not do an act which, if done, would prevent the fulfilment of a condition precedent or would cause a condition subsequent to be fulfilled, the contract takes effect according to its tenor.

Applying this to the case of a company which offered shares to its own employees and to those of its subsidiary and after an employee of a subsidiary had accepted the offer, the company's subsidiary was sold to a bidder and the employee was informed that the scheme lapsed but he sued the company for breach of contract, the court came to the conclusion that the company was not, by reason of the scheme, under a duty not to deal with the undertaking of the subsidiary in a way that would frustrate the scheme.[23]

2. *Frustration Operates Automatically*

Frustration operates automatically to discharge the contract "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances".[24] "The legal effect of frustration does not depend on their intention or their opinions, or even knowledge, as to the event."[25] "The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to

19. Privy Council, (1935) AC 524.
20. *Pancommerce SA* v *Veecheema BV*, The Times, June 16, 1983.
21. Paragraph 2-615.
22. *Thompson* v *Asda-MFI, Group*, (1988) 2 WLR 1093; *Alghussein Establishment* v *Eton College*, (1988) 1 WLR 587 HL.
23. *Thompson* v *ASDA-MFI Group plc*, (1988) 2 All ER 722 Ch D.
24. *See* Lord LOREBURN in *Davis Contractor Ltd* v *Ferham Urban District Council*, (1956) AC 696, citing from *Hirji Mulji* v *Cheong Yue Steamship Co*, (1926) AC 497, 510.
25. Lord LOREBURN *Ibid.*, citing from *Dahl* v *Nelson*, (1881) 6 App Cas 518, *per* Lord WATSON.

form its conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object."[26] This is particularly true of Indian law as Section 56 of the Contract Act "lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties."

A case, however, shows that in certain circumstances frustration may be waived by one party and then the other will be bound by the contract. In *H.R. & S. Sainsbury Ltd* v *Street*:[27]

> There was the sale of 275 tons (5% more or less) of feed barley to be grown on seller's land. The crop amounted to only 140 tons. The seller resold it to another and contended that he had the right to do so because the contract had ended by frustration.

But he was held liable for breach of contract. There was frustration only to the extent of crop failure. The buyer could waive it and claim delivery of whatever little crop the seller's land had produced.[28]

The Supreme Court has laid down that frustration puts an end to the liability to perform the contract. It does not exterminate the contract for all purposes. For example, whether the doctrine of frustration would apply or not has to be decided within the framework of the contract and, if the contract contains an arbitration clause, the arbitrator could decide the matter of frustration.[29]

3. Adjustment of Rights

The rights of the parties are adjusted under Section 65 of the Act.

65. Obligation of person who has received advantage under void agreement, or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

(a) *A* pays *B* 1000 rupees in consideration of *B's* promising to marry *C*, *A's* daughter. *C* is dead at the time of the promise. The agreement is void, but *B* must repay *A* the 1000 rupees.

(b) *A* contracts with *B* to deliver to him 250 maunds of rice before the first of May. *A* delivers 130 maunds only before that day, and none after. *B* retains the 130 maunds after the first May. He is bound to pay *A* for them.

(c) *A*, a singer, contracts with *B*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her a hundred rupees for each night's performance. On the sixth night, *A* wilfully absents herself from the theatre, and *B*, in consequence, rescinds the contract. *B* must pay *A* for the five nights on which she had sung.

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26. MUKHERJEA J in *Satyabrata Ghose* v *Mugneeram Bangur Co*, AIR 1954 SC 44, 48, citing from *Morgan* v *Manser*, (1947) 2 All ER 666.
27. (1972) 1 WLR 834.
28. *See* G.D. Goldberg, *Is Frustration Invariably Automatic*, (1972) 88 LQR 464.
29. *Naihati Jute Mills Ltd* v *Khyaliram*, (1968) 1 SCR 65: AIR 1969 SC 110. Liability under Section 65 also survives. *Bombay Dyeing & Mfg Co Ltd* v *State of Bombay*, 1958 SCR 1122: AIR 1958 SC 328: 1958 LLJ 778.

(d) *A* contracts to sing for *B* at a concert for 1000 rupees, which are paid in advance. *A* is too ill to sing. *A* is not bound to make compensation to *B* for the loss of the profits which *B* would have made if *A* had been able to sing, but must refund to *B* the 1000 rupees paid in advance.

The effect of the principle laid down in the section is that when the parties have entered into an apparently valid contract and some benefits have been passed under it, and subsequently the contract is either discovered to be void or becomes void, the party who has received the benefits must restore them to the other.[30] Thus, the section does not apply to a contract which the parties knew at the time of making it to be void.[31] The section also does not apply to a case where the benefits are being passed at a time when the contract has, though unknown to the parties, already ceased to be enforceable. This was the position in *Jagadish Prasad Pannalal* v *Produce Exchange Corporation Ltd.*[32]

There was a contract for the sale of one wagon of maize starch at the rate of Rs 77 per cwt., the control price being Rs 78. The goods were delivered on January 3 and paid for. A few days earlier, viz. on December 16, a new order was passed by the Government making Rs 48 as the price and this was to apply to all contracts in which delivery was to be given on or after January1. The buyer brought an action to recover the difference between the revised control price and the price he paid.

The court agreed with him to this extent that the contract had become void by the change in the control price and, therefore, neither party was compellable to perform, but that the buyer, having paid up, was not entitled to any refund under Section 65. For this section to apply the advantage must have been received under "contract", whereas, in the present case, the excess price was paid after the contract had already become void and ceased to be enforceable.[33]

Discovered to be Void

The first part is concerned with an agreement which never amounted to a contract, it being void *ab initio*. But the parties discovered this at a later stage. "The word 'discovered' connotes the pre-existence of that which is discovered". This will cover cases of "initial mistake". Where for example, money is paid for the sale of goods, which unknown to the parties, have already perished at the time, the money is refundable. The principle will apply whether the agreement is void by reason of law or by reason of facts.[34] Thus, for example where a minor gave a shop under a partnership to the defendant, the agreement being void, it was held that he could recover back the shop. "The intention of Section 65 is to prevent a

30. The action for recovery or restitution of the amount paid has to be filed within three years from the date on which the contract ceases to be enforceable, *Amrit Devi* v *Ridmal*, AIR 1998 Raj 25.

31. *Joginder Singh* v *Assistant Registrar of Cooperative Societies*, AIR 1965 J&K 39. *See* also *Naihati Jute Mills* v *Khyaliram*, AIR 1968 SC 522. Subsequent restrictions not rendering the contract void.

32. ILR (1945) 2 Cal 41.

33. ILR (1945) 2 Cal 41.

34. *Uttamchand* v *Mohan Das*, AIR 1964 Raj 50. This principle was also applied to a case in which certain non-existent vehicles happened to be insured by mistake. The premium paid was held to be refundable, *New India Assurance Co Ltd* v *Itty Kurian*, (1997) 2 Ker LT 830. The court followed *Kuju Collieries* v *Jharkhand Mines*, AIR 1974 SC 1892.

party to a void agreement to retain benefits received under it."[35] Similarly, consideration given on a promissory note which was not enforceable for inadequacy of stamps, was held to be refundable.[36] Likewise, the money paid under a contract with a municipality not executed in the manner laid down by the Municipal Act, was held to be refundable.[37] Payment made in advance to a contractor under a contract which is not in accordance with Article 299(1) of the Constitution relating to Government contracts has been allowed by the Orissa High Court to be recovered back under Section 65 of the Contract Act.[38] Payment received by a person for proposed sale of land which he had no right to sell, had to be returned by him to the other party.[39] Taxes realised by a contractor under the authority of State were held to be refundable to the tax-payers when it turned out that the levy itself was invalid.[40] Money paid to a person for purchasing his right of reversion, which is not transferable, being merely an expectancy, was held by the Privy Council to be refundable with 6% interest from the date of suit.[41] SIR LAWRENCE JENKINS examined the scope of the section:

> The section deals with (*a*) agreements and (*b*) contracts. The distinction between them is apparent from Section 2. By clause (*e*) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (*h*) an agreement enforceable by law is a contract. Section 65, therefore, deals with (*a*) agreements enforceable by law, and (*b*) with agreements not so enforceable. By clause (*g*) an agreement not enforceable by law is said to be void.
>
> An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in total sense from its inception as distinct from a contract that becomes void.

Applying these principles to the facts of the case their Lordships observed that the agreement was manifestly void from its inception but the parties were not able to know of this fact till the demand for the property was resisted.[42]

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35. In such cases, the party seeking relief has to restore the benefits, if any, obtained by him. Thus a minor seeking restoration of his lands disposed of by his mother was required to refund the sale price of which he had the benefit. *Devinder Singh* v *Shiv Kaur*, AIR 1970 Punj 549. But see *Bijendra Prasad* v *Duleshwari Devi*, AIR 1998 Pat 122, a minor partner not allowed to institute proceedings against his co-partners or the firm for recovering his share. The firm being not registered, the action was barred by S. 69 of the Partnership Act, 1932. *Rashamoy Chowdhury* v *Anil Krishna Dawn*, (1998) 1 Cal LJ 295, where a partnership was discovered to be void, the property contributed by a partner was allowed to be recovered.
36. *Mohd Jamal Sahab* v *Munwar Begam*, AIR 1962 AP 188.
37. *Kishangarh Municipality* v *M.K. Mills Ltd*, AIR 1961 Raj 6.
38. *State of Orissa* v *Rajballav Misra*, AIR 1976 Ori 19.
39. *Orissa SEB* v *Indian Metals & Ferro Alloys Ltd*, AIR 1991 Ori 59.
40. *Town Area Committee* v *Rajendra Kumar*, AIR 1978 All 103: 1978 ALR 78. The holder of a forged promissory note cannot recover anything under the note, but he can recover his money under Section 65 if he himself was not a party to the forgery. *Brij Basi* v *Moti Ram*, AIR 1982 All 323. Non-compliance of the requirements of the U.P. Municipalities Act renders the contract void *ab initio*. Section 65 applied giving the Municipality the right to recover *Tehbazari* dues collected by the contractor. *Ishwar Dayal* v *Rath Municipality*, AIR 1980 All 143, following *Sheikh Kallan* v *Municipal Board, Aligarh*, (1956) All LJ 715. *D.L.F. United P Ltd* v *Pem Raj*, (1981)1 SCC 433, where the section was not applicable.
41. *Harnath Kaur* v *Indan Bahadur Singh*, 50 IA 69 PC: AIR 1922 PC 403.
42. The law on the point of restitution is in need of reform, see, Goff, *Reform of the Law of Restitution*, 24 Modern LR 85 (1961).

Where the Orissa High Court found that the plaintiff who advanced money to the defendant for supply of paddy was not aware on the date of the agreement that it was in violation of law,[43] his suit for refund of money was allowed.[44] The Supreme Court allowed recovery under the category "discovered to be void" of the amount of earnest money which was paid for purchasing a piece of land. The agreement turned out to be void because the seller thought he was receiving the price at the rate of per *kanal* whereas the buyer was under the impression that he was paying the price per *bigha*.[45] Where it was discovered that the party who had agreed to sell property and had received advance, had no title to the property, the party receiving the advance was held to be under an obligation to refund the amount. The contract was void *ab initio* but discovered by the parties subsequently. The obligation to refund exists even where there is no provision in the agreement to that effect. The obligation is founded on the equitable principle of restitution and prevention of unjust enrichment.[46] A lady advocate acting as an Assistant District Counsel on the request of the District Magistrate was allowed to recover her remuneration for the working period even though the appointment was discovered to be void under Section 24(2) of the Criminal Procedure Code, 1973.[47]

A Zila Parishad awarded to the highest bidder the contract of collecting entry fee from vehicles. The contractor did not account for to the Parishad for a part of the collection and took shelter behind the illegality of such authorisation. The court allowed recovery but not in the manner of recovering as arrears of land revenue.[48]

Pari Delicto

The principle has also been held to apply in cases where a contract is void by reason of "unlawful object", but the parties were not aware of it. Thus, for instance, in a case[49] before the Rajasthan High Court:

> The parties made a forward contract in hydrogenated groundnut oil, not aware of the existence of an order issued under the Defence of India Rules prohibiting such contracts.

The court held that "the parties are not in *pari delicto*, and, therefore, it is a contract which is subsequently discovered to be void. The purchaser who has advanced money under the contract is entitled to a refund of it."[50]

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43. Orissa Rice and Paddy Control Order, 1965.
44. *Fakir Chand Seth* v *Dambhrudar Bania*, AIR 1987 Ori 50, following the observations of the Supreme Court in *Kuju Collieries Ltd* v *Jharkhand Mines Ltd.* (1974) 2 SCC 533: AIR 1974 SC 1892 and dissenting from *Bhaskarrao Buty* v *Saru Jadharao*, AIR 1978 Bom 322. For other decisions to the same effect see *Sivaramakrishniah* v *Narhari Rao*, AIR 1974 AP 186; *Lakhiram* v *Brajal*, AIR 1974 Ori 49.
45. *Tarsem Singh* v *Sukhminder Singh*, AIR 1997 SC 1400.
46. *M. Venkatesh* v *Kishore Jataram*, (1999) 2 Kar LJ 535.
47. *Indu Mehta* v *State of UP*, AIR 1987 All 309.
48. *Surendra Kumar Rai* v *Zila Parishad*, (1998) AIHC 894 All. Section 65 was held to be not applicable to a situation in which at the time of entering into the agreement the parties were aware of the fact that the agreement was opposed to a particular provision of law. The respondent was not entitled to recover anything from the petitioner. *Oriental Insurance Co Ltd* v *V.D. Jhunjhunwala*, (2001) 91 Delhi LT 496. The extension of the contract for collection of toll tax made by Zila Parishad subject to the amendment of bye-laws was held to be contingent only because bye-laws could not be amended with retrospective effect, *Sudhir Kumar* v *State of UP*, (2001) All LJ 528.
49. *Ram Singh* v *Jethamal Wadhumal & Co.* AIR 1964 Raj 232.
50. *See* also *Fakir Chand Seth* v *Dambarudhar Bania*, AIR 1987 Ori 50, advance payment for paddy in ignorance of a control order, allowed to be recovered.

The doctrine of *pari delicto* was stated in the following words in *Onkarmal* v *Banwarilal*:[51]

> The principle behind the doctrine of *pari delicto* is that where each party is equally at fault, the law favours him who is actually in possession, or that where both parties are equally culpable, the law will leave them where it finds them and will not engage itself to determine the rights as between them. But this principle is subject to well-known exceptions, one of which is that it will not apply where the parties are not or cannot be said to be really in *pari delicto*.[52]

Thus, there are at least two exceptions in which the benefits passed under an agreement which is void by reason of illegality of object can be recovered.

Firstly, where the parties are not at equal fault, the less guilty may recover anything that he has given to the other under the contract. Where a woman was induced by an insurance agent to pay premiums upon an illegal and void policy, she was held entitled to recover, as she was innocent.[53]

The doctrine of *pari delicto* is not designed to reward the wrong-doer or to penalize the wronged by denying to the victim access to justice. The doctrine is attracted only when none of the parties is a victim and both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain. Applying this principle to the landlord-tenancy relationship THAKKAR J of the Supreme Court held that advancing a sum of money by way of loan by the tenant to the landlord in order to get possession of premises under an unlawful agreement is an exploitation of a needy person and, therefore, he was entitled to have the advance adjusted towards rent as agreed.[54] Section 65 is not attracted where a negotiable instrument is rendered void by material alteration in inserting a date in an undated instrument.[55]

Secondly, where no part of illegal purpose has been executed, that is, the agreement is still executory, any benefits passed under the agreement may be recovered back. In a case before the Patna High Court:[56]

> Where in a contract of marriage which was illegal, the father of the bride refused to perform the marriage, he was held entitled to the refund of the money paid by him to the father of the bridegroom.[57]

Quantum Meruit Claims

Claim under the well-known English law doctrine of *quantum meruit* have been allowed by the courts under this section. The Supreme Court observed in *State of Madras* v *Dunkerley & Co*[58] that a claim for *quantum meruit* is a claim for damages for breach of contract. The value of the material used or supplied is a factor which furnishes a basis for assessing the amount of compensation. The claim is not for

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51. AIR 1962 Raj 127. Sections 32 and 56 do not permit conditions to be read into the contract. *V.C.K. Bus Service* v *R.T. Authority*, 1957 SCR 663: AIR 1957 SC 489.
52. Cited in *Ram Singh* v *Jethamal Wadhumal & Co*, AIR 1964 Raj 232.
53. *Hughes* v *Liverpool Victoria Legal Friendly Society*, (1916) 2 KB 482.
54. *Mohd Salimuddin* v *Misri Lal*, (1986) 2 SCC 378: AIR 1986 SC 1019 following *V.S. Rahi* v *Ram Chambeli*, (1984) 1 SCC 612: (1984) 2 SCR 290: AIR 1984 SC 595.
55. *Jayantilal Goel* v *Zubeda Khanum*, AIR 1986 AP 120.
56. *Dharindhar* v *Kanhji Sahay*, AIR 1949 Pat 250.
57. A number of authorities on the point are reviewed in the judgment. See also *Mohanlal Khushalbai* v *Yukub Khan*, AIR 1967 Guj 46.
58. 1959 SCR 379: AIR 1958 SC 560.

price of goods sold and delivered but for damages. That is also the position under Section 65. In another case[59] reasonable compensation was awarded on the implication of a contract. It will not displace an express stipulation on the point.

In a subsequent case, the Supreme Court explained the requirements of the claim. The original contract must be so discharged by the opposite party that the plaintiff is entitled to treat himself as free from the obligation of further performance and he must have elected to do so. The remedy is not available to the party who breaks the contract even though he might have partly performed it. The remedy is restitutory, it is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this respect it is different from a claim for damages which is a compensatory remedy. The court accordingly did not allow the claim of a contractor for extra payment on the ground that he had to procure the raw material from a longer distance than that represented in the tender documents.[60] The material was in fact available within the stated distance, but its removal required permission of Cantonment Authorities which the contractor could not manage to get.[61]

Explaining the nature of justice that Section 65 strives for, the Supreme Court has observed:[62]

> We do not have the slightest doubt that net profits realised by the company as a result of its various business activities can never be the measure of compensation to be awarded under Section 65. It is not as if Section 65 works in one direction only. If one party to the contract is asked to disgorge the advantage received by him under a void contract, the other party may ask him to restore the advantage received by him. The restoration of the advantage and the payment of compensation have necessarily to be mutual. In *Govindram Seksaria* v *Edward Radbore*[63] the Privy Council pointed out that the result of Section 65 was that each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract. As a result of the contract being void, the State could at the most recover from the contractor the value of the rough stone excavated from the quarries. But then it would have to make good to the company the expenditure incurred by it in quarrying operations and extraction of the rough stone.

The contract was for the grant of a quarry. It was found to be void because the parties were mistaken about the application of income tax laws in the area.

Becomes Void

The second type of situation covered by Section 65 is where a valid contract is made in the beginning, but it subsequently becomes either unlawful or impossible of performance. Any benefits which have been passed under the contract from one

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59. *Alopi Prasad* v *Union of India*, (1960) 2 SCR 793: AIR 1960 SC 588.
60. *Puran Lal Sah* v *State of UP*, (1971) 1 SCC 424.
61. *See* further, *Srinivas & Co* v *Inden Biscleers*, (1971) 3 SCC 721: AIR 1971 SC 2224; *Punjab* v *Hindustan Development Board*, AIR 1960 Punj 585.
62. *State of Rajasthan* v *Associated Stone Industries*, (1985) 1 SCC 575, 580. *Diwan Rahul Nanda* v *Nilish G Kotak*, (1998) 2 Bom CR 787, investment in another person's name in violation of tax laws; recovery of such money held to be triable issue.
63. AIR 1948 PC 56: 74 CA 295: 50 [illegible] LR 561.

party to other must be restored. This is subject to the expenses which have already been incurred by the other party in the performance of the contract.

ENGLISH LAW.—The principles of English law before the Law Reform (Frustrated Contracts) Act, 1943, were those laid down in the two coronation cases, one of them is, *Krell* v *Henry*[64] where the court held that the rent which had been paid before the contract to hire premises became void by reason of the postponement of the procession was not refundable and the outstanding rent was not recoverable. The courts left the parties where they were. They also did not like to disturb the rights which the parties had acquired before the contract became void. Of this the illustration is *Chandler* v *Webster*.[65] The plaintiff sued for refund of the rent which he had paid in advance and the landlord counter-claimed for the balance which was due. ROMER LJ stated the principle and said:

> Applying this to the facts here, as soon as it was ascertained that the procession, though no fault of either of the parties, could not take place, they were immediately free from any subsequent obligation under the contract, but the contract could not be considered as rescinded *ab initio*. That being so, many legal rights previously accrued to either of the parties remained, and could not be disturbed, and one of those rights was the right of the defendant to be paid £ 141.15 s.

The hardship that this principle is likely to cause was to a certain extent mitigated by the House of Lords in *Fibrosa Spolka Akeyjna* v *Fairbairn Lawson Combe Barbou*.[66] Lord RUSSELL OF KILLOWEN at once observed that *Chandler* v *Webster* was wrongly decided. Their Lordships accordingly allowed the £ 1000 to be recovered which were paid in advance for purchasing a machinery and the performance having been rendered illegal by the intervention of war. His Lordship continued:

> The money paid was recoverable, as having been paid for a consideration which had failed. The rule that on frustration the loss lies where it falls cannot apply in respect of moneys paid in advance when the consideration moving from the payee for the payment has wholly failed, so as to deprive the payer of his right to recover moneys so paid as moneys received to his use; but the rule will, unless altered by legislation, apply in all other respects.

LAW REFORM (FRUSTRATED CONTRACTS) ACT (ENGLISH).—The expected legislation came within a year. Now the rights of parties whose contract has ended by frustration are adjusted under the provisions of the Law Reform (Frustrated Contracts) Act, 1943. The main provisions of the Act are as follows:

All sums of money which have been paid under a frustrated contract shall be refundable and those which are still payable shall cease to be payable. If any party has incurred expenses before the time of discharge in the performance of the contract, the court may, if it thinks just to do so, allow him to deduct such expenses from the refundable deposit or allow him to recover. The same principle will apply to any benefits received other than money. In estimating the amount of expenses the court may take into account the reasonable overhead expenses and the work or services personally performed by the party. Benefits received under an insurance policy are not to be taken into account unless there is an express obligation to insure.

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64. (1903) 2 KB 740: (1903) All ER Rep 20.
65. (1904) 73 LJ KB 401: (1904) 1 KB 493, CA.
66. (1942) 2 All ER 122: (1943) AC 32.

APPROPRIATION OF PAYMENTS

[Sections 59-61]

When a debtor owing several distinct debts to one person, makes a payment, which is not sufficient to discharge all the debts, the question arises to which particular debt the payment is to be applied. The Act, in Sections 59 to 61, lays down the underlying principles:[67]

59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(*a*) *A* owes *B*, among other debts, 1000 rupees upon a promissory note, which falls due on the first June. He owes *B* no other debt of that amount. On the first June *A* pays to *B* 1000 rupees. The payment is to be applied to the discharge of the promissory note.

(*b*) *A* owes to *B* among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

1. Appropriation by debtor

The first principle is laid down by Section 59 which confers the right of appropriation upon the debtor. If the debtor owes several distinct debts to the same creditor and makes payment, he has the right to request the creditor to apply the payment to the discharge of some particular debt. If the creditor accepts the payment, he is bound by the appropriation.[68] This principle was laid

67. *Jahar Roy* v *Premji Bhimji*, (1977) 4 SCC 562.

68. Where the creditor accepted a conditional payment, he was not allowed to repudiate the condition, *Kapur Chand Godha* v *Mir Nawab*, (1963) 2 SCR 168: AIR 1963 SC 250.

down as early as (1816) in *Re Clayton*[69] and has since been incorporated in the section and also followed in a number of cases. This principle applies to several distinct debts and not to a single debt payable by instalments.[70] The debtor may exercise this right and may specify his appropriation expressly or his intention may be implied from surrounding circumstances indicating that his intention at the time of payment was to appropriate the amount deposited by him to a particular debt or to the account of that debt.[71] The payment of a money decree was directed to be in monthly instalments. The judgment remitted monthly instalments with a covering letter that the amount be appropriated towards principal. The bank did not refuse it and remained silent about it. The bank became bound by the appropriation. He could not appropriate the payments first towards interest and costs.[72]

The principle of the section applies only when there are more than one distinct debts. These sections contain a general rule for appropriation of payments towards several distinct debts and not towards various heads of one debt.[73] It was not applied to a case in which the principal and interest amount were due on a single debt. The rule applicable in such cases is that payment is first applied to wipe out interest and the balance is appropriated towards principal.[74]

2. Appropriation by creditor

The second principle is laid down in Section 60, which enables the creditor to make appropriation. If the debtor makes payment without any appropriation, the creditor may use the payment at his discretion to wipe out any debt which is due. He may, for example, use it in payment of a time-barred debt,[75] or in payment of a debt which carries simple or lesser interest.[76]

Where a mortgagor deposited some amount in the court without indicating whether it was for principal or interest, the court held that the ordinary principle that such money should first be applied to interest and costs and then to principal, would apply.[77]

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69. (1816) 1 Mer 572: 15 RR 161.
70. *Munno Bibi* v *I.T. Commr*, AIR 1952 All 514.
71. *Prem Nath Kapur* v *National Fertilizer Corpn of India Ltd*, (1996) 2 SCC 71.
72. *Smithaben H Patel* v *Industrial Credit and Development Syndicate*, AIR 1997 Kant 188; *Delhi State Cooperative Bank Ltd* v *DSCO Coop Industrial Society Ltd*, (2001) 91 Delhi LT 555 (Delhi DB).
73. *Industrial Credit & Development Syndicate* v *Smithaben H. Patel*, (1999) 3 SCC 80: AIR 1999 SC 1036: (1999) 96 Comp Cas. The rules apply before the stage of decree and not to the execution of court decree.
74. *Punjab National Bank* v *Surinder Singh Mandyal*, AIR 1996 HP 1. The court followed *Meghraj* v *Bayabai*, AIR 1970 SC 161.
75. *Kamaleshwari Prasad* v *Gangadhar*, AIR 1940 Pat 52. *State of Gujarat* v *Bank of Baroda*, AIR 1997 Guj 130, the debtor while making payment into his bank account did not indicate the particular loan to which he wanted the payment to be applied. Appropriation by the bank held to be proper. *PNB Dharamsala* v *Prem Sagar Chaudhary*, AIR 1996 HP 86, absence of instruction by judgment-debtor as to manner of appropriation, decree-holder entitled to appropriate under S. 60.
76. *Rameshwar Koer* v *M. Mehidi*, (1898) 26 Cal 39. Section 60 cannot be applied independently of S. 59. It gives discretion to the creditor and not to the judgment debtor, *Industrial Credit & Development Syndicate* v *Smithaben H. Patel*, (1999) 3 SCC 80.
77. *Meghraj* v *Baqabai*, (1969) 2 SCC 274: (1970) 1 SCR 523: AIR 1970 SC 161.

3. Appropriation by law

The third principle is in Section 61. The section applies when neither party makes an appropriation. In such a situation the law gets the right to appropriate the payment and the law prefers to wipe out the debts in the order of time in which they were incurred. The section says: "When neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not (time-barred). . . . If the debts are of equal standing, the payment shall be applied in discharge of each, proportionally."

ASSIGNMENT OF CONTRACTS

Section 37 which enables parties to dispense with performance should also enable them to assign their contractual obligations. "Assignment" means transfer of contractual rights or liability by a party to the contract to some other person who is not a party.[78] For example, if *A* owes *B* Rs 500 and *B* owes *C* a like amount, *B* has the right to receive from *A* and is under liability to pay *C*. *B* can ask *A* to pay directly to *C* and if *A* accepts, that will be an assignment of *B's* right to *C*.

Assignment of liabilities

An important principle affecting assignments is that the burden of or liability under a contract cannot be assigned. The promisor has the right to insist that performance shall be the responsibility of the promisee.[79] The promisor may have contracted with him by reason of the personal confidence which he reposed in him and, therefore, the promisor, can object to the contract being performed by any other person.[80] This is more particularly true of cases in which the engagement is of personal nature, such as, the engagement to sing or to paint. In such cases there is no question of vicarious performance. In other cases it should not matter to the promisor whether the performance is offered by the promisee himself or by someone else acting for him, provided, of course, that the promisee is responsible for the performance by his agent.[81] Explaining this in *Davis* v *Collins*,[82] Lord GREENE MR said:

> In many contracts all that is stipulated for is that the work shall be done and the actual hand to do it need not be that of the contracting party himself; the other party, will be bound to accept performance carried out by somebody else. The contracting party, of course, is the only party who remains liable. He cannot assign his liability to a sub-contractor, but his liability in those cases is to see that the work is done, and if it is not properly done, he is liable.[83]

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78. *See* Anson, LAW OF CONTRACT, 401 (23rd edn by Guest, 1972). See *R.K. Associates* v *Channappa*, AIR 1993 Kant 247, change of name of firm, old firm assigned the right to purchase a land to the new firm, which paid the price, assignee firm could enforce the sale and demand arbitration in terms of the provisions in the agreement.
79. *Robon & Sharpe* v *Drummond*, (1831) 2 B & C Ad. 303.
80. *See* Lord TENTERDEN at p 307, *ibid.*
81. *See*, for example, *British Waggon Co* v *Lea & Co*, (1880) 1 QBD 149. The party who actually performs has a right to ask the other party not to pay or to stop paying the main contractor till his dispute with the main contractor is resolved. *Yab Kee Seong* v *Teguh Bina*, (1992) 1 Current LJ 525 High Court of Shah Alam.
82. (1945) 1 All ER 247, 249.
83. This principle has been accepted by the Supreme Court in *Khardah Co Ltd* v *Raymon & Co Ltd*, (1963) 3 SCR 183 where at p 201, VENKATARAMA AIYAR J said: "The contract in question is one for the sale of goods. It is of no consequence to the buyer as to who delivers

A vicarious performance is not an assignment in the real sense of the word. "It is quite a mistake to regard that as an assignment of the contract, it is not."

Where with the consent of the promisor, the promisee drops out and some other person takes over his obligation, that is also not an assignment. It is a novation, that is, change of parties with mutual assent. In the words of VENKATARAMA AIYAR J of the Supreme Court:[84]

> As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in a substitution of liabilities.[85]

Assignment of rights

"On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either the law or under an agreement between the parties." The intention of the parties is to be gathered from the nature of the agreement and the surrounding circumstances. The leading authority is the decision of the Supreme Court in *Khardah Co Ltd* v *Raymon & Co Ltd.*[86]

> The dispute arose out of a contract for the purchase by a mill of Pakistani raw jute from a dealer, who failed to supply the goods as agreed.

The court held that the contract for the purchase of foreign jute was not assignable because the goods had to be imported under a licence which was not transferable and which also required the utilisation of the imported raw material only by the mill in question. The only other question was whether the dealer could assign his right to the price on delivery of the goods. The court conceded that ordinarily there is nothing personal about a contract for the sale of goods. The court further pointed out that "it is settled law that an arbitration clause does not take away the right of a party to assign if it is otherwise assignable.[87] In the opinion of the court the rights of the unpaid seller also do not stand in the way of the assignability of a contract. There was no provision in the contract prohibiting assignment, but even so the court held that the contract involved so many personal obligations on the part of the seller, which strongly suggested that the intention of the parties was that neither of them should assign the contract.[88] The court also took occasion to point out:

> There is in law a clear distinction between assignment of rights under a contract by a party who has performed his obligations thereunder, and assignment of a claim for compensation which one party has against the other for breach of contract. The latter is a mere claim for damages which cannot be assigned in law, the former is a benefit under an agreement, which is capable of assignment.

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the goods. What matters to him is that the goods delivered should be in accordance with the specifications."

84. In *Khardah Co Ltd* v *Raymon & Co Ltd*, (1963) 3 SCR 183: AIR 1962 SC 1810.
85. *Ibid.*, at p 202.
86. (1963) 3 SCR 183: AIR 1962 SC 1810.
87. Vide *Shayler* v *Woolf*, (1964) 2 All ER 54 and RUSSEL ON ARBITRATION, 16th edn, p 65.
88. For another illustration of a contract involving personal element, see *Namasivaya Gurukhal* v *Kadir Ahmad*, (1894) 17 Mad 168. Contra: *Jeffer Meher Ali* v *Budge Jute Mills Co*, (1906) 33 Cal 702: 34 Cal 289. For another S.C. decision see *Delhi Cloth & General Mills Ltd* v *Harnam Singh*, (1955) 2 SCR 402, 425: AIR 1955 SC 590.

The rights under a lottery ticket are assignable. Explaining this, TULZAPURKAR, J said:[89]

> A sale of lottery ticket confers on the purchaser thereof two rights (*a*) a right to participate in the draw and (*b*) a right to claim a prize contingent upon his being successful in the draw. Both would be beneficial interests in movable property, the former 'in praesenti', latter in future depending on a contingency lottery tickets, not as physical articles, but as slips of paper or memoranda, evidence, not one but both these beneficial interests in moveable property which are obviously capable of being transferred, assigned or sold and on their transfer, assignment or sale, both these beneficial interests are made over to the purchaser for a price.

The matter arose out of the attempt of the T.N. Government to subject the sale of lottery tickets to Sales Tax. Such tickets being goods within the meaning of the Sale of Goods Act, 1930, the State was held to be competent to do so. Dealing with agreements which are in the nature of grants, the court said:[90]

> It is well settled that rights and benefits arising thereunder, unless of a personal nature, partake of the character of personality as opposed to reality and, therefore, movable property capable of being assigned or transferred.[91]

Another illustration of a contract involving personal element and, therefore, incapable of being assigned is to be found in the decision of the Court of Appeal in *Kemp* v *Baerselman*.[92]

> The defendant agreed to supply a cake manufacturer with all the eggs that he might require for a year and the latter was not to purchase elsewhere. Deliveries were to be made at three different places and payment was to be by drawing bills of exchange on the manufacturer. The manufacturer's business was taken over by a company in which he was the principal shareholder, but even so the defendant refused to continue with the supplies.

It was held that the contract, being of personal nature in that it involved the personal creditworthiness of the buyer as to the mode of payment, was not capable of being assigned.

The Central Government assigned a piece of land to its own corporate undertaking with rights, liberties and privileges one of which was exemption from land revenue. It was held that the assignee became entitled to the exemption as a successor in interest of the Central Government.[93]

Effect and formalities of assignment

Consideration

In the first place, an assignment requires some consideration between the assignor and assignee. In the absence of any consideration between them, the assignment will

89. *H. Anraj* v *Govt of TN*, (1986) 1 SCC 414, 433.
90. At p 432.
91. Quoting SALMOND'S JURISPRUDENCE 412 para 108, 12th edn under the heading "Proprietory rights". See *Darlington BC* v *Wiltshier Northern Ltd*, (1995) 3 All ER 895 CA, the assignee's right to recover damages for breach of contract would be as extensive as that of the assignor. The case involved the assignment of rights in a building under construction and the action by the assignee was for defective construction.
92. (1906) 75 LJ KB 873: (1906) 2 KB 604, CA.
93. *Steel Authority of India* v *State of MP*, (1999) 4 SCC 76: AIR 1999 SC 1630.

be revocable by the assignor.[94] But when an assignment made as a gift has been completed by fulfilling the essential formalities, it cannot be revoked. This is true of all gifts. This is borne out by the following statement of TURNER LJ:[95]

> In order to make a voluntary settlement valid and effectual, the settlor must have done everything, which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.

Subject to Equities

Secondly, the title of the assignee shall be subject to all equities that exist at the time between the assignor and assignee, or that arise up to the time that the notice of assignment is given to the debtor.[96] Where, for example, the assignor had induced by fraud the other party to contract with him, the other party will have the same right of rescission against the assignee as he would have had against the assignor. But the assignee will not be affected by any equity of personal nature between the assignor and assignee. For example, the right to claim damages for the fraud committed by the assignor cannot be used to defeat the right of the assignee.[97]

Notice of Assignment

Thirdly, notice of assignment should be given to the debtor. Such a notice is useful from several points of view. It binds the debtor. In the absence of a notice, the debtor can make payment to the assignor himself and that will be a good discharge. Another advantage of giving notice is that the assignee will not be affected by any equity that may arise between the assignor and the debtor after notice. Notice is also important from the point of view of priorities. If, for example, the assignor makes more than one assignments of the same claim, the assignee who gives notice of the assignment to him first in point of time will have priority over the other, even if the assignment to him came later in time.[98]

DISCHARGE BY AGREEMENT

Contracts which need not be performed

Section 62 provides that "if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed".

62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

(a) *A* owes money to *B* under a contract. It is agreed between *A*, *B* and *C* that *B* shall thenceforth accept *C* as his debtor, instead of *A*. The old debt of *A* to *B* is at an end, and a new debt from *C* to *B* has been contracted.

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94. *Glegg* v *Bromley*, (1912) 3 KB 474. *See* PARKER J at p 491.
95. *Milory* v *Lord*, (1862) 4 De GF & J 264, 274: (1862) 31 LJ Ch 798: 7 LT 178.
96. For example, after an effective assignment, a garnishee order issue against the assignor was held to be not effective on a bank balance which already stood assigned to the assignee. *Tan Way Boom* v *Omar Maricar Holdings*, (1990) 2 Current LJ 700 High Court, Penang.
97. *Stoddart* v *Union Trust*, (1912) 1 KB 181, CA.
98. This is known as the rule in *Dearle* v *Hall*, (1823) 3 Russ 1: 2 LJ Ch 62: 27 RR 1. *See* also *Marchant* v *Morton, Down & Co*, (1901) 2 KB 829.

(*b*) *A* owes *B* 10,000 rupees. *A* enters into an agreement with *B* and gives *B* a mortgage of his (*A*'s) estate for 5000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(*c*) *A* owes *B* 1000 rupees under a contract. *B* owes *C* 1000 rupees. *B* orders *A* to credit *C* with 1000 rupees in his books, but *C* does not assent to the agreement. *B* still owes *C* 1000 rupees, and no new contract has been entered into.

Novation

When the parties to a contract agree to substitute the existing contract with a new contract, that is called *novation*.[1] In the well-known case of *Scarf* v *Jardine*[2] Lord SELBORNE explained the meaning and effect of novation in the following words:

> ...there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand, that they promise to pay him for that consideration.

Hence novation is of two kinds, namely:

(1) a novation involving change of parties; and

(2) a novation involving substitution of a new contract in place of the old.

1. *Change of Parties*

The first illustration to Section 62 is a case of novation by change of parties. If *A* is a debtor and the creditor agrees to accept *B* in his place as the debtor, the original contract between the creditor and *A* is at an end. A novation of this kind usually takes place when a new partner is admitted into an existing firm or when a partner retires from a firm and the new firm as constituted after admission or retirement accepts the liabilities of the old firm and this is approved by the persons dealing with the firm. Concurrence of all the parties is necessary.[3]

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1. Where the parties change only a part of the contract and the new contract is so inconsistent with the existing contract that they cannot stand together, there is no good novation. *Lata Construction* v *Rameshchandra Ramniklal*, (2000) 1 SCC 586: AIR 2000 SC 380.
2. (1882) 7 App Cas 345, 351.
3. *Venkatanarayana* v *Lakshmanayamma*, AIR 1929 Mad 309. For another example of substitution of parties see, *Bombay Dyeing and Mfg Co* v *State of Bombay*, 1958 SCR 1122: AIR 1958 SC 328: (1958) 1 LLJ 778. *Godan Namboothiripad* v *Kerala Financial Corpn*, AIR 1998 Ker 31, hire-purchase, default in payment, seller seized the vehicle, a third person undertook to pay the unpaid balance and got the vehicle released, the original debtor ceased to be the debtor. *State Bank of India* v *T. R. Seethaverma*, (1994) 2 Ker LT 18: AIR 1995 Ker 31, the court has to see not only whether the new debtor has consented to assume liability but also whether the creditor has accepted the liability of the new debtor. *Alikutty Paul* v *State of Kerala*, AIR 1995 Ker 291,

2. Substitution of New Agreement

When the parties to a contract agree to substitute a new contract for it, the original contract is discharged and need not be performed. It is necessary for the application of this principle that the original contract must be subsisting and unbroken. The substitution of a new contract is not possible after there has been a breach of the original contract. An early illustration is *Manohar Koyal* v *Thakur Das Nasker*.[4]

> The plaintiff sued to recover the sum of Rs 1173 due on a bond. After the due date of the bond, the plaintiff agreed to accept Rs 400 in cash and a new bond of Rs 700 payable by instalments. Subsequently the defendant neither gave Rs 400 nor the bond.

The plaintiff thereupon sued him on the original bond. The Calcutta High Court held that the original contract was discharged, not by *novation*, but by breach, and the plaintiff was entitled to sue for the breach of the original contract.[5]

The petitioner was appointed in response to an advertisement but placed at a lower scale than that mentioned in the advertisement. He accepted his placement. He then claimed the promised pay scale. He was not allowed to do so. The principle of novation applied. The appointment and acceptance at the lower scale substituted the original proposed scale.[6]

A contractor's bill was lying unpaid for about 4½ years. For that reason he was exposed to huge losses and grave economic duress. He settled his claim under a memorandum of understanding under which he accepted payment in full and final satisfaction. He then raised a dispute and sought arbitration for claiming interest on late payment. It was held that the memorandum of understanding had put an end to the original contract and therefore the contractor could not claim arbitration in terms of the original contract.[7]

In the words of the Supreme Court in *Lata Construction* v *(Dr) Ramchandra Ramniklal Shah*[8] as spoken by S. SAGHIR AHMAD J:

> "One of the essential requirements of novation, as contemplated by Section 62, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the

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lease of forest land for 99 years, the land was found subsequently to be in possession of another person, another land was offered in substitution on 40-year lease basis, the bidder did not accept it, but he could not sue for enforcement of the original contract.

4. (1888) 15 Cal 319.
5. *See* also *Dwarika* v *Bhagwati*, (1940) 186 IC 530; *Union of India* v *Kishori Lal Gupta & Bros*, AIR 1953 Cal 642, 644; on appeal before the Supreme Court, (1960)1 SCR 493: AIR 1959 SC 1362.
6. *Nagendra Kumar Brijraj Singh* v *Hindustan Salts Ltd*, (2001) 1 Guj CD 532 (Guj).
7. *Lloyds Steel Industries Ltd* v *Oil & Natural Gas Corpn Ltd*, AIR 1997 Bom 337. The court followed *Damodar Valley Corpn* v *K. K. Kar*, AIR 1974 SC 158: (1974) 1 SCC 141; *Union of India* v *Kishorilal Gupta*, AIR 1959 SC 1362. *See* also *Unikol Bottlers Ltd* v *Dhillon Kool Drinks*, AIR 1995 Delhi 25, the validity of the original contract which was substituted by a subsequent supplemental contract need not be examined at the stage of an application for grant of interim injunction. The court also recognised the principle that a person who is competent to contract can agree to rescind an existing contract.
8. AIR 2000 SC 380 at p 383.

effect of rescinding or completely altering the terms of the original contract has to be by agreement between the parties. The substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract."

The contract in the case was to provide a flat. A subsequent contract between the parties provided that the rights of the buyer under the original contract would be extinguished only on payment by him of the stipulated amount. He failed to make the payment. It was held that he could invoke the terms of the original contract and claim before the Consumer Commission that there was a deficiency in service on the part of the builder.

It is further necessary that the new agreement should be valid and enforceable. Thus, where an existing mortgage was replaced by a new agreement of mortgage, the new agreement being not enforceable for want of registration, it was held that the parties were still bound by the original mortgage.[9] In a contract to provide land free of encumbrances for a housing project, the site had to be given up because of the inability to remove hutment occupation of the land and the rates had to be increased because of the escalated price of the new site, the Bombay High Court held that it amounted to novating the old with a new contract.[10]

It has also been pointed out in a judgment of the Calcutta High Court that "Section 62 requires an agreement which necessarily implies consideration".[11] It is also obvious that there cannot be unilateral alteration of a contract. Where the parties had fixed by mutual agreement the rates of hiring a cinema hall, one of them was not allowed subsequently to alter them unilaterally.[12]

It was opined by their Lordships of the Privy Council as far back as the year 1893 in *Commercial Bank of Tasmania* v *Jones*[13] that "novation of debt operates as a complete release of the original debtor and cannot be construed as a mere covenant not to sue him."

Where there was a provision in the original contract giving parties the option to terminate the contract and the parties by means of a supplementary contract agreed to postpone the termination, it was held that this did not amount to novation of the contract.[14]

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9. *See* for example, *Shanker Lal Damodhar* v *Ambalal Ajaipal*, AIR 1946 Nag 260.
10. *Andheri Bridge View Coop Housing Society* v *Anandrao Deo*, AIR 1991 Bom 129.
11. *Union of India* v *Kishori Lal Gupta & Bros*, AIR 1953 Cal 642, 644, *Per* BACHAWAT J. A contract which is terminated by agreement, puts an end to its arbitration clauses also. *Vipinbhai* v *G.M. Western Rly*, AIR 1984 Guj 41.
12. *Magnum Films* v *Golcha Properties Ltd*, AIR 1984 Del 162. A settlement under S. 62 puts an end to the whole contract including arbitration clauses. *Vipinbhai R. Parekh* v *GM, Western Rlys*, AIR 1984 Guj 41. Where the original agreement containing an arbitration clause was substituted by a new agreement, the arbitration clause in the earlier agreement was not allowed to be resorted to. *Visakhapatnam Port Tract* v *Uma Constructions*, (1988) 25 Reports 126 AP. Where the suitor agreed to accept less sum than claimed by him, the compromise brought an end to the original contract and whatever was due under it including interest. *Central Bank of India* v *V. Guruviah Naidu*, AIR 1992 Mad 139.
13. (1893) AC 313.
14. *Unikol Bottlers Ltd* v *Dhillon Kool Drinks*, AIR 1995 Delhi 25. A provision in statutory auction rules was not allowed to be challenged on the ground that it was against S. 62 of the Contract Act. *A Veeriah Thever* v *Commr of Excise and Prohibition*, AIR 1995 Mad 288.

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustrations

A contracts with *B* to repair *B*'s house.

B neglects or refuses to point out to *A* the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Interdependent promises

Where promises are interdependent so that one party cannot perform without cooperation of the other, if the latter does not provide reasonable facilities for performance, the former is excused from his obligation to perform. The illustration appended to the section is based upon *Makin* v *Watkinson*.[15] Another illustration is *Ellon* v *Topp*.[16]

> An infant was placed by his father under a master to learn his three trades. Subsequently the master gave up one of his trades. The apprentice gave up his training for that reason.

The master sued for breach. The court came to the conclusion that the contract was on the basis of picking up three trades and the abandonment of one would not leave it to be the same contract. "If the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. If, on the other hand, the apprentice had left the training without any justification, the master would be free from any further obligation. It is evident that the master would not be liable for not teaching the apprentice if the apprentice will not be taught."[17]

Rescission and restoration

The section also permits the parties to rescind their contract. The Supreme Court allowed the parties to rescind under this section a contract for sale of forest coupes because of the substantial variance between the particulars of quantity and quality of timber held out at the time of the auction and the timer actually available. The contractor was allowed refund of his deposit. But no compensation was allowed to him for his loss because the contract contained a clause against compensation in such circumstances.[18]

Where an old contract is rescinded and is replaced by a new one, the old one will not revive only for the reason that there has been a failure to keep the new promise. The parties may, however, by mutual consent, restore the original and then the original will revive and become binding on the parties.[19]

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15. 1870 LR 6 Exch 25.
16. (1851) 6 Exch 424.
17. *Raymond* v *Minton*, (1866) LR 1 Ex 264.
18. *Syed Israr Masood* v *State of MP*, (1981) 4 SCC 289.
19. *R.N. Kumar* v *R. K. Soral*, (1988) 2 SCC 508, 511: AIR 1988 SC 1205.

Where the relationship between the parties was purely contractual and wholly non-statutory and the parties had by agreement ended their contractual obligations long back, it was held that if there was any dissatisfaction about the matter, it could have been resolved by reopening the settlement. Writ jurisdiction under Article 226 of the Constitution was not available in such matters.[20]

REMISSION OF PERFORMANCE

Section 63 allows a party to a contract to dispense with the performance of the contract by the other party, or to extend the time for performance or to accept any other satisfaction instead of performance.

63. Promisee may dispense with or remit performance of promise.—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(*a*) *A* promises to paint a picture for *B*. *B* afterwards forbids him to do so. *A* is no longer bound to perform the promise.

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

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

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

(*e*) *A* owes *B* 2000 rupees and is also indebted to other creditors. *A* makes an arrangement with his creditors, including *B*, to pay them a [21][composition] of eight annas in the rupee upon their respective demands. Payment to *B* of 1000 rupees is a discharge of *B's* demand.

The effect of the provision is that the party who has the right to demand the performance of a contract may—

(1) remit or dispense with it, wholly or in part; or

(2) extend the time for performance; or

(3) accept any other satisfaction instead of performance.[22]

Acceptance of less sum

The acceptance of a less sum of money where more is due, is a good discharge of the whole of the liability. The Supreme Court decision in *Kapur Chand Godha* v *Mir Nawab Himayatali Khan*[23] illustrates this:

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20. *Biren Poddar* v *State Bank of India*, (1995) 2 BLJR 912 Pat.
21. This word was *substituted* for the word "compensation" by S. 2 and Sch. II of the Amending Act, 1891 (XII of 1891).
22. The whole thing is linked with promisee's conduct. *CIT* v *Shantilal (P) Ltd*, (1983) 3 SCC 561, 564: 1983 SCC (Tax) 237: AIR 1983 SC 952: (1983) 144 ITR 57: 1983 Tax LR 1190.
23. (1963) 2 SCR 168: AIR 1963 SC 250.

> The liability was above twenty-seven lakhs of rupees. Hyderabad having been taken over, a committee was appointed to clear matters. It offered twenty lakhs to the creditor in full satisfaction and he accepted it. Afterwards the creditor sued the debtor for the balance.

S.K. DAS J held that the facts of the case are completely covered by Section 63 and illustration (*c*) thereof. The appellant having accepted the payment in full satisfaction of his claim was not entitled to sue. The court also relied upon Section 41 which provides that when a promisee accepts performance from a third person, he cannot afterwards sue the promisor.[24]

Similarly, in *Hari Chand Madan Gopal* v *State of Punjab*[25] the Supreme Court held:

> The Government had decided to recover only 40% and no more. The Government's decision would amount to remitting a part of the debt due by the appellants. Therefore, the Government cannot ask to recover more than 40%.

There must be proof that less sum has been accepted. Where the railways sent a cheque for an amount less than what was claimed by a party and, though the party retained the cheque, he did not issue any receipt that he was accepting it in full and final satisfaction and neither did he stop pursuing his matter, it was held that there was no evidence of an agreement to accept less sum.[26]

Waiver

To "dispense with" means that the party entitled to claim performance may waive it. The Supreme Court has already laid down[27] that waiver is the abandonment of a right which normally everybody is at liberty to waive. "A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right."[28]

An extension of time for performance by mutual consent is not the same thing as a waiver. This distinction was emphasised by the Supreme Court in *M. Sham Singh* v *State of Mysore*.[29]

> *M* was granted scholarship by the State for higher studies in the United States upon a bond that he would serve the State on his return, provided that the State offered him a job within six months of his return, failing which the bond was to be taken as waived. If *M* failed to comply he was to refund the scholarship money. On his request the State agreed to an extension of his stay in the States for practical training for one year. During this year he came to India for a domestic visit, but was allowed by the State to rejoin his practical training. On completion of his training he joined service in the United States and the State claimed refund of the scholarship money. He pleaded waiver on the part of the State.

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24. To the same effect, *Central Bank of India* v *Guruviah Naidu*, AIR 1992 Mad 139, compromise to withdraw a money suit if the debtor paid a certain sum within stipulated time, time extended and then paid by the debtor, held no claim left, not even for interest on late payment.
25. (1973) 1 SCC 204: AIR 1973 SC 381.
26. *Union of India* v *Gangaram Bhagwandas*, AIR 1977 MP 215.
27. *Waman Shriniwas Kini* v *Ratilal Bhagwandas & Co*, 1959 Supp (2) SCR 217, 226: AIR 1959 SC 689.
28. *Jagad Bandhu Chatterjee* v *Nilima Rani*, (1969) 3 SCC 445, 446: (1970) 2 SCR 925, 926.
29. (1973) 2 SCC 303: AIR 1972 SC 2440.

The court held that there was no waiver whatsoever and *M* was liable to refund. The extension was mutually agreed upon and there was no conduct on the part of the State showing an intention to waive.

The party who has waived compliance with a particular requirement may in circumstances and by giving reasonable notice withdraw his waiver. The Court of Appeal recognised this in *Charles Richards Ltd* v *Oppenheim.*[30]

> The contract was to supply a car chassis and to build a body on it within seven months, time being of the essence of the contract. The bodywork was entrusted to a third person who was to take his instructions directly from the buyer. The contractor could not deliver within time and the buyer liberally extended time until after about two months he gave notice that if the car was not delivered within 4 weeks, he would be unable to accept it. Delivery was offered still three months after this.

It was held that the buyer had the right to make time as of the essence again by giving reasonable notice and that the notice given by him was reasonable. He had rightfully rescinded the contract and was entitled to damages for breach.

Such notice must in all the circumstances of the case give a reasonable opportunity to the other party to perform his part of the contract. If time is not otherwise of an essence of the contract, the notice cannot make it so. A party cannot unilaterally amend the terms of the contract.[31]

Waiver is indeed an instance of the application of the principle of promissory estoppel. In the words of Lord DENNING:[32]

> The principle of waiver is simply this: If one party, by his conduct, leads another to believe that strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may, on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that case he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.
>
> Instances of these principles are ready to hand on contracts for the sale of goods. A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for exercising an option.[33] A buyer may by

30. (1950) 1 All ER 420: (1950) 1 KB 616.
31. *Behzadi* v *Shaftesbury Hotels Ltd*, (1991) 2 All ER 477 CA.
32. *W.J. Allan & Co Ltd* v *El Nasr Export & Import Co*, (1972) 2 QB 189: (1972) 2 WLR 800: (1972) 2 All ER 127.
33. *Burner* v *Moore*, (1904) 1 Ch 305.

requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery.[34] A seller may accept a less sum for his goods than the contracted price, thus, inducing the buyer to believe that he will not enforce payment of the balance. In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.

In this case, a contract for the sale of goods contained a stipulation for bank credit for the price in a certain manner. But the offer made by the confirming bank did not comply, in several respects, with what the sellers were entitled to require. For example, the confirming bank's offer was in terms of sterling currency. The sellers accepted it by sending their invoices and drafts etc. Afterwards the sterling was devalued and Tanzanian currency was not and the seller wanted to enforce his right as to payment in Tanzanian currency. But he was not allowed to do so. MEGAW LJ said: "It was not a concession for a specific period of time or one which the seller could operate for as long as they chose and thereafter unilaterally abrogate, any more than the buyers would have been entitled to alter the terms of the credit or to have demanded a refund from the sellers if, after his credit had been partly used, the relative values of the currencies had changed in the opposite way."[35]

Extension of time

Section 63 also permits a party to extend time for performance. The Supreme Court has pointed out in *Keshavlal Lallubhai Patel* v *Lalbhai Trikumlal Mills*[36] that the promisee cannot by unilateral act extend the time of performance of his own accord and for his own benefit. Consent of the other party is necessary.

The Privy Council held, in a case, that any of these things may be done without agreement and, therefore, also without consideration.[37] The commonest illustration is the release of a debt. A creditor may accept a less sum of money than what is due, in satisfaction of the whole debt. Another illustration is the decision of the Madras High Court in *Mathew Henry Abraham* v *The Lodge "Goodwill"*:[38]

> The plaintiff was the holder of a promissory note executed in his favour by the defendants. He agreed to abandon his claim if the 'Lodge Goodwill' which was burnt down was resuscitated. The building was completed.

His subsequent claim upon the promissory note was dismissed. One of the important questions was whether a conditional remission of this kind was within the scope of the section. The Court said:

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34. *Charles Richards Ltd* v *Oppenheim*, (1950) 1 KB 616, 621.
35. An auction sale of scrap held by the Railway Administration was subsequently revoked and the auction purchaser accepted refund of his deposit. Held, acquiescence and no further right of auction. *Mohd Usman* v *Union of India*, AIR 1982 Raj 100. The section is not applicable to acquisition of promises and its consequences. *Rajalakshmi* v *Asstt Engineer*, AIR 1980 Ker 68.
36. (1959) SCR 213: AIR 1958 SC 512: 60 Bom LR 948.
37. *Channa Mal Ram Nath* v *Mool Chand Ram Bhagat*, AIR 1928 PC 99, 102, overruling the decision of Bombay High Court in *Abaji Sitaram Modak* v *Trimbak Municipality*, (1904) 28 Bom 66. Approved by the Supreme Court in the case cited in *M. Sham Singh* v *State of Mysore*, (1973) 2 SCC 303: AIR 1972 SC 2440.
38. LR 34 Mad 156.

> The illustrations appended to the section are no doubt cases in which performance is dispensed with unconditionally. But the words of the section itself are wide enough to cover conditional releases, and there is no reason to think that the Indian Legislature contemplated a departure on this point from the English law under which a release contingent on the happening of a future event is a good release. The point on which Section 63 differs from the English law is that it does not require consideration to support a release while under English law a release without consideration is a *nudum pactum.*[39]

The same difference between English and Indian laws was stated by the Calcutta High Court in *Manohar Koyal* v *Thakur Dass Naskar.*[40] The Court said:

> It is quite clear that Section 63 not only modifies but is in direct antagonism to the law in England. It was laid down, as pointed out in the case of *Foakes* v *Beer,*[41] that for the last pretty nearly three hundred years it has been the law in England that if *A* owes *B* five thousand rupees, and *B* consents to take two thousand rupees in payment of the debt that is what is called a *nudum pactum,* and that *B* after taking two thousand rupees can subsequently bring his action for the unpaid three thousand rupees. The law in this country by virtue of Section 63[42] of the Contract Act is different.

An important difference between Sections 62 and 63 is that the former, which provides for *novation,* requires an agreement based on some consideration. But Section 63 requires neither. Under this section, the promisee may before breach gratuitously release the promisor from the obligation to perform the promise.[43] The promisee may after breach gratuitously release the promisor from his liability arising on such breach.[44] As against this, under Section 62 *novation* agreement must be made before the breach of the original promise.

ACCORD AND SATISFACTION

The accord is an agreement made after breach whereby some consideration other than his legal remedy is to be accepted by the party not in fault, followed by performance of the substituted consideration.[45] The liability arising out of breach of contract may be discharged by accord and satisfaction. The validity of accord and satisfaction must be judged by the general law of contract quite apart from the

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39. The following authorities were cited: *Davis* v *Cundasami,* ILR (1896) 19 Mad 398; *Manohar Koyal* v *Thakur Das Naskar,* ILR (1888) 15 Cal 319; *Nowroji N. Toonthi* v *Kazi Sidick Mirza,* ILR (1896) 20 Bom 636, 644.
40. ILR (1888) 15 Cal 319.
41. LR 9 App Cas 605.
42. *See* also *Ishaw* v *Madan Lal,* AIR 1965 All 34; *Shyamnagar S. Tin Factory* v *S.W.F. Product Co,* AIR 1965 Cal 541.
43. *Jitendra Chandra* v *S.N. Banerjee,* AIR 1943 Cal 181, 184 and 187.
44. See *Manohar Koyal* v *Thakur Das Naskar,* ILR (1888) 15 Cal 319, 325-327 and also *Govindji Vithalji Vithal Lal Bhajan* v *Gujarat Housing Board,* (1982) 1 SCC 415 where a works contract was prematurely terminated on account of unsatisfactory performance and subsequently the balance work was allotted to the same contractor for an agreed lump sum. The Department was not afterwards permitted to make any deductions for the earlier unsatisfactory performance.
45. *See* BACHAWAT J in *Union of India* v *Kishori Lal Gupta,* AIR 1953 Cal 642, 644, *citing* from Chitty ON CONTRACTS, 20th edn at p 286.

provisions of Sections 62 and 63.[46] The principle and effect of accord and satisfaction were thus explained in a decision of the Privy Council:[47]

> The receipt given by the appellants and accepted by the respondents and acted upon by both proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the 'receipt'. It is a clear example of what used to be well-known in Common Law pleading as 'accord and satisfaction by a substituted agreement'. No matter what were the respective rights of parties *inter se*, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have, in fact, been extinguished by the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it.[48]

A contracting party in respect of his obligation towards another is released from such obligation if there is an accord and satisfaction between the two parties. The obligation need not be executed and can be executory.[49] In *P K Ramaiah & Co* v *Chairman & MD, National Thermal Power Corpn*[50] the Supreme Court held that in view of the full and final settlement of the claim, there was an accord and satisfaction and there was no existing arbitrable dispute. Where a claim for damages was settled by the Railway by sending a cheque in full and final payment and which was to be returned if not acceptable, but the claimant encashed the cheque in protest stating that objections to encashment may be communicated within 10 days, it was held that because there was no reply from Railway, there was no mutually agreed accord and satisfaction.[51]

An example of accord and satisfaction is to be seen in *Lala Kapurchand Gadha* v *Mir Nawab Himayatalikhan*.[52] The plaintiff after some initial protest expressed readiness to accept the sum sent in full satisfaction of his claim and discharge the promissory note making endorsement of full satisfaction and received the payment.

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46. *Ibid.*
47. *P.R.L Saminathan Chetty* v *L. Palaniappa Chetty*, 18 Cal WN 617, 619-20.
48. For other authorities *see*: *Eton Cop-Dyeing Co* v *Broadbent & Son Ltd*, (1919) 89 LJ KB 186; *Babu Lal* v *Tulsi Singh*, AIR 1940 Pat 121. *Approved* by the Supreme Court in the case cited in Note 4 above. The question whether there has been an accord and satisfaction arises out of contract and can be referred to arbitration. *Bharat Heavy Electricals Ltd* v *Amar Nath*, (1982) 1 SCC 625.
49. *Amusu Properties* v *Muruchadayah*, (1989) 1 Mal LJ 451 High Court of Ipoh.
50. 1994 Supp (3) SCC 126. *See* also *Nathani Steels Ltd* v *Associated Construction*, 1995 Supp (3) SCC 324, parties arrived at a settlement in respect of their dispute. *Lloyds Steel Industries Ltd* v *ONGC*, AIR 1997 SC 337, payment due under a contract, accepted in full and final satisfaction under a memorandum of understanding, held, rights under the old contract ceased. *Kelkar & Kelkar* v *Indian Airlines*, (1996) 2 Bom CR 303, full and final settlement, payment made and accepted, no dispute left for reference to arbitration. *Camara Municipal de Bardez* v *V.M. Salgaonkare Irmao Ltd*, (1996) 5 Bom CR 434, rejection of the contractor's final bill on the ground that there had already been final payment was held to be wrongful because there was a factual dispute.
51. *Union of India* v *Navilakha & Sons*, AIR 1997 Bom 209. The court followed *Union of India* v *Babulal Uttamchand Bhandari*, 69 Bom LR 843, where the cheque sent in full and final payment by the Railway was encashed by the claimant without even notifying that he would claim the balance amount, the claim for the balance was allowed. Payment of shorter amount could not be equated with full payment without proper acceptance.
52. AIR 1963 SC 230.

In these circumstances it was held that the case was completely covered by Section 63 of the Contract Act.

In a claim under a fire insurance policy, the policy holder accepted an amount by way of full and final satisfaction of his claim on the basis of the second surveyor report. The insurance company was held to be discharged from its liability.[53]

An illegal contract cannot support an accord and satisfaction.[54]

MATERIAL ALTERATION

"Good faith is a continuing obligation inasmuch as even after entering into the contract, no material alteration can be made by a party in the terms of the contract without the consent of the other." [55] Where a contract is embodied in a deed and the party who has the custody of the deed alters it without the consent of the other in a material particular, the effect would exactly be the same as that of cancelling the deed. Both parties will be discharged from their respective obligations. The meaning of the expression "material alteration" was considered by the Supreme Court in *Kalianna Gounder* v *Palani Gounder*.[56]

> A memorandum of agreement for the sale of land under which Rs 2000 were paid in advance was with the plaintiff. The defendant refused to convey the land and pleaded that the plaintiff had altered the deed by adding the words that the seller shall "clear the debts and execute the sale deed free from encumbrance".

The plea was dismissed because the alleged alteration could not be proved, but SHAH, J took opportunity to point out:

> Even if it be assumed that the sentence regarding encumbrances was written after the deed was executed it will not invalidate the deed. Ordinarily, when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all encumbrances before executing the sale deed. The alternation, if any, cannot therefore be regarded as material .
>
> As observed in HALSBURY'S LAWS OF ENGLAND[57]: "A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed.[58]

The same principle has been acted upon where, without the consent of the other parties, the word "partner" was deleted from a deed, the date of payment was changed from 1st to 10th and the word "and" was substituted by "or". The party making such alterations was not permitted to put the deed in the action.[59] Alteration of an agreement by the purchaser of land for accommodating two signatures of

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53. *Salima Jabeen* v *National Insurance Co Ltd*, AIR 1999 J&K 110.
54. *Union Carbide Corpn* v *Union of India*, (1991) 4 SCC 584: AIR 1992 SC 248, 285.
55. *United India Insurance Co Ltd* v *MKJ Corpn*, (1996) 6 SCC 428.
56. (1970) 1 SCC 56: (1970) 2 SCR 455.
57. Vol II, 3rd Art. 599 at p 368.
58. Applied by the Privy Council in *Nathulal* v *Gomti Kuer*, (1940) 67 IA 318 PC.
59. *Loonkaran Sethiya* v *Ivon E. John*, (1977) 1 SCC 379 at pp. 394-5. An immaterial alteration does not discharge. *M.S. Anirudhan* v *Thomco's Bank*, 1963 Supp (1) SCR 63: AIR 1963 SC 746.

witnesses and to make it acceptable as a sacrosanct document was held to have discharged the agreement.[60]

60. *Sardar* v *Ram Khilanna*, AIR 1998 All 268.

9
Discharge by Breach

"A breach of contract occurs when a party thereto renounces his liability under it, or by his own act makes it impossible that he should perform his obligations under it or totally or partially fails to perform such obligations."[1] The failure to perform or renunciation may take place when the time for performance has arrived or even before that. Thus, breach is of two kinds, namely:

(1) anticipatory breach, and

(2) present breach.

ANTICIPATORY BREACH

Meaning

"An anticipatory repudiation occurs when, prior to the promised date of performance, the promisor absolutely repudiates the contract."[2] It is an announcement by the contracting party of his intention not to fulfil the contract and that he will no longer be bound by it. This kind of anticipatory renunciation has certain effects upon the rights of the parties.

Effect upon rights

Innocent Party excused from further Performance

In the first place, the other party is excused from performance or from further performance. The obligation under the original contract comes to an end and is replaced by operation of law by another obligation, namely to pay money damages. The only legal nexus that remains between the parties is to pay the damages which are assessed according to the old obligation but the old obligation no longer exists as an obligation.[3]

Options of Injured Party

IMMEDIATE RIGHT OF ACTION.—Secondly, it entitles the injured party to an option either to sue immediately or to wait till the time the act was to be done. That

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1. This definition of breach appears in *Associated Cinemas of America, Inc* v *World Amusement Co,* Supreme Court of Minnesota, (1937) 201 Minn. 94; Collected from Shepherd and Wellington, CONTRACTS AND CONTRACT REMEDIES, (4th edn 1957) 805. *Chowgule & Co Ltd* v *Rizvi Estates and Houses P Ltd*, (1997) 4 Bom CR 648, premises were handed over to the builder for development. For years (over six years) the builder commenced no work, contract broken by him by abandonment. Liability fixed in the contract at Rs 10,000 per month for breach was reduced to Rs 3000. *Dharam Vir Kalra* v *Ravinder Kumar*, (1995) 2 Punj LR 257, meaning of breach.
2. See *A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation*, (1954) 64 Yale Law Journal, 85. It is necessary that the refusal should have been communicated to the other party and should make the intention not to perform quite explicit. *Dhanraj Mills Ltd* v *Narsing*, AIR 1949 Pat 270: (1949) 27 Pat 723; *Master* v *Garret & Taylor Ltd*, (1936) 131 IC 220: AIR 1931 Rang 126.
3. *Moschi* v *Lep Air Services Ltd*, (1972) 2 All ER 393 HL. A party cannot by refusing to accepted repudiation create liability in perpetuity. See *Pushpati Krishna Murti Raju* v *APSEB*, (1996) 4 Andh LT 822, electricity permanently disconnected within 2 years whereas the supply was agreed to be for a term of 10 years. The court allowed recovery of minimum charges only for a period of 5 years and not for the whole period of 10 years.

an anticipatory breach gives an immediate right of action was recognised as early as (1853) in *Hochester* v *De La Tour*:[4]

> The plaintiff was a courier. He was engaged by the defendant to accompany him on a tour to commence on June 1, 1852. Nearly a month before this date the defendant wrote to the plaintiff that he had changed his mind, and declined his services. The plaintiff sued him for damages for breach. The defendant's counsel very powerfully contended that there could be no breach of the agreement before the day when the performance was due.

But Lord CAMPBELL CJ ruled out the objection. His Lordship said: "It cannot be laid down as universal rule that, where by agreement an act is to be done at a future date, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage.[5] If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another person for the same term, he may be immediately sued for breaking the contract.[6] So, if a man contracted to sell and deliver specific goods on a future day and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver....[7] It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind.... The man who wrongfully renounces a contract into which he has deliberately entered cannot just complain if he is immediately sued for a compensation in damages by the man whom he has injured."

ANTICIPATORY BREACH OF A CONTINGENT CONTRACT.—Even when the performance of a contract is conditional upon the happening of a contingency, an immediate action for damages will lie, if before the happening of the contingency, the promisor disables himself from performance. *Frost* v *Knight*[8] is the well-known illustration.

> The defendant promised to marry the plaintiff on the death of his father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement. The plaintiff, without waiting for the father's death, at once brought an action for the breach.

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4. Court of Queen's Bench, (1853) 2 Ellis and Blackburn 678: 95 RR 747: 118 ER 922. In a matter earlier to this, viz., *Withers* v *Reynolds*, (1831) 2 B & Ad 882, declaration that the buyer would not pay on delivery; *Nannier* v *Rayalu Iyer*, (1925) 49 Mad 781: AIR 1926 Mad 778, grounds of refusal to accept goods cannot afterwards be changed. *British and Beningtons* v *N.W. Cacher Tea Co*, (1923) AC 48, 62, total refusal; *Narasimha Mudali* v *Narayanaswami Chetty*, (1925) 49 Mad LJ 720; *Jawahar Singh* v *State of Punjab*, AIR 1926 Lah 292, repudiation conclusive against party. A right of this kind was in recognition even before the Contract Act. *Mansuk Das* v *Rangayya Chetti*, 1 Mad HC 162 and in subsequent case also. *Steel Bros & Co Ltd* v *Dayal Khatao & Co*, (1923) 47 Bom 924.
5. *Short* v *Stone*, (1846) 8 QB 358: 15 LJ QB 143.
6. *Ford* v *Tiley*, 6 B & C 325.
7. *Bowdell* v *Parsons*, 10 East 359.
8. (1872) LR 7 Exch 111.

The defendant contended that a breach could only arise on the happening of the contingency. But COCKBURN CJ held that "the case falls within the principle of *Hochester* v *De La Tour*[9] and that consequently, the present action is well brought". His Lordship said that when a contracting party announces his intention not to fulfil the contract, the contract should be taken to be broken as all its incidents "and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.... To hold that the aggrieved party must wait until the time fixed for marrying shall have arrived would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less".[10] In another case[11] of this kind, a ship was the subject-matter of a charter-party. One of the terms was that if the ship was requisitioned for war purposes, the hire would not be payable during the period of requisition. The ship was requisitioned and during that period the shipowner sold her away. This was regarded as repudiation because by selling off the ship, he had made it beyond his power to restore it back under the charterparty.

Consequences of Aggrieved Party Waiting for Performance

The option is with the aggrieved party to sue at once or wait for performance.[12] "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."[13] The acceptance of the repudiation must be made clear to the repudiating party. "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly or unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end. The aggrieved party need not personally, or by an agent, notify the repudiating party of his intention to treat the contract as at an end. It is sufficient that the fact of the acceptance comes to the aggrieved party's attention, for

9. 22 LJ QB 455.
10. *Per* COCKBURN CJ in *Frost* v *Knight*, 1872 LR 7 Exch 111. For a recent illustration see *Maredalanto Compania Naviera S.A.* v *Bergan-Handel Gmbh—The Mihalis Angelos*, (1970) 3 All ER 126: (1971) 1 QB 183 CA. Similar statements occur in *Ratanlal Brijmohan*, (1931) 33 Bom LR 703: AIR 1931 Bom 386.
11. *Omnium d' Enterprises* v *Sutherland*, (1919) 120 LT 265. A bank cannot unilaterally terminate an overdraft arrangement even if it is temporary. It was no justification to say that the arrangement had already lasted for 4 years or that the customer was not required to execute any formal document. *Indian Overseas Bank* v *Naran Pd*, AIR 1980 Guj 158.
12. *Forcometal SARI* v *Mediterranean Shipping Co SA*, (1988) 2 All ER 742.
13. Once the aggrieved party has exercised the option the party in default can no longer say that the contract still subsists. *Jhandoo Mal Jagan Nath* v *Phul Chand Fateh Chand*, AIR 1925 Lah 497.

example, notification by an unauthorised broker or other intermediary may be sufficient."[14]

If the aggrieved party does not accept the repudiation and leaves the contract alive, the consequences will be as follows:

PARTY REPUDIATING MAY CHOOSE TO PERFORM.—Firstly, the party repudiating the contract may nevertheless choose to perform when the time comes and the promisee will be bound to accept the same.[15] The party keeping the contract alive is not absolved from tendering further performance of his own obligation under the contract. Accordingly, if a repudiation by anticipatory breach is followed by affirmation of the contract the repudiating party would escape liability if the affirming party is subsequently in breach of contract. In this case the charterer refused to load the ship but the owner of the ship affirmed that the contract was still alive and yet failed to make the ship ready to load on the day specified, he became liable for breach of contract.[16]

PREMATURE TERMINATION OF CONTRACT OF EMPLOYMENT.—The principle is applicable to premature termination of a contract of employment.[17] If the employee does not accept the repudiation, the contract remains alive whether he is permitted to perform his duties or not. A managing director was removed before the expiry of his three-year term and was sought to be replaced by another appointee. He did not accept the termination. The court said that no injunction could be granted to him to prevent the employer from committing breach of contract of personal service the performance of which cannot be specifically enforced. But where a contract of personal service contains both positive and negative covenants either express or implied, an injunction to enforce the negative covenant is often granted. As such, the injunction to enforce the positive covenant, i.e., to employ the plaintiff as managing director was not allowed. However, the injunction to enforce the implied negative covenant, i.e., not to appoint someone else until the expiration of the plaintiff's period was allowed.[18]

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14. *Vitol SA* v *Norell Ltd: The Santa Clare*, (1996) 3 All ER 193 HL. Here the buyer confronted with falling prices and some delay in the loading of the ship, repudiated the contract. The seller received the notice of repudiation after the ship had sailed away. He did nothing further and sold the goods to another party. This was held to be a sufficient acceptance of the repudiation. The court followed *Wood Factory Pty Ltd* v *Kiritos Pty Ltd*, (1985) 2 NSWLR 1105 and *Majik Markets Pty Ltd* v *S&M Motor Repairs Pty Ltd*, (No. 1) (1987) 10 NSWLR 49 and *Carter & Harland*, CONTRACT LAW IN AUSTRALIA.

15. *Phul Chand Fateh Chand* v *Jugal Kishore Gulab Singh*, (1927) 8 Lah 501: 106 IC 10: AIR 1927 Lah 693.

16. *Fercometal SARL* v *Mediterranean Shipping Co SA*, (1988) 2 All ER 742 HL. If the performance is subject to a condition precedent to be fulfilled by the promissee himself, he would remain bound to fulfil it before he can sue the other. *Edridge* v *R.D. Sethna*, (1933) 60 IA 368: 36 Bom LR 127.

17. Contracts of employment are no exception to the general rule. See *Thomas Mariholl Ltd* v *Guinle*, (1979) 1 Ch 227 and *Gunton* v *Richmond Borough Council*, (1980) 3 WLR 714 CA.

18. *Datu Abdullah bin Ahmad* v *Syarikat Permodalan Kebangsaan*, (1990) 2 Current Law Journal 48 High Court, Kuala Lumpur. A servant leaving earlier forfeits his right to salary for the unexpired period. *Ramji* v *Little*, (1873) 10 Bom HC 57; *Ralli Bros* v *Ambika Pd*, (1913) 35 All 132.

Termination of the contract occurs not on the date when the repudiatory act is done, but from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of the contract.[19]

NEGATIVE INJUNCTION.—This is the other side of the old principle of *Lumley* v *Wagner*[20] where it was considered as well-settled that the courts have jurisdiction to forbid the infringement of a negative stipulation, even though it is necessary to a positive covenant for the performance of personal services. In that case, the defendant had agreed that she would sing at the plaintiff's theatre for three months and would not sing elsewhere during that period. This negative side of the covenant was enforced. Such a negative may, perhaps, produce a positive response to go to the opening at hand when all other theatres are fore-closed. "Thus injunctions have been issued in the case of agreements not to sing elsewhere than at the plaintiff's theatre[21], not, during the period of employment, to engage in any business similar to that carried on by the employer[22], and not, during the period of employment, to act as a film artiste for any motion picture company other than the employers."[23]

WHERE NEGATIVE INJUNCTION NOT ISSUED.—The cases in which a negative injunction would not be issued were explained in a case where an injunction was sought against the boxer who was leaving and the manager who was taking him in.[24] The court said:

> Where a third party induced a breach of a contract for personal services between a master and a servant or a manager and a performer and the contract involved the servant or performer exercising some special skill or talent and contained both positive and negative obligations by the servant or performer (e.g. not to enter into an agreement with any other master or manager), the court ought not to enforce the performance of the negative obligations if enforcement of them would have the effect of compelling the servant or performer to perform his positive obligations under the contract. Whether the grant of an injunction would be held to result in compulsion directed towards the servant or performer depended on the court taking a realistic approach on the facts of each case, to the probable effect of an injunction on the psychological, material or physical need of the servant or performer to maintain his skill or talent, but compulsion would be more readily inferred where a longer term injunction was sought by the master or manager or where the third party was the only other available master or manager for the servant or performer or where the original master or manager was likely to seek injunctive relief against anyone else who attempted to replace him as master or manager.

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19. Per BOWEN LJ in *Boston Deep Sea Fishing & Ice Co* v *Ansell*, (1888) 39 Ch D 339, 365. The Privy Council case of *Francis* v *Kuala Lumpur Councillors*, (1962) 1 WLR 1411, must be viewed in its proper perspective.
20. (1852) 1 De G M & G 604.
21. (1852) 1 De G M & G 604.
22. *William Robinson & Co Ltd* v *Heuer*, (1898) 2 Ch 451.
23. *Warner Brothers Pictures Inc* v *Nelson*, (1937) 1 KB 209: (1936) 3 All ER 160; *Marco Productions Ltd* v *Pagola*, (1945) KB 111: (1946) 1 All ER 155. The quotation is from Cheshire & Fifoot, LAW OF CONTRACT, 615-16 (9th edn 1976).
24. *Warren* v *Mendy*, (1989) 3 All ER 103 CA. The court applied *Whitwood Chemical Co* v *Hardman*, (1891) 2 Ch 416 and *Page One Records Ltd* v *Britton*, (1967) 3 All ER 822 and gave due consideration to cases like *Lumley* v *Wagner*, (1843-1860) All ER Rep 368 and *Warner Bros Pictures Inc* v *Nelson*, (1936) 3 All ER 160.

Furthermore, the court would be less likely to grant an injunction where the contract of service contained obligations of mutual trust and confidence between the master and servant or manager and performer and the servant or performer had genuinely lost confidence in the master or manager. Moreover, since damages as an alternative remedy to an injunction were invariably assessed by the court it ought not to be assumed that an award of damages for inducing breach of a contract for personal services would always be an inadequate alternative to the grant of an injunction. On the other hand, having regard to the sanctity of contracts, the court ought to scrutinise most carefully and even sceptically any claim by the servant or performer that he was under the human necessity of maintaining his skill or talent or that his trust in the master or manager had been betrayed or that his confidence in him had genuinely gone. On the facts, the grant of the injunctions sought would have the effect of compelling the boxer to perform his positive obligations under the contract if he was to maintain his skill or talent as a boxer when he had genuinely lost confidence in the plaintiff's ability to act as his manager. The injunctions had, therefore, rightly been discharged.

DISCHARGE BY ANY OTHER EVENT MAY BENEFIT BOTH.—Secondly, if while the contract is lying open, some event happens which discharges the contract otherwise than by repudiation, for example, by supervening impossibility or frustration, the promisor would also be entitled to take the advantage of the changed circumstances. The most appropriate illustration is *Avery* v *Bowden*.[25]

> The defendant chartered the plaintiff's ship and agreed to load it with a cargo at Odessa within forty-five days. On arrival of the ship there the defendant told the captain that he had no cargo for him and requested him to go away. The captain, however, stayed there in the hope that the defendant would fulfil his contract. But, before the expiry of forty-five days, a war broke out which rendered the performance illegal. The plaintiff then brought an action for breach.

It was held that the contract had ended by frustration and not by breach. It was open to the captain to accept the renunciation and in that case "he would have had a right to maintain an action on the charterparty to recover damages equal to the loss he had sustained from breach of the contract on the part of the defendant". But he continued to insist upon having a cargo in fulfilment of the charterparty and, therefore, the contract was still open when the war intervened.[26]

Where no other event intervenes to discharge the contract otherwise, the innocent party who kept waiting up to the last day of performance, may now sue for breach.[27]

DATE OF ASSESSMENT OF DAMAGES.—Thirdly, in case the anticipatory repudiation is accepted, damages for breach would be assessed at the time when repudiation takes place. In *Ramgopal* v *Dhanji Jadavji Bhatia*:[28]

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25. (1855) 5 E & B 714: 25 LJ QB 49: 103 RR 695: 119 ER 647: 27 LJ 119.
26. See also *William Cory & Son Ltd* v *London Corporation*, (1951) 2 KB 576 CA: (1951) 2 All ER 85.
27. *Clea Shipping Corpn* v *Bulk Oil International Ltd*, (1984) 1 All ER 129 QB, the owner kept waiting up to the last day of the time charterparty.
28. (1928) 55 IA 279: AIR 1928 PC 200; *Millet* v *Van Heck & Co*, (1921) 2 KB 369 CA.

> The defendants, the owners of a ginning mill, contracted with the plaintiff, a cotton merchant, to use half the mill's working capacity for ginning his cotton. But the defendant repudiated the contract before any cotton was supplied or ginned.

The plaintiff was held entitled to recover the estimated loss of profits at the time of repudiation. Lord SUMMER said: "This was a case of anticipatory breach. The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages as they then stood and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him."

Where, on the other hand, the promisee does not accept the anticipatory repudiation, damages will be assessed at the time fixed for performance and the promisee takes the risk of market rate falling and in the meantime he will have to take all reasonable steps to keep his loss to the minimum.[29] Thus, the law is as stated in plain and simple terms in the speech of VISCOUNT SIMON LC in *Heyman* v *Darwins Ltd*:[30]

> . . . repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.

Whether the other party accepts is a matter for his option; if he does not, the contract remains alive, as was emphasised by the House of Lords in *White & Carter (Council) Ltd* v *McGregor*.[31]

> A contract for display advertisement for 3 years of a motor garage business was struck between advertisement contractors and the agent of the garage owner, but the latter repudiated the contract by writing a letter of cancellation. The contractors refused this request and displayed the advertisement. The contract provided for annual payments and in default the payment for all the

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29. *Mackertich* v *Nobo Coomar Roy*, (1903) 30 Cal 477. Where the contract was to be performed in instalments, the date of each instalment would be the day for taking the differences in market and contract prices. *Brown* v *Muller*, (1872) LR 7 Ex 319. *Roper* v *Johnson*, (1873) LR 8 CP 167; *Krishna Jute Mills Co* v *Innes*, (1911) 21 Mad LJ 182. The desire to keep the contract alive may be inferred from a positive act or omission e.g. a lessor demanding or accepting rent after knowledge of breaches or a shipowner accepting freight under a charterparty after a breach by the charterer. *David Blackstone Ltd* v *Burnetts*, (1973) 3 All ER 782; *Brimnes, The*, (1974) 3 All ER 86.

30. (1942) AC 356, 361: (1942) 1 All ER 337, 341, quoted by SACHS LJ in *Decro-Wall International S.A.* v *Practitioners in Marketing Ltd*, (1971) 2 All ER 216: (1971) 1 WLR 361. Similarly, it has been held by the Supreme Court in *State of Kerala* v *Cochin Chemical Refineries Ltd*, (1968) 3 SCR 556: AIR 1968 SC 1361, that by refusing to advance the loan which the State had undertaken to advance, its obligation to purchase groundnut cake from the company came to an end. The contract does not terminate unless the repudiation is accepted by the other party. *Johnstone* v *Milling*, (1886) 16 QBD 460 on the basis of which BUCKLEY LJ observed in *Gunton* v *Richmond Borough Council*, (1980) 3 WLR 714, 729 that the principle is 100 years old; *Ahmed* v *Murugesa*, AIR 1958 Ker 195.

31. (1962) AC 413: (1961) 3 All ER 1178: (1962) 2 WLR 17 HL. *See* also *Islwyn Borough Council* v *New Port Borough Council*, (1994) 6 Admin LR 386 CA. An agreement between two Councils for funding the construction of a leisure complex and for contribution towards the future costs of running the complex was held to be binding with no right to withdraw. There is a presumption of irrevocability in such cases unless there is a provision to the contrary and the fact that the Councils were prone to political changes made no difference to their responsibility under the arrangement.

three years was to become due. Accordingly, the contractors claimed full payment.

The House of Lords held that the contractors were only claiming what was due to them under the contract and, therefore, were entitled to it. They had the right to reject the repudiation. Lord HODSON considered the principle to be well-established:

> It is settled as a fundamental rule of the law of contract that repudiation by one of the parties to a contract does not itself discharge it....

In *Howard* v *Pickford Tool Co Ltd*[32] ASQUITH, LJ said: "An unaccepted repudiation is a thing writ in water and of no value to anybody: It confers no legal rights to any sort or kind." It follows that, if, as here, there was no acceptance, the contract remains alive for the benefit of both parties and the party who has repudiated can change his mind but it does not follow that the party at the receiving end of the proferred repudiation is bound to accept it before the time for performance and is left to his remedy in damages for breach.

Premature Termination of Lease

Where a three-year use of premises on lease was terminated by the lessee before the expiry of the period, the court allowed the lease-money for the unexpired period by way of damages, the specific enforcement being not possible.[33]

What Constitutes Acceptance of Repudiation

In a case[34] where the buyers refused to accept the cargo because of delay in loading and the seller remained silent about the matter and the question was whether the repudiation had been accepted, the court explained the requirement of acceptance as follows:

"It is this ability of the innocent party to choose between acceptance of the repudiation and affirmation of the contract, courses attended by immediate and differing consequences, that makes it necessary, as it has repeatedly been held, for the choice of the former to be clear and unequivocal. While in human affairs, a choice may be made by thought, word or deed, it can only be manifested by word or deed. A choice, however resolute, which gains no expression outside the bosom of the chooser cannot be clear and unequivocal in the sense that the law requires. Silence and inaction, being in the generality of cases equally consistent with an affirmation of the contract, cannot constitute acceptance of a repudiation."

What amounts to repudiation

In considering whether there has been a repudiation of a contract by a party, the whole conduct of that party has to be assessed objectively in order to see whether

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32. (1951) 1 KB 417. For a study of this case *see* Nienaber, *The Effect of Anticipatory Repudiation: Principle and Policy*, (1962) Camb LJ 213; Tabachunik, *Anticipatory Breach of Contract*, 1972 Current Legal Problems, 149. The Supreme Court of India has held in *Asthing* v *L.S. John*, (1984) 1 SCC 205, that whatever implications the acceptance by the other party may have for remedial purposes, so far as the repudiating party is concerned he becomes free from the contract to the same extent as if the contract has ended. The disqualification, if any, for election purposes by virtue of the contract would immediately end. *Magnam Films* v *Golcha Properties*, AIR 1984 Del 162, unilateral alteration of terms amounts to breach.

33. *Food Corporation of India* v *Babulal Agarwal*, AIR 1998 MP 23.

34. *Vitol S A* v *Norell Ltd*, (1996) 3 All ER 193 HL.

there was an intention to abandon and refuse performance of the contract. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a manner going to the root of the contract to perform contractual obligations.[35] Every minor irregularity in the performance of a contract cannot be seized upon as a repudiation so as to put a premature end to the contract. The Court has to take into account the effect of the breach upon the contract as a whole. Thus, in a contract for the supply of 100 tons of flock of Government standard to be delivered by instalments, the sixteenth delivery was below the standard and the buyer attempted to treat this as a repudiation, but the court held that the seller's conduct did not show an intention to throw away the contract and, therefore, the buyer should have to be content with damages for defective goods.[36] Lord HEWART, CJ concluded:

> With the help of these authorities we deduce that the main tests to be considered... are, first the ratio quantitatively which the breach bears to the contract as a whole, and, secondly, the degree of probability or improbability that such a breach will be repeated. On the first point the delivery complained of amounts to no more than 1½ tons out of a contract for 100 tons. On the second point, our conclusion is that the chance of the breach being repeated is practically negligible.... The delivery complained of was an isolated instance out of twenty satisfactory deliveries actually made both before and after the instalment objected to; we hold that it cannot reasonably be inferred that similar breaches would occur in regard to subsequent deliveries.

Similarly, in a contract for supply of iron by two instalments, payment to be made within fourteen days of delivery, the buyer claimed reduction in price on account of the delay in the first delivery and the seller treating this as repudiation

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35. See the observation of Lord WILBERFORCE in *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd*, (1980) 1 All ER 571 HL. Applying this to the facts of the case, the court held that a party giving notice of rescission in terms of the provisions of the contract for purchasing land entitling him to rescind the contract if the land came under compulsory acquisition under a statutory power, would not amount to repudiation even if there was a mistaken notion as to the legal position of acquisition. The decision in *Nottingham Building Society* v *Eurodynamics Systems*, (1995) FSR 605 CA also shows the importance of contract terms in the matter of repudiation. The contract was for supply of computer software. The contract provided that the supplier would deliver up the software and other documentation (including source codes) upon any termination of the contract by the purchaser. The supplier failed to maintain delivery time-schedule until he was provided with further funds which the purchaser could not do, and demanded delivery up of the software and documentation. The court said that there was no repudiation on the part of the purchaser and he was entitled under the contract terms to a mandatory injunction for the supply. *See* also *Saphena Computing* v *Allied Collection Agencies*, (1995) FSR 616 DC, where the contract for supply of software for debt collection business was terminated by mutual consent, yet litigation arose because of copyright problems in the material already supplied. *Vaswani* v *Italian Motors*, (1996) 1 WLR 270 PC, here a car was booked at a stated price with some money deposited in advance. The seller asked the buyer to pay the increased price and on his refusal to do so, forfeited the advance. The Privy Council held that the terms of the contract did not permit recovery of increased price, but that there was no repudiation on the part of the supplier, the buyer was bound to take the vehicle at the booked price. *Federal Commerce and Navigation Ltd* v *Molena Alfa Inc*, (1979) 1 All ER 307 HL, right on the part of the charterer to terminate the charter of boats because of disputes.

36. *Maple Flock Co Ltd* v *Universal Furniture Products Ltd*, (1934) 1 KB 148: (1933) All ER Rep 15.

refused to make further deliveries, it was held that the conduct complained of did not amount to an intimation of an intention to abandon and altogether refuse performance of the contract.[37]

In a subsequent case,[38] the Court of Appeal pointed out "that to constitute repudiation, a breach of contract must go to the root of the contract.... This constitutes the test even where there are recurring breaches—producing different results according to the degree of non-compliance.... Notice that a breach is likely to occur or recur cannot, of course, be treated as being a repudiation unless it would have that effect when it did occur or recur."[39] Applying this test to the facts of the case before him, his Lordship held that repeated delay in payment ranging from 2 to 20 days and averaging 8 days and causing a nominal loss to the plaintiff which he could have debited to the defendant's account but did not do so, such defaults even if repeated could not go to the root of the contract. The plaintiffs, a French firm, were marketing their goods in the United States through the defendant firm.

Failure to perform as the occasion arises under the contract may entitle, depending upon the terms of the contract, the other party to treat that as a repudiation.

> A shipping contract incorporated the rules requiring sellers to have the cargo ready for delivery at any time within the contract period. The buyers gave a proper notice of their readiness to take the load. The sellers failed to deliver the cargo on presentation of buyers' vessel. The buyers took this failure as a repudiation and terminated the contract.[40]

It was held that the rule in question imposed an additional obligation on the sellers to have the cargo ready for the buyers to begin loading without delay or interruption as soon as the vessel was ready to load the cargo in question. The justification for this rule is that mercantile contracts are concluded with a reasonably long period of delivery and at a price which presupposes the buyers' right to call for delivery at any time having given reasonable notice. That was a valuable option which the buyers would lose if the sellers were entitled to deliver whenever they were willing and able to do so within the delivery period. Accordingly, the sellers were in breach of their obligation. This entitled the buyers to put an end to the contract. They were

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37. *Freeth* v *Burr*, (1874) 43 LJ CP 91.
38. *Decrowall International S.A.* v *Practitioners in Marketing Ltd*, (1971) 2 All ER 216 CA.
39. *Per* SACHS, LJ. His Lordship considered this to be "the long standing phraseology used by Lord ELLENBOROUGH CJ in *Davidson* v *Gwynne*, (1810) 12 East 381: (1803-13) All ER Rep 331, 335, much cited over the next 150 years by eminent judges including in 1884 by Lord BLACKBURN in *Mersey Steel & Iron Co* v *Naylor, Benzen & Co*, (1884) 9 App Cas 434, 442: (1881-1895) All ER Rep 365, 370 and adopted again recently by UPJOHN LJ in the *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd*, (1962) 2 QB 26, 64: (1962) 1 All ER 474, 484 and by Lord DENNING MR in *The Mihalis Angelos*, (1970) 3 All ER 125, 128: (1970) 3 WLR 601, 609-10. In *Madhya Pradesh Mines Ltd* v *Raibahadur Shriram Durga Pd Ltd*, (1972) 3 SCC 180: AIR 1971 SC 1983, the Supreme Court held that where the samples of manganese to be supplied under a contract were to be approved by both parties, the seller's default in giving the opportunity to the buyer to check the goods was a breach on his part.
40. *Cie Commerciale Sucres Denrees* v *C. Czarnikow Ltd*, (1990) 3 All ER 641 HL. The term was in accordance with Rule 14(1) of the RSA rules.

allowed to recover by way of damages the difference between the market price of the replacement cargo and the original contract price and loss of dispatch.[41]

Section 39 of the Indian Contract Act gives expression to the doctrine of anticipatory breach.

39. Effect of refusal of party to perform promise wholly.— When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

(a) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her 100 rupees for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A*, a singer, enters into a contract with *B*, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of hundred rupees for each night. On the sixth night, *A* wilfully absents herself. With the assent of *B*, *A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for damage sustained by him through *A*'s failure to sing on the sixth night.

Breach in entirety

The party in default must have refused altogether to perform the contract and the refusal must go to the whole of the contract, otherwise the other party would not be justified in putting an end to the contract. Thus, in *Rash Behary Shaha* v *Nirttya Gopal Nundy*:[42]

> *A* agreed to purchase from *B* under two contracts 300 tons of sugar to be delivered at different dates. *A* having failed to take delivery under the first contract, *B* claimed to rescind both contracts.

The Calcutta High Court held that as there was no refusal on the part of *A* to perform his promise in its entirety within the meaning of Section 39, *B* was not entitled to rescind the contract. The decision of the same court in *Sooltan Chund* v *Schiller*[43] emphasises the same point.

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41. The court applied the principles laid down in *European Grain and Shipping Ltd* v *David Geddes (Proteins) Ltd*, (1977) 2 Lloyd & Rep 591; *Bentsen* v *Taylor Sons & Co (No. 2)*, (1893) 2 QB 274, 281 and *Bunge Corpn* v *Tradax SA*, (1981) 2 All ER 513, 542, 545.

42. (1906) 33 CWN 477. Where after contracting to sell a particular land to one party, the vendor resold the same to another, held, a breach within the meaning of this section entitling the aggrieved party to compensation under S. 73. Also *Waryam Singh* v *Gurnam Singh*, AIR 1992 P&H 153. Where land was allotted for purpose of establishing nursing homes and the transaction was completed in all respects, cancellation was not allowed. *Kailash Chandra Kotia (Dr)* v *Rajasthan State Industrial Devp and Investment Corpn*, (1991) 1 Raj LR 174. *PC Rajput* v *State of MP*, (1994) 1 MPLJ 387, delay on the part of the Government in handing over site to the contractor does not constitute such a fundamental breach or breach in entirety to entitle the contractor to sue the Government for breach after putting an end to the contract.

43. (1878) 4 Cal 252.

> There was a contract for the sale of 200 tons of linseed oil in April and May, to be paid for on delivery. Some deliveries were made and the plaintiffs made part payment for the same withholding the balance for adjustment of their claims. But the defendants, taking that as an anticipatory repudiation, refused to make further supplies and the plaintiffs sued them for the breach.

It was held that the withholding of a part payment under a *bona fide* claim cannot be regarded as a refusal to perform the contract in its entirety.[44]

At first sight these decisions seem to be at variance with the illustrations in Section 39. According to the illustrations if a singer agrees to sing at a theatre for two nights in a week for a period of two months and then absents herself on one night, the other party is at liberty to put an end to the contract. Referring to the illustrations, GARTH CJ observed as follows:

> That illustration is perhaps not a happy one, because it may lead to misapprehension. The singer by willfully absenting herself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their contract. They were willing to pay the sum due as soon as their cross-claims were adjusted.[45]

Partial Failure Going to the Root

Whether a partial failure goes to the root of the contract or not is a question of fact in each case. In a case before the Supreme Court:[46]

> There was a contract for the sale of B Twill and Hessian deliverable in the months of April, May and June. April and May quota of B Twill and April quota of Hessian were delivered and they were accepted and paid for by the buyer. For the rest the sellers sent to the buyers delivery orders on certain mills asking them to take goods directly from the mills. The orders reached the buyers through the hands of several middlemen. They contained conditions different from the contract and required the buyer to take goods subject to the conditions imposed by the mills. The buyer refused to accept. The court held that the sellers were in breach of their contract.[47]

A contract was made for supply of human albumin. Deliveries were to be effected within the course of one year by monthly instalments. Time of delivery was to be important. No monthly quantity was fixed. Any shortfall in one month could be made up in subsequent months. The sellers failed. Nothing resulted from correspondence between the parties. The buyer ultimately repudiated the contract. He was allowed to recover damages for the breach of the whole of the contract. It was one contract and not a conglomeration of separate contracts.[48]

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44. Other similar matters: *Burn & Co* v *Thakur Saheb Sree Lukdirjee*, (1923) 28 Cal WN 104; *Volkari Bros* v *Rutna Velu Chetti*, (1894) 18 Mad 63 ILR.
45. (1878) 4 Cal 252, 256.
46. *Juggilal Kamlapat* v *Pratapmal Rameshwar*, (1978) 1 SCC 69.
47. Once the repudiation has been accepted the contract becomes rescinded. An auction-bidder refused to accept the property because it measured less than what was represented. The Government accordingly cancelled the auction and realised much greater price at reauction. The first purchaser got no relief. *Bhagat Ram Batra* v *Union of India*, (1976) 2 SCC 416.
48. *Andard Mount (London) Ltd* v *Curwell (India) Ltd*, AIR 1985 Del 45.

Where a party abandons a project before its completion, he is, of course, liable to pay the cost and expense of completion. But whether he would be entitled to recover anything for the actual work done depends upon a number of factors. One of them is that if the aggrieved party had an option to reject the work but nevertheless accepted it in its partial state, he would be bound to pay to the other an amount worked out on the basis of *quantum meruit*. Things may be different where there is no such option. In a case of this kind:[49]

> A building contractor had done a little more than half the work for which he received part payment. He informed the owner that he had no money and could not go on with the work. The owner finished the building himself using the building materials which the contractor had left on the ground.

The judgment of the court was that the contractor was entitled to get the value of the materials so used but not to any amount for working. He had abandoned the contract. The owner completed and occupied whatever he found on the ground. That could not be regarded as accepting or enjoying the benefit of the work done by the contractor. The claim for *quantum meruit* was not justified.

Where the contract is for work and labour and the completion of the entire work is not a condition precedent, payment would have to be made for the work actually done. In a case of this kind:

> The contract was to decorate a flat and to provide it with some furniture. The payment was to be net cash as the work proceeded and the balance on completion. The owner paid something more than half the contract money and moved into his flat and used the furniture. He refused to pay the balance money saying that there was bad workmanship and faulty design. The official referee reported that there had been a sufficient compliance with the contract and that the owner was bound to pay the whole amount less the cost remedying the defects which he worked out to be £ 56, roughly about 13% of the total value of the contract.

The court did not interfere with the work of the referee. It was not a composite contract like a building or work project. It was more in the nature of a labour contract. The payment had to be measured by the amount of work done.[50]

Aggrieved party's liability to offer restitution

The aggrieved party may, after putting an end to the contract, bring an action for damages for breach, but he will be bound under Section 64 to restore to the other party the benefits he might have received under the contract. This has been so held by the Privy Council in *Murlidhar Chatterjee* v *International Film Co.*[51]

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49. *Sumpter* v *Hedges*, (1898) 1 QB 673 CA.
50. *Hoenig* v *Isaacs*, (1952) 2 All ER 176 CA. This should be contrasted with *Cutter* v *Powell*, (1795-1802) All ER Rep 159 KB. The payment was promised for working as second mate for the whole of the voyage. The mate died en route and, therefore, could not complete the voyage. No recovery in terms of part payment on *quantum meruit* basis was allowed. *See* also *Bolton* v *Mahadeva*, (1972) 2 All ER 1322 CA, where a contract for central heating of a house at a cost of £ 560 was completed in such a way that it required £ 174 to put it right. This was held to be not a substantial compliance.
51. AIR 1943 PC 34.

> The defendants, a firm of film importers, agreed with the plaintiffs to supply them films at the rate of about one in a month. The plaintiffs were to pay them a fixed amount for rent and, of course, some other charges. One film was supplied and a sum of Rs 2000 was paid against it, but on account of exhibition difficulties, the film was returned to the defendants. Subsequently another sum of Rs 2000 was paid against which no film was supplied. The plaintiffs wrote to the defendants that on account of delay and breach of contract, all business dealings would be stopped. The defendants accepted this repudiation and plaintiffs sued them for the refund of their money.

It was held that the amount was refundable under Section 64, subject, of course, to the right of the defendant to claim damages for the breach. The case was referred back to the High Court for the determination of damages. Explaining the relationship between Sections 39 and 64, Sir GEORGE RANKIN said: "The contract which may be 'put an end to' under Section 39 is 'voidable'. The right to recover damages in cases where the contract has been rendered 'voidable' by the wrongful act of a party thereto and has been rescinded by the other party accordingly is a right expressly conferred by the statute. But the right to damages is no objection to the application of Section 64 to cases of rescission of contract under Section 39 and the liability to make restitution attaches to the party putting an end to the contract under Section 39."[52]

Referring to the money paid under the contract his Lordship said: "The money was paid by the plaintiff in part discharge of the consideration or to become due to them from him under the contract. It was a benefit or advantage received under the contract which the defendants were bound to restore, though they may set off against the plaintiff's claim such damage as they had sustained. The fact that the money had been spent by the defendants for the purposes of the contract was wholly immaterial."[53]

DAMAGES FOR BREACH

The party who is injured by the breach of a contract may bring an action for damages.[54] "Damages" means compensation in terms of money for the loss suffered

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52. *Ibid.*, at p. 37.

53. *Ibid.*, at p. 40. See also *Gurdian Singh* v *Pearey Lal*, AIR 1982 Del 120, where the vendor cancelled the contract, held, bound to refund benefits obtained. *De-Smet (India) P Ltd* v *B.P. Industrial Corpn*, AIR 1980 All 253, where the repudiating party was allowed refund of the advance paid by him towards the purchase of a solvent extraction plant. Such an advance is not paid as a guarantee or earnest.

54. This is the only remedy which the Contract Act affords. Some other remedies are afforded by the Specific Relief Act, 1963, e.g., an injunction to prevent breach or specific enforcement of the contract, i.e., an action for specific recovery of the thing promised to be sold. *P.R. & Co* v *Bhagwandas*, (1909) 34 Bom 192; *Finday Muir & Co* v *Radhakissen*, (1909) 36 Cal 736. Specific recovery is not allowed when the thing in question is freely available in the market. The injured party should meet his requirement by purchasing elsewhere and then claim damages for the difference in prices. This approach was adopted by the Supreme Court in *State Bank of Saurashtra* v *PNB*, AIR 2001 SC 2412, the order for recovery of securities was not upheld. There was the alternative prayer for damages. The purchaser had already paid the price to the bank. The latter was directed to refund the money with a reasonable amount of compensation. *Gunvantlal Ratanchand* v *Rameshbhai P. Patel*, (2001) 2 Guj CD 1518 (Guj), the original claim was for specific performance. That being not available, an abrupt shift to claim for damages without any prior pleading and proof of loss

by the injured party. Burden lies on the injured party to prove his loss.[55] Every action for damages raises two problems. The first is the problem of "remoteness of damage" and the second that of "measure of damages".

Remoteness of damage

Every breach of contract upsets many a settled expectation of the injured party. He may feel the consequences for a long time and in a variety of ways. A person contracts to supply to a shopkeeper pure mustard oil, but he sends impure stuff, which is a breach. The oil is seized by an inspector and destroyed. The shopkeeper is arrested, prosecuted and convicted. He suffers the loss of oil, the loss of profits to be gained on selling it, the loss of social prestige and of business reputation, not to speak of the time and money and energy wasted on defence and the mental agony and torture of the prosecution.[56]

Thus, theoretically the consequences of a breach may be endless, but there must be an end to liability. The defendant cannot be held liable for all that follows from his breach. There must be a limit to liability and beyond that limit the damage is said to be too remote and, therefore, irrecoverable.[57] The problem is where to draw the line.

The rule in Hadley v *Baxendale*

A very noble attempt was made as early as (1854) in the well-known case of *Hadley* v *Baxendale*[58] to solve the problem by laying down certain rules.

> The plaintiffs carried on an extensive business as miller. Their mill was stopped by a breakage of the crankshaft by which the mill was worked. The defendants, a firm of carriers, were engaged to carry the shaft to the manufacturers as a pattern for a new one. The plaintiffs' servant told the defendants that the mill was stopped, and that the shaft must be sent immediately. But the defendants delayed the delivery by some neglect, and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done. The action was brought

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was not allowed. *C. Panduranga Rao* v *Shyamala Rao*, 1999 AIHC 3715 (AP), specific recovery of property not ordered in favour of a person who did not pay nor showed his readiness and willingness to pay.

55. *Sudesh Prabhakar Valvaikar* v *Gopal Babu Savolkar*, (1996) 5 Bom CR 1, booking clerk of theatre misappropriated a sum of money meant for deposit in the film exhibitor's account, employer liable, but the plaintiff had to prove loss. The court said that if the *locus standi* and quantum of damages was not proved, the case could not stand.

56. See *Ram Kumar* v *Lakshmi Narayan*, AIR 1947 Cal 157. In another similar case, *Bostock & Co* v *Nicholson & Sons*, (1904) 1 KB 725, sulphuric acid sold under false warranty, the seller not knowing what the buyer wanted it for, not liable for the buyer's loss of goodwill and his liability to his customers, but only for defective goods and damage done to other goods.

57. *See* the judgment of ANDREWS, J in *Palsgraf* v *Long Island R.R. Co*, Court of Appeals of New York, (1928) 284 NY 339, reported in Thurston and Seavey, CASES ON TORTS, p. 349 (1942). The case is on negligence, but the learned Judge explains the problem of remoteness of damage which is common to both the law of tort and contract. Damages for breach of contract is only one of remedies. Others are injunction and specific enforcement. See Transworth, *Legal Remedies for Breach of Contract*, 70 Column LR 1145; Priest, *Breach and Remedy for the Tender of Non-confirming Goods* under the UNIFORM COMMERCIAL CODE: AN ECONOMISTS APPROACH, 91 Harv LR 960 (1978). *Remoteness of Damages and Judicial Discretion*, (1978) Camb LJ 288; *Restitution as a Remedy for Breach of Contract: The case of a partially performing seller*, (1982) Yale LJ 16.

58. (1854) 9 Ex 341.

for the loss of profits which would have been made during the period of the delay.

ALDERSON B laid down the following rule:

> Now we think the proper rule in such a case as the present is this:
>
> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

On the basis of this principle the defendants were held not liable for the loss of profits, because in the great multitude of cases of millers sending off broken shafts for repair, it does not follow in the ordinary circumstances that the mill is stopped. The fact that the mill was out of action for want of the shaft was a special circumstance affecting the plaintiff's mill and the same should have been pointed out to the defendants in clear terms.

This decision has always been taken as laying down two rules.[59]

(i) General Damages

General damages are those which arise naturally in the usual course of things from the breach itself. Another mode of putting this is that the defendant is liable for all that which naturally happens in the usual course of thing after the breach.[60]

(ii) Special Damages

Special damages are those which arise on account of the unusual circumstances affecting the plaintiff. They are not recoverable unless the special circumstances were brought to the knowledge of the defendant so that the possibility of the special loss was in the contemplation of the parties.

No recovery of Special Damages where no Knowledge of Special Circumstances

Lack of knowledge of special circumstances once again prevented recovery of special damages in *Horne* v *Midland Railway Company*.[61]

> The plaintiffs, a firm of shoe manufacturers, contracted to supply a quantity of shoes to a firm in London for the use of the French army at an unusually high price. The shoes were to be delivered by the 3rd of February. They consigned the shoes with the defendant railway company telling them that the consignment must reach by the 3rd, but not that there was anything exceptional in the contract. The consignment was delayed and the consignee

59. It is only recently that it has been pointed out that there is in fact only one rule. *See* for example: *The Heron II*, (1967) 3 All ER 686, noted, Murray Pickering, *Remoteness of Damages in Contract*, (1968) 31 Mod LR 203; *C. Czarnikow Ltd* v *Koufos*, (1966) 2 WLR 1397, noted in *A new look for Hadley* v *Baxendale*, 1967 Journal of Business Law 6; *Victoria Laundry* v *New Man Industries*, (1949) 2 KB 528.

60. *See* George T. Washington, *Damages in Contract and Common Law*, 48 LQR 90 (1932); FE Smith, *The Rule in Hadley* v *Baxendale*, 16 LQR 275 (1900).

61. (1873) LR 8 CP 131.

refused to accept it. The plaintiffs had to sell them in the market at about half their contract price.

In the action against the defendants for the delay in delivering the shoes, they paid into the court a sufficient sum to cover any ordinary loss occasioned thereby, but the plaintiffs further claimed the difference between the price at which they had contracted to sell the shoes and the price which they ultimately fetched. But it was held that this was a damage of an exceptional nature and it could not be supposed to have been in the contemplation of the railway company when it contracted to convey the goods by the 3rd.

For the same reason loss of profits was not allowed to be recovered in *British Columbia Saw Mill Co* v *Nettleship*.[62]

> The parts of a saw mill machinery, packed in cases, were given to the defendant, a carrier, for carriage to Vancouver. One of the cases was lost and consequently a complete mill could not be erected and operated. The plaintiff claimed the cost of lost machinery and the profits which could have been earned if the mill had been installed in time.

The Court allowed only the cost in Vancouver of the articles lost. The loss of profits to be made from the intended use of the mill was held to be too remote. WILLES J gave the following illustration in support of this conclusion:

> Take the case of a barrister on his way to practice at the Calcutta Bar, where he may have a large number of briefs awaiting him; through the default of the Peninsular and Oriental Company he is detained in Egypt or in the Suez boat, and consequently sustains great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going?[63]

WILLES J further pointed out that special damages are recoverable only when the special purpose of the contract "is brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."[64]

Special Circumstances already within Knowledge of Contract Breaker

But in the subsequent case of *Simpson* v *London & North Western Railway Co*[65] the above suggestion was qualified to this extent that if the special circumstances are already within the knowledge of the party breaking the contract, the formality of communicating them to him may not be necessary.

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62. (1868) LR 3 CP 499: 18 LT 604.
63. Corresponding to illustration (*r*). This is not applicable when the contract is for sale of goods, *Kandappa Mudaliar* v *Muthuswami Ayyar*, (1926) 50 Mad 94: AIR 1927 Mad 99.
64. Similarly, in *Dominion of India* v *All India Reporter Ltd*, AIR 1952 Nag 32, loss by railways of three volumes of a set of books without which the set became useless, recovery allowed only for the lost volumes, the goods were described only as a bundle of books without any indication of the importance of a volume. Compare this with *Hydraulic Engg Co* v *McHaffie*, (1878) 4 QBD 670, the defendant failed to supply an essential part of a machine about which he knew that his buyer was under a contract to supply to a third party, he was held liable for the plaintiff's loss of profit.
65. (1876) 1 QBD 274.

> The plaintiff was in the habit of exhibiting samples of his implements at cattle shows. He delivered his samples to the defendant company for consignment to the show grounds at New Castle. The consignment note said: "must be at New Castle on Monday certain". But no mention was made of the intention to place the goods in the exhibition. On account of negligence the goods reached only after the show was over.

But as the company was already aware of the object of carrying the goods there, the plaintiff was allowed to recover not only the loss of freight but also the profits he would have made by placing the goods at the show. COCKBURN CJ said:

> The principle is now well-settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or the circumstances are known to the carrier, from which the object ought in reason to be inferred, so that the object may be taken to have been in the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.

In another case[66] a fragmentiser was purchased by the plaintiff under a hire-purchase agreement. Its rotor broke down before normal life. The plaintiff had no means to replace it at cash price. He had to arrange it again at a hire-purchase price and claimed the same as damages. The defendant contended that the plaintiff had to pay hire-purchase price because of his lack of means. This contention was rejected. The fact that in the present circumstances of economy business has to depend upon hire-purchase system, was held to be within the contemplation of parties.

Relationship between Two Rules Re-examined

The relationship between the rules was re-examined in *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[67] Lord ASQUITH worked out a number of propositions from a consideration of the leading authorities.[68] The substance of the propositions is as follows: Only such loss is recoverable as was at the time of the contract reasonably foreseeable as liable to result from the breach. Foreseeability depends upon knowledge. Accordingly what was at that time reasonably foreseeable depends upon the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. For this purpose, knowledge "possessed" is of two kinds: one imputed, and the other actual. Every one as a reasonable person, is taken to know the "ordinary course of things" and consequently to know what loss is liable to result from a breach of the contract in that ordinary course. This is the subject-matter of the "first rule" in *Hadley* v *Baxendale*. But to this knowledge which the defendant is assumed to possess must be added his actual knowledge of the special circumstances of the case showing the possibility of more loss arising from the breach. Such a case attracts the operation of the "second rule" so as to make the additional loss recoverable.

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66. *B.P. Exploration & Co* v *Heent*, (1982) 2 QBD 925. Where the lessor knew the purpose for which the lessee required the premises, he was held liable for the loss of that purpose during the delayed period. *Jaques* v *Millar*, (1877) 6 Ch D 153.
67. (1949) 2 KB 528 CA: (1949) 1 All ER 997.
68. His Lordship considered the following: *Hadley* v *Baxendale*, (1854) 9 Exch 340; *Br. Columbia Saw Mills* v *Nettleship*, (1868) 3 CP 499; *Covy* v *Shames Iron Works Co*, LR 3 QB

The judgment emphasises that both the rules are based upon the principle of "foreseeability".[69] This gives a "new look for *Hadley* v *Baxendale*".[70] Now it has been clearly so stated by DIPLOCK LJ in *C. Czarnikow Ltd* v *Koufos*.[71]

> That there are not two rules formulated in *Hadley* v *Baxendale* but only two different instances of the application of a single rule.

Similarly, SALMON, LJ observed:[72]

> Any damage actually caused by a breach of any kind of contract is recoverable provided that when the contract was made such damage was reasonably foreseeable as liable to result from the breach.

The facts of *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[73] were as follows:

> A firm of launderers and dyers wanted to expand their business and, therefore, ordered with the defendants for the supply of a boiler of much greater capacity. The defendants agreed to deliver on June 5, 1946, but delayed delivery until November 8. The plaintiffs claimed as damages the loss of profits which would have been earned if their business was expanded in time as there were at the time unique business opportunities.

The Court allowed £ 110 as general damages but disallowed loss of profits. On appeal the case was referred to an official referee to determine what damages, in addition to £ 110, should be allowed on the basis of the knowledge then possessed by the parties. ASQUITH J said "that no supplier who has promised delivery of a boiler of an unusually large size by a particular date, with knowledge that it was to be put into use immediately on delivery can reasonably contend that he could not foresee that loss of business would be likely to result from the delay".

To the same effect is the decision of the House of Lords in *Monarch Steamship Co Ltd* v *Karlshamns Oljefabriker (A/B)*.[74]

> A British vessel was chartered in April 1939, by a British company for carrying cargo of soyabeans from Manchuria to a port in Sweden. But owing to delay caused by the vessel's unseaworthiness, she did not reach that port before the outbreak of war between Great Britain and Germany. Consequently, the ship was prohibited from going to its destination and ordered to discharge at Glasgow. The plaintiff, who needed soyabeans for their business as they were not locally available, incurred expenses in forwarding them in neutral ships.

It was held that the loss was due to unseaworthiness of the ship and the defendants were liable for it, because, in view of the international situation, they should have foreseen that war might break out and cause loss or diversion of the vessel.[75]

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69. The same point was emphasised by DEVLIN J in *Biggin & Co* v *Permanite Ltd*, (1951) 1 KB 422.
70. *See* the Editorial note in (1967) Journal of Business Law 6.
71. (1966) 2 WLR 1397, 1497; on appeal, *Heron II, the Koufos* v *C. Czarnikow Ltd*, (1969) 1 AC 350: (1967) 3 All ER 686, HL.
72. *Ibid* at p 1422.
73. (1949) 2 KB 528 CA: (1949) 1 All ER 997.
74. (1949) AC 196.
75. Lord WRIGHT in his speech reviewed most of the earlier authorities. The case was considered by KANIA CJ of the Supreme Court in *Panna Lal Lankidas* v *Mohanlal*, AIR 1951 SC 145, 148.

House of Lords Restore Original Vitality of Two Rules

The interpretation put upon the *Hadley* v *Baxendale* principles by the Court of Appeal in the *Victoria Laundry* case had virtually replaced the expression "contemplation of the parties" with "reasonable man's foresight" and this being the principle in the law of tort also, hardly any distinction remained between tort and contract principles relating to remoteness of damages. But the House of Lords in their decision in the *Heron II, Koufos* v *C. Czarnikow Ltd*[76] have restored the distinction by again laying emphasis upon the "contemplation of the parties".

> A vessel was chartered to proceed to Constanza, there to load a cargo of three thousand tons of sugar; and to carry it to Basrah, or, at the charterers' option, to Jeddah. The vessel left in time. A reasonably accurate prediction of the length of the voyage was twenty days.[77] But the vessel in breach of contract made deviation which caused a delay of nine days. If the vessel had arrived in time, the charterer would have obtained roughly £ 1 more per ton than what he actually obtained. The shipowner knew that there was a market for sugar at Basrah, but did not know that the charterer wanted to sell the sugar promptly on arrival. The shipowner also knew that sugar prices were apt to fluctuate from day to day, but had no reason to suppose that fluctuation would be downwards rather than upwards. He was sued for the loss due to fall in market price. The umpire allowed this loss. But the trial judge allowed as damages only the interest on the value of the cargo during the period of delay. The Court of Appeal reversed[78] this order and restored the award of the umpire and the House of Lords unanimously affirmed the decision of the Court of Appeal.

Lord REID emphasised that the rule (or rules) laid down in *Hadley* v *Baxendale* and which for over a century have been used for determining remoteness of damage should not be subjected to an interpretation which would result in a contrary decision of that case. His Lordship laid particular emphasis upon the fact that in that case the loss of profit was caused by the delay, but even so the defendant was held not liable not because the loss was not forseeable but because as ALDERSON B put it "it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred...". ALDERSON B clearly did not and could not mean that it was not reasonably foreseeable that delay might stop the resumption of work in the mill. He merely said that in the great multitude — which can be taken to mean the great majority—of cases it would not happen. He was not distinguishing between results which were foreseeable or unforeseeable, but between results which were merely likely because they would happen in the great majority of cases, and results which were unlikely because they would only happen in a small minority of cases. He clearly meant that a result which will happen in the great majority of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility would happen only in a small minority of cases should not be regarded as having been in their contemplation.

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76. (1967) 3 All ER 686: (1969) 1 AC 350: (1967) 3 WLR 1491.
77. This was the umpire's finding, the matter being under arbitration.
78. DIPLOCK and SALMOND LJJ; SELLERS LJ *dissenting*.

Applying this test to the facts his Lordship concluded that having regard to the knowledge available to the shipowner when he made the contract, any reasonable person in his position would have realised that such loss was sufficiently likely to result from the breach of contract thus making it proper to hold that the loss followed naturally from the breach or that the loss of that kind would have been within his contemplation.

Lord HODSON also presented the same view of *Hadley* v *Baxendale.*

> I find guidance in the use of the expression in the great multitude of cases which is to be found in more than one place in the judgment in *Hadley* v *Baxendale.* It indicates that the damages recoverable for breach of contract are such as flow naturally in most cases from the breach, whether under ordinary circumstances or from special circumstances due to the knowledge either in the possession of or communicated to the defendants. This expression throws light on the whole field of damages for breach of contract, and points to a different approach from that taken in tort cases. The approach in tort will normally be different simply because the relationship of the parties is different. The claim against the tortfeaser who has inflicted tortious damage is not the same as the claim against an opposite party for breach of contract, for the latter claim depends on the contemplation of the parties to the contract and question of remoteness as such does not arise. Consequently, liability in tort may often be of a wider kind.

Physical Injury Resulting from Breach

The wisdom of the distinction between tort and contract principles, at any rate in reference to physical injury caused by the breach, has again been questioned by Lord DENNING in *Parsons* v *Uttley Ingham & Co.*[79]

> The plaintiffs were pig farmers and they purchased from the defendants a large hopper for storage of pig nuts. They had already purchased one from them earlier and it was serving them well. The hopper was ventilated at the top, but the ventilator had to be kept closed and was to be opened after the hopper was installed at the plaintiff's farm. The defendants negligently forgot to open it and the plaintiffs could not know, it being too high. The nuts stored in the hopper became mouldy and without any knowledge of the danger, they were served to the pigs. They suffered from a rare type of intestinal infection and 254 of them perished.

The defendants were held liable for the loss of the pigs but not for loss of profits from future sales of pigs. The loss of pigs was a physical injury and the court, feeling that for such injuries the principle should be the same as in tort, the defendants were liable for all damage which could reasonably have been foreseen at the date of the breach as a possible consequence of the breach. The loss of profits was an economic loss and the defendants were not liable for it because it could not have been within the party's contemplation at the time of the contract. Thus, the opinion of the Court of Appeal is that *Hadley* v *Baxendale* should be confined to

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79. (1978) 1 All ER 525; *H. Parsons (Livestock) Ltd* v *Uttley Ingham & Co,* (1977) 3 WLR 990, noted (1978) 94 LQR 171. An earlier authority to the same effect, *Smith* v *Green,* (1875) 1 CPD 92, cow sold warranted as free from diseases, but it was diseased, the buyer's other animals infected, seller liable for the loss of livestock and not only for the animal sold.

economic loss and for physical injuries the principle of foreseeability which operates in tort should apply.[80]

Damages for Negligent Survey Report

The applicable principles have been stated by the Court of Appeal in *Watts* v *Morrow*.[81] The plaintiffs purchased a country home for £ 177,500 in reliance on a survey prepared by the defendant surveyor in which he stated that overall dwelling house was sound, stable and in good condition although there were minor defects which could be dealt with as part of ordinary ongoing maintenance and repair. After taking possession the plaintiffs discovered substantial defects not mentioned in the defendant's report which required urgent repair, including the renewal of the roof, windows and floor boards. The plaintiffs carried out repairs to remedy the defects at a cost of £ 33,961 and sought to recover this amount. The surveyor admitted liability but pleaded that it should not be more than £ 15,000, being the difference between the price paid and the price that the home was worth if the defects were taken into account. The court held that the proper measure of damages was the diminution in value rather than the cost of repairs. Applying the principle of restitution to the terms of the contract, the amount required to put the plaintiff in the position in which he would have been if the surveyor had carried out the contract of survey properly was the amount by which he was caused to pay more than the value of the house in its true condition.[82]

Section 73 of the Contract Act

The same principles are applicable in India. The Privy Council, for example, observed in *Jamal* v *Moola Dawood Sons & Co*[83] that Section 73 is declaratory of the common law as to damages. Similarly, PATANJALI SASTRI J (afterwards CJ) of the Supreme Court observed in *Pannalal Jankidas* v *Mohanlal*[84] "that the party in breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of loss or damage indirectly or remotely caused".[85] The section provides:

73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by

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80. Distinction between tort and contract is breaking down at many points. *See* Fridman, (1977) LQR 482.
81. (1991) 4 All ER 937 CA.
82. The court followed *Philips* v *Ward*, (1956) 1 All ER 874 and *Perry* v *Sidney Phillips & Son (a firm)*, (1982) 3 All ER 705.
83. (1916) 1 AC 175: 43 IA 6.
84. AIR 1951 SC 145, 153: 1950 SCR 979: 53 Bom LR 472: (1951) 21 Comp Cas 1.
85. Similarly, KANIA CJ of the Supreme Court observed in *Panna Lal Jankidas* v *Mohanlal*, AIR 1951 SC 145, 149 that the rule stated by ALDERSON B has consistently been accepted as correct; the only difficulty has been in applying it. The Supreme Court has held in *Aslhing* v *L.S. John*, (1984) 1 SCC 205 that repudiation by one party puts an end to the contract although the right to sue for damages survives. Accordingly, the disqualification by virtue of a Government contract of holding an office of profit under the State would end as soon as the contractor gives up the contract. *Timble Irmaos Ltd* v *Jorge Anibal*, (1977) 3 SCC 474, a person cannot recover damages if he has contributed to the breach. *Karnataka Power Corpn Ltd* v *Shaik Basha Transport & Civil Contractor*, 2000 AIHC 4428 (Kant), the contractor had the right under the terms of the contract to transport coal by truck/trailor. It was held to be no breach on the part of the contractor that he was using trucks.

such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

[*Market price criterion*].—(*a*) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. *B* is entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B* might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[*Extra cost of hiring alternative ship*].—(*b*) *A* hires *B's* ship to go to Bombay, and there takes on board, on the first of January, a cargo, which, *A* is to provide and to bring it to Calcutta, the freight to be paid when earned. *B's* ship does not go to Bombay, but *A* has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. *A* avails himself of those opportunities, but is put to trouble and expense in doing so. *A* is entitled to receive compensation from *B* in respect of such trouble and expense.

[*Seller's loss on resale*].—(*c*) *A* contracts to buy of *B*, at a stated price, 50 maunds of rice, no time being fixed for delivery. *A* afterwards informs *B* that he will not accept the rice if tendered to him. *B* is entitled to receive from *A*, by way of compensation, the amount, if any, by which the contract price exceeds that which *B* can obtain for the rice at the time when *A* informs *B* that he will not accept it.

[*Ship seller's loss on resale of ship*].—(*d*) *A* contracts to buy *B's* ship for 60,000 rupees, but breaks his promise. *A* must pay to *B*, by way of compensation, the excess, if any, of the contract price over the price which *B* can obtain for the ship at the time of the breach of promise.

[*Loss of value caused by delay in transit*].—(*e*) *A*, the owner of a boat, contracts with *B* to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to *B* by *A* is the difference between the price which *B* could have obtained for

the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

[*Deficient house repairing service*].—(*f*) *A* contracts to repair *B's* house in a certain manner, and receive payment in advance. *A* repairs the house, but not according to contract. *B* is entitled to recover from *A* the cost of making the repairs that conform to the contract.

[*Difference in hiring charges of ship*].—(*g*) *A* contracts to let his ship to *B* for a year, from the first of January, for a certain price. Freights rise, and on the first of January, the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from the first of January.

[*Buyer's breach, difference between market and contract prices*].—(*h*) *A* contracts to supply *B* with a certain quantity of iron at a fixed price, being a higher price than that for which *A* could procure and deliver the iron. *B* wrongfully refuses to receive the iron. *B* must pay to *A*, by way of compensation, the difference between the contract price of the iron and the sum for which *A* could have obtained and delivered it.

[*Delay caused by carrier, Hadley* v *Baxendale module*].—(*i*) *A* delivers to *B*, a common carrier, a machine, to be conveyed without delay, to *A's* mill, informing *B* that his mill is stopped for want of the machine. *B* unreasonably delays the delivery of the machine, and *A* in consequence, loses a profitable contract with the Government. *A* is entitled to receive from *B*, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

[*Knowledge of resale, loss of profit*].—(*j*) *A*, having contracted with *B to* supply *B* with 1000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with *C* for the purchase of 1000 tons of iron at 80 rupees a ton, telling *C* that he does so for the purpose of performing his contract with *B*. *C* fails to perform his contract with *A*, who cannot procure other iron, and *B*, in consequence, rescinds the contract. *C* must pay to *A* 20,000 rupees, being the profit which *A* would have made by the performance of his contract with *B*.

[*Where no knowledge of resale agreement, no more than market difference recoverable*].—(*k*) *A* contracts with *B* to make and deliver to *B*, by a fixed day, for a specified price a certain piece of machinery. *A* does not deliver the piece of machinery at the time specified, and, in consequence of this, *B* is obliged to procure another at a higher price than that which he was to have paid to *A*, and is prevented from performing a contract which *B* had made with a third person at the time of his contract with *A* (but which had not been then communicated to *A*), and is compelled to make compensation for breach of that contract. *A* must pay to *B*, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by *B* for another, but not the sum paid by *B* to the third person by way of compensation.

[*Building contract.*].—(*l*) *A*, a builder, contracts to erect and finish a house by the first of January, in order that *B* may give possession of it at that time to *C*, to whom *B* has contracted to let it. *A* is informed of the contract between *B* and *C*. *A* builds the house so badly that, before the first of January, it falls down and has to be rebuilt by *B*, who, in consequence, loses the rent which he was to have received from *C*, and is obliged to make compensation to *C* for the breach of his contract. *A* must make compensation to *B* for the cost of rebuilding the house, for the rent lost, and for the compensation made to *C*.[86]

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86. *First Consolidated* v *Padu Ehsan*, (1994) 1 Current LJ 375 (Malaysia), in computing loss of profits in their claim for damages the plaintiff submitted the costing done by a witness who was not a qualified surveyor, nevertheless holding experience in this work. The defendant

[*Breach of warranty as to quality of goods*].—(*m*) *A* sells certain merchandise to *B*, warranting it to be of a particular quality, and *B*, in reliance upon this warranty, sells it to *C* with a similar warranty. The goods prove to be not according to the warranty, and *B* becomes liable to pay *C* a sum of money by way of compensation. *B* is entitled to be reimbursed this sum by *A*.

[*Default in payment of money*].—(*n*) *A* contracts to pay a sum of money to *B* on a day specified. *A* does not pay the money on that day; *B*, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. *A* is not liable to make good to *B* anything except the principal sum he contracted to pay, together with interest up to the day of payment.

[*Market price and not loss of profit*].—(*o*) *A* contracts to deliver 50 maunds of saltpetre to *B* on the first of January, at a certain price. *B* afterwards, before the first of January, contracts to sell the saltpetre to *C* at a price higher than the market price of the first of January. *A* breaks his promise. In estimating the compensation payable by *A* to *B*, the market price of the first January, and not the profit which would have arisen to *B* from the sale to *C*, is to be taken into account.

[*Defaulting seller not liable for closure of mill*].—(*p*) *A* contracts to sell and deliver 500 bales of cotton to *B* on a fixed day. *A* knows nothing of *B's* mode of conducting his business. *A* breaks his promise, and *B*, having no cotton, is obliged to close his mill. *A* is not responsible to *B* for the loss caused to *B* by the closing of the mill.

[*Defaulting seller not liable for loss of season*].—(*q*) *A* contracts to sell and deliver to *B*, on the first of January, certain cloth which *B* intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. *B* is entitled to receive from *A*, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

[*Carrier of passengers causing delay*].—(*r*) *A*, a ship-owner, contracts with *B* to convey him from Calcutta to Sydney in *A's* ship, sailing on the first of January, and *B* pays to *A*, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and *B*, after being in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. *A* is liable to repay to *B* his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which *B* lost by arriving in Sydney too late.

Section 73 Incorporates Two Rules of Hadley v Baxendale

The section declares that compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. The section also provides that the same principles will apply where there has been a breach of a quasi-contractual obligation.[87]

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did not offer evidence of what would be the fair costing. In the circumstances, the submission of the plaintiff was accepted.

87. The right of action depends upon proof of breach. In *State of Karnataka* v *Shree Rameshwara Rice Mills*, (1987) 2 SCC 160: AIR 1987 SC 1359, the contract provided that damages would be assessed by the Government and it was held that the Government was not the proper party to determine whether a breach had taken place or not. To the same effect, *Valrappa Thevar* v *Special Tehsildar*, (1989) 1 Mad LJ 387; *P.C. Rajput* v *State of MP*, AIR 1993 MP 107, road building contract, Govt. causing some delay but extending time, the contractor thereafter neglected the work, held, no breach on the part of the Government, writ remedy not allowed to enforce a contract between the State and citizen. *Amar Singh* v *UT*,

The section thus clearly lays down two rules. Compensation is recoverable for any loss or damage—

(*i*) arising naturally in the usual course of things from the breach, or

(*ii*) which the parties knew at the time of the contract as likely to result from the breach.

The first rule is "objective" as it makes the liability to depend upon a reasonable man's foresight of the loss that will naturally result from the breach of the contract. The second rule is "subjective" as, according to it, the extent of liability depends upon the knowledge of the parties at the time of the contract about the probable result of the breach.[88]

Liability in ordinary cases

The extent of liability in ordinary cases is what may be foreseen by "the hypothetical reasonable man", as arising naturally in the usual course of things. One illustration is the decision of the Madras High Court in *Madras Railway Co* v *Govinda Rau*.[89]

> The plaintiff, who was a tailor, delivered a sewing machine and some cloth to the defendant railway company to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the company of his special purpose.

He claimed as damages the expenses of travelling up to the place of festival and of staying there and the loss of profits which he would have earned. The court held that the damages claimed were too remote. All of these were due to the frustration of the special purpose and that was not known to the company. *Fazal Ilahi* v *East Indian Railway Co*[90] is another illustration of the same kind.

> The plaintiff delivered to the defendant railway company's parcel office at Cawnpore four boxes of Chinese crackers for consignment to Allahabad where

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Chandigarh, AIR 1993 P&H 100. But initial deposit amount was ordered to be refunded under writ jurisdiction when the Government stopped working and the dispute was not about damages for breach of contract. *Krishna & Co* v *Govt of AP*, AIR 1993 AP 1. The plaintiff has also to prove his loss. Where loss is not provable, reasonable compensation is awarded on the basis of the material before the court, *English Electric Co India Ltd* v *Cement Corpn of India Ltd*, (1996) AIHC 1875 Delhi. A claim for damages is not a claim for a sum of money immediately due, *State of Meghalaya* v *J. N. Giri*, AIR 1995 Gau 23.

88. *See* Murray Pickering, *The Remoteness of Damages in Contract*, (1968) 31 Mod LR 203, where the learned writer considers the decision of the House of Lords in the *Heron II*, (1967) 3 All ER 686 and traces the "objective" and "subjective" nature of the rules in *Hadley* v *Baxendale*, at p. 204. For examples of breach see *Madhya Pradesh Mines Ltd* v *R.B. Shriram Durga Prasad Ltd*, (1972) 3 SCC 180: AIR 1971 SC 1983; *State of Kerala* v *Cochin Chemical Refineries*, (1968) 3 SCR 556: AIR 1968 SC 1361. *Ganapati Salt Works* v *State of Gujarat*, AIR 1995 Guj 61, no compensation on ground of equity where the claimant had duped the party to the lease and had grabbed the Government lease for himself.

89. (1898) 21 Mad 172. Damages cannot be recovered by a person who does not do his duty under the contract, e.g. a person whose electricity supply is suspended for non-payment of bills. *Patel Dadubhai* v *GEB*, (1990) 1 Guj LR 673. But damages were allowed where there was a long delay in restoring supply after all requirements were fulfilled. *Gujarat Electricity Board* v *K.R. Patel*, (1988) 2 Guj LH 169.

90. (1921) ILR 43 All 623.

he needed them for a festival on 5th June, but he did not disclose the purpose. The company's servants considering it unsafe to send crackers by parcel train, actually sent them by goods train and they reached only after the conclusion of the festival. The company required him to take delivery on payment of additional freight, which he refused to pay and, therefore, the company sold the goods at a nominal price.

He sued the railway company. The Court disallowed the claim for profits which would have been made, as the plaintiff's special purpose was not within the knowledge of the company.[91] But the plaintiff succeeded in recovering the cost price of his goods sold by the company in breach of the contract and Rs 100 as damages and other incidental expenses.[92]

Even where the goods are altogether lost in transit, the carrier is not liable for the loss of profits which would have been made by selling the goods at their destination.[93]

Building Contracts

Since works and building contracts are undertaken only with a view to earning profits, the party committing the breach would be liable for the contractor's loss in terms of expected profits. The Supreme Court came to this conclusion in *A.T. Brij Paul Singh* v *State of Gujarat*.[94]

A Government building contract was allotted through tenders. It fell to the share of a Poona-based contractor who transported his mobile workshop from there to work site at Rajkot in Gujarat. He had done only a part of the work when the Government unjustifiably repudiated the contract. The contractor sued for loss of profits.

It was not disputed before the Supreme Court that where in a works contract the party entrusting the work commits breach, the contractor would be entitled to claim damages for loss of profit which he expected from the project. The court noted an observation in Hudson's BUILDING AND ENGINEERING CONTRACTS[95] that in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head office overheads and profit is between 3 to 7 per cent of the total price of cost which is added to the tender. The court accordingly allowed Rs 2 lacs as compensation under the head "loss of profits" over and above other claims.[96]

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91. *See* STUART J's judgment at p. 631, who relied upon the principle laid down in *Simpson* v *The London & North Western Rly Co*, (1876)1 QB 274 and KANHAIYA LAL J's judgment at p. 637. *Union of India* v *Hari Mohan Ghosh*, (1990) 1 GLR (NOC) 31, railway administration held not liable for trader's expected profits for the loss of his consignment when the administration was not aware of the object of his dispatch.
92. *See* also *G.A. Jolli* v *The Dominion of India*, AIR 1949 Cal 380, 389.
93. *Ibid.* The court relied upon: *Schulze & Co* v *Great Eastern Rly Co*, (1887) 19 QBD 30; *Stroms Burks Aktil Bolag* v *John Peter*, (1905) AC 515; *Sally Werbheim* v *Chicoutimi Pulp Co*, (1911) AC 301; *Lancashire & Yorkshire Rly* v *Mac Nicoll*, (1918) 88 LJKB 601. A consignee to whom a consignment had been delayed was not allowed to recover damages caused by the closure of his factory. *Union of India* v *P. W. & G. Mills*, AIR 1967 Punj 497.
94. (1984) 4 SCC 59: AIR 1984 SC 1703.
95. 10th edn (1970).
96. See further *State of Kerala* v *Bhaskaran*, AIR 1985 Ker 49. In a works contract the Government undertook the responsibility of supplying cement but failed to do so. The contractor was allowed to recover 10% estimated profits as the Government did not controvert it. In *Basildon Distt Council* v *J.E. Lesser (Properties) Ltd*, (1985) 1 All ER 20

In a contract for the construction of a swimming-pool, the depth of the pool happened to be only 6 feet 9 inches whereas the building contract required it to be 7 feet 6 inches and at the diving point it was not more than six feet. This resulted in a claim for damages for defective construction. The Trial Judge found that the pool was perfectly safe for diving and that the shortfall in depth made no difference to the value of the pool. He also found that it would cost about £ 21,000 to cure the defect by digging the pool deeper. It was quite likely that even after receiving the above amount, the owner might not spend on repair. He held that the appropriate measure of damages was the difference in value between the pool as it was and the pool as it should have been if the contract was properly performed and allowed £ 2500. The Court of Appeal reversed this and allowed the full cost of cure. But the House of Lords restored the decision of the trial judge.[97]

Some earlier cases on the subject were also decided either on the basis of cost of cure or difference in value depending on whether in the circumstances of the case, cure would be reasonable or whether recovery on the basis of difference in value would be reasonable. The latter would be more reasonable where the building, though defective, is nevertheless substantially useful. The costs of rectification even if recovered, may not be so used.[98]

An approach of this kind was also to be seen in a New York decision where two principles were stated: "first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the goods to be obtained, and, secondly, the appropriate measure of damages is the difference in value, even though it would result in a nominal award."[99]

Scheme for allotment of plots

Damages for mental pain and anguish cannot be awarded in a case in which there is a breach on the part of a development authority in delaying the completion of the scheme. It is not a head of damages in ordinary commercial contracts. The court, however, allowed interest at the rate of 12% on the refundable amount though there

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QBD, in a building contract under which it was the responsibility of the contractor to design and construct dwellings, he was not allowed the defence of contributory negligence against his liability for defective design and execution. *Pishori Lal Maggo* v *Delhi Development Authority*, (1997) AIHC 1579 Delhi, the arbitrator allowed recovery to the extent of 10% profit on the estimated costs, the court affirmed the award. *Metro Electric Co* v *Delhi Development Authority*, AIR 1980 Delhi 266, clause providing for 10% extra costs, upheld. *Govt of AP* v *Satyam Rao*, AIR 1996 AP 288, contractor prevented from completing contract because of breach on the part of the Government, award of damages on the basis of loss of profits which the contractor could have derived from the rest of the work. *C. T. Xavier* v *P. V. Joseph*, AIR 1995 Ker 140, 10% of the total value of the contract allowed to the contractor by way of damages for breach of contract.

97. *Ruxley Electronics and Construction Ltd* v *Forsyth*, (1995) 3 All ER 268 HL; (1995) 3 WLR 118.

98. See *East Ham B.C.* v *Bernard Sunley & Sons Ltd*, (1965) 3 All ER 619 HL and *Jacob and Youngs Inc* v *Kent*, (1921) 230 NY 239, New York Court of Appeal.

99. *Jacob & Youngs, Incorporated* v *George E Kent*, 230 NY 239 (1921). Lord LLOYD extracted this statement from the judgment of CARDOZO J, in the above case. See *Ruxley Electronics and Construction Ltd* v *Forsyth*, (1995) 3 WLR 118 at 133. *See* also Andrew Phang, *Subjectivity, Objectivity and Policy—Contractual Damages in the House of Lords*, (1996) JBL. *Gautam Constructions & Fisheries Ltd* v *National Bank for Agriculture and Rural Development*, AIR 2000 SC 3018, basement area not allowed to be equated with office area for rate purposes.

was no provision in the contract to that effect. It is justifiable on the equitable ground. The brochure of the scheme clearly excluded the liability of the authority to pay interest in cases of refund of consideration. It was held that this clause would apply only to cases in which the claimant himself has brought about the circumstances of refund.[1]

A works contract was rescinded on the ground that the contractor had not completed within the stipulated time even 10% of the works. But evidence showed that the contract was improperly rescinded and, therefore, it amounted to a breach of contract. The contractor claimed Rs 20,000 as compensation, being 10% of the value of the contract. The court said that the contractor was entitled to claim damages for loss of profit which he expected from the project. His claim was held to be fully justified. The High Court erred in holding that the claim should have been based on actual loss suffered.[2]

Difference between market price and contract price

The Supreme Court has been generally following these principles in its various decisions. One such decision is *Murlidhar Chiranjilal* v *Harishchandra Dwarkadas*.[3]

> There was a contract for supplying canvas to be consigned to Calcutta, *f.o.r.* Kanpur. The transport and labour charges were to be borne by the buyer. The seller failed to supply and the question was whether damages were to be assessed according to Kanpur or Calcutta prices and whether the seller was entitled to profits which he could have made on resale at Calcutta.

WANCHOO J (afterwards CJ) held that the goods were deliverable at Kanpur and, therefore, damages should be assessed according to the difference between contract and market prices at Kanpur, for that was the only loss which would be said to have arisen naturally in the usual course of things from the breach. The learned judge referred to two principles which he considered to be well-settled. One is that as far as money can do it, the aggrieved party is to be put in as good a situation as if the contract had been performed. This is qualified by the second principle which imposes upon the buyer the duty to take reasonable steps to mitigate the consequences of the breach.[4] These two principles also follow from the law as laid down in Section 73 read with the *Explanation* therefor. Here the contract was to be performed at Kanpur and, therefore, the buyer should have proved the difference in prices at Kanpur which he did not do and, accordingly the court said: "On this state of the evidence it could not be said that any damage naturally arose in the usual course of things."

The buyer contended that the seller knew that the goods were required at Calcutta and, therefore, it was in his contemplation that the loss would be suffered at Calcutta.

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1. *Ghaziabad Development Authority* v *Union of India*, AIR 2000 SC 2003. The court noted its own decision in *Sovintorg (India) Ltd* v *State Bank of India*, (1999) 6 SCC 406: 1999 AIR SCW 2878: AIR 1999 SC 2963, where in similar circumstances the National Consumer Disputes Redressal Commission directed the amount deposited by the claimant to be returned with interest @ 12% and the Supreme Court enhanced it to 15%.
2. *Dwarka Das* v *State of MP*, (1999) 3 SCC 500: AIR 1999 SC 1031. The court relied on *A.T. Brij Paul Singh* v *State of Gujarat*, (1984) 4 SCC 59 and *Mohd Salamatullah* v *Govt of AP*, (1977) 3 SCC 590.
3. (1962) 1 SCR 653: AIR 1962 SC 366
4. The decision of the House of Lords in *British Westing House Electric & Mfg Co Ltd* v *Underground Electric Rly Co of London*, (1912) AC 673, 689 was cited as an authority.

He relied upon *R. & H. Hall Ltd* v *W.H. Pim Junior Co*[5] and *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*[6] Distinguishing the present case from these, the learned Judge observed:

> They are cases of a special type; in one case the parties knew that goods purchased were likely to be resold before delivery and therefore any loss that by the breach of contract may eventually result may include loss that may have been suffered by the buyers because of the failure to honour the intermediate contract of resale made by them; in the other case, the goods were purchased by the party for his own business for a particular purpose which the sellers were expected to know and if any loss resulted from the delay in the supply, the sellers would be liable for that loss, if they had knowledge that such loss was likely to result.

In the present case, on the other hand, the only thing that the seller knew was that the goods were to be booked to Calcutta from which the court refused to infer that the goods were meant for resale or for resale in Calcutta.[7]

Whether actual purchase or sale of goods necessary

The High Court of Delhi was of the view in *Union of India* v *Commercial Metal Corpn*[8] that it is not necessary that on default by the seller to deliver, the plaintiff should have actually bought the goods elsewhere and only then claim the difference. The court said that damages could be claimed on market basis. The same ruling was repeated in *Saraya Distillery* v *Union of India*,[9] the court saying that the injured party can recover compensation on the basis of the difference between the contract and market prices without actually purchasing the goods. All that has to be proved is the buying price at which the injured party can obtain substitute goods. In *Ismail Sait & Sons* v *Wilson & Co*[10] the Madras High Court held that the provisions contained in Section 73 did not envisage that the injured buyer must resort to actual purchase and suffer loss before claiming damages.[11] The Bombay High Court has expressed the view that neither Section 73 nor these rulings would apply where the parties provide for a different rule. They can lay down their own remedial system. The difference which the court saw in this case was the provision in the contract that in the event of part delivery, "the purchaser shall purchase goods from the open market and then claim damages." It was on the basis of this clause that the court held that the plaintiff was not entitled to any compensation without actually

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5. (1928) All ER 763.
6. (1949) 1 All ER 997.
7. Where the goods contracted to be sold are not marketable in the sense that they cannot be sold elsewhere, the price fixed in the contract is the appropriate measure of damages. The State Electricity Board had refused to take goods after accepting tender, *PSEB* v *Abnash Textile Trading Agencies*, AIR 1986 P&H 323; *Pravara Sahakari Sakhar Karkhana Ltd* v *Express Industrial Corpn*, AIR 2002 Bom 185, seller failed to deliver balance of the goods, the buyer was not able to show any loss in production, he was allowed Rs 25,000 (estimated amount) because of the breach of the contract. *Thyssen Stahl Union GmbH* v *SAIL*, AIR 2002 Del 255, the party to the arbitration proved no loss, the arbitrator could not have awarded damages.
8. AIR 1982 Delhi 267.
9. AIR 1984 Delhi 360.
10. AIR 1919 Mad 1053.
11. The court agreed with the similar view expressed in *Vishwanath* v *Amarlal*, AIR 1957 MB

acquiring the material elsewhere and then showing his loss.[12] Thus special circumstances may justify departure from the rule that actual purchase is not necessary. In a case before the Calcutta High Court,[13] the seller did not supply anything because he wanted increase in price to which the buyer did not agree. The buyer, however, purchased some quantity from the seller at the enhanced price as a special case outside the contract. The rest of the contract was cancelled. The buyer had not purchased anything from the market. His claim for damages was not allowed. At least the market price should be discovered and produced before the court. Quantification of damages without it was not proper.

Award of interest on difference

Where because of the purchaser's breach, the supplier had to resell the goods elsewhere and became entitled to recover the difference, the court allowed future interest @ 20% p.a. from the date of the suit till the date of judgment and 6% p.a. from the date of judgment till realisation.[14]

Loss of profits is special loss

Thus, loss of profits which were to accrue upon resale cannot be recovered unless it is communicated to the other party that the goods are for resale upon a special contract. This is further borne out by the decision of the Supreme Court in *Karsandas H. Thacker* v *Saran Engineering Co Ltd.*[15]

> It was a contract to supply 200 tons of scrap iron. The buyer undertook to supply the same quantity to the Export Corporation, Calcutta. The seller failed to supply and in consequence the buyer could not keep his date with the Corporation. The Corporation recovered from him the difference between the contract price and the market price. The seller contended that he should not be held liable for anything because control price of iron scrap was still the same and he had no knowledge of the contract of resale to the Corporation.

The court found the facts of the case to be similar to illustration *(k)* according to which the seller has not to pay any compensation that the buyer may have to pay to his sub-buyers by reason of the breach unless he was made aware of the buyer's purpose at the time of the contract. RAGHUBAR DAYAL, J said:

> On account of non-delivery of scrap iron he (the buyer) could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. This means that he did not stand to pay a higher price than what he was to pay to the respondent (the seller) and therefore he could not have suffered any loss on account of the breach.... The actual loss which he suffered on account of the breach was the result of his contracting to sell 200 tons of scrap iron for export to the Export Corporation.

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12. *Maharashtra State Electricity Board* v *Sterlite Industries (India) Ltd*, AIR 2000 Bom 204: (2000) 2 Mh LJ 181.
13. *Usha Deltron Ltd* v *Nand Kishore Parasramka*, AIR 2001 Cal 137.
14. *Cotton Corporation of India Ltd* v *Algappa Cotton Mills*, AIR 2001 Bom 429.
15. AIR 1965 SC 1981. See also *Kwei Tek Chao* v *British Traders*, (1954) 1 All ER 779, 797 where DEVLIN LJ explains the difference when the sub-sale is within the contemplation of the parties. Other cases where there was notice of resale: *Thol* v *Henderson*, (1881) 8 QBD 457; *Zippel* v *Kapur & Co*, 139 IC 114 (1932): AIR 1932 Sikkim 9; *Kasler & Cohen* v *Slavonski*, (1928) 1 KB 78, chain of contracts.

As the seller did not know this contract, he could not have known of the likelihood of the loss actually suffered.[16]

Where a person was dispossessed of his leased premises prematurely, he was allowed to recover retrenchment compensation which he had to pay to labour and loss of profits calculated on the basis of figures provided by the plaintiff for the period he actually did business. The court said that that was the best indicator. The period for loss of business would be the unexpired period of the lease.[17] The court said[18] that there cannot be a direct and concrete evidence of loss of profits. Damages on account of loss of profit are in the nature of prospective damages and, therefore, necessarily contingent. It is now well established principle of law that the mere fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the liability to pay damages.[19]

Consequences of Delay in Transit

Consequences of delay in transit have been noted by the Supreme Court in some cases. A consignment of goods with the railways reached its destination after inordinate delay, caused by gross negligence, of seven months. The plaintiff's money remained blocked for the period. He was allowed to recover interest on the money by way of damages for the loss.[20] In another case of delay and damage, the railways have been held liable to the extent to which the value of the goods had diminished.[21] Where the goods are damaged by the railways the measure of damages

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16. *See* also *Modi Sugar Mills* v *Union of India*, 1984 Supp SCC 338: AIR 1984 SC 1248, where liability was imposed for not returning the containers in which the goods were sent. Some principles relating to measure of damages were restated by the Supreme Court in *Trojan & Co* v *Nagappa Chettiar*, 1953 SCR 789: AIR 1953 SC 235. Where no time for delivery of goods is specified, the measure would be prices on the date of refusal, *Ambalavana Chettiar* v *Express Newspapers Ltd*, (1968) 2 SCR 239: AIR 1968 SC 741. No action for damages is maintainable in respect of unlawful contracts. *Koteswar Vittal Kamath* v *K. Rangappa Baliga & Co*, (1969) 1 SCC 225: (1969) 3 SCR 40: AIR 1969 SC 504. Ascertainment according to the lowest market price and the contract price. *M.N. Gangappa* v *A.N. Sehgal & Co*, (1973) 3 SCC 406: AIR 1972 SC 696. The right to sue for damages does not give rise to a debt which is immediately due so as to entitle the plaintiff to a set-off liability to pay back the loan. *Mirza Javed Murtaza* v *UP Financial Corpn*, 235. As for the effect of inflation on damages see Duncan Wallace, *Assessment of Construction Cost Damages*, (1982) 98 LQR 406; State for extra work done under a contract even if no rate was fixed before the work was done. *State of UP* v *Hari Kishan*, 1983 All LJ 630. Acceptance of earnest money under protest does not put an end to the right of the injured party to recover damages for breach. *Mohd U. Usman* v *Union of India*, AIR 1984 Raj 156.

17. *Kishan Lal Kalra* v *NDMC*, AIR 2001 Delhi 402.

18. *Ibid* at p 409.

19. Citing *Chaplin* v *Hicks*, (1911) 2 KB 786; *Biggin* v *Permanite*, (1951) 1 KB 422, where DEVLIN J said that where price evidence is obtainable, the court naturally expects to have it, but where not, the court must do the best it can.

20. *Union of India* v *Steel Stock Holders' Syndicate, Poona*, (1976) 3 SCC 108: AIR 1976 SC 879.

21. *Union of India* v *B. Prahlad & Co*, AIR 1976 Del 236 that is to say, the market value of the goods minus their value in their damaged state; the plaintiff must do all that he reasonably can to mitigate his loss; if the damaged goods are still saleable though at a lower price, the measure of damages will be the market price of the goods minus what they would have fetched in their damaged state if the plaintiff had sold them. *Savani Transport P Ltd* v *Gangadhar Ghose*, AIR 1986 Cal 330, the court laid stress upon the fact that the salvage value of the goods cannot be ignored and that whatever be the difficulty the court cannot shrink from ascertaining the salvage value; *Dunn* v *Bucknall Bros*, (1902) 2 KB 614, 623 CA.

would be the market price at the time of damage and not the price at which the injured party purchased the goods.[22] Regard must also be had to the type of market and setback to price because of the taste and prejudices of a special customer class.[23] In a fire insurance contract, the damaged goods were sold by auction under due intimation to the insurer, who did not turn up, the court allowed the difference between the insured price and the amount realised.[24]

Meaning of market price

In almost all sales transactions which fail to go through the normal yardstick for working out the sum of money to which the aggrieved party is entitled is the difference between the contract and market prices.[25] This rule presupposes the existence of a market and the possibility of ascertaining the price of the goods in that market. Both these concepts were the subject-matter of some explanation in a case where the buyer refused to accept the goods.[26] The court dealt with the question in the following way:

> In assessing damages for failure to perform a contract for the purchase of goods the measure of damages payable by the defaulting buyer is the difference between the contract price and the current or market price at the date of breach based on a hypothetical sale of the particular amount of the goods in question in the available market but disregarding any characteristics of the seller which might have led to a lower price being obtained. In determining whether there is an 'available market' for the goods in question, if the seller actually offered the goods for sale there is no available market unless there is one actual buyer on that day at a fair price. If, on the other hand, there is only a notional or hypothetical sale

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22. *Union of India* v *West Punjab Factories*, (1966) 1 SCR 580: AIR 1966 SC 395; *Union of India* v *Jolly Steel Industries*, 1980 Supp SCC 436: AIR 1980 SC 1346. See also *M. Lachia Setty* v *Coffee Board*, (1980) 4 SCC 636, where the auction purchaser refused to take the goods and the Coffee Board had to reauction them, the latter allowed to recover the shortfall from the defaulter. *Union of India* v *K.H. Rao*, (1977) 1 SCC 583, failure to supply onions; Government allowed to recover the difference at which they purchased onions elsewhere. *M. S. Desai & Co* v *Hindustan Petroleum Co Ltd*, AIR 1987 Guj 19, where it was held that a premature termination of a privileged business, such as the privilege of distributing petroleum products, by the grantor, a Govt. Undertaking in this case, can be challenged by a writ petition as it involves non-contractual questions also and compensation can be awarded in the same petition.

23. *Madeshwar Cargo Movers* v *Hindustan Cocoa Products Ltd*, (1993) 2 Bom CR 154, sensitive goods like "five-star", "double decker" were under transport.

24. *Harshad Coop Mktg Socy Ltd* v *United India Fire and Gen Ins Co Ltd*, AIR 1992 Bom 341. In a shipment of bulk goods, the quantity of cargo was not known to the carrier. The cargo was discharged and taken away by the consignee. He found no damage to goods. His subsequent claim for short delivery was not allowed. Chances of loss during standardisation of bulk cargo could not be ruled out. *Sejndia Steam Navigation Co* v *Union of India*, AIR 1998 Ker 250.

25. *Hajee Ismail & Sons* v *Wilson & Co*, (1918) 41 Mad 709; *Errol Mackey* v *Kameshwar*, (1932) 59 IA 398: 34 Bom LR 1596; *Vishwanath* v *Amarlal*, AIR 1957 MB 190. Where no market existed to enable the buyer to effect his purchase of the coal of the contract quality, the defaulting seller's rates with other buyers from him were taken into account for guidance. *Jagmohandas* v *Nusserwanji*, (1902) 26 Bom 744.

26. *Shearson Lehman Hutton Inc* v *Maclaine Watson & Co Ltd*, (1990) 3 All ER 723 QBD. (Commercial Court) *See* also *A P Paper Mills Ltd* v *Principal Secretary*, (1997) 3 Andh LT 649 DB, buyer refused supply of hardwood, sale by auction at his risk, loss recoverable, but there was no justification in offering him further after his first refusal, no liability on such offering.

there is no available market unless on the relevant day there were in the market sufficient traders potentially in touch with each other to evidence a market in which the seller could if he had wished have sold the goods. Furthermore, the market price on a hypothetical sale is the fair market price for the total quantity of the goods if they had to be sold on the relevant day but taking into account the price which might be negotiated within a few days with other potential buyers who were not part of the market on that day only because of difficulties in communication. It followed that the plaintiffs were entitled to damages based on the fair market or current price on the date of the breach for 7,755 tonnes of standard grade tin but that price in turn would be based on both the price which would have been obtained by a sale of all the tin on 12 March 1986 and the price which would have been obtained by sales negotiated over a short period before or after that date.[27]

Escalation costs

A works contract was in writing. Delay in completing the works was due to the contractor's fault. It seemed that he was delaying things in order to take advantage of escalation of prices. Full payment was already made to him according to the originally agreed rates. A *quantum meruit* suit for recovering escalated costs was held to be not maintainable.[28]

Agreement to provide finance

An arrangement to provide funds for an approved project is not a typical contract; it is only a facility. Where, after releasing some instalments, the lending institution refuses to go further, the borrower cannot compel it, nor hold it liable in damages for the loss of his expectations, nor claim a set-off against its demand for interest on the money already provided, his right, if any, to damages.[29]

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27. The court followed: *Garnat Grain Co Inc* v *HMF Faure & Fairclough Ltd* and *Bunge Corpn*, (1967) 2 All ER 353: (1968) AC 1130: (1967) 3 WLR 143, HL. See further *Rajasthan Rajya Sahkari Kraya Vikraya Sangh Ltd, Jaipur*, (1988) 2 Raj LR 962 where it was observed: It is not necessary to prove actual loss. Anticipated loss of profit can be determined by the court while awarding compensation. What is necessary is that the plaintiff should establish what was the contractual rate of purchase and what was the rate of article on the date on which it was to be supplied. The difference between the two is a loss to the purchaser, if it is not supplied by the seller to the purchaser. This is so because the buyer cannot be allowed to be put in a better position than he would have been if the contract had been performed. *Wertheim* v *Chicoutimi Pulp Co*, (1911) AC 301. In this case goods were delivered by the seller late when they were worth Rs 50 per ton in the market as against the contract price of Rs 80, but the buyer got Rs 70 per ton on resale. He was allowed Rs 10 per ton by way of his loss. *Gouri Datt* v *Nanik Ram*, (1916) 14 All LJ 597, where no time for delivery was fixed and the buyer having given notice fixing the time, the time so fixed was the day on which prices were to be compared. *Engell* v *Fitch*, (1869) LR 4 QB 659 Exch. on deliberate refusal to sell land, the value of resale by the seller was taken as the evidence of market value.

28. *Gujarat Housing Board* v *Harilal Jethalal*, AIR 2001 Guj 259.

29. *Industrial Finance Corpn of India* v *Sehgal Papers Ltd*, AIR 1986 P&H 21. This is so because the liability to pay damages is not a debt whether the claim is for liquidated or unliquidated damages. Debt is created by a decree. See *Textile Machinery Corpn Ltd* v *Kichcha Sugar Co*, (1989) 2 Cal LT 101, the court relied on *Union of India* v *Rallia Ram*, AIR 1963 SC 1685; *Kesoram Industries & Cotton Mills Ltd* v *EWT*, AIR 1966 SC 1370; *Union of India* v *Raman Iron Foundry*, (1974) 2 SCC 231: AIR 1974 SC 1265. *Minhas Steels Ltd* v *Punjab & Sind Bank Ltd*, (1997) 3 Bom CR 522, writ against bank for releasing the promised working capital, held it is not the court's function to act as the super board or

Commercial parties are free to vary their contracting terms and to withdraw credit facilities without constituting duress. There is no economic duress where there are an arm's length commercial dealings between two companies having equality of bargaining power. This principle was laid down in a case in which facts were:

> A company bought cigarettes in bulk from a person who happened by a mistake to deliver them to a wrong address. Before they could be collected from that place, they were stolen. The supplier invoiced the buyer for the price thinking that the property in the goods had passed to the buyer and threatened to cut off the buyer's credit facilities if he did not pay. The buyer paid to secure his credit facilities and brought an action for repayment saying that the payment was under pressure amounting to economic duress. This was not allowed.[30]

Compensation for liability to third party before payment

Where, on account of the seller's default, the buyer was not able to keep his commitment under a sub-sale and became liable to compensate the third party, the court said that there is no rule of law that a liability without payment does not constitute a recoverable loss. Where a seller of goods breaches his contract with the buyer so as to result in the buyer being liable to a third party to whom he had agreed to resell the goods, the buyer has a claim for substantial damages against the seller prior to his discharging the liability to the third party by payment. In this case the first buyer had become impecunious and, therefore, unable to pay. His claim against the seller was assigned to the sub-buyer who had brought the claim in the right of the buyer. The court held that the liability to the third party was enforceable even before it was discharged.[31]

MEASURE OF DAMAGES

Once the extent of recoverable loss is determined, it has to be evaluated in terms of money. This is the problem of measure of damages and is governed by some fundamental principles.

Claim for damages is not debt

A claim for damages arising out of breach of contract, whether for general or liquidated damages, remains only a claim till its adjudication by the court and becomes a debt only after the court awards it. Till then and on the basis of the claim alone, the claimant is not entitled to present a winding up petition of the defendant company on the ground of its inability to pay debts.[32]

Damages are compensatory, not penal

In the words of ASQUITH J: "It is well-settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights have been observed."[33] "The primary aim or principle of the law of damages for a breach of contract is to place the plaintiff in the

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appellate authority over the judgment of the bank. The court can interfere only if the decision is mala fide or arbitrary.

30. *CTN Cash and Cary* v *Gallaher*, (1994) 4 All ER 714 CA.
31. *Total Liban S.A.* v *Virtol Energy S.A.*, (2000) 1 All ER 267 (QBD).
32. *Greenhills Exports P Ltd* v *Coffee Board*, (2001) 4 Kar LJ 158 (DB).
33. In *Victoria Laundry (Windsor) Ltd* v *Newman Industries Ltd*, (1949) 2 KB 528 CA. Adopted by the Andhra Pradesh High Court in *Dhulipudi Namayya* v *Union of India*, AIR 1958 AP 533.

same position he would be in if the contract had been fulfilled, or to place the plaintiff in the position he would have occupied had the breach of the contract not occurred. When this is accomplished, the primary aim or principle of the law of damages has been fulfilled."[34] In a case involving the construction of a swimming-pool where the depth of the pool happened to be less than what was specified, the pool being otherwise useful, the court allowed the difference in value of the pool as provided and its value as it should have been provided. The court did not allow the cost of setting right the pool because that would have given the recipient windfall profits which are impermissible because the award of damages is to compensate the claimant and not to punish the payer.[35]

Robinson v *Harman*[36] is an apt illustration. The defendant, having agreed to grant a lease of a certain property to the plaintiff, refused to do so. The court allowed the plaintiff by way of damages the expenses incurred by him on the preliminary legal work and also for the profits which he would have earned if the lease had been granted to him. PARKE B stated the principle thus:

> What damages is the plaintiff entitled to recover? The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Thus, damages are given by way of compensation for the loss suffered by the plaintiff and not for the purpose of punishing the defendant for the breach.[37] Motive for and the manner of breach are not taken into account because generally "punitive damages are not recoverable for breach of contract".[38]

Inconvenience caused by breach

But the inconvenience caused by the breach may be taken into account. Thus, for example, in *Hobbs* v *London & South-Western Rly Co*[39], where a train pulled its passengers to a wrong direction and consequently the plaintiff and his wife, finding no other conveyance, nor a place to stay, had to walk home at midnight, the jury allowed £ 8 as the damages for the inconvenience suffered by the

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34. *See* HAWTHORNE in *Friedman Iron & Supply Co* v *J.B. Beaird & Co*, Supreme Court of Louisiana, (1952) 63 SO 2d, 144; Collected from Shepherd and Wellington, CONTRACT AND CONTRACT REMEDIES, p. 912 (1957), *Murlidhar Chiranjilal* v *Harishchandra*, (1962) 1 SCR 653: AIR 1962 SC 366.

35. *Ruxley Electronics and Construction Ltd* v *Forsyth*, (1995) 3 WLR 118 at pp. 124-125 HL. The court was of the view that the owner would be unjustly enriched if he were allowed the cost of building a new pool and were nevertheless allowed to retain the existing one. *Thakorlal V. Patel (Dr)* v *Syed Badruddin (Lt-Col)*, (1993) 1 Guj LR 28, motive and manner of breach irrelevant, defendant is not to be punished.

36. (1848) 18 LJ Ex 202.

37. For example, delay in payment of money will entail interest on remittances but other consequences are not taken into account. *Graham* v *Campbell*, (1878) 7 Ch Div 494.

38. THE AMERICAN RESTATEMENT OF THE LAW OF CONTRACTS, Section 342 entitled *Punitive Damages*. *S. Sukumaran Nair* v *P. Narayanan*, (1996) 2 Mad LJ 184, punitive damages may be allowed in special cases like breach of promise of marriage as in this case. Exemplary damages were allowed for loss of reputation and injured feelings. The future of the frustrated woman would be bleak, chances of marriage remote. *Suresh Babu Nath* v *Hargovind Batham*, AIR 1995 MP 82, compensation for breach of promise of marriage and for fraud for duping into sex on promise of marriage and resulting pregnancy.

39. (1875) LR 10 QB 111. *Hamlin* v *Great Northern Ry*, 156 ER 1261.

plaintiffs in being obliged to walk and £ 20 in respect of the wife's illness caused by catching cold. On appeal, the court of Queen's Bench held that the £ 8 was properly awarded but not £ 20.

> The inconvenience of walking back must be taken to have been within the reasonable contemplation of the parties. But the wife's cold was not the necessary or even the probable consequence of the breach.

But in the subsequent case of *McMahon* v *Fields*[40] the above decision was criticised and damages were allowed when the plaintiff's horses were turned out of the defendant's stable in breach of contract and they caught cold before an alternative accommodation could be found for them.

Loss caused by misrepresentation

The price at which a thing is purchased and its difference with the real value when misrepresentation about it is discovered, is the yardstick for compensation. A horse was purchased described as fit for races. But it turned out to be of different breed. That was discovered after a long process of trial and error and after discovery its market value was much less. It was held that where an article purchased as a result of misrepresentation could have been resold immediately after the sale for the price paid but by the time the misrepresentation was discovered its value had fallen by reason of a defect in it which had then become apparent, the appropriate measure of damages would be the difference between the purchase price and its value at the time when misrepresentation is discovered and not the difference between the purchase price and its actual value at the time of purchase.[41] The court referred to the decision in *Doyle* v *Olby (Ironmongers) Ltd*[42] which deals with cases in which a business or an article is not purchased for immediate resale. The court cited the following dictum of WINN LJ:

> It appears to me that in a case where there has been a breach of warranty of authority, and still more clearly where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting point for any court called on to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence. It will be too remote not necessarily because it was not contemplated by the representor but in any case where the person deceived has not himself behaved with reasonable prudence, reasonable common sense or can in any true sense be said to have been the author of his own misfortune. The damage that he seeks to recover must have flowed directly from the fraud perpetrated on him.

WINN LJ then assessed the damages in that case by reference to precisely what the plaintiff had done after acquiring the business including selling the business at some

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40. (1881) 7 QBD 591 CA. "The assessment of damages cannot be based on the economic policy of the country from where the goods are to be imported." *Naihati Jute Mills* v *Khyaliram*, AIR 1968 SC 522. Quoted from I.C. Saxena, *Law of Contract*, ANNUAL SURVEY OF INDIAN LAW (1967-68). An arbitrator is also bound by the provisions of Section 73. *Bungo Steel Furniture* v *Union of India*, AIR 1967 SC 378.
41. *Naughton* v *O'Callaghan*, (1990) 3 All ER QBD 191.
42. (1969) 2 All ER 119: (1969) 2 QB 158.

later time and giving credit for that sale price. It is perhaps also useful to refer in this connection to *Johnson* v *Agnew*[43] in which Lord WILBERFORCE said:

> 'The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in Section 51 of the Sale of Goods Act 1893. [S. 59 of the Indian Sale of Goods Act, 1930] But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances. In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle* v *Earl Vane*[44] the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman* v *Haynes*[45] at a reasonable time after the last request of the defendants (the buyers) to withhold delivery. In *Radford* v *De Froberville*[46] where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.'

A person owned two neighbouring hairdressing salons. He sold one of them. He deliberately and falsely told the buyer before the sale that he would not work at the other salon except in cases of emergency. This statement was particularly important since it meant that the clientele would not follow him to the neighbouring business. After the sale was completed, the buyer discovered that the seller was working full-time at his other neighbouring business. An award of £10,000 was allowed to the buyer for the consequential loss of business. BELDAM LJ observed:[47]

> "If in fact the plaintiffs lost the profits which they could reasonably have expected from running a business in the area of a kind similar to the business in this case, I can see no reason why they do not fall within the words of Lord ATKIN in *Clark* v *Urquahart*,[48] "actual damage directly following from the fraudulent inducement."

The court noted the development in this field to this effect as shown by a number of decisions which make it clear that the tortious measure of damages is the true one.[49]

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43. (1979) 1 All ER 883; (1980) AC 367.
44. 1867 LR 2 QB 275; *affd.* 1868 LR 3 QB 272.
45. 1875 LR 10 CP 598.
46. (1978) 1 All ER 33; (1977) 1 WLR 1262.
47. *East* v *Maurer*, (1991) 1 WLR 461 CA.
48. (1930) AC 28.
49. One such decision was *Chesnean* v *Interhome Ltd.* (1983) 114 NLJ 341.

Incidence of taxation

Since the principle is that of compensation, and no more than compensation, the benefits, if any, that the plaintiff has received against the loss suffered are to be taken into account. For example, where a dismissed employee receives unemployment benefit, his compensation is reduced by that amount. If he is given compensation for loss of prospective earnings, the amount of income tax which he would have to pay on the amount if received as earnings would go to reduce the compensation. This principle was laid down by the House of Lords in *British Transport Corporation* v *Gourley*[50] and was followed by the Court of Appeal in *Parsons* v *B.N.M. Laboratories Ltd*[51] where HARMAN LJ stated the effect of the House of Lords' decision in these words:

> The case (*Gourley* case) decides that in an action whether in tort for injuries arising from negligence or in contract for wrongful dismissal where the loss of the plaintiff consists wholly or in part in a loss of earnings, and where the sum to be awarded in damages will not suffer deduction of tax in his hands, then in ascertaining the plaintiff's loss his tax liability, that is to say, the sum which he would have had to pay in income tax including sur tax in acquiring the lost earnings, must be deducted from his loss in assessing the damage.... Unemployment insurance is a sum receivable by contract made by the employed man and his employer each of whom contributes to the State on the footing that if and when the servant is unemployed the State will make good part of his earnings to him. I do not think that such a payment is truly analogous to insurance money, as in the leading case of *Bradburn* v *Great Westerne Rail Co*[52] where there was a purely voluntary contract made by the plaintiff. This is a contribution which he is bound to make with the very object of mitigating the damage which inability to work will do him. It is just as if his employer continued to pay part of his wages. The loss he suffers is *pro tanto* diminished and therefore cannot be charged against the wrongdoer.[53]

Nominal damages

Where the plaintiff suffers no loss the court may still award him nominal damages in recognition of his right. But this is in the discretion of the court. The court may altogether refuse to award any damages or may award even substantial damages. It has been pointed out by the Delhi High Court, following some earlier High Court decisions,[54] that Section 73 does not give any cause of action unless and until damage is actually suffered. The case before the court was *Union of India* v *Tribhuwan Das Lalji Patel*.[55]

> A contract for the supply of sleepers to the railway administration contained a number of clauses including this that irrespective of whether the Government suffered any loss or not on account of the contractor's failure to

50. (1955) 3 All ER 796: (1956) AC 185.
51. (1963) 2 All ER 658: (1964) 1 QB 1395.
52. (1874) LR 10 Ex 1.
53. Damages allowed in an arbitration award reflect business loss not speculation loss. *CIT* v *Shantilal*, (1983) 3 SCC 561: AIR 1983 SC 952.
54. *Sitaram Bindraban* v *Chiranjilal Brijlal*, AIR 1958 Bom 291; *Jado Prasad* v *Jamuna Prasad*, AIR 1946 Pat 263.
55. AIR 1971 Del 120. Citing *Vishwanath* v *Amarlal*, AIR 1957 MB 190.

supply, the Government was entitled to damages. The contractor failed to supply, but the railways did not suffer any loss. Even so an action for damages was instituted against the contractor.

It was argued on the strength of some High Court decisions[56] and illustration *(a)* to Section 73 that it is not necessary for the aggrieved party to prove that he purchased the goods from an alternative source and suffered a loss; he is entitled to the difference in the contract and market prices in any case. Reliance was also placed upon the Privy Council decision in *Errol Mackay* v *Kameshwar Singh*[57] where it was observed that the difference, if the market price exceeds the contract price, is the sole damage in general recoverable and a contract of resale or repurchase is immaterial. PRAKASH NARAIN J did not agree with this contention. He took the Privy Council decision to be no authority for the proposition that irrespective of whether there was any loss, damages must still be paid and that the decision is only in the context of quantum of damages. Thus, he refused to countenance the view that compensation can be awarded when there has been no loss or damage. "If the contrary view was to be taken", he said, "the provision of Section 73 will become nugatory and a party would be penalised, though the other party has suffered no loss."

Even so the category of nominal damages cannot be ruled out. Thus, where a Government contract for building roads was terminated before the expiry of the notice period as prescribed in the contract in circumstances which did not entitle the contractor to recover loss of profit, he was allowed nominal damages.[58]

Where a seller of land suffered no loss from the buyer's refusal to perform, and, on the contrary, made a huge windfall profit by selling the land to another person, he was not permitted to forfeit the buyer's advance and this in spite of the fact that the land remained vacant till the new buyer was found.[59] A piece of land was sold. As a part of the sale agreement, the buyer covenanted to build only 72 houses on the land. In breach of the agreement, the buyer built 77 houses. The seller sued him for breach of the covenant. The question was what should be the correct measure of damages where there is the following set of circumstances: (*a*) There has been a deliberate breach of contract, (*b*) the party in breach has made a profit from that breach, and (*c*) the innocent party is in financial terms in the same position as if the contract had been fully performed.[60] STYN LJ proceeded as follows stating and applying the first principles:

> "An award of compensation for breach of contract serves to protect three separate interests. The starting principle is that the aggrieved party ought to be compensated for loss of his positive or expectation interests. In other words, the object is to put the aggrieved party in the same financial position as if the contract had been fully performed. But the law also protects the negative

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56. The Learned Judge declared his agreement with the above cited Madhya Bharat case and the decision of the Madras High Court in *Ismail Sait & Sons* v *Wilson & Co*, AIR 1919 Mad 1053.
57. AIR 1932 PC 196.
58. *State of MP* v *Recondo Ltd*, 1989 MPLJ 822. *Electronic Enterprises* v *Union of India*, AIR 2000 Delhi 55, the Government used the goods supplied, no damages claimed or proved for alleged late deliveries. The Government was not allowed to withhold payment.
59. *Mohanlal* v *Dayaldas & Co*, AIR 1976 Raj 68.
60. *Surrey County Council* v *Bredero Homes Ltd*, (1993) 1 WLR 1361 CA.

interest of the aggrieved party. If the aggrieved party is unable to establish the value of a loss of bargain he may seek compensation in respect of his reliance losses. The object of such an award is to compensate the aggrieved party for expenses incurred and losses suffered in reliance on the contract. These two complementary principles share one feature. Both are pure compensatory principles. If the aggrieved party has suffered no loss he is not entitled to be compensated by invoking these principles. The application of these principles to the present case would result in an award of nominal damages only.

There is, however, a third principle which protects the aggrieved party's restitutionary interest. The object of such an award is not to compensate the plaintiff for a loss, but to deprive the defendant of the benefit he gained by the breach of contract. The classic illustration is a claim for the return of goods sold and delivered where the buyer has repudiated his obligation to pay the price. It is not traditional to describe a claim for restitution following a breach of contract as damages. What matters is that a coherent law of obligations must inevitably extend its protection to cover certain restitutionary interests. How far that protection should extend is the essence of the problem before us."[61]

The object of the award in this case was not to compensate the plaintiff for financial injury but to deprive the defendant of an unjustly acquired gain. As to this his Lordship said:

"The introduction of restitutionary remedies to deprive cynical contract breakers of the fruits of their breaches of contract will lead to greater uncertainty in the assessment of damages in commercial and consumer disputes. It is of paramount importance that the way in which disputes are likely to be resolved by the courts must be readily predictable. Given the premise that the aggrieved party has suffered no loss, is such a dramatic extension of restitutionary remedies justified in order to confer a windfall in each case on the aggrieved party? I think not. In any event such a widespread availability of restitutionary remedies will have a tendency to discourage economic activity in relevant situations. In a range of cases, such liability would fall on the underwriters who have insured relevant liability risks. Inevitably the underwriters would have to be compensated for the new species of potential claims. Insurance premiums would have to go up. That, too, is a consequence which mitigates against the proposed extension. The recognition of the proposed extension will in my view not serve the public interest. It is sound policy to guard against extending the protection of the law of obligations too widely. The present case involves no breach of fiduciary obligations. It is a case of breach of contract. The principles governing expectation or reliance losses cannot be invoked. Given the fact of the breach of contract the only question is whether restitution is an appropriate remedy for this wrong. The case does not involve any invasion of the plaintiff's property interests even in the broadest sense of that word. I would therefore rule that no restitutionary remedy is available and there is certainly no other remedy available."

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61. Citing MAC GREGOR ON DAMAGES and Professor PBH Birke, CIVIL WRONGS, A NEW WORLD (Butterworth Lectures 1990-91).

In such a case, however, the court may award nominal damages. The decision of the Court of Appeal in *Charter* v *Sullivan*[62] is an apt illustration.

> The defendant, having contracted to buy a Hillman car from a car dealer, ultimately refused to buy. Within a week the car was sold to another customer. Indeed, the dealer was able to sell as many cars as he wanted and lost nothing on account of the defendant's breach. Even so he wanted to recover the loss of his profit.

The court held that he was entitled only to nominal damages and 40 shillings were allowed.

As against it, in another case[63] on account of the customer's breach in not lifting the car in terms of his agreement, the dealer had to return the car to the manufacturer. He was allowed to recover the profit which he would have made on sale of the car to the defaulting customer.

Pre-contract expenditure

Pre-contract expenditure may be recovered as damages if it was within the contemplation of the parties. The Court of Appeal laid down this principle in *Anglia Television Ltd* v *Reed*.[64] Here, a television artiste who having been engaged as a leading actor for a television film, repudiated the contract. The producer was unable to find a substitute and, therefore, had to abandon the project. The loss of profit was incapable of being estimated. The court allowed him as damages the money spent by him in engaging a director, a designer, etc., as this kind of expenditure was within the contemplation of the parties. Lord DENNING MR explained the principle thus:

> The plaintiff in such a case as this has to make election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits—or if he cannot prove what his profits would have been—he can claim in the alternative the expenditure which has been thrown away, that is, wasted by reason of the breach. That is shown by *Cullinane* v *British Rema Manufacturing Co Ltd.*[65]
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> If the plaintiff claims the wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also the expenditure incurred before the contract, provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken....He (the party, committing the breach) must pay damages for all the expenditure so wasted and thrown away. This view is supported by the recent decision of BRIGHTMAN LJ in *Lloyd* v *Stanbury*.[66] There was a contract for the sale of land. In anticipation of the contract—and before it was concluded—the purchaser went to such expense in moving a caravan to the site and in getting his furniture there. The seller afterwards entered into a contract to sell the land to the purchaser, but afterwards broke his contract. The land had not increased in value, so the purchaser could not

62. (1957) 1 All ER 809: (1957) 2 QB 117, CA.
63. *W.L. Thompson Ltd* v *Robinson (Gunmakers) Ltd*, (1955) 1 All ER 809: (1955) Ch 177.
64. (1971) 3 All ER 690.
65. (1954) 1 QB 292: (1953) 2 All ER 1257, CA.
66. (1971) 2 All ER 267: (1971) 1 WLR 535.

claim for any loss of profits. But BRIGHTMAN J held that he could recover the cost of moving the caravan and furniture, because it was "within the contemplation of the parties when the contract was signed". That decision is in accord with correct principle, namely, that wasted expenditure can be recovered when it was wasted by reason of the defendant's breach of contract. It is true that, if the defendant had never entered into the contract, he would not be liable, and the expenditure would have been incurred by the plaintiff without redress; but, the defendant having made his contract and broken it, it does not lie in his mouth to say he is not liable, when it was because of his breach that the expenditure has been wasted.

Competitive tendering involves considerable expenditure of time and money. The tenderers do not get paid for it. Where a party tendered for a construction work, and before anything, was given to believe that the work would be allotted to them. They were encouraged to do further work in estimating and tendering, but ultimately the contract was awarded to someone else. For such further work the party was allowed to recover payment.[67] Where a quotation for a residential development was accepted "subject to contract" but no contract could follow because in the intervening period land prices crashed and the project had to be abandoned, it was held that the bidder's expenditure in payment of fees to professional people for preparing plans of development was not recoverable. They had incurred it voluntarily and not on encouragement. The court said:[68]

> "Each party to such negotiations must be taken to know that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk in the sense that he will have no recompense for those costs if no contract results."

Mental pain and suffering (*Non-Pecuniary Loss*)

In ordinary cases damages for mental pain and suffering caused by the breach are not allowed.[69] It is not appropriate to award damages for anguish and vexation caused by breach of contract when the contract is an ordinary commercial one.[70] But they may be allowed in special cases. According to the American RESTATEMENT such damages may be allowed where "the breach was wanton or reckless and caused bodily harm" and where the defendant had reason to know that the breach would cause mental suffering.[71] An illustration is found in a case before the Supreme Court of Colorado, U.S.[72]

> The defendant, a banking corporation, agreed to loan plaintiff money for a trip to California by crediting his account with such sums as he might need after

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67. *William Lacey (Hounslow) Ltd* v *Davis*, (1957) 2 All ER 712. Expenditure was allowed to be recovered under the doctrine of restitution as explained in *Marston Construction Co Ltd* v *Kigas Ltd*, (1989) 15 Con LR 116.
68. *Regalian Properties plc* v *London Dockland Development Corpn*, (1995) 1 All ER 1005, at p. 1024.
69. *Kemp* v *Sobers*, (1851) 1 Sim (NS) 517, 520; *Withers* v *General Theatre Corpn Ltd*, (1933) 2 KB 536; *Hamlin* v *Great Northern Ry Co*, 156 ER 1261.
70. *Hayes* v *Dodd*, The Independent, July 13, 1988 CA; *Bliss* v *South East Thames Regional Health Authority*, 1987 CLY 1304; *Perry* v *Phillips*, 1982 CLY 2164.
71. Section 341, of the Restatement.
72. *Westesen* v *Olathe State Bank*, (1925) 78 Colo 217. *See* Shephered and Wellington, CONTRACTS AND CONTRACT REMEDIES, (1957), p. 856.

reaching his destination. The plaintiff reached California, but the defendant refused to give him the promised credit.

The Court allowed damages for humiliation and mental suffering. The banker could have foreseen that the plaintiff, having gone away from home and among strangers on the basis of the promise, would naturally suffer mental anguish if his cheque was not honoured.

Three cases listed by the House of Lords

The House of Lords in *Addis* v *Gramophone Co Ltd*[73] listed three situations in which mental pain and suffering can be taken into account:

> There are three well-known exceptions to the general rule..., namely, actions against a banker for refusing to pay a customer's cheque when he has in his hands funds of the customer, to meet it; actions for breach of promise of marriage (now abolished in England), and actions like that in *Flurean* v *Thornhill*[74] where the vendor of real estate, fails to make title.

Lord ATKINSON then added he knew of none other and that any tendency to create a fourth exception should be checked rather than stimulated. His Lordship warned that application of tort principles to contract would lead to confusion, uncertainty and anomalies and occasionally to injustice and make the law a still more 'lawless science' that it is said to be. Suppose, for example, that a debtor refused to pay his creditor, should the damages be reduced if the debtor is helpless and apologetic and increased if the refusal is from a malicious desire to injure the creditor? His Lordship expressed the opinion that these matters should not play any part in the law of contract where the principle is that the aggrieved party "is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more". The facts of the case were:

> The plaintiff was employed by the defendant company at a certain salary and commission on trade done. He could be dismissed by six months' notice. He was given six months' notice and at the same time another person was appointed to his place, thus preventing him from acting as manager even for the notice period and earning his commission.

The House of Lords rejected the claim for damages for the humiliating manner of dismissal, but allowed damages for the commission and salary which he had lost. Lord ATKINSON explained the principles thus:

> The damages the plaintiff sustained by his illegal dismissal were: (1) the wages for the period of six months...; (2) the profits on commission which would in all probability have been earned by him; and possibly (3) damages in respect of time which might reasonably elapse before he could obtain other employment.

His Lordship then referred to the sum of £ 600 which was awarded to him not in respect of these heads of damage, but in respect of the harsh and humiliating way in which he was dismissed, including the pain he experienced by reason of the

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73. (1909) AC 488: 78 LJ KB 1122: 1010 LT 466. Followed in *Haron Bin Mundir* v *Singapore Amateur Atheletic Assn.*, (1992) Current LJ 284 High Court Singapore so as to hold that in business matters damages for emotional loss are not allowed.
74. (1776) 2 WB 1078.

imputation upon him conveyed by the manner of his dismissal. This kind of compensation was accordingly not allowed.

The reason for this conservative approach and reason why it would have to be diluted in the modern circumstances of life appears from the following statement.

> "In an age where stress has, generally speaking, clearly increased and has become more of a reality in the perception of people generally, it is, perhaps, not surprising that there has been increasing dissatisfaction with this general approach. However, it is also clear that the courts have to be vigilant to guard against inflated and (more importantly) bogus claims, lest the release of the floodgates sweep away all semblance of reason, common sense and justice."[75]

This line of reasoning was approved by the House of Lords in *Johnson* v *Unisys Ltd*[76] Here also their Lordships did not allow damages for unfair dismissal as a special count of liability under the head psychological injury caused by the manner of dismissal. The claim was for summary dismissal after an irregularity. Their Lordships observed by a majority that there is no right of action at common law to recover financial losses arising from unfair manner of dismissal. Any other conclusion would be contrary to the statutory system for dealing with unfair dismissals. The Parliament in creating the new system under the Employment Rights Act, 1996 (English) had not left any scope for contractual damages where the power of dismissal was not exercised in good faith or faiRly The Parliament has established an entirely new system outside the ordinary courts with tribunals staffed by a majority of lay members applying new statutory concepts and offering statutory remedies. Many of the new rules such as the limit on the amount of the statutory award, are not based upon any general principles which the courts used to apply.

Mental Distress caused by Negligent Survey Report or Advice

The same principle was followed where mental distress was caused by a negligent survey report as a result of which a house was purchased at a price higher than it was worth and considerable time and money had to be spent on making it habitable. A sum of £ 8000 (being £ 4000 to each plaintiff) was awarded at the trial, but the Court of Appeal held that damages for breach of a normal contract of survey are only recoverable for distress caused by physical consequences of the breach and not for mental distress not caused by physical discomfort or inconvenience resulting from the breach and that accordingly the plaintiffs were not entitled to damages for distress and inconvenience but instead they would each be awarded damages of £ 750 for physical discomfort.[77]

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75. Andrew Phang, *Subjectivity, Objectivity and Policy—Contractual Damages in the House of Lords*, (1996) JBL 362.

76. (2001) 2 All ER 801 (HL). For another case in which damages for humiliating manner of dismissal were not allowed see *Johnson* v *Unisys Ltd*, (1999) 1 All ER 854 (CA), compensation awarded by the industrial court was supposed to cover that aspect also.

77. *Watts* v *Morrow*, (1991) 4 All ER 937 Ch. Following *Perry* v *Sidney Phillips & Son (a firm)*, (1982) 3 All ER 705; (1982) 1 WLR 1297 where the principle of modest compensation in such cases was adopted; *Hayes* v *James & Charles Dodd (a firm)*, (1990) 2 All ER 815, 826 agreeing with the remark in *Bliss* v *South East Thames Regional Health Authority*, (1987) ICR 700, 718 that damages of this kind are only recoverable where the subject-matter of the contract or duty in tort is to provide peace of mind and freedom from distress. The other cases in which awards were modified and adjusted for inflation since the date of award:

In *Hayes* v *Dodd*,[78] the court was of the view that the law on this point would seem to be in some doubt, but felt that, if the law needs clarification, it may be provided by the House of Lords or by the Law Commission. Damages awarded for negligence or want of skill, whether against professional men or anyone else, must provide fair compensation, but no more than that. The court believed that in one or more American States damages are awarded for wrongfully defending an action instead of admitting it, but felt that there was no such remedy in England. In *Perry* v *Sidney Phillips & Sons (a firm)*[79] damages were awarded for the distress, worry, inconvenience and trouble which the plaintiff had suffered while living in the house he bought, owing to the defects which his surveyor had overlooked. Lord DENNING MR considered that these consequences were reasonably foreseeable. KERR, LJ stated a narrower test:[80]

> So far as the question of damages for vexation and inconvenience is concerned, it should be noted that the deputy judge awarded these not for the tension or frustration of a person who is involved in a legal dispute in which the other party refuses to meet its liabilities. If he had done so, it would have been wrong, because such aggravation is experienced by almost all litigants. He awarded these damages because of the physical consequences of the breach, which were all foreseeable at the time. The fact that in such cases damages under this head may be recoverable, if they have been suffered but not otherwise, is supported by the decision of this court in *Hutchinson* v *Harris*.[81]

Applying these principles to the case of *Hayes* v *Dodd*[82] STAUGHTON LJ said:[83]

> I am not convinced that it is enough to ask whether mental distress was reasonably foreseeable as a consequence, or even whether it should reasonably have been contemplated as not unlikely to result from a breach of contract. It seems to me that damages for mental distress in contract are, as a matter of policy, limited to certain classes of case. I would broadly follow the classification provided by DILLON LJ in *Bliss* v *South East Thames Regional Health Authority*:[84]
>
> '... where the contract which has been broken was itself a contract to provide peace of mind or freedom from distress ....'
>
> It may be that the class is somewhat wider than that. But it should not, in my judgment, include any case where the object of the contract was not comfort or pleasure, or the relief of discomfort, but simply carrying on a commercial activity with a view to profit. So I would disallow the item of damages for anguish and vexation.

Roberts v *Hamson & Co (a firm)*, (1989) 2 All ER 504; (1990) 1 WLR 94; *Cross* v *Martin & Mortimer*, (1989) 1 EG LR 154; *Steward* v *Rapley*, (1989) 1 EGLR 159; *Bigg* v *Howard Son & Gooch*, (1990) 1 EGLR 173; *Hipkins* v *Jack Cotton Partnership*, (1989) 2 EGLR 157.

78. (1990) 2 All ER 815 CA.
79. (1982) 3 All ER 705; (1982) 1 WLR 1297.
80. *Ibid* at 712; 1307.
81. (1978) 10 Build LR 19.
82. (1990) 2 All ER 815 CA.
83. *Ibid* at 825.
84. (1987) 1 CR 700, 718.

The facts were that the defendant solicitor told the plaintiffs who were shifting their motor repair garage that they would have the right of way from the backside of the site. But that was not to be. The supposed passage was very quickly blocked after completion of the purchase. The plaintiffs were unable to carry on business without access to the site. They claimed damages for wasted expenditure and for anguish and vexation. The court held as follows:

> The judge had been entitled in the circumstances to award damages on the basis of comparing the plaintiffs' actual situation with the position in which they would have been if they had never entered into the transaction at all rather than with the position they would have been in had the transaction been successful. He had therefore been entitled to award damages on the basis of the capital expenditure thrown away in the purchase of the business and the expenses incurred. However, damages for anguish and vexation arising out of a breach of contract were not irrecoverable unless the object of the contract was to provide peace of mind or freedom from distress and accordingly, were not recoverable for anguish and vexation arising out of the breach of a purely commercial contract. It followed that the damages would be reduced by the amount awarded for anguish and vexation and to that extent the appeal would be allowed.[85]

Housing Service

The complainant filed a petition before the Monopolies and Restrictive Trade Practices Commission against a Development Authority on the grounds of excessive delay and failure to hand over possession of the plot. Commission awarded, among other counts, Rs 50,000 as damages for mental agony suffered by the complainant. The Supreme Court held that this was an error on the part of the Commission.[86] In such cases, the court said, the normal rule should apply which is that the vendor should pay damages for the purchaser's loss of bargain by paying the market value of the property at the time fixed for completion less the contract price. The purchaser may claim loss of profit which he intended to make from a particular use of the land if the vendor had actual or imputed knowledge of such use. For delay in performance the normal nature of damages is the value of the use of the land for the period of delay, viz., usually its rental value. Interest can be awarded on equitable grounds in appropriate cases. The rate of interest should neither be too high nor too low. Interest at the rate of 12% p.a. should be just and proper and would meet the ends of justice in this case.

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85. The court applied the dicta of Lord BLACKBURN in *Livingstone* v *Rawyards Coal Co*, (1880) 5 App Cas 35, 39 and Dillon, LJ in *Bliss* v *South East Thames Regional Health Authority*, (1987) ICR 700, 718. *See* also *Allied Maples Group* v *Simmons & Simmons*, (1995) 4 All ER 907 (CA), which considered the question of the liability of a solicitor for negligent advice in the matter of take over of business: *Brown* v *K.M.R. Services Ltd*, (1995) 4 All ER 598, in the circumstances of the case it was proper to assess damages on the basis of what, on the balance of probabilities, the plaintiffs would have probably done in the matter of investment if they had been properly advised. Evidence showed that they would have reduced the investment.

86. *Ghaziabad Development Authority* v *Union of India*, (2000) 6 SCC 113: AIR 2000 SC 2003: (2000) All LJ 1456.

As the seller did not know this contract, he could not have known of the likelihood of the loss actually suffered.[16]

Where a person was dispossessed of his leased premises prematurely, he was allowed to recover retrenchment compensation which he had to pay to labour and loss of profits calculated on the basis of figures provided by the plaintiff for the period he actually did business. The court said that that was the best indicator. The period for loss of business would be the unexpired period of the lease.[17] The court said[18] that there cannot be a direct and concrete evidence of loss of profits. Damages on account of loss of profit are in the nature of prospective damages and, therefore, necessarily contingent. It is now well established principle of law that the mere fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the liability to pay damages.[19]

Consequences of Delay in Transit

Consequences of delay in transit have been noted by the Supreme Court in some cases. A consignment of goods with the railways reached its destination after inordinate delay, caused by gross negligence, of seven months. The plaintiff's money remained blocked for the period. He was allowed to recover interest on the money by way of damages for the loss.[20] In another case of delay and damage, the railways have been held liable to the extent to which the value of the goods had diminished.[21] Where the goods are damaged by the railways the measure of damages

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16. *See* also *Modi Sugar Mills* v *Union of India*, 1984 Supp SCC 338: AIR 1984 SC 1248, where liability was imposed for not returning the containers in which the goods were sent. Some principles relating to measure of damages were restated by the Supreme Court in *Trojan & Co* v *Nagappa Chettiar*, 1953 SCR 789: AIR 1953 SC 235. Where no time for delivery of goods is specified, the measure would be prices on the date of refusal, *Ambalavana Chettiar* v *Express Newspapers Ltd*, (1968) 2 SCR 239: AIR 1968 SC 741. No action for damages is maintainable in respect of unlawful contracts. *Koteswar Vittal Kamath* v *K. Rangappa Baliga & Co*, (1969) 1 SCC 225: (1969) 3 SCR 40: AIR 1969 SC 504; Ascertainment according to the lowest market price and the contract price. *M.N. Gangappa* v *A.N. Setty & Co*, (1973) 3 SCC 406: AIR 1972 SC 696. The right to sue for damages does not give rise to a debt which is immediately due so as to entitle the plaintiff to a set-off liability to pay back the loan. *Mirza Javed Murtaza* v *UP Financial Corpn.* 235. As for the effect of inflation on damages see Duncan Wallace, *Assessment of Construction Cost Damages*, (1982) 98 LQR 406; State for extra work done under a contract even if no rate was fixed before the work was done. *State of UP* v *Hari Kishan*, 1983 All LJ 630. Acceptance of earnest money under protest does not put an end to the right of the injured party to recover damages for breach. *Mohd U. Usman* v *Union of India*, AIR 1984 Raj 156.
17. *Kishan Lal Kalra* v *NDMC*, AIR 2001 Delhi 402.
18. *Ibid* at p 409.
19. Citing *Chaplin* v *Hicks*, (1911) 2 KB 786; *Biggin* v *Permanite*, (1951) 1 KB 422, where DEVLIN J said that where price evidence is obtainable, the court naturally expects to have it, but where not, the court must do the best it can.
20. *Union of India* v *Steel Stock Holders' Syndicate, Poona*, (1976) 3 SCC 108: AIR 1976 SC 879.
21. *Union of India* v *B. Prahlad & Co*, AIR 1976 Del 236 that is to say, the market value of the goods minus their value in their damaged state: the plaintiff must do all that he reasonably can to mitigate his loss: if the damaged goods are still saleable though at a lower price, the measure of damages will be the market price of the goods minus what they would have fetched in their damaged state if the plaintiff had sold them. *Savani Transport P Ltd* v *Gangadhar Ghose*, AIR 1986 Cal 330, the court laid stress upon the fact that the salvage value of the goods cannot be ignored and that whatever be the difficulty the court cannot shrink from ascertaining the salvage value; *Dunn* v *Bucknall Bros*, (1902) 2 KB 614, 623 CA.

would be the market price at the time of damage and not the price at which the injured party purchased the goods.[22] Regard must also be had to the type of market and setback to price because of the taste and prejudices of a special customer class.[23] In a fire insurance contract, the damaged goods were sold by auction under due intimation to the insurer, who did not turn up, the court allowed the difference between the insured price and the amount realised.[24]

Meaning of market price

In almost all sales transactions which fail to go through the normal yardstick for working out the sum of money to which the aggrieved party is entitled is the difference between the contract and market prices.[25] This rule presupposes the existence of a market and the possibility of ascertaining the price of the goods in that market. Both these concepts were the subject-matter of some explanation in a case where the buyer refused to accept the goods.[26] The court dealt with the question in the following way:

> In assessing damages for failure to perform a contract for the purchase of goods the measure of damages payable by the defaulting buyer is the difference between the contract price and the current or market price at the date of breach based on a hypothetical sale of the particular amount of the goods in question in the available market but disregarding any characteristics of the seller which might have led to a lower price being obtained. In determining whether there is an 'available market' for the goods in question, if the seller actually offered the goods for sale there is no available market unless there is one actual buyer on that day at a fair price. If, on the other hand, there is only a notional or hypothetical sale

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22. *Union of India* v *West Punjab Factories*, (1966) 1 SCR 580: AIR 1966 SC 395; *Union of India* v *Jolly Steel Industries*, 1980 Supp SCC 436: AIR 1980 SC 1346. See also *M. Lachia Setty* v *Coffee Board*, (1980) 4 SCC 636, where the auction purchaser refused to take the goods and the Coffee Board had to reauction them, the latter allowed to recover the shortfall from the defaulter. *Union of India* v *K.H. Rao*, (1977) 1 SCC 583, failure to supply onions; Government allowed to recover the difference at which they purchased onions elsewhere. *M. S. Desai & Co* v *Hindustan Petroleum Co Ltd*, AIR 1987 Guj 19, where it was held that a premature termination of a privileged business, such as the privilege of distributing petroleum products, by the grantor, a Govt. Undertaking in this case, can be challenged by a writ petition as it involves non-contractual questions also and compensation can be awarded in the same petition.

23. *Madeshwar Cargo Movers* v *Hindustan Cocoa Products Ltd*, (1993) 2 Bom CR 154, sensitive goods like "five-star", "double decker" were under transport.

24. *Harshad Coop Mktg Socy Ltd* v *United India Fire and Gen Ins Co Ltd*, AIR 1992 Bom 341. In a shipment of bulk goods, the quantity of cargo was not known to the carrier. The cargo was discharged and taken away by the consignee. He found no damage to goods. His subsequent claim for short delivery was not allowed. Chances of loss during standardisation of bulk cargo could not be ruled out, *Sejndia Steam Navigation Co* v *Union of India*, AIR 1998 Ker 250.

25. *Hajee Ismail & Sons* v *Wilson & Co*, (1918) 41 Mad 709; *Errol Mackey* v *Kameshwar*, (1932) 59 IA 398: 34 Bom LR 1596; *Vishwanath* v *Amarlal*, AIR 1957 MB 190. Where no market existed to enable the buyer to effect his purchase of the coal of the contract quality, the defaulting seller's rates with other buyers from him were taken into account for guidance. *Jagmohandas* v *Nusserwanji*, (1902) 26 Bom 744.

26. *Shearson Lehman Hutton Inc* v *Maclaine Watson & Co Ltd*, (1990) 3 All ER 723 QBD (Commercial Court) *See* also *A P Paper Mills Ltd* v *Principal Secretary*, (1997) 3 Andh LT 649 DB, buyer refused supply of hardwood, sale by auction at his risk, loss recoverable, but there was no justification in offering him further after his first refusal, no liability on such offering.

Negligent Surgical Operation

A 24-year-old female was surgically operated for sterilisation. The operation was performed in a crude and primitive manner without administering even local anaesthesia. The doctor showed incompetence in cutting small intestine instead of fallopian tube which became the direct cause of death. Rupees 1,60,000 with 12% interest were awarded. The amount was directed to be paid to the husband and minor children of the deceased. [87]

Negligence in Maintenance of Electricity Lines

Where the petitioner's sole son, who was blind, died of electrocution by coming in contact with a pole which was live due to inefficient maintenance, the Municipal Corporation was directed to pay Rs 50,000 with 12% interest. [88]

Contracts for providing Peace of Mind or preventing Mental Distress

But now the principle is revolving round to this that in every proper case damages for mental distress can be recovered.

PHOTOGRAPHER'S FAILURE TO APPEAR AT WEDDING.—In a Scottish case, a photographer who had agreed to take photographs at a wedding, failed in breach of his contract to appear there. As a result the bride had no photographs of her wedding. She was allowed damages for the resulting injury to her feelings. [89]

FAILURE BY BAND TO ATTEND WEDDING RECEPTION.—A businessman of some standing in his community engaged a top 12 men band for his daughter's wedding reception to which some 1200 guests came. The band was to play for four hours during the reception, the meal and then for dancing. Such music was part of the expected hospitality. On the day, the band-master telephoned, half-an-hour after they should have arrived, to say that they had broken down 200 miles away and were not coming. Friends of the host assisted him by arranging two local musicians and by playing tapes but that was started later and was no proper substitute for the band. It was held that a daughter's wedding is a very special day for any father. It was a matter of personal prestige for the father to offer the special band as part of his hospitality to both sides' families and his many business and social friends and he suffered a considerable humiliation by the events. The court ordered refund of advance deposit and £800 as general damages for disappointment and humiliation. [90]

CANCELLATION OF WEDDING RECEPTION.—A motel was booked for the plaintiff's daughter's wedding reception to which 105 guests had been invited. The motel contracted to provide a three-course meal, sherry reception and a room where a band would play for dancing. The motel cancelled this 48 hours before the wedding. The only alternative was a small function room at a public house where a cold buffet was laid on. The room was cramped and there was no space for dancing. It was held that an only daughter's wedding reception is of unique importance for a parent. General damages of £ 750 were awarded for inconvenience and disappointment plus £

87. *Joseph* v *Dr George Moonjely*, AIR 1994 Ker 289.
88. *Xavier* v *State of TN*, AIR 1994 Mad 306, interest running from the date of petition till payment. The court followed *Kumari* v *State of TN*, AIR 1992 SC 2069: (1992) 2 SCC 223.
89. *Diesen* v *Samson*, (1971) SLT 49; noted in CURRENT LAW, November 1971.
90. *Dharni* v *Dhami*, 1988 CLY 409.

265 special damages for the cancellation fee of the band and telephone calls to notify guests of the changed venue.[91]

HOLIDAY CASES.—In the case of *Jarvis* v *Swan Tours Ltd*[92] Lord DENNING MR described the principle that damages cannot be recovered for mental pain and suffering caused by the breach to be out of date.

> The plaintiff wanted to spend his holidays. He was attracted by the representations held out by a tourist agency that certain kind of facilities, recreation, company, etc., would be provided by them on tours conducted by them. The promises turned out to be unreal and the plaintiff was much disappointed. He was allowed damages for disappointed expectations, the court saying that in a proper case damages for mental distress can be recovered and one such case is a contract for holiday.

His Lordship laid down: "In a proper case damages for mental distress can be recovered in contract just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment. If the contracting party breaks his contract, damage can be given for disappointment, the distress, the upset and the frustration caused by the breach. (Such loss may be) difficult to assess in terms of money, but it is no more difficult than the assessment which the courts have to make everyday in personal injury cases for loss of amenities."

This was followed in *Jackson* v *Horizon Holidays*:[93]

> The plaintiff entered into a contract for a holiday for himself, his wife and two children. In many material respects the defendant failed to provide the holiday in accordance with their description. The court allowed damages not merely for the distress to the plaintiff but also for the wife and children.

A Canadian court allowed damages for mental distress where a motor home was contracted to be borrowed to the defendant's knowledge for holiday purposes and he failed to provide it.[94]

Package tour.—The tourist agency owes responsibility not only for its own services but also for services hired from others for further stages of the package. The plaintiff booked a package tour of mainland China for his daughter. The service was offered by a Hong Kong travel company. At the border with mainland China, the tour was joined by a guide of a Chinese travel company. One of the items was to visit and cross a lake. The party missed the ferry. An alternative arrangement was made by hiring a speedboat of a third agency. The boat was small. It could carry only eight at one time out of 24. The driver of

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91. *Hotson & Hotson* v *Payne*, 1988 CLY 1047.
92. (1973) 1 All ER 71 CA; (1973) QB 233. In another case, *Wilson* v *Pegasus Holidays (London)*, 1988 CLY 1059, a hotel was described in its brochure as offering a "superb standard of accommodation", but in fact it had inadequate toilet and bathing facilities, exposed electric wiring and was in a very poor decorative order. It was booked for skiing holiday, but the slopes were at some distance and the bus service was erratic. Following kinds of damages were awarded: £ 125 for loss of enjoyment and diminution in the value of the holiday; £ 400 for extra stress, worry and responsibility.
93. (1975) 3 All ER 92 CA; (1975) 1 WLR 1468. Thirty-three hours dislocation caused to a tourist party being conducted under package holiday which obstruction was due to air traffic control problems was held to be not a breach and, therefore, an action for inconvenience was dismissed. *Compton* v *I.L.G. Travel*, 1990 CLY 625.
94. *Elder* v *Koppe*, (1974) 53 DLR (3d) 705 (NSSC).

the boat completed two trips and refused to go for the third. Another employee of the third agency was to drive the boat. This driver negligently operated too fast, caused a crash in which the plaintiff's daughter was thrown overboard and lost in drowning. The original Hong Kong agency tried to save its skin by saying that the tragedy was not due to any act on the part of their employees. Holding them liable the court said:[95]

> "Taking the contract as a whole their Lordships consider that the first defendant here undertook to provide and not merely to arrange all the services included in the programme, even if some activities were to be carried out by others. The first defendant's obligation under the contract that the services would be provided with reasonable skill and care remains even if some of the services were to be rendered by others, and even if tortious liability may exist on the part of those others."

SOLICITOR'S FAILURE.—The principle is now no more confined to holiday cases. The decision of the English Court of Appeal in *Heywood* v *Wellers (a firm)*[96] has rendered it to be a principle of general import.

> The plaintiff engaged a firm of solicitors to obtain an injunction against a man who was harassing her. The solicitors obtained an injunction but failed to bring the man before the court when he molested her again with the result that the harassment remained unabated.

She was allowed to recover damages from the solicitors for the consequential mental anguish. The court expressed the opinion that this kind of loss is no different from any other loss, for any reasonable man could have foreseen that continued molestation would cause further mental distress. JAMES J proceeded as follows:

> It is also the law that where, at the time of making a contract, it is within the comtemplation of the contracting parties that a foreseeable result of a breach of the contract will be to cause vexation, frustration or distress, then if a breach occurs which does bring about that result, damages are recoverable under that heading. Not in every case of breach of contract on the part of a solicitor towards his client will damage be recoverable under this head. It is only when the services contracted for are such that both solicitor and client contemplate that a failure by the solicitor to perform the contract will foreseeably occasion vexation, frustration or distress.

LOSS OF PETS DUE TO CARRIER'S NEGLIGENCE.—This principle was applied by a Canadian court to the distress caused by the loss of a pet due to a carrier's negligence.[97]

> The plaintiffs wanted to carry their two pet dogs with them in the flight. The plaintiffs were willing to pay for the entire first class section of the aircraft

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95. *Wong Mee Wan* v *Kwan Kin Travel Services Ltd*, (1995) 4 All ER 745 PC.
96. (1976) 1 All ER 300: (1976) QB 446; see also *Cox* v *Philips Industries*, (1976) 1 WLR 638, QB. *Bailey* v *Bullock*, (1950) 2 All ER 1167, in a case of solicitor's negligence it was held that damages for inconvenience and discomfort could be recovered for the solicitor's failure to get possession of premises for his client but not damages for annoyance and mental distress. Relying on *Groom* v *Cracker*, (1938) 2 All ER 394, 415: (1939) 1 KB 194, 224.
97. *Newell* v *Canadian Pacific Airlines*, (1976) 74 DLR (3d) 574 (Ont. Cty. Ct.).

for the purpose of keeping their pets with them. But the defendants did not agree to that. They told the plaintiffs that the pets would be carried in the cargo compartment and assured that they would arrive in the first class condition. But, as the luck would have it, the pets happened to be placed next to a container of dry ice which threw out fumes. One pet perished and the other was taken ill.

The plaintiff successfully claimed damages, apart from, for the loss of the dog, for "the anguish and sadness".

DEMOTION OF EMPLOYEE WITHOUT REASONABLE CAUSE.—Where an employee was relegated without appropriate cause to a position of lesser responsibility in breach of contract, it was held that since, it must have been in the contemplation of the parties that the breach, without reasonable cause, would expose the plaintiff to the vexation, frustration and distress which he had suffered, the plaintiff was entitled to damages of five hundred pounds. The plaintiff had become depressed, anxious, frustrated and ill.

DELAY IN PAYMENT.—The person whose payment is delayed is entitled to loss of interest on the money. Where an insurer made payment of the life policy money one-and-a-half year after the policy became a claim and there was no justification for the delay, the claimant was allowed to recover the money with interest.[1]

Dishonour of Cheques

An account holder in a building society described himself as a self-employed businessman in export and import dealings stating his income to be below £ 5000. He issued a cheque for £ 4500. The building society happened wrongly to dishonour this cheque. He claimed substantial damages.

The Court of Appeal was of the view that it was too late in time (1996) to draw a distinction between traders and non-traders for the purposes of assessment of compensation for loss of honour in respect of general damages flowing from the dishonour of a cheque. The court said:[2]

> The credit rating of individuals is as important for their personal transactions, including mortgages and hire-purchase as well as banking facilities, as it is for those who are engaged in trade, and it is notorious that central registers are now kept. I would have no hesitation in holding that what is in effect a presumption of some damage arises in every case, insofar as this is a presumption of fact.

Trade Secrets

Intellectual property rights include trade secrets, confidential information, know-how, patents, trade marks, copyrights, designs, etc. These rights do not have any physical corpus. They are intangible. They are the creations of brain and constitute a vital business property in the competitive market economy. A complete protection of such rights is necessary for encouragement of creative and innovative

1. *Adaramani Devi* v *LIC*, (1998) AIHC 3006 Ori.
2. *Kpohraror* v *Woolwith Building Society*, (1996) 4 All ER 199 at p. 124 CA.

abilities. The protection afforded by law is exemplified in the following statement in Charlesworth:[3]

> Intellectual property rights overlap, protecting different facets of a product, for example, the product itself may be patented, its method of manufacture may be protected as a trade secret; sales literature and software used to run the product, may be protected by copyright; its shape or configuration may be protected by new design right; and its name by a trade mark.

The usual remedies for breach of confidence are : action for an account of earnings from the use of the information; action for damages and an injunction for prevention of misuse. For an action to succeed it would be necessary to show that there was information of confidential nature which was shared under an obligation of confidence with the person proceeded against and that there was an actual or threatened use or disclosure of the information. If the information has already become a part of public knowledge, no action may lie.[4]

There is an implied term in a contract of employment that an employee may not make use of his employer's trade secrets. An employee who comes in touch with such information can be restrained from using it to the prejudice of his employer's interest.[5] Secrets may also be shared with a collaborator on the condition that the company shall maintain secrecy of all the technical information and that it should obtain corresponding secret arrangements from its employees.[6]

An injunction can be issued against a third party also with whom the former employee gets new employment from using or further using any information of confidential nature provided to him by the employee in breach of his duty of confidence. If he still persists even after getting notice of the breach of confidence, he can be held liable in damages for the use of an intellectual property which did not belong to him.[7]

Damages for breach of confidence

Damages are also allowed for breach of confidence.

> Three actresses formed a rock group. They conceived an idea of producing a television serial, based on their experience, to focus attention on their individual and group life so as to contrast their collective character with their individual character. The idea was conveyed in the course of oral negotiations to a television company. This resulted in a written agreement which provided some payment to the ladies but forbade the company from using the idea unless the ladies were given the opportunity to act and they declined it. Without giving the opportunity, the company produced the programme with great commercial success.

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3. CHARLESWORTH'S BUSINESS LAW, 637 (5th edn, 1991).
4. The requisites of such action were listed by Sir ROBERT MEGARRY in *Thomas Marshall* v *Guinle*, (1978) 3 All ER 193, 209.
5. (1971) 23 DLR (3rd) 612, Onatrio CA, Canada, here no use of secret knowledge was involved in obtaining a contract in competition with the former employer. *Attwood* v *Lamont*, (1920) 3 KB 571: 1920 All ER Rep 55, the employee was not in touch with trade secrets.
6. *Niranjan Shanker Golikari* v *Century Spg & Mfg Co Ltd*, (1967) 2 SCR 378: AIR 1967 SC 1098. In *Coco* v *Clark*, (1969) RPC 41, 48 Megarry, J, explained that in a sharing of information for business, the recepient may not be able to deny confidence.
7. *See* further notes under S. 27 of the Contract Act (*supra*) under the heading "Protection of Trade Secrets".

The company was held liable in damages to the ladies. The agreement contained an implied negative covenant. The circumstances in which it was communicated imported an obligation of confidence. The content of the idea was clearly identifiable, original, of potential commercial attractiveness and capable of reaching fruition.[8]

Injunction to restrain breach of confidence

Where damages would not be an appropriate remedy, an injunction may be issued against improper use of confidence. An illustration is *Attorney General* v *Barker*.[9]

> The first defendant was employed in the royal household between 1980 and 1983 on terms which included a contractual undertaking not to disclose, publish or reveal any incident, conversation or information concerning any member of the royal family or any visitor or guest which came to his knowledge during his employment or any information relating to his employment in the royal service unless duly authorised in writing to do so. The undertaking was perpetual and worldwide and the first defendant expressly acknowledged that it included an agreement on his part not to publish any such matter in any book. The second defendant, which was a Canadian company controlled by the first defendant, planned to publish in the United Kingdom a book written by the first defendant about his service in the royal household. The book was a flagrant breach of the first defendant's undertaking. The first defendant having refused to comply with the terms of his undertaking, the Attorney General issued a writ applying for worldwide injunctions against the defendants restraining publication of the book. The court held as follows:
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> The Attorney General's claim was not based on a breach of confidentiality but on a breach of contract, the consideration for the covenant by the first defendant not to publish matter concerning his experiences in the royal household being the agreement to take him on the staff of the royal household and to pay him wages or a salary. Accordingly, the first defendant had for a consideration entered into a negative covenant which was limited neither territorially nor in time and such a covenant was enforceable provided it could not be attacked for obscurity, illegality or on public policy grounds such as being in restraint of trade. The covenant was not void on any ground of public policy or on the ground that it restricted the freedom of expression abroad contrary to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and in the circumstances the balance of justice required that an interlocutory injunction having extra-territorial effect be granted against both defendants.

Injunction for restraining breach of contract

A supply system to the Army which had been going on since 1960 was not allowed to be scrapped all of a sudden by blacklisting the supplier. A person dealing with the Government in matters of sale and purchase develops legitimate interest and expectations. The order of blacklisting amounted to denial of equality of

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8. *Fraser* v *Thames Television Ltd*, (1983) 2 All ER 101, HL. Liability to damages is not excusable only because it is difficult to assess them with precision. In such cases the buyer is entitled to presumptions as to his loss. See *Andard Mount (London) Ltd* v *Curewel (India) Ltd*, AIR 1985 Del 45. It was a contract for sale of human albumin. Breach of promise of marriage is actionable. The amount of compensation depends upon circumstances among which mental pain and suffering is one factor. *Prema* v *Mustak Ahmed*, AIR 1987 Guj 106.
9. (1990) 3 All ER 257 CA.

opportunity. Before issuing such an order some explanation should have been called for. The court would not interfere in the matter if it is decided again by giving opportunity to the supplier.[10]

Writ remedy against termination of dealership

A dealership agreement was terminated by reason of breaches on the part of the dealer. He applied for a writ against the order expecting that contractual obligations should be decided on the basis of affidavit evidence. The court refused to entertain the petition. The matter related to contract, trade and business. It should be adjudicated through an appropriate civil action.[11]

Withdrawal of letter of intent and writ remedy

A letter of intent was issued in favour of the petitioner for granting him a retail outlet for sale of petroleum products. The letter was subsequently withdrawn without assigning any reasons. This was held to fall foul of Article 14 of the Constitution. The court said that in appropriate cases it could interfere in contract matters in the exercise of writ jurisdiction. The respondent was directed to restore the letter of intent and take further steps in accordance with the law and prescribed procedure.[12]

Impact of inflation on damages

In *Doyle* v *Nichols*[13] the court took into account the likely impact of inflation while awarding damages to the widow of a doctor in respect of his death in a road accident. The House of Lords had expressed the opinion in an earlier case[14] that if there was firm basis for the conclusion that the awardee would be affected by future inflation, the court should take it into account as best as it could. In this case the victim of the accident was a salaried employee. His salary would have naturally increased according to the rate of inflation. His dependents would suffer obvious injustice if their dependency figure was not increased accordingly.

Duty to mitigate [S. 73 (Explanation)]

The explanation attached to Section 73 provides for the duty to mitigate damages. It says:

> In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

The injured party has to make reasonable efforts to avoid the losses resulting from the breach so that his loss is kept to the minimum. The most frequent application of this rule takes place in contracts for sale or purchase of goods. On the buyer's refusal to take delivery, the seller should resell the goods at the prevailing market price and he may then recover from the defaulting buyer as damages the difference between the price he realised and the price he would have received under the

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10. *Bombay Motor Stores* v *Union of India*, (2000) 1 BLIR 23 (Pat).
11. *Howrah Motor Co Ltd* v *Bharat Petroleum Corpn*, (2000) 3 BLJR 1854 (Pat); *Bhushan Krishna* v *Union of India*, (1999) 2 BLJR 1100 (Pat) another writ petition relegated to civil suit because the appointment as dealer was itself in dispute.
12. *Alok Prasad Verma* v *Union of India*, (2000) 3 BLJR 1913 (Pat).
13. 1979 JBL 62. The Times, May 20, 1978.
14. *Taylor* v *O'Connor*, (1971) AC 115.

contract.[15] If the seller does not resell the goods and his loss is aggravated by the falling market, he cannot recover the enhanced loss. The well-known authority for this proposition is the decision of the Privy Council in *Jamal, A.K.A.S.* v *Moola Dawood Sons & Co.*[16]

> The plaintiff contracted to sell to the defendants 23,500 shares to be delivered and paid for on December 30, 1911. The shares were tendered on this date, but the defendants declined to take delivery or to pay for them. At the market price for sales upon that day, the shares would have realised Rs 1,09,218 less than their price under the contract. But the plaintiff sold the shares only after February when the market was again rising and he realised only Rs 79,862 less than the price under the contract.
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> The defendants contended that they should be held liable to pay the loss of only Rs 79,862. But he was held liable for Rs1,09,218. Lord WRENBURY explained the principles of law thus:[17]
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> It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss subsequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.[18] If the seller retains the shares after the breach he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises.

Where goods were sold 4½ months after breach in a crashing market, that was held to be not reasonable and F.C.I. was allowed to recover only nominal damages. Forfeiture of the earnest money of Rs 1000 was considered to be sufficient.[19]

Similarly, where a seller refuses to perform the contract, the buyer should buy the goods if they are available from any alternative source and cannot recover any further loss that may be due to his own neglect.[20]

Auction Sales and Duty of Mitigation

In the application of the duty of mitigation to sales through auction, it has been held that if the highest bidder backs out, and as compared with the bids at reauction the

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15. *Ambalavana Chettiar & Co Ltd* v *Express Newspapers Ltd*, (1968) 2 SCR 239: AIR 1968 SC 741. *Thakorlal V. Patel* v *Syed Badruddin*, (1993) 1 Guj LR 28, duty of mitigation stressed.
16. (1916) 43 IA 6: ILR (1916) 43 Cal 493.
17. At pp. 10-11.
18. "*Staniforth* v *Lyall*, (1830) 7 Bing 169, is an illustration of this".
19. *Bismi Abdullah & Sons* v *FCI*, AIR 1987 Ker 56; *Gujarat State Road Transport Corpn* v *Ray Orr Brothers*, AIR 2000 Guj 313, the Government purchased the requisite machinery almost one year after the failure on the part of the tenderer. The Government was allowed the difference between the rates of the tenderer whose quotation was accepted and that of the next higher tenderer.
20. See *Rodocanachi* v *Milburn*, (1886) 18 QBD 67 and *William Bros* v *Aguis*, (1914) AC 510. Cited in *Jamal* v *Moola Dawood Sons*, (1916) 43 IA 6, 11. See further *Thawardas Perumal* v *Union of India*, (1955) 2 SCR 40: AIR 1969 SC 504. See also *Sotiros Shipping Inc* v *Sameret Solholt*, (1981) Com LR 201, a contract for sale of ship, the seller defaulted, but offered alternative ship which the buyer refused to accept, held the buyer had reasonably failed to mitigate his loss. For a general study *see* P.J. Davis, *Economic Stringency and Recovery of Damages*, (1982) JBL 21, where the author considers the general aspects of the duty of mitigation.

bid of the next higher bidder at the original auction was much greater and if the right to sell the goods to him was still held in reserve (in this case his earnest money was still not refunded) the goods should be offered to him and the difference can be recovered from the defaulting bidder. The Municipality was allowed to recover nothing in this case because instead of accepting the next higher bid, the goods were reauctioned at a very low value.[21]

Contract of Employment and Duty of Mitigation

The duty of mitigation also finds application in reference to premature termination of a contract of employment. Thus, where on account of the retirement of two out of four partners, a partnership firm was ended and with it the services of the manager but the remaining two partners reconstituted the firm and offered him employment on identical terms which he refused to accept and instead brought an action for damages, it was held that he should have accepted the employment in mitigation of his loss and that he was entitled to nominal damages only.[22]

But where no alternative employment of equal standing is available to him, the ex-employer cannot ask that he should have mitigated his loss by accepting a lesser job. The Bombay High Court in *K.G. Hiranandani* v *Bharat Barrel & Drum Mfg Co P Ltd*[23] explained the real nature of the duty of mitigation. VIMAD LAL J said:

> Though what the Explanation enacts is popularly called the 'rule' in regard to mitigation of damages, and has been so referred to even in decided cases and standard works, and though it is loosely called a 'duty' to mitigate, the position really is, as our legislature has rightly stated, merely this, that what the Explanation means is not in the nature of an independent rule or duty but is merely a factor to be taken into account in assessing the damages naturally arising from the breach, for the purpose of the main part of Section 73.

The learned Judge then adopted a passage from MAYNE ON DAMAGES[24] to the effect that the expression is somewhat loose one, since there is no duty which is actionable or which is owed to anyone by the plaintiff, and continued to say that the proper construction of the explanation is that the means, if any, of remedying the inconvenience caused by the breach of contract are factors that go to reduce the damages that might otherwise have arisen "naturally" from the breach.

Explaining the principle relating to damage arising from breach of a contract of employment, the learned Judge held that "there is abundant authority for the proposition that in cases in which the contract of employment was for a fixed period, the normal measure of damages would be the salary for the whole of the unexpired period of service. The principle of awarding damages for a reasonable period or reasonable period of notice comes into play only when the contract of employment is not for a fixed period." The learned Judge found support in the

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21. *A. R. Krishnamurthy* v *Arni Municipality*, (1985) 1 Mad LJ 437. The court referred to *Muthiah* v *Harischandra*, AIR 1962 SC 366: (1962) 1 SCR 653.
22. *Brace* v *Calder*, (1895) 2 QB 253: (1895-99) All ER Rep 1196.
23. AIR 1969 Bom 373. To the same effect, *S. M. Murray* v *Fenner India Ltd*, AIR 1986 Delhi 427, where the court pointed out that an employee was not compellable to take up a lesser job and, therefore, the amount of compensation is the remuneration which he would have earned.
24. 12th edn, para 149, point 2.

decision of the Supreme Court in *S.S. Shetty* v *Bharat Nidhi Ltd*[25] where BHAGWATI J delivering the judgment of the Bench observed (*obiter*) that if the contract of employment is for a specific term, the servant would be entitled to damages the amount of which would be measured, *prima facie* and subject to the rule of mitigation, by the salary of which the master has deprived him.[26]

On the facts of the case, the employer contended that the dismissed employee did not make any serious effort to find an alternative employment. Referring to this the learned Judge said that the defendant cannot impose new and extraordinary duties on the aggrieved party;[27] nor he can ask him to take up just any and every employment that may be available to him, e.g., the employee is not expected to accept an employment in a lower status, nor will he be expected to go to a different part of the country or in a different type of work.[28] In conclusion the learned Judge said that there was no evidence to show that a job similar to that of a general manager of a factory with somewhat similar status and pay scale as well as nature of work was available at or about the time when the breach occurred.

The burden is on the defendant to show the availability of an alternative job of equal status. It is not for the plaintiff to show the absence of such opportunities. The court can take notice of the fact that jobs are not a market commodity which can be bought at convenience. WADHWA J of the High Court of Delhi permitted the plaintiff to prove for the purpose of calculating his compensation any remuneration which was being paid to him in addition to the amount mentioned in the contract.[29]

An employee of a bank, which failed, was not allowed to maintain an action against the bank for damages for loss of reputation in the financial services industry by reason of belonging to a bank of that kind, though the damage to the reputation was such that he was not able to get employment in that industry.[30]

Advantage out of One's Own Wrong not Allowed

The rule that a person cannot be permitted to take advantage of his own wrong is a rule of construction rather than a principle of law and therefore it can be

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25. AIR 1958 SC 12: 1958 SCR 442: (1957) 2 LLJ 696.
26. The learned Judge also found statements to the effect in Mayne on DAMAGES (12th edn), para 6081; CHITTY ON CONTRACTS (22nd edn) Vol. 2, para 1141 and HALSBURY'S LAWS OF ENGLAND (3rd edn), Vol. 11 p. 244, para 414. Where a teacher was removed by the management without hearing and litigation persisted for 20 years, the court, taking note of the possibility that the employee must have picked up some employment, awarded salary of three years considering this as an adequate compensation, *Devi Kewalram Madrani* v *Premier High School*, (1995) 3 Bom CR 229.
27. Relying upon Pollock & Mulla, THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS, 8th edn, at p. 472.
28. Quoting from Mayne on DAMAGES (12th edn), para 611, p. 526.
29. *S.M. Murray* v *Fenner (India) Ltd*, AIR 1986 Delhi 427. The fact that an employee becomes entitled to contributory provident fund does not change the character of the employment to this extent that he became entitled to be there till retirement by superannuation. *M.D. Rajan* v *I.T.C. Ltd*, (1985) Mad LJ 372: where the removal was on grounds different from those stated in the contract, the same was not upheld and new grounds were not permitted to be added to justify the action. *Purna Chandra Bora* v *Commissioner, Assam State Housing Board*, (1991) 1 Guj LR 192, relying upon *Mohinder Singh Gill* v *Chief Election Commr*, (1978) 1 SCC 405: AIR 1978 SC 851; *Prahlad Ramchandra Rao* v *University of Goa*, 1991 Mh LJ 844, selection, acceptance, resignation from earlier post, held, no termination except in accordance with law.
30. *Malik* v *Bank of Credit and Commerce International*, (1995) 3 All ER 545.

excluded by express terms of the contract. Accordingly, damages for loss of share option cannot be claimed by an employee who is wrongfully dismissed shortly before becoming entitled to exercise the option if the option scheme expressly stated that the option was to lapse if the employee ceased to be employed by the employer. The option-holder is not entitled to any compensation for loss of the option if the option-holder ceased to be employed by the company for any reason whatsoever. Furthermore, the court said that the termination of a contract of employment destroys the status or relationship between the employer and employee, although certain aspects of the contract may continue to exist, and since the option to purchase the employer company's shares depended upon the status or relationship of the employer to the employee it no longer continued in existence when the employee was dismissed.[31]

Aggrieved party Increasing Loss by Unreasonable Conduct

Where the aggrieved party increases his loss by unreasonable conduct, he cannot hold the defendant liable for the same. For example, in *Derbishire* v *Warran*[32] the plaintiff's car was damaged due to defendant's negligence. The plaintiff got the car repaired at a cost which was double the value of a new equally good substitute car. The Court of Appeal did not allow him to recover the difference between the insurance money and the cost of repair, but allowed the difference between the insurance money and the market value of the car. HARMAN, LJ distinguished the case from *O'Grady* v *Westminster Scaffolding Ltd*[33] where the plaintiff was held entitled to the cost of repairing his car at a cost considerably exceeding its market value, because the car was unique and could not be replaced.

The duty to mitigate damages in its essence means that the court can take into account the conduct of the injured party so as to see what he ought in reason to have done, whereby his loss has been or would have been, diminished.[34] The substance of the rule was also indicated by the House of Lords in *British Westing House Electric & Manufacturing Co* v *Underground Electric Railway Co of London*,[35] where Lord HALDANE said:

> The fundamental basis thus is compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which

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31. *Micklefield* v *SAC Technology Ltd*, (1991) 1 All ER 275 Ch D. The court distinguished *Alghussein Establishment* v *Eton College*, (1991) 1 All ER 267 HL, where a tenant by failing to develop the land was trying to convert it into a lease on account of his own default, the House of Lords observing that the principle applies also where a party sought to obtain a benefit under a continuing contract on account of his own breach. For damages for breach of contract of employment, *see* 16 HALSBURY'S LAWS OF ENGLAND, (4th edn) paras 651-53. The tort doctrine of contributory negligence is not applicable to the breach of a contractual duty which is of strict nature. *Barclays Bank plc* v *Fairelough Building Ltd*, (1995) 1 All ER 289 CA.
32. (1963) 3 All ER 310: (1963) 1 WLR 1067, CA.
33. (1962) 2 Lloyd's Rep 238.
34. As stated by COCKBURN CJ in *Frost* v *Knight*, (1872) LR 7 Exch 111; 41 LJ Ex 78. The duty of mitigation does not cast any obligation on the plaintiff to prove that he had no means of remedying or mitigating the loss suffered. *Sagarmal Agarwal* v *Union of India*, AIR Sikkim 22, where an auction-purchaser refused to take the goods and they were reauctioned at a lesser price, the seller was entitled to recover the difference, the duty of mitigation does not stand in the way. *M. Lachia Setty* v *Coffee Board, Bangalore*, (1980) 4 SCC 636.
35. (1912) AC 673, 687.

imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.

Where a five star hotel accommodation was booked six months in advance to suit personal and family need and though on account of heavy booking and rush the hotel was not able to provide the accommodation, they did arrange an alternative accommodation which the guest rejected, she was given refund of the whole money she had paid and was not allowed to recover anything more.[36]

Thus, what matters is the reasonableness of the conduct of the injured party.[37] A characteristic illustration is *Payzu Ltd* v *Saundars*.[38]

> In a contract of sale of goods, delivery was to be in instalments over a period of nine months and payment was to be made within one month of delivery. The buyer failed to pay for the first instalment within the stated time. The seller refused to deliver any further instalments but offered to do so if cash was paid against each delivery.

The buyer sued him for breach of contract claiming as damages the difference between the contract and market prices. The seller contended that if the buyer had accepted their proposal of deliveries against cash, their loss would have been less. The question, therefore, was what a prudent person ought to have done in the circumstances. The court laid down that the buyer should have considered the proposal. "The plaintiffs were in fact in a position to pay cash for the goods, but, instead of accepting the defendant's offer, which was made perfectly *bona fide*, the plaintiffs permitted themselves to sustain a larger measure of loss which as prudent and reasonable people they ought to have avoided."

Transactions Concerning Property

This result would not follow everywhere. Suppose that a buyer agrees to buy property having a certain quality and the seller delivers property without that quality. There is a difference between the market value of the property with that quality and without it. The buyer is clearly entitled to recover the difference between the two values. Suppose further that the seller in response to the buyer's notice proposes to buy back the property and refund the price, but the buyer refuses. Does he lose the right to recover the difference between the two values? The Court of Appeal answered in *Strutt* v *Whitnell*[39] where facts of this kind were involved, that the buyer would be entitled to retain the property and to recover the difference between the values. The seller cannot compel him to forgo his right to substantial damages as the price of retaining what has become his own property. The seller cannot say that the buyer had no good reason for refusing to accept his offer to buy

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36. *Toubi* v *Inatsun Holidays*, 1988 CLY 423, 1060. In another case the accommodation was provided but with lesser facilities than represented and £ 750 for diminution in value of holiday, £1000 for general inconvenience and disappointment and interest at 12% allowed. *Jones and Jones* v *Villa Ramos*, 1988 CLY 1061. Another similar successful claim, *Duthie* v *Thomson Holidays*, 1988 CLY 1068.
37. *Le Blanche* v *L. & N W Ry Co*, (1876) 1 CPD 286, 309, 313; *Erie County Natural Gas Co* v *Carroll*, (1911) AC 105; *Girish Chandra* v *Kunja Bihari*, (1908) 35 Cal 683, where the property could have been saved by paying off the rent accumulating on account of the sub-tenant's default.
38. (1919) 2 KB 581.
39. (1975) 1 WLR 870; (1975) 2 All ER 510.

back the property. "The buyer is entitled to retain his property without any investigation of his reasons for wishing to do so and that his right to recover the difference between the two values is not contingent on his having acted reasonably in the matter of the seller's offer to repurchase."

In such cases the option is with the buyer either to retain the goods and recover the difference or to return the goods against refund of price and then sue for damages for breach, if any. The seller cannot impose the choice of the option upon the buyer. The court distinguished this case from the decision in the *Payzu case*[40] where the goods had not been delivered in breach of the contract and were offered on different terms.

Section 73 is universally applicable to property transactions also. There is no other special provision about such transactions. In England, however, it was held by the House of Lords in the early case of *Bain* v *Forthergill*[41] that a purchaser of real estate cannot recover damages for the loss of his bargain. He is entitled to refund of his deposit and to the recovery of his expenses. The vendor, who was deceiving him may be sued for the tort of deceit for the consequences of deception in not providing good title or in making a promise without the intention of performing it. In India, on the other hand, it has been judicially observed that "the legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities".[42] So a frustrated purchaser of immovable property in India is entitled to damages equal to the amount of loss arising naturally in the usual course of things from the breach itself subject, of course, to the duty of mitigation.[43] The court said: "As Section 73 imposes no exception on the ordinary law as to damages, whatever be the subject-matter of the contract, it seems that in cases of breach of contract for sale of immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable in damages."[44] Some other High Courts have expressed similar views.[45] Accordingly, where the vendor guaranteed a good title but even so the vendee was evicted, the latter was allowed to recover the value of the land at the date of eviction and not merely refund of price.[46]

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40. *Payzu Ltd* v *Saundars*, (1919) 2 KB 581.
41. (1874) LR 7 HLC 158. The Karnataka High Court has held in *Happy Home Builders* v *Delite Enterprises*, (1995) AIHC 1320 that in a transaction for sale of immovable property which fails to go through, unless there is evidence of loss to the prospective purchaser, he is not entitled to damages but only to refund of advance paid with interest. The doctrine of *status quo ante* becomes applicable. As against an advance of Rs 15,000 for purchase of property which the seller failed to perform, Rs 2000 per year were allowed as compensation for deprivation of money, *Sardar Mohar Singh* v *Mangilal*, (1997) 9 SCC 217.
42. *Nagardas* v *Ahmed khan*, (1895) 21 Bom 175, FARRAN CJ at p. 185, contrary to the earlier observation of the same court in *Pitambar* v *Cassibai*, (1886) 11 Bom 272.
43. This view was approved by the Bombay HC in *Ranchhod* v *Manmohandas*, (1907) 32 Bom 165 where the court expressed the opinion that *Bain* v *Forthergill*, (1874) LR 7 HLC 158 was not applicable in India.
44. *Ibid.*, MACLEOD J at p. 171.
45. *Nabinchandra* v *Krishna*, (1911) 38 Cal 458; *Jaikishan Das* v *Arya Priti Nidhi*, (1920) 1 Lah 380; *Mangal Singh* v *Dial Chand*, AIR 1940 Lah 159; *Adikasawan Naidu* v *Gurunath*, (1918) 40 Mad 338.
46. *Nagardas* v *Ahmed khan*, (1998) 21 Bom 175.

NEGLIGENT VALUATION.—The plaintiffs lost a huge sum of money because they happened to allow loans to purchasers of commercial property on the basis of valuation report given by the defendant. The valuation was negligently done. The loss became aggravated because of the collapse of the property market. The Court of Appeal allowed recovery of the whole amount lost. The court said that once it is established "that the valuer's negligence led the lender to make a loan, he would not otherwise have made it seems to us that the lender is entitled to be compensated for all the damage he has suffered. If the market moves upwards, the valuer reaps the benefit; if it moves downwards, he stands the loss."[47]

Aggreived Party not to be Inflicted with Unusual Burdens

The duty of mitigation cannot impose upon the plaintiff burdens of unusual nature. There was a transfer of a part of a plot of land, the transferee undertaking to erect a boundary wall, which wall would have increased the value of the seller's remaining land. The buyer failed to erect the wall. In an action against him, the measure of damages would have been the cost of constructing the wall. He contended that if the wall had been constructed by the plaintiff as soon as there was the breach, the cost would have been much less; the plaintiff waited till the decision in the case and, in the meantime, inflation had escalated the cost and that he should not be held liable for the increased cost. The court felt that it was reasonable for the plaintiff to wait as long as his right to damages was disputed and there was no injustice to the defendant if the result of inflation was to increase the pecuniary amount of his ultimate liability.[48]

Reluctance of Courts to expand scope of Duty of Mitigation

Thus courts have shown a great reluctance in expanding the dimensions of the duty of mitigation.

> The distributor of a dress manufacturer agreed to purchase a given number of garments in two seasons. He had complete freedom to choose garments of any variety and to resell them in his area at any prices. The distributor repudiated the contract. He was sued for breach. He argued that he should be called upon to pay damages for manufacturer's loss of profits on their cheapest garments, because he had the freedom to choose any garments.

The court said that since it could not have been in the contemplation of the parties that the distributor would stock only the minimum priced garments, which would have been destructive of their market, damages must be computed on the basis of a reasonable criterion which should also be the least unfavourable to the distributor.[49]

Contributory Negligence

In contract claims the duty to keep one's loss to the minimum is capable of taking care of the matter where the loss is either caused or increased by the claimant's contributory negligence. But where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of

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47. *Banque Bruxelles Lambert SA* v *Eagle Star Ins Co Ltd*, (1995) 2 All ER 769.
48. *Radford* v *De Froberville*, (1978) 1 All ER 33.
49. *Paula Lee Ltd* v *Robert Zahil & Co Ltd*, (1983) 2 All ER 390 QBD. A contractor whose application for extension of time was disposed of after some time was not allowed to claim any compensation on the ground that if his application had been disposed of earlier, he would have earned something elsewhere, *Devender Singh* v *State of UP*, AIR 1987 All 306.

any contract the court has power to apportion blame and to reduce the damages recoverable by the plaintiff even though the claim is made in contract. This approach was adopted in a principal's action against his agent for breach of agent's duty in circumstances in which the principal failed to rectify the matters during the subsequent opportunities available to him.[50] The defence of contributory negligence is not available as against a claim for damages which is founded on a strictly contractual obligation. A contractor was engaged for cleaning of roofs made of corrugated asbestos sheets. He did not properly control the asbestos discharge. The refuse contaminated the premises necessitating extensive remedial works. As against the owners' action for damages, the contractor contended that the owners were also negligent because their architectural department did not provide proper supervision of the work. The court found that the owners' claim was only in contract being based on a breach of two contractual terms. The defence of contributory negligence would not apply to such a claim.[51]

Recovery of damages as arrears of land revenue

The Supreme Court has upheld the validity of a clause in a Government contract which authorised the State to recover damages as arrears of land revenue.[52] Where there was no such clause recovery of dues under a contract by way of arrears of land revenue was not allowed.[53]

LIQUIDATED DAMAGES AND PENALTY [S. 74]

English law

The parties to a contract may determine beforehand the amount of compensation payable in the event of breach. According to English law a sum so fixed may fall in any of the following two categories:

(1) Liquidated damages, or

(2) Penalty.

If the sum fixed represents a genuine pre-estimate of the probable damage that is likely to result from the breach, it is liquidated damages. A sum less than the amount of probable damage is also regarded as liquidated damages. The whole of such sum is recoverable.[54] A well-known illustration is *Dunlop Pneumatic Tyre Co Ltd* v *New Garage & Motor Co Ltd*.[55]

> A manufacturer of tyres supplied a quantity of tyres to a dealer on the condition that they would not be sold below the list prices and that liquidated damages, not penalty, of £ 5 would be payable for every tyre sold in breach of the agreement. The dealer committed breach. The question was whether the above sum was intended as a genuine compensation for the loss suffered.

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50. *Forsikringsaktieselskapet Vesta* v *Butcher*, (1988) 2 All ER 43 CA. The court adopted the ruling in *Rowe* v *Turner Hopkins & Partners*, (1980) 2 NZLR 550, but did not follow *A.B. Marintrans* v *Comet Shipping Co Ltd*, (1985) 3 All ER 442.
51. *Barclays Bank* v *Fairclough Building*, (1995) 1 All ER 288 CA.
52. *State of Karnataka* v *Shri e Rameshwara Rice Mills*, (1987) 2 SCC 160: AIR 1987 SC 1359.
53. *Mohd Umar* v *Nagar Palika, Khatima*, AIR 1998 All 227.
54. See *Cellulose Acetate Silk Co* v *Widnes Foundry, (1925) Ltd*, (1933) AC 20, apparently based upon the principle that the parties have the right to limit their liability.
55. (1915) AC 79, (1914-15) All ER Rep 739, HL.

The House of Lords held it to be liquidated damages. Lord DUNEDIN stated the effect of cases in the following propositions:

(1) The expression used by the parties is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

(2) The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.[56]

(3) The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract.[57]

(4) To assist this task, various tests have been suggested:

(a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.[58]

(b) It will be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is a sum greater than the sum which ought to have been paid.[59]

(c) There is a presumption (but no more) that it is penalty, when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion a serious and others but trifling damage".[60]

Court's power to reduce specified amount

If the sum fixed by the parties is found to be liquidated damages, the whole of it is recoverable. But if it is viewed as "penalty", it is rejected. Damages will then be calculated according to the ordinary principles. In doing so the following "salutary warning" of DIPLOCK, LJ should be kept in mind:[61]

> The court should not be astute to descry a penalty clause in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former.

To this Cheshire and Fifoot add:[62]

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56. *Clydebank Engineering & Shipbuilding Co* v *Don Jose Ramos Yzquierdoy Castaneda*, (1905) AC 6.
57. *Public Works Commr* v *Hills*, (1906) AC 368; *Webster* v *Bosanquet*, (1912) AC 394.
58. Illustration given by Lord HALSBURY in *Clydebank case* (supra).
59. *Kemble* v *Farren*, 6 Bing 141 and JESSEL MR in *Wallis* v *Smith*, 21 Ch D 243.
60. Lord WATSON in *Lord Elphinstone* v *Monkland Iron & Coal Co*, 11 AC 232. Following these propositions the Singapore CA held in *Golden Bay Realty Pte Ltd* v *Orchard Twelve Investments Pte Ltd*, (1989) 2 Mal LJ 70, that liquidated damages rate specified in the agreement of 9 % per annum over 85 % of the purchase price of property could not be said to be an extravagant or unconscionable amount.
61. *Robophone Facilities Ltd* v *Blank*, (1966) 1 WLR 1428, 1447.
62. LAW OF CONTRACT, 611 (9th edn 1976 by Furmston).

Such a stipulation reflects good business sense and is advantageous to both parties. It enables them to envisage the financial consequence of a breach; and if litigation proves inevitable, it avoids the difficulty and legal costs, often heavy, of proving what loss has in fact been suffered by the innocent party.

An illustration of "penalty" is *Ford Motor Co* v *Armstrong*.[63]

The defendant, a retailer, received from the plaintiffs, supplies of cars and parts and agreed not to sell any item below the listed price. A sum of £ 250 was payable for every breach as "agreed damages".

A breach having taken place, a majority of the Court of Appeal held that the sum fixed was a penalty as it might happen that a part sold in breach was of lesser value than the damages payable.

Application to Hire-purchase Contracts

Another illustration of penalty is *Lamdon Trust Co Ltd* v *Hurrel*.[64]

A car was purchased on hire-purchase terms, the total price payable by instalments being £ 558. The agreement provided that if the purchaser returned the car or if, on account of his default the seller retook it, the total sum, including the instalments already paid, of £ 425 must be paid. The purchaser paid up to £ 302 and then defaulted. The seller retook and resold it for £ 270, thus receiving a total sum of £ 572, which was more than the contract price. Even so he brought an action to recover £ 122, being the difference between £ 425 and the instalments paid.

But his claim failed. The court rejected the sum as being a penalty and not a genuine pre-estimate of the probable damage. In arriving at this conclusion DENNING LJ took into account these circumstances: "The £ 425 is three quarters of the total price. It is inserted by the hire-purchase companies by rule of thumb without regard to the make of car, its age, the market conditions or anything of the kind. It is the same for all." In addition to the liability to pay £ 425, the purchaser was to keep the car in good order, repair and condition and was to pay independent damages for any breach of this condition, supposing that the car was taken back within a month, could anyone think that the hire or depreciation would go up to £ 425. "In these circumstances", his Lordship concluded, "I cannot regard the figure of three-quarters as a genuine pre-estimate of damage. If the parties had genuinely tried to estimate the depreciation of this particular car, the figure would have been much less."

In India also hire-purchase agreements are not immune from the applicability of Section 74. They are also to be tested on the same anvil. In this case[65] interest at the rate of 18% p.a. was added to the principal sum in advance. There was a further stipulation to pay compensation at the rate of 2½% p.m. on the amount of hire-purchase in arrears. The total rate came up to 30% p.a. on an amount which already included 18% p.a. This was held to be excessive. Following the decision of the Supreme Court in *R.P. Subbaramma Sastri* v *K.S. Raghavan*[66] the court said:

63. (1915) 31 TLR 267, CA.
64. (1955) 1 All ER 839; *Sub nom. Lamdon Trust Co Ltd* v *Hurrel*, (1951) 1 WLR 391.
65. *Pushpendra Motilal Singh* v *Commercial Automobiles*, (1999) 2 MPLJ 319 at p. 324.
66. AIR 1987 SC 1257.

"A weak cannot be pushed to the wall because of the inequality of bargaining power. He cannot be held bound by terms in fine print which are unduly onerous, oppressive and unreasonable."

Heavy Amount as Evidence of Penalty

The House of Lords in their decision in *Bridge* v *Cambell Discount Co Ltd*[67] carried this principle further still by holding that where two-third of the price is made payable in the event of a default, that should be viewed as a "penalty". The Court of Appeal pointed out in a subsequent case[68], that where a hire-purchase agreement which, in the event of default, provides for the payment of the full amount or a fixed amount whether the default takes place in the beginning or towards the end of the period of agreement, is bound to be regarded as a penalty. Similarly, where the sum of money payable being very small and the agreement provides that in the event of default a large sum would become payable, that is obviously a penalty. In an old case:[69]

The defendant, an artiste, engaged himself to act as a principal comedian at a theatre for a fixed period on a charge of about three and a half pounds per night. The agreement provided that in the event of default by either party a sum of £ 1000 was payable. This was described in the agreement as liquidated and ascertained damages.

But even so the court held this to be a penalty. Its effect was that a failure to pay a small sum of £ 3 1/2 or for any other minor default, a sum of £ 1000 would become payable. The amount thus bore no relation with the degree or extent of breach.

Fixed Figure Constitutes Ceiling

Where the figure of compensation assessed by the parties carries some sense, whether it is reasonable or not, it will constitute the ceiling, and nothing more than that would be recoverable. In a case before the House of Lords:[70]

A contract for the delivery and erection of a certain machinery provided that the contractor would have to pay £ 20 as penalty for each day of default. The contractor delayed the completion of the work by thirty weeks. According to the contract his liability was £ 600, but the purchasers claimed £ 5850 being the actual loss suffered by them by reason of the delay

They were held entitled to claim only £ 600. Lord ATKIN, pointing out that the court was not bound by the terminology used by the parties, said:

Except that it is called a penalty, which on the cases is far from conclusive, it appears to be an amount of compensation measured by the period of delay, I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both the parties that the actual damage would be much more than £ 20 a week; but it was intended to go towards the damage and it was all that the sellers were prepared to pay.[71]

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67. (1962) 1 All ER 385: (1962) AC 600: (1962) 2 WLR 439.
68. *Anglo-Auto Finance Co Ltd* v *James*, (1963) 3 All ER 566: (1963) 1 WLR 1942, CA.
69. *Kemble* v *Farren*, (1829) 6 Bing 141: (1824-34) All ER Rep 641, the Court of Chancery.
70. *Cellulose Acetate Silk Co Ltd* v *Widness Foundry* (1925) *Ltd*, (1933) AC 20: (1932) All ER Rep 567, HL.
71. *See* McGregor, *Compensation* v *Punishment in Damages Awards*, (1965) 27 MLR 629: Hodgin and Veitch, (1965) 27 MLR 629; Hodgin and Veitch, *Punitive Damages*, *re-*

Stipulation for Payment on Events Extraneous to Breach of Contract

A contract providing for payment of money by one party on the occurrence of a specified event, rather than on the breach of a contractual duty owed by that party, cannot be a penalty. A person who guaranteed the payment of promissory notes issued by a contractor against which loans were provided, could not avoid his liability by showing that the amount covered by the promissory notes would have amounted to a penalty.[72]

Applicable whether Stipulation is for Payment in Cash or Kind

There is no difference between a penalty for non-payment of money due under a contract and a penalty for the non-performance of some other obligation and, furthermore, there is no distinction between a penalty which requires the payment of money and a penalty which requires the transfer of property. This observation occurs in a case[73] in which a clause in a sale agreement required the purchaser to transfer the shares back to the vendor for fixed sum if he defaulted in payment of instalments. The sum fixed for transfer back did not reflect the true value of the shares. The purchaser defaulted in payment of instalments and wanted to escape the rigour of the transaction by saying that it amounted to a penalty. The court adopted a novel approach which is reflected by the following summary of the judgment.

> In all cases, the consequences of a contractual term being identified as a penalty clause are the same, namely the clause, remained a term of the contract and would not be struck out merely because it was a penalty but enforcement of the clause would be subject to equitable relief without the need for a specific claim in that behalf on the part of the defendant ; accordingly, if the clause was sued on by the plaintiff it would not be enforced by the court beyond the amount of the plaintiff's actual loss.

On its true construction the retransfer agreement was intended to provide the plaintiff with security for unpaid instalments and it gave the plaintiff the remedy of repossession as an alternative to suing for recovery of any unpaid instalments. In those circumstances the court would make available to the plaintiff two alternative forms of relief, namely (*a*) an order for the sale of the shares by the court and payment to the plaintiff of the unpaid instalments and interest out of the proceeds of the sale or (*b*) an inquiry as to the value of the shares and if the value of the shares did not exceed the amount of the unpaid instalments and interest by £ 40,000 an order for specific performance of the agreement for the retransfer of the shares, with the choice of relief being left to the plaintiff. If the plaintiff declined to accept either form of relief the order for specific performance would be discharged since otherwise the court would be enforcing a penalty and the plaintiff would be left to

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assessed, (1972) 12 ICLQ 119; Benjamin, *Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts*, (1960) 9 ICLQ 600. This is so under S. 74 also. The section contains the words not exceeding the amount named by the parties. *Nait Ram* v *Shib Dat*, (1882) 5 All 238. Where the amount so named is more than reasonable, it would be reduced to a reasonable amount. *Abboke Heggadthi* v *K. Shetty*, (1906) 29 Mad 491. Where the amount specified is in terms of "not less than" it would still be subject to the court's discretion to reduce it to a reasonable amount. *Chunilal V. Mehta* v *Century Spg & Mfg Co Ltd*, AIR 1962 SC 1314, 1319.

72. *E.C.G.D.* v *Universal Oil Products*, (1983) 2 All ER (QBD).

73. *Johnson* v *Johnson*, (1989) 1 All ER 621 CA.

his remedy of suing to recover the amount of the unpaid instalments in a fresh action.[74]

Conditions of Membership

A rule of an association as a condition of membership and as a matter of policy provided that members should share equally in the benefits and burdens of the association and that someone who declined the burden should not participate in the benefit. The court said that a rule of this kind was not in the nature of a penalty clause. The clause required the members under a resolution of the company to make additional subscription and provided that if a member failed to do so, he would be precluded from sharing the benefits of any recovery that the association might make. This was held to be not a penalty clause.[75]

Section 74, Contract Act

Section 74 of the Indian Contract Act lays down a slightly different rule:

74. Compensation for breach of contract where penalty stipulated for.—[76][When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [77][Central Government] or of any [78][State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.

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74. KERR, LJ dissented from this solution of the problem. *Beckham* v *Drake*, (1849) 2 HL Cas 579; *Craig* v *M'Beath*, (1863) 1 M 1020, dictum of Lord Hatherley LC in *Thompson* v *Hudson*, (1869) LR 4 HL 1, 15; *Dagenham (Thames) Dock Co, ex p Hulse, Re*, (1873) LR 8 Ch App 1022; *Public Works Commr* v *Hills*, (1904-7) All ER Rep 919; *Wall* v *Rederiaktiebolaget Luggude*, (1915) 3 KB 66 and *Bridge* v *Campbell Discount Co Ltd*, (1962) 1 All ER 385, applied.

75. *Nutting* v *Baldwin*, (1995) 2 All ER 321.

76. These paragraphs were *substituted* for the first paragraph of S. 74 by S. 4 of the Indian Contract (Amendment) Act, 1899 (VI of 1899).

77. These words were *substituted* for the "Government of India" by the Government of India (Adoptation of Indian Laws) Order, 1937.

78. *Subs.* by the A.O. 1950 for "Provincial Government".

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) *A* contracts with *B* to pay *B* Rs 1000, if he fails to pay *B* Rs 500 on a given day. *A* fails to pay *B* Rs 500 on that day. *B* is entitled to recover from *A* such compensation not exceeding Rs 1000 as the Court considers reasonable.

(b) *A* contracts with *B* that, if *A* practises as a surgeon within Calcutta, he will pay *B* Rs 5000. *A* practises as a surgeon in Calcutta. *B* is entitled to such compensation, not exceeding Rs 5000, as the Court considers reasonable.

(c) *A* gives a recognizance binding him in a penalty of Rs 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

[79][*(d)* *A* gives *B* a bond for the repayment of Rs 1000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and *B* is only entitled to recover from *A* such compensation as the Court considers reasonable.

(e) *A*, who owes money to *B*, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty and *B* is only entitled to reasonable compensation in case of breach.

(f) *A* undertakes to repay *B* a loan of Rs 1000 by five equal monthly instalments, with a stipulation that, in default of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) *A* borrows Rs 100 from *B* and gives him a bond for Rs 200 payable by five yearly instalments of Rs 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.][80]

The rule is that where a sum is named in a contract as the amount to be paid in case of breach, regardless whether it is a penalty or not, the party suffering from breach is entitled to receive reasonable compensation not exceeding the amount so named. The named sum constitutes the maximum limit of liability. The court cannot order damages beyond that. "The distinction has been abolished in India. The courts award reasonable compensation not exceeding the stipulation. The courts knock down agreements which are unconscionable and extravagant."[81] But the court has the latitude to reduce the amount to what appears to be reasonable in the

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79. Illustrations (*d*) to (*g*) *added* by S. 4 of the Indian Contract (Amendment) Act, (6 of 1899).

80. *Custodian* v *East West Travel and Trade Links Ltd*, (1995) 4 Bom CR 194 compound interest which amounted to penalty, but the court said that the conduct of the party in delaying payment and suppressing the liability to pay was such that no sympathy could be shown and the stipulated interest was recoverable. *HP Fruit Growers' Co-operative Mark Processing Society* v *HP Housing Board*, AIR 1996 HP 94, lease, lease instalments included interest rates, on default double rate payable over and above that already included, held penalty, it could at most be simple interest at normal rates.

81. *Pushpendra Motilal Singh* v *Commercial Automobilies*, (1999) 2 MPLJ 319 at p. 324.

circumstances.[82] Whether or not the party has proved to have suffered actual loss, is immaterial.[83]

This has certain advantages over the English system. The section dispenses with the necessity of laying down rules for distinguishing liquidated damages from penalty. Further, according to English law, the court must either accept the amount in whole or reject it in whole. In India, the court need not reject the amount. It may either accept the amount or reduce it to what appears reasonable.[84] In the *Fateh Chand* case the Supreme Court observed as follows:[85] "Section 74 is clearly an attempt to eliminate the somewhat elaborate refinements made under the English Common Law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. . . . The Indian Legislature sought to cut across the web of rules and presumptions under the English Common Law by enacting a uniform principle applicable to all stipulations naming the amount to be paid in case of breach and stipulations by way of penalty."

One Party could not be Adjudicating Authority

In a case before the Supreme Court[86] a clause in a contract was to the effect that for any breach of the conditions of the contract the first party shall be liable to pay damages to the second party as may be assessed by the second party. This clause was held to be void because it had the effect of making a party also a judge to decide breach and assess damages. The court said: "The power to assess damages is

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82. Hence, the right is the right to sue for the breach and not for the amount reserved because the court has to ascertain its reasonableness. *State of Gujarat* v *M. K. Patel & Co*, AIR 1985 Guj 179. Where under a term of the contract, the Government side was authorised to assess compensation for breach, it was held that the clause would apply only when there was an admitted breach. Such a clause would not enable the party so empowered to ignore the requirements of S. 74 one of which is that only a reasonable amount would be allowed. If the contract is otherwise binding. S. 74 can be used only to prevent penalty, otherwise it is not applicable. *Hameed* v *Jayabharat Credit and Investment Co Ltd*, AIR 1986 Ker 206. In a contract to supply hydrogen gas cylinders, the rate of Rs 1.25 per week for detention of the cylinders beyond the first three weeks' period was held to be a proper measure of damages. *Indian Drugs and Pharmaceuticals Ltd* v *Industrial Oxygen Co P Ltd*, 1984 Mh LJ 690. *A P State Electricity Board* v *VBC Foods P Ltd*, AIR 1998 AP 177, a term in the energy supply agreement that 2% per month interest would be charged on bill amounts in default was held to be reasonable within the meaning of S. 74 *Sahib Ram & Co* v *Rajasthan State Agricultural Marketing Board*, (1995) AIHC 358, award of full amount provided in contract for failure of or delay in performance without assessment of loss suffered by the aggrieved party was held to be in the nature of levying a penalty. *John* v *Oriental Kuries Ltd*, (1994) 2 Ker LT 353, provision for the whole number of instalments becoming immediately due on default, not a penalty.

83. This section is not attracted by a penal provision in a consent decree. *Punjab Woollen Textiles Firm* v *Bank of India*, AIR 1992 P&H 158. For a contrary view, see *Parvati Bai* v *A.P. Jain*, 1985 MPLJ 703. But the provision is applicable to compromises, e.g. a truck driver's compromise agreement either to set right the damage done by negligent driving or to pay Rs 10,000. *C.K. Kesaram* v *Kudaythoor*, (1990) 2 Ker LJ 424. A stipulation for increased interest from the day of default may be a stipulation by way of penalty and whenever it is so, relief is to be granted under the section. The rate of interest will be allowed by way of compensation in the discretion of the court, *Pushpendra Motilal Singh* v *Commercial Automobiles*, (1999) 2 MPLJ 319.

84. See *Fateh Chand* v *Balkrishan Das*, AIR 1963 SC 1405: (1964) 1 SCR 515 and *Chunilal V Mehta & Sons Ltd* v *Century Spg & Mfg Co Ltd*, AIR 1962 SC 1314.

85. AIR 1963 SC 1405.

86. *State of Karnataka* v *Rameshawara Rice Mills*, AIR 1987 SC 1359.

subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the clause afforded scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the officer regarding breach can be sustained under the law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes breach, adjudication should be by an independent person or body and not by the other party to the contract. The position will be different where there is no dispute or there is consensus between the parties regarding the breach of conditions. In such a case, the officer of the State even though a party to the contract will be within his rights in assessing the damages occasioned by the breach.[87] The cumulative effect of the decisions is that when breach is not admitted, one of the contracting parties cannot arrogate to itself the power to claim compensation for the breach from the other party without there being any adjudication by an outside agency as to whether there was any breach of contract. The State could not be a judge in its own cause or its own arbiter.

Breach and Right to Compensation must be Established

The injured party has to prove that there has been a breach of contract on the part of the other party and, therefore, the remedial system provided in the contract has become exercisable. The claim in this case was for refund of amount retained by the other party as liquidated damages for breach. A decree for refund of the amount was passed without going into the question whether delay in completion of the work was caused due to lapses on the part of one party or the other or whether the guarantee had become invokable. The case was sent back to the trial court for fact finding as to breach and its consequences.[88]

Common Features between English and Indian Laws

Yet the distinction between liquidated damages and penalty is not altogether irrelevant to the section. Its relevance, in the first place, arises from the fact that the amount contemplated by the parties will be reduced only if it appears to be by way of penalty. Otherwise the whole of it is recoverable as liquidated damages. Secondly, the first explanation to the section uses the word "penalty". It provides that "a stipulation for increased interest from the date of default may be a stipulation by way of penalty". Where, for instance, money is borrowed at 12% interest payable six-monthly, and the agreement provides that in case of default an interest of 75% shall be payable. This is a stipulation by way of penalty.[89] Similarly, where a sum of Rs 100 is borrowed but a

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87. Followed in *Rambal Co* v *Kerala State Science & Technology Museum*, AIR 2000 Ker 296 (DB), where also it was held that disputed questions of breach and damages can be decided by the court or by a tribunal and not by a party irrespective of whatever may be the contract clause and also by the Full Bench in *Abdul Rahiman* v *Divisional Forest Officer*, (1988) 2 Ker LT 290: AIR 1989 Ker 1 (FB); *Anchor Lines P Ltd* v *Cement Corporation of India Ltd*, (2000) 4 Kar LJ 485, a party to the contract cannot be arbiter in his own cause; adjudication of disputed question of breach of contract should be by some independent person or body of persons. The party holding bank guarantee first encashed it and then gave notice to the other of the alleged breach of contract and adjustment of the guarantee amount against self-assessed damages. All this was held to be wrong.

88. *FACT Engineering Works* v *Kerala Industries*, AIR 2001 Ker 326.

89. Charging of compound interest at the same rate after default is not penalty *per se*, *Mallavarapu* v *Buddaraju*, AIR 1982 AP 313; following *Bhushana Rao* v *Subbayya*, AIR

bond is given for Rs 200, which further provides that in default of payment of any instalment the whole shall become due. This is a penalty.[90] But where a sum of Rs 100 is borrowed and it is payable by five-monthly instalments and the bond provides that in default of payment of any instalment the whole shall become due, then it is not a penalty and the contract is enforceable.[91] An illustration of penalty is the decision of the Madhya Pradesh High Court in *Gurubax Singh* v *Begum Rafiya*.[92] The contract involved the sale of standing trees for a sum of Rs 60,000. The contract provided that in the event of default by either party a compensation of Rs 50,000 would be payable. The court regarded this to be a penalty and required the plaintiff to prove his actual loss. It was not possible for the court to accept that a contract involving a consideration of Rs 60,000 would cause a damage of Rs 50,000 if not performed. Where the whole of the money is presently due and it is only for the benefit of the debtor and for his convenience that the creditor agrees to accept payment in instalments, a provision that a default in the payment of one instalment would make the whole amount to be due at once would not amount to penalty.[93]

It has been held that a term of a loan agreement which provides for immediate repayment of capital in the event of a default by the borrower and for payment of

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1936 PC 283. Acceleration of interest is penalty, but not accelleration of capital. *Wadham Stringer Tin Ltd* v *Meaney*, (1980) 3 All ER 789; *considered* 1982 JBL 148. Where a sum of about Rs 16,000 was advanced and Rs 28,000 had to be paid back in instalments under Kuri Chit Fund Scheme, the whole becoming due on default in paying a single instalment, the Supreme Court held the stipulation to be by way of penalty. *K. P. Subbarama Sastri* v *K. S. Raghavan*, (1987) 2 SCC 424: AIR 1987 SC 1257.

90. Illustrative cases: *Mackintosh* v *Crow*, (1883) 9 Cal 689; *Umarkhan* v *Salekhan*, (1892) 17 Bom 106; *Abdul Gani* v *Nandlal*, (1902) 30 Cal 15; *Rameshwar Pd Singh* v *Raisham Kishen*, (1901) 29 Cal 43; *Trimbak* v *Bhagchand*, (1902) 27 Bom 21; *Sunder Koer* v *Rai Sham Kishen*, (1907) 34 Cal 150. A provision for compound interest does not by itself amount to penalty. *Hari Lahu Patil* v *Ramji Valad Panda*, (1904) 28 Bom 371. "A compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." *Sundar Koer* v *Rai Sham Krishen*, LR 34 IA 9.

91. Illustration (*e*), *ibid*. The Punjab and Haryana High Court allowed in *Jyoti Cold Stores* v *Punjab Financial Corpn*, AIR 1973 P&H 38, recovery of enhanced interest at 11% from a permanent defaulter. Where concession in interest rate is offered on prompt payments, restoration of the original interest on default is not a penalty. *Kutubudin* v *Bashiruddin*, (1910) 32 All 448; *Fitz Holmes* v *Bank of Upper India Ltd*, (1923) 14 Lah 258; *Administrator of Burma* v *Moola*, AIR 1928 Rang 19; *Wallingfield* v *Mutual Society*, (1880) 5 App Cas 685. Similarly, option of a less but prompt payment where more is due but full payment to be recovered on default, no penalty. *Waman* v *Yeshwant*, AIR 1949 Bom 97: 50 Bom LR 688; *Popular Bank of India* v *C. Lal*, AIR 1947 All 136. The award of compound interest has been held to be not a penalty unless it is fixed at a higher interest, *Shriniwas Raghuvendra Javalgekar* v *Bank of Maharashtra*, (1994) 4 Bom CR 139.

92. AIR 1979 MP 66.

93. *K.P. Subbrama Sastri* v *K.S. Raghavan*, (1987) 2 SCC 424: AIR 1987 SC 1257. Now there is a statutory power under the Usurious Loans Act, 1918 to relieve the borrower against exorbitant interest, *Najaf Ali Khan* v *Mohd Fazal Ali*, AIR 1928 All 225, interest reduced from 37% to 12%. Exorbitant interest rates are reduced to reasonable amount. For example, 75% reduced to 15% and 60% compound to 30% simple. *Krishna Charan* v *S.K. Das*, (1917) 44 Cal 162; *Abdul Majeed* v *K.C. Pal*, (1914) 42 Cal 69. Other illustrations: *Periasami Thallavar* v *Subramanian Ansari*, (1904) 14 Mad LJ 136; *Chuni Lal* v *Munna Lal*, (1930) 11 Lah 635: AIR 1931 Lah 120; *Rama Krishnayya Venkata*, AIR 1934 Mad 31; *Jyoti Cold Stores* v *Punjab Financial Corpn*, AIR 1973 P&H 38.

interest due up to the date of default, but not future interest, is not a penalty clause.[94] A clause in an agreement that the special benefit of a share in the property at a lower price offered to a party under the contract would not be available to a party defaulting in payment of an instalment within the stated time, has been held as not amounting to a penalty.[95]

Still another common feature between the English common law and Indian law is shown by the decision of the Supreme Court in *Chunilal V. Mehta & Sons Ltd* v *Century Spg & Mfg Co Ltd*[96], where it has been held that "by providing for compensation in express terms the right to claim damages under the general law is necessarily excluded".

> An agreement for the appointment of managing agents provided that their remuneration would be Rs 6000 per month or 10% of the gross profits of a year whichever was more and also that in the event of premature termination their compensation would be not less than Rs 6000 per month for the whole of the unexpired period. They were removed before the expiry of the term and claimed compensation at the rate of 10% of the gross profits.

But the Supreme Court held that they must be content with the rate of Rs 6000 per month. They were bound by the clause. "It seems to us that the intention of the parties was that if the appellants were relieved of the duty to work as managing agents, they should not be entitled to get anything more than Rs 6000 per month by way of compensation."[97]

Forfeiture of Earnest Money or Deposit

In the application of Section 74 to forfeiture clauses, the Supreme Court has drawn distinction between "earnest money" and "security deposit". The distinction was set to work in *Fatehchand* v *Balkishan Das*.[98]

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94. *Angelic Star, The*, (1988) 1 FTLR 94 CA.
95. *Sova Ray* v *Gostha Gopal Dey*, (1988) 2 SCC 134: AIR 1988 SC 981.
96. AIR 1962 SC 1314: 1962 Supp (3) SCR 549: (1962) 1 LLJ 656. Penalty cannot be imposed where delay is due to the conduct of the party trying to impose penalty. *Oil and Natural Gas Commission* v *S.S. Agarwalla & Co*, AIR 1984 Gau 11.
97. There is nothing essentially wrong in awarding the maximum fixed by the parties. *Shiva Jute Baling Ltd* v *Hindley & Co*, (1960) 1 SCR 569: AIR 1959 SC 1357: (1965) 1 MLJ 1. For example of penal interest see *Nageshwarswami* v *V. V. Rao*, 1953 SCR 894: AIR 1953 SC 370.
98. (1964) 1 SCR 515: AIR 1963 SC 1405. Followed in *Seetharama* v *Abbas*, (1988) 2 Ker LT 478. Where an amount was deposited before the acceptance of the offer by way of earnest but thereafter acceptance could not take place because the acceptor introduced his own conditions, no contract arose and so no forfeiture of the earnest money could be allowed. *Arvind Coal & Construction Co* v *Damodar Valley Corpn*, AIR 1991 Pat 14. Similarly, an amount paid pending negotiations for letting out premises which did not fructify was ordered to be refunded with 12% interest. *J.K. Industries Ltd* v *Mohan Investments and Properties P Ltd*, AIR 1992 Del 305. *See* also *Union of India* v *Shiam Sunder Lal*, (1963) All LJ 251; *Maung Ba* v *Motor House Co*, (1929) 7 Rang 431. Forfeiture is not an automatic act. It has to be carried out and this should be done by the contracting party himself or duly authorised agent. A legal counsel appointment by the managing director of the company for negotiating sale of its properties was held to be not authorised for rescinding a contract and forfeiting the contractor's earnest money. *Happy Home Builders P Ltd* v *Delite Enterprises*, (1995) AIHC 1320. Forfeiture of licence fee does not take place automatically on violation of the conditions of the licence. The Commissioner may order forfeiture either in full or in part, but before that he must hear the licensee and pass a judgment in accordance with the loss to the Government. Automatic forfeiture would amount to penalty. *G. Shankar Reddy* v

An agreement for the sale of certain land and bungalow for Rs 1,12,500 provided that the buyer was to pay Rs 1000 as earnest money and Rs 24,000 on delivery of possession. The buyer made these payments and was put in possession. The agreement further provided that if the buyer failed to pay the balance price and get the sale deed registered by a certain date, the sum of Rs 25,000 would stand forfeited, the agreement cancelled and the buyer shall return possession to the seller. The buyer defaulted and the seller forfeited the above sum and brought an action to recover possession and compensation for occupation and use.

He was allowed to forfeit Rs 1000 being earnest money and to retain the sum of Rs 24,000 also not by virtue of his right to forfeit but as representing use value. SHAH, J refuted the fallacy as shown by some High Court decisions that Section 74 applies only to cases where the aggrieved party is seeking to recover a fixed amount on breach of contract and not to cases where an amount received under the contract is sought to be forfeited.

> In our judgment the expression 'the contract contains any other stipulation by way of penalty' comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future or for forfeiture of right to money or other property already delivered. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture.[1]

Neither earnest money nor any other kind of deposit which is liable to be forfeited can be subjected to forfeiture if the underlying contract is void. The Supreme Court laid down this principle in a case in which in a transaction for sale of land the buyer was under the impression that he was getting the land at the agreed price per *bigha* whereas the seller believed he was selling per *kanal*. The parties being at cross-purposes and being not *ad idem*, the agreement was void. There was no question of forfeiting, the earnest money. It was refundable under S. 65, the contract having been discovered to be void.[2]

Similarly, there can be no forfeiture or encashment of bank guarantee where no contract arises. A tender which has been revoked before acceptance cannot be accepted

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Prohibition and Excise Supdt, (1997) 5 Andh LT 177. The matter of distinction between earnest money and deposit was also discussed in *Vijaya Foundry* v *Gorden Woodroffe & Co*, (1963) 2 Mad LJ 153. This decision was followed in *Sabina D' Costa* v *Joseph Antony Noronha*, AIR 1984 Kant 122 which dealt with the legal position of the subject and how the court should deal with the question of forfeiture of earnest money.

1. The provision is applicable to every kind of deposit by whatever name it may be called. The words "any other stipulation by way of penalty" are wide enough to cover all kinds of forfeiture provisions. *Union of India* v *Shaim Sunder Lal*, 1963 All LJ 251. *Bombay Scrap Traders* v *Board of Trustees of Port of Bombay*, (1994) 1 Bom CR 266, failure on the part of the tenderer to comply with the work order, forfeiture of earnest money, held justified.
2. *Tarsem Singh* v *Sukhminder Singh*, AIR 1997 SC 1400. But see *State of Gujarat* v *Dahyabhai Zaverbhai*, AIR 1997 SC 2701, the contractor abandoned the project, forfeiture of security deposit held justified. *J.K. Enterprises* v *State of MP*, AIR 1997 MP 68, forfeiture of earnest money on failure of bidder to perform, justified.

and, therefore, the bank guarantee submitted along with the tender also becomes revoked and cannot be encashed.[3]

> Whatever be the name or nature of the amount deposited by one party with the other which is liable to forfeiture in the event of breach, Section 74 would come into play and only that part of the amount would be open to forfeiture which is reasonable in the circumstances of the case. Anything more would tantamount to penalty.[4] Forfeiture of earnest money is permissible by way of liquidated damages.[5]

Whether Actual Loss Necessary

Another question which the court considered was whether actual proof of loss is necessary to recover anything under Section 74. In the earlier case of *Chunilal V. Mehta & Sons Ltd* v *Century Spinning & Mfg Co Ltd*[6] MUDHOLKAR J suggested that where the right to recover liquidated damages under Section 74 is found to exist "no question of ascertaining damage really arises". The section also says that the named sum is recoverable "whether or not actual damage or loss is proved to have been caused thereby". But even so SHAH J felt that these words of the section only dispense with proof of "actual loss or damage". The section does not justify the award of compensation, when in consequence of the breach no legal injury at all has resulted. This is so because compensation can only be awarded under Section 73 for loss which naturally arose or was in the contemplation of the parties. Thus proof of some loss is necessary[7], though it will not be necessary to prove the extent of it.

This view was reaffirmed by SHAH J (acting CJ) in *Maula Bux* v *Union of India*.[8]

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3. *Omprakash & Co* v *City and Industrial Development Corpn of Maharashtra Ltd*, (1993) Mh LJ 1419. *V. Lakshmanan* v *B R Mandalagiri*, 1995 Supp (2) SCC 33, forfeiture of earnest money on default in sale of land. The same was the position in *Food Corpn of India* v *Sujit Roy*, AIR 2000 Gau 61. 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.
4. *Thakorlal V. Patel* v *Syed Badruddin*, (1993) 1 Guj LR 28. *See* also *P. Nagrajan* v *Southern Structurals Ltd*, (1995) 1 Mad 337, agreement upon entering into service that the employee would serve for 5 years, Rs 15,000 payable for breach of the term, held reasonable compensation.
5. *Narendrakumar Nakhat* v *Nandi Hasbi Textile Mills Ltd*, AIR 1997 Kant 185. Where a contract for purchase of property worth 30 lakh rupees carried earnest money of three lakh rupees and a damage clause of 12 lakh rupees, the clause was held to be unreasonable. *Roshan Lal* v *Manohar Lal*, AIR 2000 Delhi 31.
6. 1962 Supp (3) SCR 549: AIR 1962 SC 1314: (1962)1 LLJ 656. *See* also *Hind Construction Contractors Ltd* v *State of Maharashtra*, (1979) 2 SCC 70: AIR 1979 SC 720, where the State illegally rescinded the contract, it was not allowed to forefeit the contractor's deposit.
7. The claimant has to prove his actual loss. *Karamchand Thapar & Bros Ltd* v *H.H. Jethandani*, 76 Cal WN 38.
8. (1969) 2 SCC 554: (1970) 1 SCR 928: AIR 1970 SC 1955. Followed in *Food Corporation of India* v *Gauri Prasad Gopal*, 1987 All LJ 567 where the FCI had reserved the right to recover Rs 5000 on default by the supplier plus expenses and difference in prices in the alternative purchase and was ordered to refund the security deposit of Rs 5000 because the Corpn did not show any actual loss. To the same effect, *Guna Sittampalam* v *Sittampalam*, (1989) 2 Current LJ 251. High Court, Kuala Lumpur, no forfeiture allowed where no loss

The plaintiff contracted to supply to Military Headquarters, U.P. Area, potatoes, poultry, eggs and fish for one year and deposited Rs 18,500 for due performance of the contract. The plaintiff having made persistent defaults in making regular and full supplies, the Government of India, in pursuance of the terms of the contract, rescinded the contract and forfeited the amount deposited by the plaintiff.

The High Court of Allahabad was of the view that the deposit in question was in the nature of earnest money and the Supreme Court decision in *Fateh Chand* v *Balkishan Das*[9] did not purport to overrule the previous trend of authorities to the effect that earnest money deposited by way of security for the due performance of a contract does not amount to penalty as contemplated by Section 74. The Supreme Court did not countenance the view that every such deposit is necessarily an earnest. The court cited the meaning of earnest money as given in Earl Jowitt, THE DICTIONARY OF ENGLISH LAW:[10]

> Giving an earnest or earnest money is a mode of signifying assent to a contract of sale or the like by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest, have made up their minds.

The court also cited the observation of the Privy Council in *Chiranjit Singh* v *Har Swarup*[11] that "earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through by reason of the fault or failure of the vendee". If this is the view of an earnest deposit, then quite obviously the deposit in the present case was not by way of earnest because it was not to be appropriated towards the payment of price, but was to be held as a security. SHAH, acting C.J. (afterwards CJ), then referred to the cases to the effect that Section 74 has no application to forfeiture of deposits[12] and ruled that this view is no longer good law. The learned Chief Justice continued:

> Forfeiture of earnest money under a contract of sale, if the amount is reasonable does not fall within Section 74. This has been decided in several cases.[13] These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid, the undertaking is in the nature of a penalty.

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was shown to have been caused on the vendee's failure to take shares. The court referred to *Fateh Chand* v *Balkishan Das*, AIR 1968 SC 1405.

9. (1964) 1 SCR 515.
10. At p. 689.
11. AIR 1926 PC 1. To the same effect, *State of Gujrat* v *Mohanlal Motilal & Co*, (1987) 1 GLH 447; *Panna Singh* v *Arjan Singh*, AIR 1929 PC 179: (1929) 31 Bom LR 909; *Bhalchandra* v *Mahadev*, AIR 1947 Nag 193.
12. Such cases are: *Natesa Aiyar* v *Appava Padayachi*, (1915) 38 Mad 178, FB; *Singer Mfg Co* v *Raja Prosad*, (1909) 36 Cal 960; *Manian Pattar* v *Madras Rly Co*, (1906) 29 Mad 119; *Abba Gani & Co* v *Trustees of the Port of Bombay*, (1952) Bom 747.
13. Following cases were cited: *Chiranjit Singh* v *Harswarup*, AIR 1926 PC 1; *Roshan Lal* v *Delhi Cloth & General Mills Co Ltd*, (1911) 33 All 166; *Mohd Habibullah* v *Mohd Shafi*, (1919) 41 All 324; *Bishen Chand* v *Radha Kishan Das*, (1897) 19 All 489.

Referring to the argument that Rs 18,500 represent a genuine pre-estimate of the probable damage, the learned Chief Justice said that the Union has not proved to have suffered any loss. If no loss is proved to have been suffered, the provisions of the Act in Sections 73 and 74 relating to damages for breach are not attracted. The court confined the words of Section 74 that "whether or not actual damage or loss is proved to have been caused thereby" to cases in which it is not possible to prove the monetary value of the loss and, therefore, the value fixed by the parties may be taken as the reasonable measure of compensation. But where the loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. Since no attempt was made by the Government to prove whether the prices paid to the alternative source of supply were less or more than the contract price, therefore, the Government was not entitled to any compensation for the breach.

Where the actual loss was not proved and the whole of the actually reserved amount of 5% of the total project value was levied as liquidated damages, the court said that it amounted to a penalty. The award of the arbitrator to that extent was set aside.[14]

WHERE NO LOSS CAUSED.—An amount was paid by a purchaser in advance towards the purchase price of the goods. The contract provided that on default by the purchaser the amount would be forfeited. He defaulted. He was allowed refund. The seller proved no loss. The court said that retention of money for a long period was sufficient to compensate the plaintiff.[15]

WHERE PROFIT FOLLOWS.—Where not only no loss was caused to the seller of land by the buyer's refusal to perform, but, on the contrary, he resold it at a profit, the seller was not permitted to forfeit the advance paid by the buyer.[16]

FORFEITURE OF EARNEST MONEY ONLY WHEN REASONABLE TO DO SO.—In the subsequent case of *Shree Hanuman Cotton Mills* v *Tata Aircraft Ltd*:[17]

> The plaintiffs contracted with the defendants to purchase from them aeroscrap for rupees ten lakhs and paid Rs 2,50,000, being 25% of the purchase price. One of the conditions, among others being, that if he failed to pay the balance of the purchase price in accordance with the contract, the deposit would be forfeited and the contract cancelled. The buyer defaulted and the seller forfeited the deposit. The buyer sued to recover it.

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14. *English Electric Co of India Ltd* v *Cement Corpn of India Ltd*, (1998) AIHC 1875 Delhi. See also *A. Murali & Co* v *State Trading Corpn of India*, AIR 2001 Mad 271, earnest money deposit was taken to cover possible losses. The contractor committed breach. No legal injury or actual loss was caused to the opposite party. The contractor was allowed to recover back earnest money. Interest @ 12% p.a. was allowed.
15. *Sabina D'Costa* v *Joseph Antony*, AIR 1984 Kant 122. Similarly, where the seller committed breach of the contract by sending defective goods which were rejected by the buyer, the seller was not allowed to forfeit the money held by him by way of advance payment. *P.M. Naina Mohd Rowther* v *Kapporchand Jain*, (1988) 1 Mad LJ 261.
16. *Mohanlal* v *Dayaldas & Co*, AIR 1976 Raj 68. Compare this with *Lal Chand* v *Chandigarh Admn*, AIR 1992 P&H 194 where the earnest money of an allottee of a plot, who defaulted in further payments, was held to be properly forfeited irrespective of any consideration of the fact of loss, if any, caused, or profit obtained upon reallotment. Perhaps this is necessary to exclude opportunist allottees.
17. (1969) 3 SCC 522: (1970) 3 SCR 127: AIR 1970 SC 1986.

The court held that the deposit in question was intended as earnest money. The agreement clearly provided that the deposit would carry no interest and would be adjusted in the final bills. It was a part of the price and the seller was entitled to forfeit it. VAIDIALINGAM J found sufficient support in the following decision of the Privy Council:

> In *Chiranjit Singh* v *Har Swarup*,[18] though the contract stipulated that a sum of Rs 20,000 should be paid as earnest, the buyer did not pay any amount by way of earnest, as such, but he paid Rs 1,65,000 against the purchase price. But, nevertheless, the High Court, as well as the Judicial Committee, treated a sum of Rs 20,000 out of the sum of Rs 1,65,000, as earnest money paid under the terms of the agreement, and a claim to recover that amount of earnest money was negatived. In the case before us, the contract clearly refers to the earnest money being paid and to the fact of Rs 2,50,000 having been paid as earnest. Therefore, there is no ambiguity regarding the nature of the above payment and the right of the respondent to forfeit the same.

The learned Judge refused to consider the obiter observation of the Supreme Court in *Maula Bux* v *Union of India*[19] that earnest money can be forfeited without attracting Section 74 if the amount thereof is reasonable as binding. He pointed out that the Supreme Court itself had no occasion in that case to consider the question of reasonableness or otherwise of the earnest deposit being forfeited.[20]

DISTINCTION BETWEEN EARNEST AND DEPOSIT, HOW FAR REAL.— Thus, it appears that the court has gone more by technical considerations than by the substance of the bargains in question. In either case the initial payment, whether named as earnest or security deposit, was intended as a cover or protection against inconvenience or possible loss likely to be caused by the breach. If the deposit was named as earnest the court allowed it to be forfeited, but not otherwise, thus defeating the purport of the bargain that the parties had voluntarily made. The fact that the payment of a sum of money in a purchase agreement is not expressed as a deposit does not for that reason alone render the payment not a true deposit or earnest money. The intention of the parties with regard to the payment as earnest money may be gathered by examining the agreement as a whole. Even if no time for completion of the sale by paying the balance of the price was specified, the seller's notice for completing the sale within 7 days became a reasonable specification of time. Therefore, on the purchaser's failure to do so, the money paid by him was validly forfeited even if there was no provision in the original agreement for any such forfeiture.[21]

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18. AIR 1926 PC 1.
19. (1969) 2 SCC 554: AIR 1970 SC 1955.
20. See also *Naresh Chandra Sanyal* v *Calcutta Stock Exchange Assn Ltd*, (1971) 1 SCC 50, 58: (1971) 2 SCR 483, 494: AIR 1971 SC 422: (1970) 41 Com Cas 51, where upon the forfeiture of a share, the consequent price realised was more than the sum due and, therefore, the court ordered the surplus to be refunded to the holder whose share was forfeited for otherwise it would have been a penalty. *Mohd Sultan* v *Naina Mohammad*, AIR 1973 Mad 233, in the absence of a forfeiture clause, nothing can be forfeited, only reasonable compensation can be recovered. After deducting reasonable compensation, the remainder of the money has to be refunded to the depositor. *Mayson* v *Clonet*, (1924) App Cas 980; *Public Works Commissioner* v *Hill*, (1906) App Cas 368.
21. *Yab Kok Heng* v *International Auto Enterprise*, (1994) 1 Current LJ 414 (Malaysia). The court said that expressions like earnest money, part payment or deposit are generally used

The facts of *Maula Bux* v *Union of India*[22] were virtually repeated before the Supreme Court in *Union of India* v *Rampur Distillery & Chemical Co Ltd*[23] with only this difference that instead of eggs etc., it was "rum" that the contractor had failed to supply and the Supreme Court refused to allow the deposit to be forfeited or reasonable compensation to be recovered as the court found that breach of contract caused no loss to the Government and the Government made no attempt to establish that it had suffered any loss or damage on account of the breach.[24] The Gujarat High Court in its decision in *Variety Body Builders* v *Union of India*[25] followed the Supreme Court decisions in reference to a failure to supply rubber and metal to the Western Railway. Commenting upon this trend of decisions, a learned writer says:

> In the light of these decisions it is important for the Government departments to advise officers entering into contracts with contractors on behalf of the Government that they ought not to lull themselves into a false feeling of security by taking a security deposit and stipulating for its forfeiture upon default by the contractor. Under Section 74 all that the Government can claim is reasonable compensation and it is always necessary that the Government should establish the actual damage suffered by it by the contractor's default. If Government officers are not educated on these questions, the defaulting contractor will not only be able to recover his security deposit, but will be able to get away without paying any damages for breach of contract, as did the contractor in *Maula Bux and Variety Body Builders*.[26]

NO FORFEITURE WHERE EXTRA COSTS OTHERWISE RECOVERED.—Where, upon the failure of the contractor to complete the work, the State got the work executed at his risk and also recovered the extra expenses from him, the State was not allowed to forfeit his security deposit. This would have amounted to penalty and the State had suffered no loss.[27] The Andhra Pradesh High Court allowed the plaintiff to recover the stipulated amount of Rs 2000 from a vendor of land who failed to

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interchangeably. So stated in *Sun Properties* v *Happy Shopping Plaza*, (1972) 1 Malaysia LJ 89.

22. (1969) 2 SCC 554: (1970) 1 SCR 928.
23. AIR 1973 SC 1098: (1973) 1 SCC 649. *See* also *Tainwala Engg & Foundry Works* v *HEC*, AIR 1991 NOC 63 Pat, the party forfeiting deposit not allowed to do so when neither there was any pleading nor proof of the amount of loss; *Pran Nath Suri* v *State of M P*, AIR 1991 MP 121, on the failure of the bidder to execute documents, the auctioneer not reselling during the whole of the period, not allowed to recover any loss but entitled to forfeit earnest money.
24. SHELAT and CHANDRA JJ *see* at p. 1099. Followed in *State of T N* v *K.R. Selvamoorthy*, AIR 1987 Mad 171; where the amount deposited for obtaining a lease was ordered to be refunded because on the plaintiff not taking the lease, the defendant did not prove any loss.
25. AIR 1973 Guj 256.
26. K. Ponnoswami, *Survey of the Law of Contract* (Annual Survey of Indian Law, 1973) at p. 440. For another learned study of the subject, *see* I.C. Saxena, *Deposit Forfeiture: A Comparative Legal Perspective*, (1970) 12 J. I. L 441 and the *Survey of the Law of Contract*, (1970) ASIL, 320, 353-57.
27. *State of UP* v *Chandra Gupta & Co*, AIR 1977 All 28.

perfect his title within the prescribed time although no proof was given of any actual loss.[28]

Security Money under Other Contracts

Security money paid in respect of other contracts cannot be forfeited in respect of the contract under dispute, but bill-money due to the contractor under other contracts may be so used.

> A clause in a contract provided that all moneys or compensation payable to the Government under the terms of the contract may be realised out of the security deposit or money due under any other account.

The Supreme Court came to the conclusion that this clause enabled the Government to realise its claim from money due to the contractor in respect of other contracts and the security deposited under the present contract but not the security deposit belonging to other contracts.[29]

Where a contract for the supply of gas in cylinders was being performed in instalments and there was such a breach in respect of one instalment which entitled the purchaser to terminate the contract, he was allowed compensation at the rate fixed in the contract for the failure to supply the remainder. To attract Section 74 it is not necessary that a contract should be broken in its entirety.[30]

Consent decrees

The Madhya Pradesh High Court considered it to be well-settled that principles underlying Section 74 are applicable to consent decrees. A contract embodied in a decree is subject to all the incidents of any other contract. Accordingly, if it contains any clause which is of penal nature, it can be struck out. Applying these principles to a contract for sale of land for Rs 2000 half of which was deposited by way of earnest and which was compromised under which a consent decree was passed to the effect that the defendant would pay Rs 2000 plus costs in two instalments and that if he defaulted he would execute the sale deed in favour of the plaintiff, the default clause was held to be a penalty. The court said that the executing court shall always have power to apply equitable principles embodied in Section 74 and relieve a party to the contract against any term in the decree which operates as a penalty.[31]

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28 *Makkala v Gunnala*, AIR 1977 AP 374.

29. *Union of India v K.H. Rao*, (1977) 1 SCC 583. In the subsequent case of *H.M. Kamaluddin Ansari & Co v Union of India*, AIR 1984 SC 29, where the court expresses the opinion that money due in respect of other contracts may be forfeited if there is a clear and express provision to that effect under the contract. Where a vendor has been given the right to repurchase on default and he does so, it cannot be called a penalty on default. The court cannot provide any relief against repurchase. *K. Simrathmull v Nanjalingiah Gowder*, 1962 Supp 3 SCR 476: AIR 1963 SC 1182. In the sale of a forest for Rs 60,000, damages for failure to perform were named as Rs 50,000, held, a penalty. The seller was not allowed even normal compensation because he proved no loss. *Gurbax Singh v Begum Rafiya*, AIR 1979 MP 66. Where the Government wants to debar and backlist a contractor, that being also a penalty, the contractor should be given an opportunity to explain his position. *Joseph Vilangandan v Executive Engineer*, (1978) 3 SCC 36.

30. *Indian Drugs & Pharmaceutical Ltd v Indus. Oxygen Co*, 1984 Mah LJ 690. *K.B. Mackaish v Ajjiltira*, AIR 1997 Kant 194, the party who caused premature termination of a cinematographic agreement agreed that the aggrieved party would have suffered a loss of Rs 25,000. An award Rs 10,000 by way of damages was held to be justified.

31. *Parvati Bai v Ayodhia Pd Jain*, 1985 MPLJ 703, citing *Shyam Sunder v Indramoni Das*, AIR 1951 Ori 46 ; *Nanjibhai v Ramkishan*, 1976 MPLJ 650. *Juharilal v Mohin Das*, AIR 1972

On the other hand, where the compromise about a decree was that if the tenant would pay all the money found due against him by a certain date, the landlord would not enforce the decree of dispossession, this was held to be as not amounting to a penalty.[32]

A compromise decree provided for payment of the principal sum with interest at the rate of 18% p.a. from the date of suit till date of decree. Liberty was given to the decree holder to apply for its execution if the judgment-debtor failed to pay the decree by the date specified in it. This stipulation was held to be not in the nature of a penalty. The court said that the executing court had no jurisdiction to go into the question whether the rate of interest awarded was excessive or unreasonable.[33]

Where the plaintiff's suit was compromised on the basis that he would pay certain sum of money by instalments and that on default in payment, the plaintiff's suit would be dismissed, it was held that this would amount to penalty and, therefore, extension of time should be granted for covering up the delay in the payment of the first instalment.[34]

Clear notice of clause requisite

To justify forfeiture of advance deposit, being a part of the price as 'earnest' the terms of the contract should be sufficiently explicit and must be made known to the party making the deposit. In this case the aggrieved party has shown that the terms of auction were neither advertised nor were they supplied to the intending bidders at the time of the auction. The auctioning authority, therefore, could not contend that 1/4 payment was meant as earnest and a guarantee money for performance. Nor the authority had proved any loss upon the bidder's default.[35]

Minimum charges

Minimum charges for supply of electricity have been held to be not by way of penalty. The maintenance of a supply line does cost something and if a consumer does not consume to a certain figure, the supplier may recover from him the specified minimum in order to meet his costs. This requires that the minimum should be reasonable in the circumstances and not arbitrary.[36]

All 457. For a contrary view, see *Punjab Woollen Textiles Firm* v *Bank of India*, AIR 1992 P&H 158.

32. *Prithvichand Ramchand Sahlok* v *S.Y. Shinde*, AIR 1993 SC 1929, 1934-35: (1993) 3 Bom CR 435.
33. *B. V. Basavaraj* v *N.R. Chandran*, (2000) 3 Kar LJ 195.
34. *Jolly Steel Industries P Ltd* v *Gupta Steel Industries*, (1997) 1 Bom CR 192. *See* also *Tudor Grange Holdings Ltd* v *Citi Bank NA*, (1991) 4 All ER 1, show the extent of application of fairness and reasonableness to compromises in court cases.
35. *Bhanwarlal* v *Babulal*, AIR 1992 MP 6.
36. *Mahavir Khandsari Sugar Mill* v *Maharashtra SEB*, AIR 1993 Bom 279. The court followed *Gujarat Electricity Board* v *Shri Rajratna Naranbhai Mills Co Ltd*, (1975) 16 Guj LR 90 ; *Watkins Mayor & Co* v *Jullundur Electricity Supply Co*, AIR 1955 Punj 133. Here the concept of minimum charge was thus explained : "A minimum charge is not really a charge which has for its basis the consumption of electrical energy. It is based on the principle that every consumer's installation involves the licensee in a certain amount of capital expenditure in plant and mains on which he has to have a reasonable return. He gets a return when energy is actually consumed . . . but the minimum charges are really a return on his capital outlay incurred for the particular consumer." To the same effect, *Mahavir Khandsari Sugar Mills* v *Maharashtra SEB*, (1993) 1 Bom CR 331.

Bank's service charges

As per the terms and conditions of the issue of credit card, the holder of the card had to pay a service charge if he did not pay to the bank within the stipulated time the amount used through the credit. This was held to be not a penalty. The fact that the bank was not complying with certain requirements of the Service Tax Charges Act would not alter the nature of the charge.[37]

Statutory damages

Where compensation is payable in terms of a statutory provision, the Supreme Court has held that the provision applicable would be one that is in force at the time of cause of action and not one that was in force at the time of the contract. The plaintiff's husband was killed by a goods lorry which was insured with the defendant insurance company. At the time of the policy, the statutory compensation for loss of life under the Motor Vehicles Act, 1939, was Rs 20,000. By the time of the accident the Act had been amended by raising the compensation money to Rs 50,000. The court allowed the revised figure. This did not amount to retrospective operation, because the accident had taken place after the amendment. The result would have been different if the accident had happened before the amendment or if the parties had contracted only on the basis of law as it then stood.[38]

Where no ceiling was fixed on energy to be consumed by consumers and there was no breach of contract, nor any loss to the supplier, levy of penalty on energy consumed in excess of the contracted demand was held to be illegal.[39]

A *Statutory contract* means that it is a contract with some statutory content which generally contain provisions regarding determination of tariff as per, for example, S. 43-A(2) of the Electricity Supply Act, 1948 regarding determination of tariff. The court was dealing with a power purchase agreement.[40]

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37. *Central Bank of India* v *Manipur Vasant Kini*, (2000) 1 Mh LJ 744, the suit based on the money used through credit card was allowed as a summary suit.
38. *Padma Srinivasan* v *Premier Ins Co Ltd*, (1982) 1 SCC 613: 1982 SCC (Cri) 330: AIR 1982 SC 836 : (1982) 44 FLR 271.
39. *Sri Visnu Cements Ltd* v *A P State Electricity Board*, AIR 1999 AP 103.
40. *Indian Thermal Power Ltd* v *State of MP*, AIR 2000 SC 1005.

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Quasi Contracts or Certain Relations resembling those created by Contract

There are many situations in which law as well as justice require that a certain person be required to conform to an obligation, although he has neither broken any contract nor committed any tort. For example, a person in whose home certain goods have been left by mistake is bound to restore them. Such obligations are generally described, for want of a better or more appropriate name, as quasi-contractual obligations.

Rationale

Theory of Unjust Enrichment

The theory on which quasi-contractual obligations are based is not yet finally settled. Lord MANSFIELD who is considered to be the real founder of such obligations, explained them on the principle that law as well as justice should try to prevent "unjust enrichment", that is, enrichment of one person at the cost of another. His Lordship offered this explanation in *Moses* v *Macferlan*:[1]

> "Jacob issued four promissory notes to Moses and the latter indorsed them to Macferlan, excluding, by a written agreement, his personal liability on the endorsement. Even so Macferlan sued Moses on the endorsement and he was held liable despite the agreement. Moses was thus compelled to discharge a liability which he had excluded and, therefore, sued to recover back his money from Macferlan."

He was allowed to do so. After stating that such money cannot be recovered where the person to whom it is given can "retain it with a safe conscience", Lord MANSFIELD continued:

> "But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition; or extortion; or oppression; or for an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money."

A liability of this kind is hard to classify. Partly it resembles liability under the law of tort inasmuch as it arises independently of any contract. Partly it resembles contract inasmuch as it is owed only to one party and not "to persons generally". Thus it can be accounted for either under an implied contract or under natural justice and equity for the prevention of unjust enrichment. Lord MANSFIELD preferred the latter theory.

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1. (1760) 2 Burr 1005, 1012: (1558-1774) All ER Rep 581.

Theory of "Implied-in-fact" Contract

But beginning with the decision of the House of Lords in *Sinclair* v *Brougham*,[2] it became fashionable to discard Lord MANSFIELD'S formulation and to rely upon an implied-in-fact contract.

> A building society undertook banking business which was outside its objects and, therefore, *ultra vires*. The society came to be wound up. After paying off all the outside creditors, a mixed sum of money was left which represented partly the shareholders' money and partly that of the *ultra vires* depositors, but was not sufficient to pay both of them. The depositors tried to get priority by resorting to the quasi-contractual action for recovery of money had and received for the depositors' benefit, for otherwise the shareholders would be unjustly enriched.

The House of Lords allowed rateable *(pari passu)* distribution of the mixed fund among the claimants, but did not allow any remedy under quasi-contract. Lord HALDANE maintained that common law knows personal actions of only two classes, namely, those founded on contract and those founded on tort. "When it speaks of action arising *quasi ex contractu* it refers only to a class of action in theory which is imputed to the defendant by a fiction of law."[3] Similarly, Lord SUMNER observed that an action for money had and received rests, not on a contractual bargain between the parties, but "upon a notional or imputed promise to repay".[4] Lord PARKER expressly pointed out that if a promise to pay back an *ultra vires* loan could be imputed to the company as quasi-contractual obligation, the result would be to validate a transaction which has been declared to be void on the ground of public policy and the law would be enforcing a notional contract where an express contract would have been void.[5]

This approach dominated decisions for a long time and the decision was taken to have settled that the juridical basis of quasi-contract was the implied, notional or fictional contract. Where the circumstances of a case do not lead to an inference of this kind or where such an inference would be against the law, no liability will arise.[6]

Restoration of Theory of Unjust Enrichment

The identification of quasi-contracts with implied contracts restricted the scope of relief which would have been possible without any such hindrance under the principle of "natural justice and equity". The suffocation was felt by House of Lords

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2. (1914) AC 398: (1914-15) All ER Rep 622.
3. *Ibid.* at p 415.
4. *Sinclair* v *Brougham*, (1914) AC 392, 452: (1914-15) All ER Rep 622.
5. *Ibid.* at p 440. The Supreme Court applied the principle of unjust enrichment to cases of imported raw materials captively consumed in manufacture of final produce. *Union of India* v *Solar Pesticide P Ltd*, AIR 2000 SC 862.
6. SCRUTTON LJ in *Holt* v *Markham*, (1923) 1 KB 504, 513 described Lord Mansfield's doctrine as "now discarded"; Lord GREENE in *Morgan* v *Ashcroft*, (1938) 1 KB 49, 62 contended that Lord MANSFIELD'S views could not be the true foundation of the claim. For another similar instance see *Re Diplock, Diplock* v *Wintle*, (1947) Ch 716, 724: (1947) 1 All ER 522; on appeal, (1948) Ch 465, 480-81: (1948) 2 All ER 318, 326.

itself in *Fibrosa Spolka Akeyjna* v *Fairbain Lawson Combe Barbour Ltd*[7] A sum of money was paid in advance under a contract for the supply of a machine Or 'for the supply of machinery', and the performance was obstructed by the outbreak of war. Their Lordships allowed the advance to be recovered back as having been paid for a consideration which had wholly failed. Lord WRIGHT lent support to Lord MANSFIELD'S theory of unjust enrichment. He observed:[8]

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

Referring to the ratio decidendi of the decision of the House of Lords in *Sinclair* v *Brougham*[9] Lord WRIGHT pointed out that the case turned upon the principle that it was against public policy to allow the recovery of an *ultra vires* deposit, whether the claim be based upon contract or quasi-contract. The observations of their Lordships relating to the foundation of quasi-contract were merely *obiter dicta*. Indeed the House adopted the *pari passu* distribution of the available assets as a technique to prevent the unjust enrichment of the shareholders at the cost of the depositors.[10]

Provisions of the Indian Contract Act

Chapter V of the Indian Contract Act deals with such situations under the heading "Of certain relations resembling those created by contract". The chapter avoids the words "quasi-contract", and in view of the clear statutory authorisation the courts in India are not hindered in allowing relief under the different sections of Act by the theoretical considerations concerning quasi-contracts. But English cases do provide valuable guidance not only as to scope of relief but also as to the way the provisions should be interpreted to keep them in tune with the changing notions of justice. Sections 68 to 72 provide for five kinds of quasi-contractual obligation.

1. Supply of necessaries [S. 68]

Where necessaries are supplied to a person who is incompetent to contract or to someone whom he is legally bound to support, the supplier is entitled to recover the price from the property of the incompetent person.[11]

68. Claim for necessaries supplied to person incapable of contracting, or on his account.—If a person, incapable of entering

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7. (1943) AC 32: (1942) 2 All ER 122, HL.
8. *Fibrosa Spolka Akeyjna* v *Favibain Lawson combe Barbowe Ltd*, (1943) AC 32, 61. *See also* his Lordship's observations in *Brooks Wharf & Bull Wharf Ltd* v *Goodman Bros*, (1937) 1 KB 534, 545: (1936) 3 All ER 696, 707.
9. (1914) AC 398: (1914-15) All ER Rep 622.
10. The matter was considered by Lord Wright in his article on the case in 57 LQR 200 and included in his LEGAL ESSAYS AND ADDRESSEES, page 1. Support for this approach is also to be found in Lord ATKIN'S speech in *United Australia Ltd* v *Barclays Bank Ltd*, (1941) AC 1, 27-29. Lord DENNING has also voiced himself against the implied contract theory. *See* (1949) LQR 37.
11. This provision has already been considered in the chapter on capacity to contract.

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 condition in 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.

2. Payment by interested person [S. 69]

69. Reimbursement of person paying money due by another, in payment of which he is interested.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by *A*, the Zamindar. The revenue payable by *A* to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of *B's* lease. *B*, to prevent the sale and consequent annulment of his own lease, pays to the Government the sum due from *A*. *A* is bound to make good to *B* the amount so paid.

Conditions of liability

The conditions of liability under this section may now be stated.

Payer Must be Interested in Making Payment

Firstly, the plaintiff should be interested in making the payment. The interest which the plaintiff seeks to protect must, of course, be legally recognisable. His honest belief that he has an interest to protect is enough.[12] Where a party had agreed to purchase certain mills, he was allowed to recover from the seller the amount of already overdue municipal taxes paid by him in order to save the property from being sold in execution. By agreeing to purchase the property he had acquired sufficient interest in it to safeguard.[13] Lord RADCLIFFE refused to agree that the payment in question was voluntary:

> "The company had contracted to buy these mills, and they were imminently threatened with a forced sale which would, of course, defeat its purchase. Money had to be found for the taxes if the mills were to be saved. The Maharaja (seller) showed no sign of paying the municipality. So the appellant company paid. But to describe it in those circumstances as having made a voluntary payment appears to their Lordships to involve some misuse of language."

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12. So held by the Allahabad High Court in *Munni Bibi* v *Triloki Nath*, (1931) 54 All 140. The interest in performing one's contract is something different. Accordingly in *Transworld Shipping Services* v *Owners etc*, (1986) 11 Mad LJ 32 no recovery from the owners of ship was allowed to a person who repaired it under his contract with the charterers.
13. *Govindram Gordhandas Seksaria* v *State of Gondal*, AIR 1950 PC 99: 77 IA 156.

Explaining that the purchaser was sufficiently "interested" so as to attract Section 69, his Lordship continued:

> "In any ordinary use of language the company was interested in the taxes being paid at the time . . . since only through a payment could it realise the fruit of the contract that it had entered into. The words (of Section 69) themselves do not require that a person to be interested in a payment should at the time have a legal proprietary interest in the property in respect of which the payment is made. It is no doubt true that there have been decisions which have tested whether a person was interested in a payment by ascertaining whether he had such a proprietary interest. It may be a good test in appropriate circumstances. But it would be a bad fallacy to deduce from the circumstance that a person may be interested in payment because he has an interest in the property to which it relates the conclusion that no one who has not any interest in a property can be interested in a payment made in respect of that property. In truth, Section 69 invites no such judicial limitation. The section is part of a Chapter of the Contract Act devoted to 'Quasi-contract'. The phrase itself is no doubt taken from a familiar branch of the English common law, although there is no reason to suppose that the Indian Contract Act was intended to do no more than to reproduce in compendious phrases the precise doctrines of the English law of contract. But the general purport of the section is reasonably clear to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment, against any other person who, rather than he, could have been made liable at law to make the payment."

But Should not be Bound to Pay

Secondly, it is necessary that the plaintiff himself should not be bound to pay. He should only be interested in making the payment in order to protect his own interest. Where a person is jointly liable with others to pay, a payment by him of the others' share would not give him a right of recovery under this section.[14] Where a port authority was under a statutory liability to pay an injured workman and paid him, it could not recover from the defendant, a contractor, whose negligence had caused injury, because the port authority was not only "interested" but was also bound in its own independent obligation to pay.[15]

Defendant Should be under Legal Compulsion to Pay

Thirdly, the defendant should have been "bound by law" to pay the money. The words "bound by law" have been held, after some hesitation, to mean bound by law or by contract. It is not necessary that the liability should be only statutory. It is enough that "the defendant at the suit of any person might be compelled to pay".[16] Explaining the purport of the phrase in *Govindram Gordhandas Seksaria* v *State of*

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14. *Jagpatiraju* v *Sadnusannama Arad*, AIR 1916 Mad 980; *Futteh Ali* v *Ganga Nath Roy*, (1881) 8 Cal 113; *Manindra* v *Jamahir*, (1905) 32 Cal 643; *Gopinath* v *Raghuvansh Kumar*, AIR 1949 Pat 522.

15. *Port Trust, Madras* v *Bombay Company*, AIR 1967 Mad 318. *Urban Improvement Co P Ltd* v *Ujagar Singh*, AIR 1996 P&H 167, increased development charges paid by developer, entitled to recover from purchaser.

16. *Rasappa Pillai* v *Doraisami Reddiar*, AIR 1925 Mad 1041. Similar opinion has been expressed by the Privy Council in *Govindram Gordhandas Seksaria* v *State of Gondal*, AIR 1950 PC 99: 77 IA 156.

Gondal[17], where a Maharaja, having sold certain mills without paying overdue municipal taxes, was sued by the buyer who had to pay to save the property from being sold, Lord RADCLIFFE said:

> "The Maharaja was bound to pay this money in the sense that he made a legally enforceable contract with Seksaria to pay it. Unless the words 'bound by law to pay' where they occur in the section, exclude those obligations of law which arise *inter partes*, whether by contract or by tort, and embrace no more than those public duties which are imposed by statute or general law, the Maharaja was a person from whom reimbursement could be claimed under the section. But their Lordships think that the words extend to any obligation which is an effective bond in law. Certainly the common law of England afforded a right of indemnity to one who had paid 'under compulsion of law' against the true obliger without limiting the circumstances in which the latter's liability had arisen. Certainly, too, there is authority in the courts of India for the proposition that 'bound by law' covers obligations of contract or tort."

Where a person is only morally bound and is not legally compellable to pay, he will not be bound to pay the party discharging his moral obligation. In a case before the Madras High Court, a person had, before his death, gifted certain claims to the defendant. The taxing authorities, however, added the claims to the estate of the deceased and recovered the tax from his widow despite her protests. The widow then sought to recover the amount from the defendant, but he was held not liable. If the taxing authorities had ordered him to pay, only then it could be said that he was bound by law to pay.[18]

Payment Should be by One to Another

Lastly, the plaintiff should have made the payment to another person and not to himself. "Thus, where a certain Government was the tenant of a land and paid to itself out of the rent due to the landlord the arrears of land revenue due to itself, the Government could not recover from the landlord. It was a transfer of money from one head to another within the Government and not 'payment to another' and though it was done to save the land from being sold in execution, it did not come within the principle of the section.[19]

3. Liability to pay for non-gratuitous acts [S. 70]

Section 70 creates liability to pay for the benefits of an act which the doer did not intend to do gratuitously.

70. Obligation of person enjoying benefit of non-gratuitous act.— Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

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17. AIR 1950 PC 99: 77 IA 156: *See* also *Raghavan* v *Alamelu Ammal*, (1907) 31 Mad 35.
18. *Raghavan* v *Alamelu Ammal*, (1907) 31 Mad 35.
19. *Secretary of State for India* v *Fernandes*, (1907) 30 Mad 375.

Illustrations

(*a*) *A*, a tradesman, leaves goods at *B's* house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.

(*b*) *A* saves *B's* property from fire. *A* is not entitled to compensation from *B*, if, the circumstances show that he intended to act gratuitously.

Conditions of liability under the section

GAJENDRAGADKAR J (afterwards CJ) stated in *State of West Bengal* v *B.K. Mondal & Sons*[20] the conditions on which the liability under the section arises:

> "It is plain that three conditions must be satisfied before this section can be invoked: (1) a person should lawfully do something for another person or deliver something to him; (2) in doing the said thing or delivering the said thing he must not intend to act gratuitously; and (3) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof."

'Not Intending to do so Gratuitously'

Thus, one of the purposes of the section is to assure payment to a person who has done something for another voluntarily and yet with the thought of being paid. He should have contemplated being paid from the very beginning. A Municipal Council which constructed and maintained a bus-stand was allowed to recover some charges from bus operators who used the stand though there was no agreement to that effect.[21] An employer is bound to pay for services rendered by his employees.[22] A university could not escape its liability to reimburse a lecturer who worked under an appointment given to him by the vice-chancellor though the post on which he was appointed was not sanctioned by the State.[23] The words "does anything" would include payment of money. Making payment for another tantamounts to doing something for him. Accordingly, a bank discounting an order of payment and giving credit to the customer was allowed reimbursement from the customer for something done for him.[24] Where a tenant bank overstayed and also did not pay the increased rent which it had acknowledged, the court said:[25] "Having regard to the law laid down in various decisions of the Supreme Court and High Courts on the principle of 'tenant-holding over' and its consequential effect making the tenant liable to pay damages or mesne profits to the landlord for continuing in possession without any

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20. AIR 1962 SC 779: (1962) 1 SCR 876. The section applies to individuals as well as to corporations.

21. *Municipal Council, Rajgarh* v *MPSRTC*, 1991 MPLJ 910. Rs 3 per bus was considered to be quite reasonable. *A. Abu Mohd* v *L.M. Mohd*, (1994) 2 Ker LJ 664, amount paid during negotiations for a proposed marriage, proposal fell through, the amount allowed to be recovered back. *Food Corpn of India* v *Alleppey Municipality*, AIR 1996 Ker 241, services rendered by Municipal Corporation in respect of buildings owned by Central Government, payment is in the nature of compensation under S. 70.

22. *Bihar Nurses' Regn Council* v *Hirendra Prasad Sinha*, (1991) 1 PLJR 114: (1991) 2 BLJR 1222.

23. *Shyam Behari Prasad Singh* v *State of Bihar*, (1991) 2 BLJR 1024.

24. *Federal Bank* v *Joseph*, (1990) 1 Ker LT 889.

25. *Bank of India* v *V. Swaroop Reddy*, AIR 2001 AP 260: (2001) 2 Andh LT 388; *Syndicate Bank* v *Seema Traders*, 1999 AIHC 1876 (Kant), borrower liable to pay interest irrespective of anything else because otherwise he would be enriching himself at the cost of the lender; *B.N. Venketaswamy* v *P.S. Rukmiamma*, 1999 AIHC 1979 (Kant), interest is recoverable even if there is no provision to that effect in the loan agreement.

authority of law and similarly in view of the legal position as regards the principle of unjust enrichment under the provisions of Section 70 of the Act, the court came to the inevitable conclusion that under Section 70 of the Indian Contract Act, 1872, we come to the irresistible conclusion that the defendant bank is liable to pay the plaintiff the entire amount of the suit claim."

Section Would not Encourage Officious Interference in Affairs of Others

Secondly, the person for whom the act is done is not bound to pay unless he had the choice to reject the services. "If a person delivers something to another, it would be open to the latter to refuse to accept the thing and to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another, it would be open to the latter not to accept what has been done by the former; in that case again Section 70 would not apply. In other words, the person said to be liable under Section 70 always has the option not to accept the thing. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises."[26] In the application of this principle, the courts have had to strike a balance between two factors. Firstly, the rule cannot be used by anybody to make officious interference in the affairs of another.[27] The court will not compel a person to pay for services which have been thrust upon him against his will. JENKINS CJ, dealing with the scope of Section 70 in *Suchand Ghosal* v *Balram Mardana*,[28] said:

> "The terms of Section 70 are unquestionably wide, but applied with discretion; they enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

Request for Services Creates Implied Promise to Pay

Yet, thirdly, it is necessary that services should have been rendered without any request. Reasonable compensation may, however, be recovered for services rendered at request.[29] This has been so held by the Supreme Court in *State of West Bengal* v *B.K. Mondal & Sons*:[30]

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26. *Ibid. Haji Adam Sait Dharmasthapanam* v *Hameed*, 1985 Ker LT 169. In *Transworld Shipping Services* v *Owners etc*, (1986) 2 Mad LJ 32, no recovery was allowed from the owners of a ship to a person who repaired it under arrangement with the charterers.
27. *Muthu Raman* v *Chinna Vellayan*, (1916) 39 Mad 965.
28. (1911) 38 Cal 1.
29. *Sibkisore Ghose* v *Manik Chandra*, (1915) 29 IC 453, lawyers entitled to reasonable fee where none was agreed to. *See*, however, *Abu Mohd* v *Mohd Kunju Lebba*, (1994) 2 Ker LT 713 where THOMAS J has been of the view that Section 70 indicates that there is no distinction between the grant of a benefit to another on request or a grant without request. In both cases, the person who enjoys the benefit is liable to recompense the grantor. In this case payment was made on demand under a marriage proposal which fizzled out.
30. AIR 1962 SC 779. Where the goods delivered have been accepted, the remedy is a suit for price and not under this section. *Union of India* v *Sitaram Jaiswal*, (1976) 4 SCC 505; *Abdul Jalil* v *State of WB*, AIR 1984 Cal 200, contract without compliance with Article 299. *Civil Engineers (India)* v *Delhi Development Authority*, (1995) 60 Delhi LT 26, work done by contractor on oral instructions, nothing in writing, work accepted, order of payment by arbitrator valid. *Dinshaw and Dinshaw* v *Indoswe Engrs P Ltd*, AIR 1995 Bom 180, in a

The plaintiff, on the request of an officer of the State of West Bengal, constructed a kutcha road, guard-room, office, kitchen, room for clerks and storage sheds for the use of the Civil Supplies Department of the Government. The State accepted the works but tried to escape liability under the pretence that no contract had been concluded in accordance with the requirements of Section 175(3) of the Government of India Act, 1935 (now Article 299 of the Constitution of India). The contractor was thus forced to try his luck with the State under Section 70, and it proved to be better than that of the State but at the cost of fighting up to the Supreme Court for a sum of Rs 19,325.

GAJENDRAGADKAR J (afterwards CJ), examined the conditions of liability under the section and found that they were all satisfied by the facts and, therefore, held the State liable. There was no doubt that the State even after having requested for the works had the right to reject. "It could have called upon the contractor to demolish the storage sheds and take away the material used; but if the State accepted the storage sheds and used them and enjoyed their benefit, then different considerations come into play and Section 70 can be invoked."

Non-compliance of Constitutional Requirements of Contracting with State

The learned judge had still to face the mighty argument that the statutory formalities of contracting with the State had not been observed and that the enforcement of any such contract would defeat the relevant statute. This difficulty was got over by holding that what was sought to be enforced was not a contract, but a relation resembling those created by a contract. Thus, in cases falling under Section 70 the person doing something for another cannot sue for specific performance, nor ask for damages for breach and this for the simple reason that there is no contract between the parties. All that Section 70 provides for is that if the services or goods are accepted a liability to pay arises. The mandatory provisions of Section 175(3) of the Government of India Act, 1935, could be said to be circumvented only if a contract not fulfilling the requirements were to be enforced, and not when a claim was enforced under Section 70 which arises not by virtue of any contract but rather by reason of the fact that the work has been done by one party and enjoyed by the other without any contract at all. The mere act of construction and its acceptance by the State cannot be said to contravene the provisions of Section 175(3). "Once it is realised that a cause of action for a claim for compensation under Section 70 is based not upon the delivery of the goods or the doing of any work as such but upon the acceptance and enjoyment of the said goods or said work, it would not be difficult to hold that Section 70 does not treat as valid the contravention of Section 175(3) of the Act. That being so, the argument that the respondent's construction of Section 70 nullifies the effect of Section 175(3) of the Act cannot be accepted." "Any other approach would not only cause injustice to a private party, but would also hamper Government business."

"It is well known that in functioning of the vast organisation represented by a modern State, Government officers have invariably to enter into a variety of contracts which are often of a petty nature. Sometimes they have to act in emergency, and on many occasions, in pursuit of the welfare policy of the

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building contract, some additional work was done which was not covered by the contract, the other party held liable to pay for such work. Inferior pipes were installed whereas the contract required quality. Payment on the basis of inferior quality ordered.

State, the Government officers may have to contract orally or through correspondence, without complying with the provisions of Section 175(3). If, in all these cases, what is done in pursuance of the contract is on behalf of the Government and for their use and enjoyment and is otherwise legitimate and proper, Section 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contracts had not been made as required by Section 175(3). . . . We are referring to this aspect of the matter not with a view to detract from the binding character of the provisions of Section 175(3), but to point out that like ordinary citizens even the State Government is subject to the provisions of Section 70."

The court also laid down that the position of the State cannot be compared with that of a minor. "The minor is excluded from the operation of Section 70 for the reason that his case has been specifically provided for by Section 68. What Section 70 prevents is unjust enrichment and it applies as much to corporations and Government as to individuals.... Besides, in the case of a minor, even the voluntary acceptance of the benefit of the work done or thing delivered, which is the foundation of the claim under Section 70, would not be present and so, on principle, Section 70 cannot be invoked against a minor."[31]

The principle of this case has been reaffirmed by the Supreme Court in *Pillo Dhunjishaw Sidhwa* v *Municipal Corporation of the City of Ponna.*[32] Here too the Corporation tried to escape liability for spare motor parts supplied to it on the ground that the contract was not made in accordance with the Bombay Municipal Corporation Act (59 of 1949). But the Corporation was held liable to pay under Section 70. The only question was what should be the measure of compensation. SHAH, J (afterwards CJ) cited with approval the decision of the Lahore High Court in *Secretary of State* v *G.T. Sarin & Co*[33] where it was held that "a person without an enforceable contract in his favour supplying goods to a Government Department is entitled to a money equivalent of the goods delivered, assessed at the market rate prevailing on the date on which the supplies were made".[34] In the present case the rates quoted by the supplier in his invoice were considered to be the fair measure of compensation giving the State the right to show that the market price was less than that, but the Corporation did nothing in this respect.[35] Thus, though the claim under Section 70 is not based upon any contract, yet the contract between the parties is relevant at least for indicating the fair measure of compensation.

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31. *Followed* in *New Marine Coal Co* v *Union of India,* (1964) 2 SCR 859; *Mulamchand* v *State of MP,* AIR 1968 SC 1218: (1968) 3 SCR 214, where no restitution was allowed because the plaintiff could not prove what work he had done for the Government; *Mangi Lal* v *Mewar Textile Mills Staff Consumers Co-op Society Ltd,* 1985 Raj LR 274, the cost of construction of canteen was allowed to be recovered when because of the violation of the canteen allotment rules, the canteen was taken over by the State.
32. (1970) 1 SCC 213: (1970) 3 SCR 415: AIR 1970 SC 1201.
33. ILR 11 Lah 375.
34. *Ibid.*
35. Again *followed* in *Pannalal* v *Deputy Commissioner, Bhandara,* (1973) 1 SCC 639, where the State was held liable to pay for the construction of a hospital. *See* at p 643. An executory contract not complying with the statutory requirements cannot be enforced. *Karamshi Jethabhai Somayya* v *State of Bombay,* (1964) 6 SCR 984: AIR 1964 SC 1714.

Recovery under Oral or Non-provable Contracts

The Supreme Court has further held that where a contractor whose work has been accepted by the other party claims compensation under an oral agreement, which he is not able to prove, he would still be entitled to compensation under Section 70.[36] In another case,[37] the Supreme Court held the Government liable to a person who, on the instructions of the Government, transferred the steel allotted to him in excess to a third person who failed to pay.

Contracts Void under Article 299

Recovery under the section is possible even if there was no contract or the contract was void under Article 299 of the Constitution. Thus the Government was allowed to recover the cost of training from a candidate who refused to join the Government service. The Government could have waived but there was no evidence of waiver. He was sent on training on his agreeing to serve the Government. He could not say that no advantage came to him from the training.[38]

It is not necessary that services should have been rendered under circumstances of pressing emergency.[39]

"Lawfully Does"

Fourthly, services should have been rendered lawfully. Commenting upon this in *State of West Bengal* v *B.K. Mondal & Sons*,[40] the Supreme Court has said that the word "lawfully" is not a surplusage and must be treated as an integral part of Section 70 and even if it is taken to refer to an object of consideration which is forbidden by Section 23 of the Contract Act, it cannot be taken to mean as requiring the State to pay under Section 70 for the services which it has enjoyed was something forbidden by Section 175(3) of the Government of India Act, 1935. Payment for extra work done in connection with a contract without any agreement has been allowed to be recovered under this section.[41]

It has been a point of emphasis that between the person claiming compensation and the person against whom it is claimed, some lawful relationship must exist and it should arise by reason of the fact that what has been done for the former has been accepted and enjoyed by the latter. Acting on this, the Orissa High Court allowed a person to recover what he had paid to another for purchasing his paddy not knowing at the time that his purchase was in violation of a State Control Order.[42] Where a

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36. *V.R. Subramanyam* v *B. Thayappa*, (1961) 3 SCR 663: AIR 1966 SC 1034. The position, therefore, is that S. 70 does not require a contract. A person who purchased the equity of redemption and saved the property from being sold out was allowed to recover proportionate reimbursement from his co-owner. *Asaar Ali Khan* v *Baij Nath Pd*, AIR 1983 All 197; *Jethruse D'Souza* v *Catherine D'Souza*, AIR 1983 Kant 14; *Narendra Nath* v *Fnendra Nath*, (1953) 8 DLR Cal 27. No relief can be allowed under this section where there is neither contract nor any other service. *Devi Sahai Paliwal* v *Union of India*, (1976) 4 SCC 763.
37. *Union of India* v *J.K. Gas Plant*, (1980) 3 SCC 469: AIR 1980 SC 1330.
38. *P.C. Wadhwa* v *State of Punjab*, AIR 1987 P&H 117.
39. So pointed out by the Privy Council in *Damodara Mudaliar* v *Secy of State for India*, (1894) 18 Mad 88, 91.
40. AIR 1962 SC 779.
41. *State of UP* v *Chandra Gupta & Co*, AIR 1977 All 28.
42. *Fakir Chand Seth* v *Dambardhar Bania*, AIR 1987 Ori 50 following *Mulamchand* v *State of MP*, AIR 1968 SC 1218.

lady Advocate accepted the request of the District Magistrate and rendered services as an Assistant District Counsel for a certain period, she was allowed to retain the remuneration already received and also to recover the remaining remuneration for the period of service even if her appointment was found to be void under Section 24(2) of the Criminal Procedure Code, 1973.[43]

Where a teacher due for retirement at the age of 55 obtained a stay order contending that he was entitled to continue up to 60 and remained in service beyond 55 before the matter was decided against him, he was allowed to recover the monetary benefits of his entitlement for the overlapping period. His conduct was not unlawful. He remained in service not by usurpation but under superior orders.[44]

Non-Gratuitous Acts

In the fifth place, the person rendering services should not have intended to act gratuitously. The decision of the Madras High Court in *Damodara Mudaliar* v *Secretary of State for India*[45] is the leading authority.

> A number of villages were drawing irrigation waters from a tank. Some of the villages were under direct State tenancy, others under *Zamindars*. The Government carried out repairs to the tank for its preservation. The *Zamindars* also enjoyed the benefits of the repairs.

They were accordingly held liable to make proportional contribution towards the expenses of repair. The case shows that even where the party making payment or rendering services is personally interested in the matter, he can recover proportional contribution from those who have enjoyed the benefits of his services. Similarly, where the owners of a *hat* were required at the pain of termination of their licence to make certain improvements in the *hat*, one of them who carried out the improvements recovered compensation from his co-owners.[46]

Lender of Money

A party admitted receipt of money as a loan. The transaction was oral wholly dependent upon the faith reposed by the lender. The circumstances showed it to be a contract of loan. The court said that it could direct the borrower to pay back the money at appropriate interest. It was not material that there was no stamped paper acknowledging receipt of money.[47]

"ENJOYS THE BENEFIT."—Lastly, the defendant must have derived a direct benefit from the payment or services. Where the works done by a railway company developed the adjoining lands and consequently the municipality received more taxes, this was held to be not a sufficient benefit to enable the railway company to recover compensation from the municipality.[48]

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43. *Indu Mehta* v *State*, AIR 1987 A11 309.
44. *Ramakrishnan Nair* v *State of Kerala*, (1989) 2 Ker LJ 100.
45. (1894) 18 Mad 88.
46. *Jarao Kumari* v *Basanta Kumar Rao*, (1905) 32 Cal 374.
47. *Narayan Venkatesh Pandit* v *Syed Nuroddin Khadri*, (1999) 2 Kar LJ 449.
48. *Governor-General in Council* v *Madura Municipality*, (1948) 75 IA 213: 71B 1949 PC 39. *See also* the decision of the Supreme Court in *Srinivas & Co* v *Inden Biselers*, (1971) 3 SCC 725: AIR 1971 SC 2224. Advance payment for purchasing paddy in ignorance of control

Services rendered to a person incompetent to contract at the time cannot be made the basis of an action under this section.[49]

Similarly, where no services have been rendered at all, for example, where the Government cancelled a lease granted to the plaintiff by an officer who was not so authorised, no relief can be allowed under the section.[50]

4. Finder of goods [S. 71]

Section 71 lays down the responsibility of a finder of goods.

71. Responsibility of finder of goods.—A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.

Thus in respect of duties and liabilities a finder is treated at a par with bailee. The finder's position, therefore, has been considered along with bailment.

The Supreme Court has ruled in *Union of India* v *Amar Singh*[51] that the statutory fiction by which a contract of bailment is inferred between a finder of goods and the real owner should not be enlarged by analogy or otherwise and, therefore, a railway authority which took into its custody wagons containing the plaintiff's goods and which were left across the border by Pakistan became the contractual bailees of goods, and it is not necessary to regard them as finders within the meaning of Section 70.

5. Mistake or coercion [S. 72]

Section 72 deals with payments made or things delivered under mistake or coercion.

72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

(*a*) *A* and *B* jointly owe 100 rupees to *C*. *A* alone pays the amount to *C*, and *B*, not knowing this fact, pays 100 rupees over again to *C*. *C* is bound to repay the amount to *B*.

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order allowed to be recovered because the payee had the benefit for the payment. *Fakir Chand Seth* v *Dambarudhar Bania*, AIR 1987 Ori 50.

49. *Ambika Textiles, Re*, AIR 1950 Cal 491.

50. *Kirorilal* v *State of MP*, AIR 1977 Raj 101. Payments made and accepted under an express contract did not attract S. 70 although the parties were mistaken about the distance. *Kochu Devassey* v *State of Kerala*, AIR 1982 Ker LR 180. Person claiming restitution under the section has to offer proof of the work done by him: *Mulchand* v *State of MP*, (1968) 3 SCR 214: AIR 1968 SC 1218. The section was not applied to the case of a person who was not party to the transaction though he was the beneficiary, *Paidi* v *Indian Bank Ltd*, AIR 1982 Kant 338. *Aeries Advertising Bureau* v *C.T. Devaraj*, (1995) 3 SCC 250: AIR 1995 SC 2251: (1995) 1 Mad LJ 110: (1995) Guj LR LH 1024, no liability of the financier only because he approved the advertisement for the circus. He derived no benefit. *Sangamesh Printing Press* v *Chief Executive Officer, Taluk Development Board*, (1999) 6 SCC 44, the case under the section was not canvassed before the High Court at appeal stage, but there were findings of fact by the trial court and those could be used for considering the claim at the High Court level.

51. (1960) 2 SCR 75, 84-85: AIR 1960 SC 233: ILR (1960) Punj 536.

(*b*) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Mistake of Fact or of Law

Money paid under mistake is recoverable whether the mistake be of fact or of law.[52] The controversy between High Court decisions as to whether money paid under mistake of law could be recovered was set at rest by the Privy Council in *Sri Sri Shiba Prasad Singh* v *Maharaja Srish Chandra Nandi*.[53]

> "Payment 'by mistake' in Section 72 must refer to a payment which was not legally due and which could not have been enforced; the 'mistake' is on thinking that the money paid was due when, in fact, it was not due. There is nothing inconsistent in enacting on the other hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but, on the other hand, that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid. Moreover, if the argument based on inconsistency with Section 21 were valid, a similar argument based on inconsistency with Section 22 would be valid and would lead to the conclusion that Section 72 does not even apply to mistake of fact.... It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable, no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise."

Refund of Tax Money paid without being Due

The Supreme Court in its decision in *Sales Tax Officer, Banaras* v *Kanhaiya Lal Mukund Lal Saraf*[54] has accepted this interpretation of Section 72.

A certain amount of sales tax was paid by a firm under the U.P. Sales Tax law on its forward transactions and subsequently to the payment, the Allahabad

52. Expressly so held by the Privy Council in *Sri Sri Shiba Pd* v *Maharaja Srish Chandra*, AIR 1949 PC 297. *See* also *Jammu & Kashmir* v *Attar-ul-Nisa*, AIR 1967 SC 540, money credited by a bank under Government Orders to the account of a customer by mistake, not allowed to be recovered under the section. Similarly, sales tax paid by a Government in pursuance of a contract was not allowed to be recovered. *Union of India* v *Lal Chand & Sons*, AIR 1967 Cal 310. No relief is allowed under this section against a minor: *State of WB* v *B.K. Mondal & Sons*, AIR 1962 SC 779, 789; *Bankey Bihari Pd* v *Mahendra Pd*, AIR 1940 Pat 324; *D. Gurumurty* v *Raghu Podhan*, AIR 1967 Ori 68.

53. (1949) 76 IA 44 PC. In *Wolf & Sons* v *Dadyabha Khimji & Co*, (1919) 44 Bom 631, the Bombay High Court and in *Apparao Chettiar* v *South Indian Rly Co*, AIR 1929 Mad 177, the Madras High Court had held as influenced by Section 21 and English Law that Section 72 could not apply to payments made under mistake of law, whereas the Calcutta High Court in *Jagadish Prasad Pannalal* v *Produce Exchange Corpn Ltd*, AIR 1946 Cal 245 had taken the contrary view.

54. 1959 SCR 1350: AIR 1959 SC 135: (1958) 9 STC 747: (1959) 1 Mad LJ 35. *Masand Transport* v *Addl Transport Commissioner*, (1996) AIHC 3556, reassessment, original demand lapsed being impliedly struck down by reassessment, taxpayer entitled to refund.

High Court ruled the levy of sales tax on such transactions to be *ultra vires.*[55] The firm sought to recover back the tax money.

Rejecting the contention based on English, American and Australian laws which do not allow payments made under mistake of law to be recovered, the Supreme Court allowed the recovery. "The section in terms does not make any distinction between a mistake of law or a mistake of fact. The term 'mistake' has been used without any qualification or limitation whatever...."[56] The court found no ground for any estoppel against the firm and disapproved the following statement of the Nagpur High Court.[57]

> "If the reason for the rule is that a person paying money under mistake is entitled to recover it, because it is against the conscience of the receiver to retain it, then when the receiver has no longer the money with him or cannot be considered as still having it, as in a case where he has spent it on his own purposes, different consideration must necessarily arise."

In reference to this, the Supreme Court said that "no such equitable consideration can be imported when the terms of Section 72 are clear and unambiguous".

If a mistake either of law or of fact is established, the assessee is entitled to recover the money and the party receiving it is bound to return it irrespective of any other consideration. Money paid under a mistake of law comes within 'mistake' in Section 72 of the Contract Act and there is no question of estoppel when the mistake of law is common to both the assessee and the taxing authority.[58]

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55. Vide *Budh Prakash Jai Prakash* v *STO, Pilibhit*, 1952 All LJ 322; *confirmed* by the Supreme Court, (1955) 1 SCR 143. *Somaiya Organics (India) Ltd* v *State of UP*, AIR 2001 SC 1723, the principle of unjust enrichment cannot be extended to give a right to the State to recover or realise vend fee after the statute has been struck down.
56. BHAGWATI J, 1959 SCR 1359, 1364.
57. In *Nagorao* v *Governor-General in Council*, AIR 1951 Nag 372, 374.
58. *CST* v *Auriya Chamber of Commerce*, (1986) 3 SCC 50: 1986 SCC (Tax) 449: AIR 1986 SC 1556: 1986 Tax LR 2396: (1986) 62 STC 327. Such relief can be had by means of a writ under Art. 226 of the Constitution and regular suit would not be needed. There should not have been any laches. See *Shiv Shanker Dal Mills* v *State of Haryana*, (1980) 2 SCC 437: AIR 1980 SC 1037; *Shri Vallabh Glass Works Ltd* v *Union of India*, (1984) 3 SCC 362: AIR 1984 SC 971; *Salonah Tea Co* v *Supdt of Taxes*, (1988) 1 SCC 401: (1988) 33 ELT 249 SC; *Tilokchand* v *H.B. Munshi*, (1969) 1 SCC 110: AIR 1970 SC 898; *Mahabir Kishore* v *State of MP*, (1989) 4 SCC 1: AIR 1990 SC 313; *Union of India* v *Straw Products*, (1989) 2 OLR 356 (Orissa). Payment of taxes under an Unconstitutional Act allowed to be recovered. *Kamalapur (Assam) Tea Estate P Ltd* v *Supdt of Taxes*, (1988) 1 Gau LR 290. Refund of octroi illegally recovered. *Dhrangadhra Municipality* v *Dhrangadhra Chemical Works Ltd*, (1988) 1 Guj LH 324. Such refunds are allowable even if the relevant statute provides that there shall be no refund of mistaken payments. See *Mamta Drinks & Industries* v *Union of India*, (1990) 70 Cut LT 423 Ori. Remedy by way of writ would not, however, be available where taxes are not involved, or there is no other unconstitutional conduct and the dispute is about ordinary trade terms even if one of the parties is a Government. *Chandrika* v *D.R.M., Southern Rly*, (1985) 1 Mad LJ 369. Water charges paid under a rule which was struck down. Claim for refund was filed after the expiry of a reasonable period, not allowed. *Municipal Corporation of Greater Bombay* v *Bombay Tyres International Ltd*, (1998) 1 Andh LD 1: AIR 1998 SC 1629.

Scope of the word "mistake" in context of Overpaid Taxes

The scope of the word "mistake" has been further exemplified by the Supreme Court in *Tilokchand Motichand* v *Commissioner of Sales Tax*.[59]

> A firm paid sales tax of more than twenty-six thousand rupees in respect of sales to consumers outside the State of Bombay and which were, therefore, not liable to any sales tax. The firm had itself collected the tax money from its customers. The amount was ordered to be refunded. A cheque was given to the firm subject to the condition that within one month it should produce receipts from the customers outside Bombay showing that the refund in question had been passed over to them. The firm failed to do so and was, therefore, informed to return the tax money to the State failing which it would be recovered as arrears of land revenue. The firm petitioned to the Bombay High Court but lost it. It paid back the amount only when it received an order of attachment. When all this was going on but unknown to the firm, the Act under which the recovery was made from the firm had been declared by the Supreme Court to be *ultra vires*.[60] The firm sought to recover back the money as having been paid under either mistake of law or coercion.

The court adopted the view of "mistake" which had been taken in the earlier Privy Council and Supreme Court decisions to the effect that the word means mistake in thinking that the money was due when in fact it was not due and held that the firm in this case did not suffer from any such mistake. The firm fully appreciated the legal position and knew that the money was in fact due until the statute under which recovery was made was declared to be *ultra vires*. The court, however, held that the payment was made under coercion and would have been recoverable under Section 72, had it not been for the expiry of the period of limitation. MITTER J who spoke for the majority, held that the three years' period which was available in this case for filing a suit for refund began to run from the date on which the Act came into force and the petition was filed after more than three years from that date. HEGDE J rightly dissented from this aspect of the majority view. According to him time should begin to run from the date on which the Act was ultimately declared to be void and the petition was filed very soon thereafter.[61] But it seems that justice lay in the majority view, for, as between the

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59. (1969) 1 SCC 110: (1969) 2 SCR 824: AIR 1970 SC 898: (1970) 25 STC 289. Other cases of the same kind: *State of MP* v *Bhailal Bhai*, (1964) 6 SCR 261: AIR 1964 SC 1006: (1964) 15 STC 450; *Ballabhdas* v *M.C. Malkapur*, (1970) 2 SCC 267: AIR 1970 SC 1002.

60. Vide *Kantilal Babulal* v *Sales Tax Officer*, AIR 1968 SC 445.

61. Where the statute is unconstitutional and, therefore, refund is allowable under Art. 226, not the period of limitation, but the doctrine of laches would apply. This is so because in such a case the collection is without the authority of law. *Straw Products* v *Factory Officer*, (1982) 54 Cut LT (Notes) 38: (1986) 23 Excise LT 70; *Hyderabad Bottling* v *Union of India*, (1987) 27 Excise LT 408; *Finolex Cables* v *Union of India*, (1988) 35 Excise LT 343. Where, on the other hand, the Act is valid but the payment is mistaken and recovery is allowable under Section 72, the general law of limitation would apply. *Mamta Drinks and Industries* v *Union of India*, (1990) 70 Cut LT 423, 427-428. It was held that the period of limitation would run not from the date of judgment but from the date of the petitioner's knowledge. *Maruthy Enterprises* v *Corpn of City of Bangalore*, AIR 1999 Kant 41, where overpaid property tax was held to be refundable to the extent of the amount paid within the preceding three years, the rest having become time-barred.

firm and the State, the latter was better entitled to the money which belonged not to the firm but to its customers.[62]

Where subsequently to the payment of excise duty the Excise Commissioner declared that no duty was payable on those goods, it was held that the plaintiff's claim to refund could not be defeated on the ground that the refund would unjustly enrich him.[63] This should be contrasted with a decision of the Andhra Pradesh High Court.[64] Fee collected from consumers on the sale of denatured spirit and paid into the Government account, though the fee was illegal, the amount paid under it was not allowed to be recovered back because it would have gone to enrich the seller at the cost of the various buyers whom he would not have been able to pay back. As against this recovery was allowed to a person who was compelled without authority to pay Rs 5 per quintal on the food exported by him under his export licence, the source of payment being his own pocket and not the money collected from customers.[65]

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62. The cases in which the posture against refund to the firm on the ground of unjust enrichment was adopted were reviewed in *Roplax (India) Ltd* v *Union of India*, AIR 1989 Bom 183. In *Nawabganj Sugar Mills* v *Union of India*, (1976) 1 SCC 120: AIR 1976 SC 1152, refund allowed with a scheme for assuring refund to those who had paid the tax money to the assessee firm; *Shiv Shankar Dal Mills* v *State of Haryana*, (1980) 2 SCC 437: AIR 1980 SC 1037, the refund money ordered to be paid over to payers; *U.P. State Electricity Board* v *City Board, Mussoorie*, (1985) 2 SCC 16: AIR 1985 SC 883; *State of MP* v *Vyankatlal*, (1985) 2 SCC 544: AIR 1985 SC 901.

63. *R. Parthasarthy* v *Dipsi Chemicals*, 1987 Mah LJ 900; *Agra Beverages Corpn Ltd* v *Union of India*, (1988) 25 Reports 140 All. The Supreme Court has again reiterated in *Deputy Commr, Andaman* v *Consumer Co-op Stores Ltd*, AIR 1999 SC 696 that the State should not resist the demand for refund of tax money (excise in this case) on the ground of unjust enrichment, where the money has been illegally collected from the taxpayer. *Mafatlal Industries Ltd* v *Union of India*, (1997) 5 SCC 536, a person claiming restitution must show that he has suffered loss or injury. If the assessee has passed on the tax burden to third persons, a suit for refund on the ground of payment under mistake of law would not be maintainable. The dissenting judge (SEN J) was of the view that even in such cases refund should be allowed. *Pfizer Ltd* v *Union of India*, (1996) 4 Bom CR 119, claim for refund of excise duty paid under mistake on an item which was exempt, exemption was subject to certain conditions, held, without proof of compliance with those conditions, refund could not be claimed.

64. *N.V. Ramaiah* v *State*, AIR 1986 AP 361. Also to the same effect, *Dhrangadhra Municipality* v *Dhrangadhra Chemical Works*, (1988) 1 Guj LH 324, illegal octori. *Followed* in *Union of India* v *Wood Papers Ltd*, (1989) 2 Guj LR 1323 with this observation that no recovery can be allowed to a person who has suffered no loss. Accordingly, taxes illegally collected and paid over to the State not allowed to be recovered by a dealer who was not in a position to refund to his customers. Also following *State of MP* v *Vyankatlal*, (1985) 2 SCC 544: AIR 1985 SC 901. Refund is allowed prospectively from the date of judgment declaring the levy to be unconstitutional. *Kesoram Industries Ltd* v *Coal India Ltd*, AIR 1993 Cal 78. No refund was allowed where proof was not offered of the fact that the incidence of the excise duty was not passed off to the buyers of the goods. *Union of India* v *I.T.C. Ltd*, 1993 Supp (4) SCC 326, distinguishing *Tata Engineering and Locomotive Co Ltd* v *Municipal Corpn, Thane*, 1993 Supp (1) SCC 361: because in this case there was material on record that Telco had not recovered the amount paid by them by way of octroi duty from any third person. Also to the same effect, *Birla Cement Works* v *State of Punjab*, AIR 1993 P&H 274, octroi ordered to be refunded because the goods were taken out of the State.

65. *State* v *Bansilal Chatarlal*, 1985 Raj LR 325. The Bombay decision to the same effect is in *Garware Plastics & Polyster Ltd* v *M.C. of Aurangabad*, AIR 1999 Bom 431, octroi duty was paid and there was a claim for refund. The claimant did not plead that the amount paid was not added to the cost of the product and, therefore, was not passed on to buyers. He was not allowed to claim refund.

Limitation and Latches

Recovery proceedings generally are instituted by way of writ petition. There is no period of limitation applicable to writs. The only requirement is that there should not be unreasonable delay amounting to laches. It has been held that the period of limitation would not begin to run until the applicant has discovered the mistake or could have discovered it with reasonable diligence. The claim was laid within one month of the mistake of law becoming known. It was held that the claim could not be defeated on the ground of limitation.[66]

A petition was filed for refund of extra property tax paid under mistake. The petitioner failed to explain the delay and latches in approaching the court. The fact that he received belated advice was not considered to be sufficient. The fact that the money was utilised by the municipal corporation for the welfare of the people was held to be no defence. The court restricted recovery of overpayment to the preceding three years and not for the whole period.[67]

Some other Examples of Mistake

Another obvious case is a mistaken credit entry in a customer's account in a bank and the customer withdrawing the amount. He would be bound to pay back the amount along with interest under the Interest Act.[68] Where rice-millers were paid an amount in excess of the agreed rate because of a mistake in classification according to quality, they were required to disgorge the unjust enrichment.[69]

Where a sum of money was paid to a bank as a price of the goods and the bank issued delivery orders which were not accepted by the warehousekeeper, the Calcutta High Court held that this was not a payment under mistake and Section 72 was not applicable.[70] Where the railway authorities charged extra fare under the mistaken belief that the goods would have to be carried by a longer route, they were ordered to refund the extra fare.[71] Where the vendor of mortgaged property allowed the purchaser to retain a part of the price for enabling him to pay off the mortgagee and no such payment became necessary because the relief was provided to him under a statutory provision with the result that the mortgage was redeemed without payment, it was held that the purchaser was bound to return the money retained by

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66. *Chrisine Hoden India Ltd* v *N. D. Godag*, (1993) 2 Bom CR 169.
67. *Maruthy Enterprises* v *Corpn of City of Bangalore*, AIR 1999 Kant 41.
68. *S. Ketrabarsappa* v *Indian Bank*, AIR 1987 Kant 236. *Grindlays Bank* v *Centre for Development of International Technology*, AIR 1997 Delhi 164, foreign remittance credited by bank into defendant's account by mistake, defendant required to refund with 12% interest. *Ameen Trading Co* v *Bank of Baroda*, (1993) 2 Ker LT 442, mistaken credit by bank, withdrawal by customer, liable to refund.
69. *Food Corpn of India* v *K. Venkateswara*, (1988) 25 Reports 6: (1988) 1 Andh LT 930.
70. *Lohia Trading Co* v *Central Bank of India*, AIR 1978 Cal 468.
71. *Associated Cement Co Ltd* v *Union of India*, AIR 1998 MP 241. *Union of India* v *Steel Authority of India Ltd*, AIR 1997 Ori 77, where also the goods were carried by shorter route though fare charged was that of the longer route. *T. Ranganathan* v *Essau Alfred*, (1997) 1 Kar LJ 721, a tenant against whom a decree for recovery of rent was passed was not permitted to say that he had already paid the rents covered by the decree and, therefore, the landlord would be a double beneficiary. The doctrine of *res judicata* prevented him from saying so. He could have taken that defence in the suit itself. *Somnath Mahaswara* v *Orissa State Road Transport Corpn*, AIR 1995 Ori 186, payment made under arrangement which was not permissible under the applicable Act not allowed to be recovered back.

him for redemption.[72] A mistaken overpayment of rent has been held to be recoverable. The court said that when a person seeks recovery of money paid under a mistake of law, it is not necessary to establish that he had mistakenly believed that he was liable to make the payment. He has only to show that he would not have made the payment but for the mistake and possibly that the mistake was directly connected with the overpayment or connected to the relationship between the payer and the payee.[73]

Change of Position by Payee in Reliance on Payment

Every payment made under mistake is, however, not recoverable. "There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise."[74] The Calcutta High Court followed this principle in a case in which the facts were as follows:[75]

> The plaintiff bank made payment of certain crossed cheques to the defendant bank. The latter informed their customer-payee of the cheques that the payment had been received for the cheques. It then turned out that the cheques were forged. The plaintiff sued the defendant bank and his customer to recover back the amount contending that the payment had been made under the mistaken belief that the cheques were genuine.

The court came to the conclusion that if the defendant bank had not paid away the proceeds to its customer or if the customer had not yet delivered the goods, the money could have been recovered back under Section 72. The defendant bank and its customer were as much ignorant of the forgery as the plaintiff bank and they, having altered their position because of the cheques being cleared, it was too late to recover back. Neither they were guilty of any fraud nor they had been enriched by the mistake.[76]

This defence would be available to the payee only if he can show that he has changed his position to his disadvantage in consequence of the payment. Thus where certain films were delivered in pursuance to a contract for processing, developing and exhibition and certain instalments were paid by the recipient who had also spent some money on processing, etc, he was allowed to recover back the money paid when it was discovered that the contract was void. The payee was not prejudiced by the fact that he delivered the films because they would be restored to him. It was the payer who was prejudiced having expended money on processing, etc.[77]

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72. *Saraswathi Ammal* v *Shanmughavadivammal*, AIR 1994 Mad 234.
73. *Nurdin & Peacock Plc* v *D.B. Ramsden & Co Ltd*, (1999) 1 All ER 941 (Ch D); *Gujarat Steel Tubes Ltd* v *Board of Trustees of the Port of Kandla*, AIR 2002 Guj 173, plea of refund at the stage of arguments not allowed.
74. So observed by the Privy Council in *Shiba Prasad Singh* v *Srish Chandra*, 76 Ind App 244: AIR 1949 PC 297.
75. *Union Bank of India* v *A.T. Ali Hussain & Co*, AIR 1978 Cal 169.
76. Another example of the same kind is *Citibank N.A.* v *Brown Shipley & Co Ltd*, (1991) 2 All ER 690 QBD. A draft was issued by a bank on telephonic instructions confirmed by a letter purporting to be from the customer and handed over by the person receiving it to another bank which bank after getting confirmation of genuineness from the issuing bank paid the amount. The issuing bank was not allowed to recover back the amount from the receiving bank though the letter of authority turned out to be forged.
77. *Rover International Ltd* v *Cannon Films Sales Ltd*, (1989) 3 All ER 423 CA.

DILLON AND NICHOLLS L JJ were of the view that the right to refund is of absolute nature except for two limited cases, namely, where there is an estoppel by reason of the payer's conduct or where the payment had been made to an agent who paid it over to the principal. There was a total failure of consideration because the payee of the instalments had no right to hand over the films.[78]

The Supreme Court did not allow a party to recover back the amount of surcharge paid by him to a corporation for granting him an export licence, though the levy was subsequently found to be not authorised. Illegal taxes were considered by the court to be something different from payments made to comply with the terms and conditions of a permit.[79] But where extra payment happened to be made on procurement of paddy because of a mistake about its quality, it was allowed to be recovered back.[80]

The payment of a sum of money by way of part payment of the price in advance for purchase of goods was allowed to be recovered back even where the buyer himself made a default in buying the goods. The court said that the result would have been different if the contract had contained a forfeiture clause. The court allowed interest at 9% p.a.[81]

Acceptance of less sum under court orders

In a contract for supply of gas, the seller's attempt to increase prices (price escalation) was challenged. The court directed by an interim order that the supply should be continued at original prices. The proposed enhancement was finally found to be valid. It was held that the consumers were liable to pay the difference in prices since the first notice of escalation and also interest on delayed payments. The court applied the principles of deemed renewal and restitution.[82] The terms of the original contract had expired. No new contract could be made because of the consumers refusal to accept the new price. The continuance of the supply and its acceptance by consumers under the court order became the foundation of a deemed renewal.[83]

Coercion

The word "coercion" is used in this section in its general sense and not as defined in Section 15.[84] Thus money paid under pressure of circumstances, such as

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78. Applying *Warman v Southern Counties Car Finance Ltd*, (1949) 1 All ER 711.
79. *Dhanyalakshmi Rice Mills* v *Commr of Civil Supplies*, (1976) 4 SCC 723: AIR 1976 SC 2243. A transaction entered into at a police station was presumably held to be under coercion. *Mathew* v *Kuruvilla*, 1983 Ker LT 104. Quite obviously the section does not apply where no mistake is made out as touching the transaction in question. *Union of India* v *Jal Rustomji Modi*, (1970) 3 SCC 368: AIR 1970 SC 1490.
80. *Food Corporation of India* v *K. Venkateswara Rao*, (1987) 2 Andh LT (Notes on Recent Cases) 81: (1988) 1 Andh LT 930. Liability under the Negotiable Instruments Act, 1881 for negligent handling of collection of cheques cannot be evaded by saying that action should be brought under S. 72 for payment made under mistake, *Union Bank of India*, AIR 1997 Mad 23.
81. *Baldev Steel Ltd* v *Empire Dyeing & Mfg Co Ltd*, AIR 2001 Delhi 391. Where payments were made to the owner of the property to be bought and also to the person acting for him in making the agreement and the sale having fallen through, recovery was allowed against both though the owner was saying that there was no dealing with him, *K.S. Satyanarayna* v *V.R. Narayanarao*, (1999) 6 SCC 104: AIR 1999 SC 2544.
82. *ONGC* v *Assn of Gas Consuming Industries*, AIR 2001 SC 2796.
83. *Ibid.*
84. *Seth Kanhaya Lal* v *National Bank of India*, (1913) 40 IA 56.

prevention of the execution of a decree on a property in which the party paying is interested, may be recovered even though "coercion" as defined in Section 15 is not established.[85]

QUASI-CONTRACTS IN ENGLISH LAW

The variety of quasi-contractual obligations recognised by English Law may now be noted.

Payments to the defendant's use

Two principles seem to govern this kind of quasi-contractual liability. One of them is that the payment should have been made under pressure and not voluntarily and the other is that the defendant should have been bound to pay and has been relieved of his liability by the payment made by the plaintiff.

An expenditure or payment made purely voluntarily will not do. If, for example, a person pays premiums due upon the policy of another without his request and without any compulsion, he cannot recover.[86] Similarly, where a municipal corporation, having no legal liability to do so, carried out repairs of a canal bridge, which it was the obligation of the canal authority to maintain, the corporation could not recover, although the bridge was, for want of repair, endangering the road and although the corporation had without success requested the defendant to carry out the repairs. They were still volunteers.[87] There was no legal compulsion on them to carry out the repairs. The only compulsion was the damage being done to the road and the expenditure made by them in protecting the road may give remedy under some other principle but definitely not under quasi-contract.

The kind of compulsion or pressure that the law recognises for the purposes of this remedy is evidenced by *Exall* v *Partridge*.[88] Here the plaintiff had left his carriage upon the premises in which the defendant was living as a tenant. The landlord lawfully seized all the goods on the premises including the carriage for non-payment of rent and would have sold them in execution of his claim. The plaintiff paid the outstanding rent to get back his carriage and then sued the defendant for the amount. He was held entitled to it.

Another illustration is *Brook's Wharf & Bull Wharf Ltd* v *Goodman Brothers*.[89] This was a case in which the plaintiffs, who were warehousemen, had taken into their bonded warehouse furs which were imported and were liable to duty. A man keeps a bonded warehouse on the terms that he will be responsible to the Commissioner of Customs and Excise if those goods go out of his bonded warehouse before the duties have been paid. The defendants had imported skins and

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85. *Ibid.* Where an alleged surety was compelled to pay a guaranteed loan of which he was not aware, nor his property was charged under it, held coercion within the meaning of S. 72, 1988 Reports 25. 440 Kam. Demand of guaranteed minimum payment by a State Electricity Board does not become unconscionable only because the Government has ordered cut in supply of energy to certain consumers on daily basis. There is no unjust enrichment of the Electricity Board by that reason alone and, therefore, no remedy under S. 72. *West Bengal State Electricity Board* v *Sidharta Ferro Alloys*, AIR 1997 Cal 221.

86. *Falcke* v *Scottish Imperial Ins Co*, (1886) 34 Ch D 234. The defendant would, however, become liable if he ratifies the payment. See *Leigh* v *Dickson*, (1884) 15 QBD 60, 64.

87. *Macclesfield Corpn* v *Great Central Railway*, (1911) 2 KB 528. This is so because common law does not favour volunteers. For details *see* AGENCY OF NECESSITY, *post*.

88. (1799) 8 Term Rep 308; (1775-1802) All ER Rep 341.

89. (1937) 1 KB 534.

put them in the plaintiff's warehouse. The goods were stolen from the warehouse and the Commissioner recovered the duty from the warehousemen. "They had no answer, they had held the bonded goods, the bonded goods had left their warehouse and could be made available by the thieves on the home market, and the bonded warehousemen had to pay. They were held entitled to recover from the importers the amount which they had paid because it was primarily the importer's duty to have paid the import duties as soon as the goods were imported into this country."

The conditions of this action were restated by LYNSKEY J in *Monmouthshire County Council* v *Smith*[90].

> "The essence of the rule is that there must be a common liability to pay money to a particular person; that the plaintiff has been compelled to pay it by law; that the defendant is liable to pay that money; and that the defendant's debt or liability has been discharged by the plaintiff's payment."

This statement was affirmed by the Court of Appeal. The appeal was heard along with *Metropolitan Police District Receiver* v *Croydon Corpn.*[91] The two appeals raised exactly the same point. In each case a police constable was injured through the negligence of the defendants and had to remain off duty during the period of illness and the police authorities had under the duties to pay him off-duty wages. The action in each case was to recover the amount so paid away as off-duty wages. The contention was that if the police authorities had not paid them, the constables could have recovered from the defendants the loss of wages and that the liability of the defendants was thereby reduced. But the Court of Appeal did not allow any remedy under quasi-contract. In each case the defendant was liable to pay compensation to the injured constable and the liability to compensation did not include loss of wages because the constable had not suffered that loss. Thus the payment by the plaintiff did not relieve the defendant of any liability.

Voluntary Payments

Payments made under Mistake of Fact

Payments made under a mistake of fact can be recovered provided that the party paying would have been liable to pay if the mistaken fact were true. Thus where money was paid under a life insurance policy which to the knowledge of the company had lapsed, but the fact of lapse having been forgotten at the moment, the company was held entitled to recover back the money.[92] PARKE B pointing out that it would be against conscience for a person receiving such payment to retain it. The principle of this case was applied subsequently to a case where payment was made under a policy of marine insurance under the mistaken knowledge that the cargo of lemons had perished whereas in fact it was only sold *en route*, the Privy Council held that the money was recoverable.[93]

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90. (1956) 2 All ER 800, 809; affirmed, *Monmouthshire County Council* v *Smith*, (1957) 2 QB 154: (1957) 1 All ER 78: (1957) 2 WLR 33.
91. (1957) 1 All ER 78, CA.
92. *Kelly* v *Solary*, (1841) 9 M&W 54: (1835-42) All ER Rep 320: 11 LJ Ex 10.
93. *Norwich Union Fire Ins. Society Ltd* v *Price (W.H.) Ltd*, (1934) AC 455: (1934) All ER Rep 352.

One of the essential conditions of this action is that "the mistake must be as to a fact which, if true, would make the person paying liable to pay the money". This suggestion was made in *Aiken* v *Short*[94] and was approved by the Court of Appeal in *Morgan* v *Ashcroff*[95]. The facts as summarised by the court were as follows:

> The respondent is a book-maker. The plaintiff is a publican who was a regular customer of the respondent for betting transactions. The nature of the mistakes which led to the alleged overpayment of about £24 upon which the action was brought, was proved in evidence to have been a clerical error by the respondent's clerk which led her to give the appellant credit for the sum of about £24 twice over; thus causing the respondent to pay to the appellant £24 too much.

The action was to recover back the overpayment, and it was lost on two grounds. Firstly, the court was forbidden by the Gaming Act, 1845, from looking into betting transactions and, secondly, even if the mistaken overcredit were taken to be true, there would have been no liability to pay.

In the subsequent case of *Larner* v *London County Council*[96] the Court of Appeal relaxed the principle to this extent that a belief that there is a moral liability to pay is sufficient to prevent the payment from being regarded as purely voluntary. In that case an employer whose servants were called up for military service proposed to pay them the difference between their pay and the pay given to them by the military authorities. The plaintiff to whom such difference had to be paid did not inform the employer of the difference and consequently he was overpaid. When he came back the employer began to deduct from his pay the extra payment which he tried to stop. But the employer was allowed to recover the extra payment. The scheme was no doubt voluntary, but once announced, the payments made under it could not be regarded as voluntary.

It is also necessary for this kind of action to succeed that the mistake must be one of fact and not of law. The distinction may often be difficult to draw and the rule may for this reason have often been criticized, it is still a part of the law. Thus, payment of extra rent made under an agreement to increase rent made in violation of a Rent Control Act could not be recovered.[97] Similarly, the duty paid on an item which the House of Lords had held in another case to be not dutiable, could not be recovered.[98] So was true of an extra gratuity paid on a mistaken view of the relevant regulations.[99]

Where a private document has been construed by a court of law, that interpretation becomes a part of the law. Thus, where an undertaking in a separation deed to pay the wife an annual sum of money "free of any deductions whatever" had already been construed as excluding deduction for income tax, a payment in

94. (1856) 1 H & N 210, 215; (1843-60) All ER Rep 425; 25 LJ Ex 321.
95. (1938) 1 KB 49; (1937) 3 All ER 92, CA.
96. (1949) 2 KB 683; (1949) 1 All ER 964.
97. *Sharp Bros & Knight* v *Chant*, (1917) 1 KB 771, CA.
98. *National Pari-Mutual Assn Ltd* v *R.*, (1930) 47 TLR 110.
99. *Holt* v *Markham*, (1923) 1 KB 504.

ignorance of this interpretation without deducting income tax could not be recovered.[1]

Payments made under an Ineffective Contract

Three kinds of situation are generally considered under this head, namely, total failure of consideration, money paid under a void contract and money paid under an illegal contract. The effects of void and illegal contracts have already been considered, only the effect of total failure of consideration will be taken up here. Where one of the parties to a contract has paid money in the performance of his part but the other party fails to do his part, the former has an option, namely, either to sue the other for the breach of contract or to treat the contract as at an end and recover back his money under quasi-contract. Quasi-contractual remedy arises when there has been a total failure of consideration as opposed to partial. For example, where a shareholder of a company transferred his shares to the plaintiff for which the price was paid, but the company on account of certain conduct on the part of the transferor himself refused to register the transfer of his shares, this was held to be a total failure of consideration enabling the plaintiff to recover back his price.[2]

Other instances can be seen in transactions relating to sale of goods. If the buyer has to return the goods on account of there being no title on the part of the seller to sell, the buyer can recover the whole of his price without any deduction for use value, for there is, in such cases, a total and not a partial failure of consideration.[3] The same principle shall apply where the goods have been taken under hire-purchase and the buyer had to return them to the true owner.[4]

Partial failure of consideration will not have the same effect. Thus, where a boy was registered as an apprentice with a watchmaker for a period of six years on payment of a premium and the master died when the boy had learned only for one year, he could not recover any part of his premium, there being only a partial failure of consideration.[5] The same result followed where a party occupied a premises on paying the agreed rent but left soon thereafter on account of the landlord's failure to carry out his part of the promise, he could not recover back the rent.[6]

Payments made under compulsion

Where the owner of a market realised tolls from a shopkeeper by seizing his goods and it being subsequently held that he had no such authority, the shopkeeper

1. *Ord* v *Ord*, (1923) 2 KB 432.
2. *Wilkinson* v *Lloyd*, (1845) 7 QB 27: 4 LT (OS) 432.
3. *Rawland* v *Divall*, (1923) 2 KB 500.
4. *Warman* v *Southern Counties Car Finance Corpn Ltd*, (1949) 2 KB 516: (1949) 1 All ER 711. *See* also *Hudson* v *Robinson*, (1816) 4 M&W 475, where too the seller had no title. *Eldan Services Ltd* v *Chandag Motors Ltd*, (1990) 3 All ER 459, post-dated cheques issued for taking over a business, breach alleged, held that the court had no jurisdiction to stay encashment of the cheques until the matter was decided one way or the other. The court considered *Chase Manhattan Bank N A* v *Israel-British (London) Bank Ltd*, (1979) 1 All ER 1025.
5. *Whincup* v *Hughes*, (1871) LR 6 CP 78.
6. *Hunt* v *Silk*, (1804) 5 East 449: (1803-1813) All ER Rep 655. No refund was allowed to an auction-purchaser who after paying the initial 10% deposit backed out. Forfeiture of his deposit, the court said, was not akin to a penalty or liquidated damages. *Zemhunt (Holdings)* v *Control Securities*, 1991 Scottish LT 653: 1991 CLY 5101.

was allowed to reclaim the toll money.[7] But where any such fee or toll is paid without improper pressure or compulsion, there would be no right of recovery;[8] so also where the payment is in response to summons issued by a court of law.[9] Payments extorted under colour of authority which is unfounded are recoverable.[10]

Quantum Meruit

Where a party has in the performance of his contract done some work or rendered some service and the further performance has been made useless by the other party, he may recover reasonable compensation for the work or service. *Plinche* v *Colburn*[11] is an authority for this principle.

> The plaintiff was the author of several dramatic entertainments. He was engaged by the defendants, who were the publishers of a work called "The Juvenile Library" to write for that work an article to illustrate the history of armour and costumes from the earliest times, for which he was to be paid 100 guineas. The plaintiff made various drawings and prepared a considerable portion of manuscript when the defendants discontinued the Juvenile Library. The plaintiff claimed a sum of 50 guineas for the part which he had prepared, and the trouble he had taken in the business. He was held entitled to it.

Similarly, where a printer, having printed most of the work, refused to complete it because the dedication was libellous, he was held entitled to recover on *quantum meruit*.[12] A similar recovery is allowed where a person has rendered services under a supposed contract which turns out to be a nullity. *Craven-Ellis* v *Canons Ltd*[13] is an authority for this.

> The plaintiff was appointed managing director of a company. The appointment was made by the other directors who were disqualified by reason of having not taken their qualification shares. The plaintiff also did not take his qualification shares. But he continued to act as managing director and sued the company for his agreed remuneration or for a reasonable remuneration on the basis of *quantum meruit*.

The Court of Appeal rejected the claim for the agreed remuneration, the contract of appointment being void, but allowed him to recover on the basis of *quantum meruit*. GREEH LJ emphasised that a claim of this kind does not depend upon implied contract arising by virtue of the services having been accepted or upon inference of law, but upon a rule of law.

> "The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services or goods. It is one of the cases which are referred to in books on contract as obligations

7. *Maskell* v *Horner*, (1915) 3 KB 106, CA.
8. *Twyford* v *Manchester Corpn*, (1946) 1 Ch 236.
9. *Moore* v *Vestry of Fulham*, (1895) 1 QB 399.
10. *Newdigate* v *Davy*, (1694) 1 Lord Ragm 742.
11. (1831) 5 C & P 58: 1 Moo & S 51.
12. *Clay* v *Yates*, (1856) 25 LJ Ex 237.
13. (1936) 2 KB 403: (1936) 2 All ER 1066, CA.

arising *quasi ex contractu* of which a well-known instance is a claim based on money which had been received."[14]

Though the remedy is independent of contract, but the contract, if any, shall not be wholly irrelevant. Thus where a ship was delivered for repairs and the contractor used more expensive material than that authorised by the contract, he could not recover under the contract because he had not carried it out precisely, nor under *quasi-contract*, because the shipowner had no chance to reject the expensive material. He could not have rejected the ship after it was already repaired and the mere taking of his own property was not the same thing as an acquiescence in or acceptance of the work done.[15]

Where adequate relief is available under the contract itself, the court may not provide any relief under quasi-contract.

In the course of the performance of a contract to construct a power dam, the owner was in several important respects in breach of the contract. The breach was so fundamental as to justify termination of the contract. However, the contractor continued to work and completed the project. He claimed compensation for the owner's breach on *quantum meruit* basis.

It was held that the contractor, having continued to work the contract in the face of the owner's breach, was entitled to recover under the contract. Since the contractor had completed the contract, and had adequate remedy under the contract, there was no need for law to fashion a restitutionary remedy. Nor would it be right for the contractor to obtain a possibly higher rate of compensation than that under the contract.[16]

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14. At p 412. A was a licensed builder who did work and supplied materials pursuant to an oral building contract. He sued for the value of the work done and materials supplied. The defendant relied upon the Building Licensing Act, 1971, which provided that a contract was not enforceable by a builder unless it was made in writing and signed by the parties, held, action on the basis of a *quantum meruit* such as that brought by the builder rested not on implied contract but on a claim for restitution and the liability to pay a reasonable remuneration arose from the operation of the law upon the circumstances. A *quantum meruit* is an obligation or debt imposed by operation of law which arises in the defendant having taken the benefit of the work done, goods supplied or services rendered. *Pavey and Matthews Proprietary* v *Paul*, (1990) 6 Const. LJ 59, High Court of Australia, 1990 CLY 662.

15. *Farman & Co Ltd* v *The Liddesdale*, (1900) AC 190 PC. Such claims have been considered in India under S. 65 of the Contract Act.

16. *Morrison Knudsen & Co* v *B.C. Hydro and Power Authority*, (1978) 85 DLR (3rd) 186 (Br Col CA). The Supreme Court did not allow escalated rates where the rates already fixed under the contract seemed to be quite reasonable. *Gautam Construction and Fisheries Ltd* v *National Bank for Agricultural & Rural Development*, (2000) 6 SCC 519.

PART II

SPECIFIC CONTRACTS

(Ss. 124-238)

11
Contract of Indemnity

Definition and Nature

Definition in English Law

An illustration in English law of the meaning and effect of a contract of indemnity is to be found in the facts of *Adamson* v *Jarvis*:[1]

> The plaintiff, an auctioneer, sold certain cattle on the instruction of the defendant. It subsequently turned out that the livestock did not belong to the defendant, but to another person, who made the auctioneer liable and the auctioneer in his turn sued the defendant for indemnity for the loss he had thus suffered by acting on the defendant's directions.

The court laid down that the plaintiff having acted on the request of the defendant was entitled to assume that, if, what he did, turned out to be wrongful, he would be indemnified by the defendant.

Thus "indemnity" in English law means a promise to save a person harmless from the consequences of an act. The promise may be express or it may be implied from the circumstances of the case. Thus, for example, in *Dugdale* v *Lovering*:[2]

> The plaintiffs were in possession of certain trucks which were claimed both by the defendants and one K.P. Co The defendants demanded delivery and the plaintiffs asked for an indemnity bond, but received no reply. Even so they delivered the trucks to the defendants.

K.P. Co., having successfully sued the plaintiffs for conversion of their property, the plaintiffs were held entitled to recover indemnity from the defendants on an implied promise as evidenced by the fact that by demanding an indemnity, they made it quite clear that they had no intention to deliver except on indemnity. Similarly, in *Shefield Corporation* v *Barclay*,[3] a corporation, having registered a transfer of stock on the request of a banker, was held entitled to recover indemnity from the banker when the transfers were discovered to be forged.

The English definition of indemnity is wide enough to include a promise of indemnity against loss arising from any cause whatsoever, e.g., loss caused by fire or by some other accident. Indeed, every contract of insurance, other than life assurance, is a contract of indemnity.[4]

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1. (1827) 4 Bing 66: 5 LJ (OS) (CP) 68: 29 RR 503.
2. (1875) 10 CP 196: 44 LJ (CP) 157: 32 LT 155.
3. (1905) AC 392. In similar circumstances in *Starkey* v *Bank of England*, (1903) AC 114, a bank was allowed to recover indemnity from an agent who presented a transfer document on which one out of three signatures were forged, though he did not know this fact.
4. See *Regional Manager, Oriental Fire and General Ins Co* v *Saving Solvent Oil Extractions Ltd*, (1997) 6 Andh LD 1 DB, AP, the following propositions are noticeable from the judgment: in a claim under an insurance policy, if the insurer is refusing payment, the burden lies upon him to show that the assured violated the conditions of the policy, if the assured presents a bogus claim (in this case that the whole stock was burnt, which was not found to be true) he would forfeit all benefits under the policy, he has to observe good faith

Definition in Section 124 Narrower

But the definition of "indemnity" in Section 124 of the Indian Contract Act is somewhat narrower. It is like this:

124. "Contract of Indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

Illustration

A contracts to indemnify *B* against the consequences of any proceedings which *C* may take against *B* in respect of a certain sum of 200 rupees. This is a contract of indemnity.

The only illustration appended to the section says that if a person promises to save another from the consequences of a proceeding which may be commenced against him it is a contract of indemnity.[5]

The person who gives the indemnity is called the "indemnifier" and the person for whose protection it is given is called the "indemnity-holder" or "indemnified".

Thus the scope of "indemnity" is by the very process of definition restricted to cases where there is a promise to indemnify against loss, caused: (*a*) by the promisor himself, or (*b*) by any other person. The definition excludes from its purview cases of loss arising from accidents like fire or perils of the sea. Loss must be caused by some human agency.[6] Contracts of insurance against loss are covered by the chapter on Contingent Contracts.[7]

Secondly, situations like those in *Adamson* v *Jarvis*[8] where cattle were sold under the instruction of a wrongful owner, are also outside the scope of this definition. Such cases and the case of a loss arising from an act done at the request of the promisor are covered by Section 223 of the Act which provides for indemnity between principal and agent.[9]

The promise of indemnity, as envisaged by the section, may be express or implied. An illustration of implied indemnity is the decision of the Privy Council in *Secretary of State* v *Bank of India Ltd.*[10]

A note with forged indorsement was given to a bank which received it for value and in good faith. The bank sent it to the Public Debt Office for renewal in

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throughout; a provision in the policy that the insurer may enter upon the affected premises and may remain there for the purposes of assessment, does not make it his duty to do so. *State of Orissa* v *United India Insurance Co Ltd*, AIR 1997 SC 2671, insurance from port to port, cancellation by the insurer at a subsequent stage, valid.

5. For another illustration see *Mange Ladha Ram* v *Ganda Mal*, AIR 1929 Lah 388, where a vendor's promise to the vendee to be liable if title to the land was disturbed was held to be one of indemnity. Other illustrations are service bonds executed by the employees to serve the master for a particular period or persons claiming payment of money or delivery of goods on indeminity bonds having lost the original documents of title. *M. Sham Singh* v *State of Mysore*, (1972) 2 SCC 303: AIR 1973 SC 2440, an employee, sent abroad for training on scholarship, undertaking to serve the State on coming back.
6. See *Gajanan Moreshwar* v *Moreshwar Madan*, (1942) 203 IC 261: AIR 1942 Bom 302: 44 Bom LR 703.
7. See *Tropical Insurance Co* v *Zenith Life Assurance*, (1941) 196 IC 198 (Lah).
8. *Supra*, Note 1.
9. The Illustrations to S. 223 refer to situations like that in *Adamson* v *Jarvis* (*supra*, Note 1).
10. (1938) 175 IC 327 (PC).

their name. The true owner of the note recovered compensation from the State and the State was allowed to recover from the bank on an implied promise of indemnity.

An indemnity bond which permits an employee to leave the employment earlier than the minimum agreed period only at the cost of the forfeiture of his bond money is valid provided both the period of restriction and the bond money are reasonable. Only that part of the bond money can be retained which is necessary to indemnify the employer for his loss.[11]

Extent of Liability

Section 125 lays down the extent of liability.

125. Rights of indemnity-holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor; and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

The indemnity-holder, acting within the scope of his authority, is entitled to recover the following amounts—

(1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise of indemnity applies;[12]

(2) all costs which he may be compelled to pay in such suits if, in bringing or defending it, he did not contravene the order of the promisor, and acted as it would have been prudent for him to act in the absence of any

11. *P.N.V.S.V. Prasad* v *Union of India*, (1995) 1 Andh WR 120, minimum period of compulsory service three years, three months' remuneration to be recovered if the employee left earlier. Neither penal under S. 74, nor unenforceable under S. 23.

12. *Parker* v *Lewis*, (1873) LR 8 Ch 1035. *Nallappa* v *Virdhachala*, (1914) ILR 37 Mad 270, right arises as soon as the decree is passed against the promisee; *Chiranjilal* v *Naraini*, (1919) 41 All 395.

contract of indemnity, or, if the promisor authorised him to bring or defend the suit;[13]

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.[14]

A person who encashes an indemnity bond which is in the nature of a bank guarantee can retain only that part of the amount of the bond which represents the damage or loss suffered by the bond-holder as a result of the contracting party's breach. Anything more would be undeserved windfall for one party and penalty of the other.[15]

Where a motor vehicle (truck) was under indemnity insurance for Rs 2.00.000 and it was stolen with no chances of recovery, it was held that the proper amount of indemnity was as fixed by the surveyor at Rs 1,87,492 and that it was payable with 18% interest for the delay period. The settlement of claim at a lesser amount by insurance authorities was arbitrary and unfair under Article 14 of the Constitution.[16]

Commencement of Liability

An important question in this connection is when does the indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover his indemnity? The original English rule was that indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim. The maxim of law was: "you must be damnified before you can claim to be indemnified." But the law is now different. The process of transformation is well-explained by CHAGLA J[17] of the Bombay High Court in *Gajanan Moreshwar* v *Moreshwar Madan*:[18]

> "It is true that under the English common law no action could be maintained until the actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not

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13. *Bepin* v *Chunder Seekur Mookerjee*, 1880 ILR 5 Cal 811; *Gopal Singh* v *Bhawani Pd*, 1888 ILR 10 All 531.
14. See *Bepin* v *Chunder Seekur Mookerjee*, 1880 ILR 5 Cal 811; *Venkatta Rangayya Apparao* v *Varaprasad Rao*, (1921) 60 IC 164: 1920 Mad 898, and also the decision of the Supreme Court in *Ramaswami* v *Muthu Krishna*, AIR 1967 SC 359, noted I.C. Saxena, *Mercantile Law*, 141-42, ANNUAL SURVEY OF INDIAN LAW, 1967-68. *See* further, *Union of India* v *Amarendra Nath*, AIR 1967 Cal 119; *Bihal Chandra* v *Chattur Sen*, AIR 1967 All 506. Where a seller promised to the purchaser to indemnify him against dues, if any, it was held that such indemnity clause would include only then existing dues and not those subsequently imposed though restrospectively. *Elizabeth* v *Algesendran*, 1986 Ker LT 52[1]. *See* also *E.E. Caledonia* v *Orbit Valve Co*, (1994) 2 Lloyd's Rep 230 CA, where the question was as to the scope of the indemnity clause on an employee's death and whether the clause covered acts of negligence and breaches of statutory duty. *Sujir Ganesh Nayak & Co* v *National Insurance Co Ltd*, AIR 1996 Ker 49, the fire policy carried "riot and strike endorsement", this was held to be applicable to partial cessation or interruption of work resulting in loss.
15. *Cargill International SA* v *Bangladesh Sugar & Food Industries Corpn*, (1996) 4 All ER 563.
16. *Mohit Kumar Saha* v *New India Assurance Co Ltd*, AIR 1997 Cal 179.
17. Afterwards CJ.
18. AIR 1942 Bom 302, 304. *Followed* in *Khetrapal* v *Madhukar Pictures*, AIR 1956 Bom 106: 57 Bom LR 1122.

enforce his indemnity till he had actually paid the loss. If a suit was filed against him he had actually to wait till a judgment was pronounced and it was only after he had satisfied the judgment that he could sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. Therefore, the court of equity stepped in and mitigated the rigour of the common law. The court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into court sufficient money which would constitute a fund for paying off the claim whenever it was made."[19]

This principle was expounded in *Re Richardson, Ex parte The Governors of St. Thomas's Hospital*,[20] where BUCKLEY LJ observed: "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay.... "[21] The High Court of Calcutta in its well-known decision in *Osman Jamal & Sons Ltd* v *Gopal Purshottam*[22] followed this principle.

A company was acting as the commission agents of the defendant firm and in that capacity bought certain goods for the defendants which they failed to take. The supplier became entitled to recover from the company certain sum of money as damages for breach. The company went into liquidation before paying the claim.

It was held that the Official Liquidator could recover the amount even though the company had not actually paid the vendor. The court, however, directed that the amount should be set apart so that it is used in full payment of the vendor in respect of whose contract the company had incurred liability.[23]

The High Courts of Allahabad[24], Madras[25] and Patna[26] have all expressed their concurrence in the principle that as soon as the liability of the indemnity-holder to

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19. The Court *distinguished* the case from its earlier decision in *Shanker Nimbaji* v *Laxman Sapdu*, AIR 1940 Bom 161: 42 Bom LR 175; *see* the judgment of COZENS-HARDY MR in *Richardson, Re*, (1911) 2 KB 705, 709. *See also* WRIGHT J in *Wolmserhausen* v *Gullick*, (1893) 2 Ch 514, 528 and NEVILLE J in *Law Guarantee Trust & Accident Society, Re*, (1913) 2 Ch 604, 639.
20. (1911) 2 KB 705, 715.
21. *Supra*, at p 715; *cited* by LORD WILLIAMS J of the Calcutta High Court in *Osman Jamal & Sons* v *Gopal Purshottam*, (1928) ILR 56 Cal 262, 266, where the learned judge reviewed all the English authorities. Earlier to this KENNEDY LJ observed in *Liverpool Mortgage Insurance Co's* case, (1914) 2 Ch 617, 638: that indemnity does not merely mean to reimburse in respect of moneys paid, but to save from loss in respect of the liability against which the indemnity has been given because otherwise indemnity may be worth very little if the indemnity-holder is not able to pay in the first instance.
22. 1928 ILR 56 Cal 262. *See also* to the same effect, *Kumar Nath Bhattacharjee* v *Nobo Kumar*, ILR 26 Cal 241.
23. *Followed* in *Prafulla Kumar* v *Gopi Ballabh*, AIR 1964 Cal 159.
24. See *Shiamlal* v *Abdul Salam*, AIR 1931 All 754: ILR 53 All 246; *Abdul Majeed* v *Abdul Rashid*, AIR 1936 All 598.
25. *Ramalingathudayar* v *Unnamalai Achi*, (1914) 24 IC 423: (1915) 38 Mad 791.
26. *Chunibhai Patel* v *Natha Bhai*, AIR 1944 Pat 1. *Abdul Hussain, Jambawala* v *Bombay Metal Syndicate*, AIR 1972 Bom 252, order of direct payment of sales tax to authorities from the person due without the intervention of the seller. An action can be brought by the indemnity-

pay becomes clear and certain he should have the right to require the indemnifier to put him in a position to meet the claim. But contrary views have also been expressed.[27]

Where an authorised agent of the insurance company collected the premium amount from the assured against proper receipt, the liability of the insurer began from that moment though the agent deposited the collection with the company after the occurrence.[28]

Specified Time for Notice

An insured motor vehicle was lost by theft. The insurance policy required the assured to send notice to the insurer immediately after theft or any other criminal act. The assured made police report of the theft immediately after the incident, but informed the insurer after one month. The question was whether this could be regarded as a notice given immediately. The court said that the expression immediately implies notice to be given with promptitude avoiding unnecessary delay. Immediate police report showed the *bona fides* of the assured in the matter. Report to the insurer after one month could not be regarded as unreasonable. Indemnification could not be denied.[29]

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holder within three years from the date of payment by him. *Shanti Swarup* v *Munshi Singh*, AIR 1967 SC 1315. The indemnifier has the right under the principle of subrogation to sue the person who caused the loss. *Maharana Shri Jarvat Singhji* v *Secy of State for India*, 1889 ILR 14 Bom 299.

27. *See*, for example, *Shanker Nimbaji* v *Laxman Sapdu*, AIR 1940 Bom 161; *Sham Sunder* v *Chandu Lal*, AIR 1935 Lah 974; *Ranganath* v *Pachusao*, AIR 1935 Nag 147; *Chand Bibi* v *Santosh Kumar Pal*, (1933) 146 IC 863.

28. *Oriental Insurance Co Ltd* v *Asha Paul*, (1996) AIHC 2043 J&K.

29. *Praful Kumar Mohanty* v *Regional Manager of Oriental Insurance Co Ltd*, (1997) AIHC 2822 Ori. The court *cited* ROLFE B in *Thompson* v *Gibson*, 10 LJ Ex 243 to the effect that "immediately implies that the act to be done should be done with all convenient speed. In other words, the thing to be done should be done as quickly as is reasonably possible", *per* COCKBURN CJ in *R.* v *Berkshire Justices*, 4 QBD 469.