LL.B. I Term

Principles of Contract
(General Principles)

Cases Selected and Edited by
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Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper is 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper.

Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

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Semester- First
Course Name- Law of Contract
Course Code- LB-CC-102
(Compulsory Paper)

Core course: 5 credits **Classes 64 (4 Classes/ week + Tutorial)**

The law relating to contracts is one of the basic laws to be studied by every law student the world over. The law of contracts touches equally upon the lives of ordinary persons and the activities of business whether organized on small or large scale. For any lawyer this branch of law is extremely important and without a sound understanding of the underlying principles it is impossible to succeed in his career.

This branch of law deals with law relating to promises, their formation, performance and enforceability. It is scattered over several legislations. There are special legislations dealing with particular contractual relationship, e.g. The Sale of Goods Act, 1930, The Partnership Act, 1932. And there are various laws that contain certain special provisions for particular situations. However, this paper will include a study of general principles of contracts spelt out in sections 1-75 of the Indian Contract Act, 1872 together with certain provisions of related legislations and Common Law.

Objectives of the Course:

- To acquaint the students with fundamental concepts of law relating to contracts.
- To study the Indian statutes specifically relating to contracts and to analyse the legal provisions through case laws and the related reference material.
- To study the practical application of law relating to contracts.

Course Outcomes:

The students will be able to learn and understand:

- The system of formation and discharge of contracts in India and the role of courts in enforcing them.
- The concept of voluntarily created civil obligations.
- Synthesis of case laws, identification of issues, applicability of relevant provisions and critical analysis of the judicial decisions with reference to the Indian Contract Act, 1872, the Specific Relief Act, 1963, the Indian Majority Act, 1875, and the Information Technology Act, 2000.

- Tracing the existing legal framework through latest Judgments and applicability of provisions in the evolving as well as technological driven society.

Teaching Methodology:

- The course will be conducted through lectures, presentations and discussions.
  - Class Room Teaching- 52 classes
  - Presentations/discussions- 12 classes

CONTENTS

Prescribed Legislations:

(1) The Indian Contract Act, 1872
(2) The Specific Relief Act, 1963
(3) The Indian Majority Act, 1875
(4) The Information Technology Act, 2000

Prescribed Books:

(1) ***Pollock & Mulla, Indian Contract & Specific Relief Act*** *(edited by R Yashod Vardhan and Chitra Narayan)* 15th Ed. 2017

(2) J. Beatson, **Anson's *Law of Contract*** (28th ed., 2002)
(3) H.K. Saharay, **Dutt on *Contract – The Indian Contract Act, 1872*** (10th ed., 2006)
(4) Avtar Singh, ***Law of Contract and Specific Relief*** (11th ed., 2013)
(5) Sachin Rastogi, ***Insights into E-Contracts in India***, 2014
(6) R K Singh, ***Law Relating to Electronic Contracts***, 2013

Recommended Reading:

(7) M.P.Furmston, Cheshire, Fifoot and Furmston's, ***Law of Contract*** (15th ed., 2007)

Topic 1 : **2 classes**

General Introduction – History and Nature of Contractual Obligations

Topic 2 : **6 classes**

Formation of an Agreement Intention to create legal relationship; offer and invitation to treat; kinds of offer, communication, acceptance and revocation of offer and acceptance; modes of revocation of offer - Indian Contract Act, 1872, sections 2 – 10

Cases

Topic 3 : **3 classes**

Making of an Agreement – Special Situations Tenders and Auctions- Indian Contract Act, 1872, sections 2-10

Cases:

Topic 4 : **5 classes**

Consideration Meaning; basis and the nature of consideration; Doctrine of Privity of Contract and of consideration, its exceptions; Exceptions of consideration – Indian Contract Act, 1872, sections 2(d), 2(f), 23 and 25

Topic 5 : **5 classes**

Capacity to Contract Legal disability to enter into contract - Minors, persons of unsound mind ; person under legal disability; lunatics, idiots; Restitution in cases of minor's agreement; Liability for necessaries supplied to the minor - Indian Contract Act, 1872, sections 10, 11, 12, 64, 65, 68; Specific Relief Act, 1963, section 33; Indian Majority Act, 1875

Topic 6 : **7 classes**

Free Consent Free consent ; Definition – Coercion, Undue influence, Fraud, Misrepresentation and Mistake; Effect on contracts influenced by any factor vitiating free consent - Indian Contract Act, 1872, sections 13 – 22

Cases

Topic 7 : **5 classes**

Limitations on Freedom of Contract Circumstances in which agreements become void or voidable, Distinction between void and voidable agreements; Unlawful Agreements; Public policy; Agreements with unlawful consideration in part and objects; Agreements without consideration; Agreements in restraint of marriage; Agreements in restraint of trade; Agreements in restraint of legal proceedings; Ambiguous and uncertain agreements & Wagering agreements -Indian Contract Act, 1872, sections 23 – 30

Cases

Topic 8 : 8 classes

Discharge of a Contract Modes-Discharge by performance; Frustration; Supervening impossibility of performance; Grounds of Frustration and its effect; Discharge by Agreement and Novation - Indian Contract Act, 1872, sections 37 – 67

Cases

Topic 9 : 6 classes

Remedies for Breach of Contract (a) Damages; Types of Damages; Basis of Assessment of Damages; Remoteness of Damages and (b) Measures of Damages; Mitigation of Damages; Penalty & Liquidated Damages – Indian Contract Act, 1872, sections 73 – 74

Cases

39. *Oil & Natural Gas Corporation Ltd.* v. *Saw Pipes Ltd.* (2003) 4 SCALE 92 200

Topic 10 : **3 classes**

Quasi – Contracts Obligations resembling those created by Contract (Quasi – Contracts): Concept and classification - Indian Contract Act, 1872, sections 68 – 72

Cases

40. *State of West Bengal* v. B.*K. Mondal & Sons,* AIR 1962 SC 779 211

Topic 11 : **2 classes**

E- Contracts Nature and scope; Formation of E-contracts; Legislative Framework; Judicial Approach – The Information Technology Act, 2000, sections 3--5, 10--17.

Cases

41. *P R Transport Agency* v. Union of India, AIR 2006 ALL 23
42. *Timex International Fze Ltd Dubai* v. Vedanta Aluminium Ltd. (2010) 3 SCC 1

IMPORTANT NOTE:

1. The topics, cases and suggested readings given above are not exhaustive. The Committee of teachers teaching the Course shall be at liberty to revise the topics/case/suggested readings.
2. Students are required to study/refer to the legislations as amended from time to time, and consult the latest editions of books.

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FORMATION OF AN AGREEMENT

Carlill v. *Carbolic Smoke Ball Co.*

[1891-4] All ER 127

On Nov. 13, 1891, the following advertisement was published by the defendants in the "P'all Mall Gazette":

> "£ 100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic influenza, colds, or any diseases caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £ 1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter. During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball. One Carbolic Smoke Ball will last a family several months, making it the cheapest remedy in the world at the price – 10s. post free. The ball can be refilled at a cost of 5s. Address: Carbolic Smoke Ball Co., 27, Princes Street, Hanover Square, London, W."

The plaintiff, believing in the accuracy of the statements appearing in the advertisement with regard to the efficacy of the smoke ball in cases of influenza, or as a preventive of that disease, purchased one and used it three times every day, as directed by the instructions, for several weeks, from the middle of November, 1891, until Jan. 17, 1892, at which latter date she had an attack of influenza. Thereupon her husband wrote a letter for her to the defendants, stating what had occurred, and asking for the £100 promised by the defendants in the advertisement. The payment of that sum was refused by the defendants, and the present action was brought for its recovery. At the trial before Hawkins J. and a special jury the facts were not disputed, and the arguments of counsel on each side on the points of law involved in the case were heard by the learned judge on further consideration. It was denied on the part of the defendants that there was any contract between them and the plaintiff; and, alternatively, that, if there were any, it was void as a wagering contract. Hawkins J., gave judgment for the plaintiff and the defendants appealed.

LINDLEY, L.J. - This is an appeal by the defendants against a decision of Hawkins, J., rendering them liable to pay the plaintiff £100 under the circumstances to which I will allude presently. The defendants are interested in selling as largely as possible an article they call the "Carbolic smoke ball." What that is I do not know. But they have great faith in it as an effectual preventive against influenza and colds, or any diseases caused by taking cold, and as also useful in a great variety of other complaints. They are so confident in the merits of this thing that they say in one leaflet that the carbolic smoke ball never fails to cure all the diseases therein mentioned when used strictly according to these directions. Like other tradespeople they want to induce the public to have sufficient confidence in their preparation to buy it largely. That being the position they put this advertisement into various newspapers. It is printed in black-faced type, that is to say, the striking parts of it are. It is, therefore, put in a form to attract attention, and they mean that it should attract attention for the purposes to

which I have already alluded. [His Lordship read the advertisement.] The plaintiff is a lady who, upon the faith of one of these advertisements, went and bought at a chemist's in Oxford Street one of these smoke balls. She used it three times daily for two weeks according to the printed directions supplied. But before she had done using it she was unfortunate enough to contract influenza, so that in her case this ball did not produce the desired effect. Whereupon she says to the Carbolic Smoke Ball Co.: "Pay me this reward of £ 100." "Oh no", they respond, "We will not pay you the £100." She then brings an action, and Hawkins, J., has held that the defendants must pay her the £100. Then they *appeal* to us and say that judgment is erroneous. The appeal has been argued with great ingenuity by the defendants' counsel, and his contentions are reduced in substance to this that, put it as you will, this is not a binding promise.

I will pass, before I proceed further, to some of the various contentions which were raised for the purpose of disposing of them. I will afterwards return to the serious question which arises. First, it was said no action will lie upon this advertisement because it is a policy of insurance. You have, however, only got to look at it, I think, to dismiss that contention. Then it was said that this is a wager or bet. Hawkins, J., examined that with his usual skill, and came to the conclusion that nobody ever thought of a bet, and that there is nothing whatever in common with a bet. I so entirely agree with him that I propose to pass that over as not worth serious attention.

The first observation I would make upon this is that we are not dealing with any inference of fact. We are dealing with an express promise to pay £ 100 in certain events. There can be no mistake about that at all. Read this how you will, and twist it about as you will, here is a distinct promise, expressed in language which is perfectly unmistakeable, that £100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts influenza after having used the ball three times daily, and so on. One must look a little further and see if this is intended to be a promise at all; whether it is a mere puff – a sort of thing which means nothing. Is that the meaning of it? My answer to that question is "No", and I base my answer upon this passage: "£1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter." What is that money deposited for? What is that passage put in for, except to negative the suggestion that this a mere puff, and means nothing at all? The deposit is called in aid by the advertisers as proof of their sincerity in the matter. What do they mean? It is to show their intention to pay the £100 in the events which they have specified. I do not know who drew the advertisement, but he has distinctly in words expressed that promise. It is as plain as words can make it.

Then it is said that it is a promise that is not binding. In the first place it is said that it is not made with anybody in particular. The offer is to anybody who performs the conditions named in the advertisement. Anybody who does perform the conditions accepts the offer. I take it that if you look at this advertisement in point of law; it is an offer to pay £ 100 to anybody who will perform these conditions, and the performance of these conditions is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is that celebrated advertisement case of ***Williams* v. *Carwardine*** [(1883) 4 B. & Ad. 621], which has been followed by a good many other cases concerning advertisements of rewards. But then it is said : "Supposing that the performance of the conditions is an acceptance of the offer, that

acceptance ought to be notified." Unquestionably as a general proposition when an offer is made, you must have it not only accepted, but the acceptance notified. But is that so in cases of this kind? I apprehend that this is rather an exception to the rule, or, if not an exception, it is open to the observation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required (which I doubt very much, for I rather think the true view is that which is as expressed and explained by Lord Blackburn in ***Brogden* v. *Metropolitan Rail. Co.*** [(1877) 2 AC 666], the person who makes the offer receives the notice of acceptance contemporaneously with his notice of the performance of the conditions. Anyhow, if notice is wanted, he gets it before his offer is revoked, which is all you want in principle. But I doubt very much whether the true view is not, in a case of this kind, that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

We have, therefore, all the elements which are necessary to form a binding contract enforceable in point of law subject to two observations. First of all, it is said that this advertisement is so vague that you cannot construe it as a promise; that the vagueness of the language, to which I will allude presently, shows that a legal promise was never intended nor contemplated. No doubt the language is vague and uncertain in some respects, and particularly in that the £ 100 is to be paid to any person who contracts influenza after having used the ball three times daily, and so on. It is said, "When are they to be used?" According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I doubt whether that was meant, and I doubt whether that would not be pushing too far the doctrine as to construing language most strongly against the person using it. I doubt whether business people, or reasonable people would understand that if you took a smoke ball and used it three times daily for the time specified – two weeks – you were to be guaranteed against influenza for the rest of your life. I do not think the advertisement means that, to do the defendants justice. I think it would be pushing their language a little too far. But if it does not mean that, what does it mean? It is for them to show what it does mean; and it strikes me that there are two reasonable constructions to be put on this advertisement, either of which will answer the purpose of the plaintiff. Possibly there are three.

It may mean that the promise of the reward is limited to persons catching the increasing influenza, or any colds, or diseases caused by taking colds, during the prevalence of the epidemic. That is one suggestion. That does not fascinate me, I confess. I prefer the other two. Another is, that you are warranted free from catching influenza, or cold, or other diseases caused by taking cold, while you are using this preparation. If that is the meaning, then the plaintiff was actually using the preparation when she got influenza. Another meaning – and the one which I rather think I should prefer myself – is becoming diseased within a reasonable time after having used the smoke ball. Then it is asked: "What is a reasonable time?" And one of my brothers suggested that depended upon the reasonable view of the time taken by a germ in developing? I do not feel pressed by that. It strikes me that a reasonable time may be got at in a business sense, and in a sense to the satisfaction of a lawyer in this way. Find out what the preparation is. A chemist will tell you that. Find out from a skilled

physician how long such a preparation could be reasonably expected to endure so as to protect a person from an epidemic or cold. In that way you will get a standard to be laid before a court by which it might exercise its judgment as to what a reasonable time would be. And it strikes me, I confess, that the true construction of this is that £ 100 will be paid to anybody who uses this smoke ball three times daily, for two weeks according to the printed directions, and who gets influenza, or a cold, or some other disease caused by taking cold, within a reasonable time after so using it. I think that is the fair and proper business construction of it. If that is the true construction, it is enough for the plaintiff. Therefore, I say no more about the vagueness of the document.

I come now to the last point, which I think requires attention, i.e., the question of consideration. Counsel for the defendants has argued with great skill that this a nudum pactum – that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. Counsel says it is no advantage to them how much the ball is used. What is an advantage to them and what benefits them is the sale, and he has put the ingenious case that a lot of these balls might be stolen, and that it would be no advantage to them if the thief or other people used them. The answer to that I think is this. It is quite obvious that, in the view of the defendants, the advertisers, a use of the smoke balls by the public, if they can get the public to have confidence enough to use them, will react and produce a sale which is directly beneficial to them, the defendants. Therefore, it appears to me that out of this transaction emerges an advantage to them which is enough to constitute a consideration. But there is another view of it. What about the person who acts upon this and accepts the offer? Does not that person put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily at the request of the defendants for two weeks according to the directions? Is that to go for nothing? It appears to me that is a distinct inconvenience, if not a detriment, to any person who uses the smoke ball. When, therefore, you come to analyse this argument of want of consideration, it appears to me that there is ample consideration for the promise.

It appears to me, therefore, that these defendants must perform their promise, and if they have been so unguarded and so unwary as to expose themselves to a great many actions, so much the worse for them. For once in a way the advertiser has reckoned too much on the gullibility of the public. It appears to me that it would be very little short of a scandal if we said that no action would lie on such a promise as this, acted upon as it has been. The appeal must be dismissed with costs.

BOWEN, L.J. - I am of the same opinion. We were asked by counsel for the defendants to say that this document was a contract too vague to be enforced. The first observation that arises is that the document is not a contract at all. It is an offer made to the public. The terms of the offer, counsel says, are too vague to be treated as a definite offer, the acceptance of which would constitute a binding contract. He relies on his construction of the document, in accordance with which he says there is no limit of time fixed for catching influenza, and that it cannot seriously be meant to promise to pay money to a person who catches influenza at any time after the inhaling of the smoke ball. He says also that, if you look at this document you will find great vagueness in the limitation of the persons with whom the contract was intended to be made – that it does not follow that they do not include persons who may have

used the smoke ball before the advertisement was issued, and that at all events, it is a contract with the world in general. He further says, that it is an unreasonable thing to suppose it to be a contract, because nobody in their senses would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense, and there is no such provision here made for the checking. He says that all that shows that this is rather in the nature of a puff or a proclamation than a promise or an offer intended to mature into a contract when accepted.

Counsel says that the terms are incapable of being consolidated into a contract. But he seems to think that the strength of the position he desires to adopt is rather that the vagueness of the document shows that no contract at all was intended. It seems to me that in order to arrive at this contract we must read it in its plain meaning as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it upon the points which the defendant's counsel has brought to our attention? It was intended unquestionably to have some effect, and I think the effect which it was intended to have was that by means of the use of the carbolic smoke ball the sale of the carbolic smoke ball should be increased. It was designed to make people buy the ball. But it was also designed to make them use it, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the usage of it should be increased.

The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts influenza, and the defendants say that "contracts" there does not apply only to persons who contract influenza after the publication of the advertisement, but that it might include persons who had contracted influenza before. I cannot so read it. It is written in colloquial and popular language. I think that the expression is equivalent to this, that £ 100 will be paid to any person who shall contract influenza after having used the carbolic smoke ball three times daily for two weeks. It seems to me that would be the way in which the public would read it. A plain person who read this advertisement would read it in this plain way, that if anybody after the advertisement was published used three times daily for two weeks the carbolic smoke ball and then caught cold he would be entitled to the reward.

Counsel says: "Within what time is this protection to endure? Is it to go on for ever or what is to be the limit of time?" I confess that I think myself that there are two constructions of this document, each of them contains good sense, and each of them seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic. If so, it was during the epidemic that the plaintiff contracted the disease. I think more probably it means that it is to be a protection while it is in use. That seems to me the way in which an ordinary person would understand an ordinary advertisement about medicine and especially about a specific against influenza. It could not be supposed that after you had left off using it you would still be protected for ever as if there was a stamp set upon your forehead that you were never to catch influenza because you had used the carbolic

smoke ball. I think it means during the use. It seems to me that the language of the advertisement lends itself to that construction. It says:

> "During the last epidemic of influenza many thousand Carbolic Smoke Balls were sold, and in no ascertained case was the disease contracted by those using the Carbolic Smoke Ball."

The advertisement concludes with saying that one smoke ball will last a family several months – which means that it is to be continually used – and that the ball can be refilled at a cost of 5s. I, therefore, have no hesitation in saying that I think on the plain construction of this advertisement the protection was to ensure during the time that the carbolic smoke ball was being used. Lindley, L.J., thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point, but it is not necessary for me to develop it, because as I read the contract it covered the exact moment during which the disease here was contracted.

Was the £ 100 reward intended to be paid? It not only says the reward will be paid, but it says: "We have lodged £ 1,000 to meet it." Therefore, it cannot be said that it was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon, but counsel for the defendants says that there was no check on the persons who might claim to have used the ball and become entitled to the reward, and that it would be an insensate thing to promise £ 100 to a person who used the smoke ball unless you could check his using it. The answer to that seems to me to be that, if a person chooses to make these extravagant promises, he probably does so because it pays him to make them, and if he has made them the extravagance of the promises is no reason in law why he should not be bound by them.

It is said it is made to all the world, i.e., to anybody. It is not a contract made with all the world. There is the fallacy of that argument. It is an offer made to all the world, and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the conditions? It is an offer to become liable to anyone, who before it is retracted performs the conditions. Although the offer is made to all the world the contract is made with that limited portion of the public who come forward and perform the conditions on the faith of the advertisement. This case is not like those cases in which you offer to negotiate, or you issue an advertisement that you have got a stock of books to sell or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate, offers to receive offers, offers "to chaffer", as a learned judge in one of the cases has said: per Willes J., in ***Spencer* v. *Harding*** [(1870) L.R. 5 CP 561]. If this is an offer to be bound on a condition, then there is a contract the moment the acceptor fulfils the condition. That seems to me to be sense, and it is also the ground on which all these advertisement cases have been decided during the century. It cannot be put better than in Willes, J.'s judgment in ***Spencer* v. *Harding***, where he says (at p. 563):

> "There never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who, before the offer should be retracted, should be the

> person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on 'and we undertake to sell to the highest bidder', the reward cases would have applied, and there would have been a good contract in respect of the persons."

As soon as the highest bidder presents himself – says Willes, J., in effect – the person who was to hold the vinculum juris on the other side of the contract was ascertained, and it became settled.

Then it was said that there was no notification of the acceptance of the offer. One cannot doubt that as an ordinary rule of law an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless you do that, the two minds may be apart, and there is not that consensus which is necessary according to the English law to constitute a contract. But the mode of notifying acceptance is for the benefit of the person who makes the offer as well as for the opposite party, and so the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates that a particular mode of acceptance is sufficient to make the bargain binding, it is only necessary for the person to whom the offer is made to follow the indicated method of acceptance. And if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, and the offer is one which in its character dispenses with notification of the acceptance, then according to the intimation of the very person proposing the contract, performance of the condition is a sufficient acceptance without notification. That seems to me to be the principle which lies at the bottom of the acceptance cases, of which an instance is the well-known judgment of Mellish, L.J., in ***Harris* v. *Nickerson*** [(1873) L.R. 8 Q.B. 286], and Lord Blackburn's opinion in the House of Lords in ***Brogden* v. *Metropolitan Rail. Co.*** [(1877) 2 AC 666 at 691]. It seems to me that that is exactly the line which he takes.

If that is the law, how are you to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract the answer from the character of the business which is being done. And in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the conditions, but that, if he performs the conditions at once, notification is dispensed with. It seems to me, also, that no other view could be taken from the point of view of common sense. If I advertise to the world that my dog is lost and that anybody who brings him to a particular place will be paid some money, are all the police or other persons whose business is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Of course they look for the dog, and as soon as they find the dog, they have performed the condition. The very essence of the transaction is that the dog should be found. It is not necessary under such circumstances, it seems to me, that in order to make the contract binding, there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it. A person who makes an offer

in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. In his offer he impliedly indicates that he does not require notification of the acceptance of the offer.

In the present case the promise was put forward, I think, with the intention that it should be acted upon, and it was acted upon. It seems to me that there was ample consideration for the promise, and that, therefore, the plaintiff is entitled to recover the reward.

[**A.L. Smith, L.J.**, delivered judgment to the same effect: Ed].

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Pharmaceutical Society of Great Britain v. Boots Cash Chemist (Southern) Ltd. (1952) 2 All ER Rep. 456

LORD GODDARD, C. J. – This is a Special Case stated under R.S.C. Ord. 34, r. 1, and agreed between the parties and it turns on s. 18(1) of the Pharmacy and Poisons Act, 1933, which provides:

> "Subject to the provisions of this Part of this Act, it shall not be lawful –
>
> (a) for a person to sell any poison included in Part I of the Poison List, unless – (i) he is an authorised seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

The defendants have adopted what is called a "self-service" system in some of their shops – in particular, in a shop at 73, Burnt Oak Broadway, Edgware. The system of self-service consists in allowing persons who resort to the shop to go to shelves where goods are exposed for sale and marked with the price. They take the article required and go to the cash desk, where the cashier or assistant sees the article, states the price, and takes the money. In the part of the defendants' shop which is labelled "Chemist's dept." there are on certain shelves ointments and drugs, some of which contain poisonous substances but in such minute quantities that there is no acute danger. These substances come within Part I of the Poisons List, but the medicines in the ordinary way may be sold without a doctor's prescription and can be taken with safety by the purchaser. There is no suggestion that the defendants expose dangerous drugs for sale. Before any person can leave with what he has bought he has to pass the scrutiny and supervision of a qualified pharmacist.

The question for decision is whether the sale is completed before or after the intending purchaser has paid his money, passed the scrutiny of the pharmacist, and left the shop, or, in other words, whether the offer out of which the contract arises is an offer of the purchaser or an offer of the seller.

In ***Carlill* v. *Carbolic Smoke Ball Co.*** [(1893) 1 Q.B. 256], a company offered compensation to anybody who, having used the carbolic smoke ball for a certain length of time in a prescribed manner, contracted influenza. One of the inducements held out to people

to buy the carbolic smoke ball was a representation that it was a specific against influenza. The plaintiff used it according to the prescription, but, nevertheless, contracted influenza. She sued the Carbolic Smoke Ball Co. for the compensation and was successful. In the Court of Appeal Bowen, L.J., said [(1893) 1 Q.B. 269]:

> "[T]here can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."

Counsel for the plaintiffs says that what the defendants did was to invite the public to come into their shop and to say to them: "Help yourself to any of these articles, all of which are priced," and that was an offer by the defendants to sell to any person who came into the shop any of the articles so priced. Counsel for the defendants, on the other hand, contends that there is nothing revolutionary in this kind of trading, which, he says, is in no way different from the exposure of goods which a shop keeper sometimes makes outside or inside his premises, at the same time leaving some goods behind the counter. It is a well-established principle that the mere fact that a shop keeper exposes goods which indicate to the public that he is willing to treat does not amount to an offer to sell. I do not think I ought to hold that there has been here a complete reversal of that principle merely because a self-service scheme is in operation. In my opinion, what was done here came to no more than that the customer was informed that he could pick up an article and bring it to the shop-keeper, the contract for sale being completed if the shop-keeper accepted the customer's offer to buy. The offer is an offer to buy, not an offer to sell. The fact that the supervising pharmacist is at the place where the money has to be paid is an indication that the purchaser may or may not be informed that the shop keeper is willing to complete the contract. One has to apply common sense and the ordinary principles of commerce in this matter. If one were to hold that in the case of self-service shops the contract was complete directly the purchaser picked up the article, serious consequences might result. The property would pass to him at once and he would be able to insist on the shop keeper allowing him to take it away, even where the shop-keeper might think it very undesirable. On the other hand, once a person had picked up an article, he would never be able to put it back and say that he had changed his mind. The shop-keeper could say that the property had passed and he must buy.

It seems to me, therefore, that it makes no difference that a shop is a self-service shop and that the transaction is not different from the normal transaction in a shop. The shop-keeper is not making an offer to avail every article in the shop to any person who may come in, and such person cannot insist on buying by saying: "I accept your offer." Books are displayed in a bookshop and customers are invited to pick them up and look at them even if they do not actually buy them. There is no offer of the shop-keeper to sell before the customer has taken the book to the shop-keeper or his assistant and said that he wants to buy it and the shop-keeper has said: "Yes." That would not prevent the shop-keeper, seeking the book picked up, from saying: "I am sorry I cannot let you have that book. It is the only copy I have got, and I

have already promised it to another customer." Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from a shelf does not amount to an acceptance of an offer to sell, but is an offer by the customer to buy. I feel bound also to say that the sale here was made under the supervision of a pharmacist. There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price, and that took place under the supervision of a pharmacist. Therefore, judgment is for the defendants.

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Balfour v. *Balfour*

(1918-19) ALL ER 860 (C.A.)

WARRINGTON, L. J. – The wife in this case sues her husband for money which she claims to be due to her from her husband as an agreed allowance of £ 30 a month, the wife agreeing to support herself throughout without calling upon her husband for any maintenance and support. The wife therefore sets out to prove a binding legal contract between herself and her husband, that the husband shall in consideration of a promise by the wife pay her the sum of £ 30 a month.

The learned judge in the court below has found in these terms:

> "It seems to me on these letters that there was a definite bargain between the husband and the wife under which, while the husband was in India and in a sufficient position and the wife was in England living separate from him, she should be paid a definite sum of £ 30 a month, and that agreement was made when the husband returned to Ceylon, and was re-affirmed on at least two occasions after unhappy differences had shown themselves, at any rate on the part of the husband, and when it was probable that their separation might last for some time."

Then he proceeded, having found that there was this definite agreement. With all respect to him it was not a definite agreement at all because it continued under the circumstances arising. But, having found on the facts that there was such an agreement, he proceeded to show that agreement could be supported as a legal contract because there was sufficient consideration in the promise made by the wife.

We have now to determine whether there was in the first place a contract in the legal sense between the husband and wife under which the husband was bound to pay this £ 30 a month. There really is no dispute about the facts. The parties were married in August, 1900. The husband had a post under the Government of Ceylon as director of irrigation, and after the marriage they went to Ceylon and lived there together until the year 1915, except that for a short time in 1906 they together paid a visit to this country, and in 1908 the wife came home to this country in order to submit to an operation. In November, 1915, the wife came to this country, the husband coming home on leave, they came together intending to return. They remained in England until August, 1916, when the husband's leave had expired and he had to return. The wife, however, on the doctor's advice, was to remain in England. On August 8, 1916, the husband was about to sail, and it is on that day that it is alleged that the agreement sued upon was made by parol between the husband and wife. The wife gave evidence of what took place, and I think that I cannot do better than refer to the learned judge's note for the account of what she said took place. She said: "In August, 1916, my husband's leave was up. I was suffering from rheumatoid arthritis. My doctor advised my staying in England for some months, and not to go out till November 4. I booked a passage for next sailing day in September. On August 8 my husband sailed. He gave me a cheque from August 8 to August 31 for £ 24, and promised to give me £ 30 per month till I joined him in Ceylon." There were certain letters read as to which I shall have to say a word or two presently, and then the wife said later on: "My husband and I wrote the figure together on

August 8 and £34 was shown. Afterwards he said £30." That means that the husband jotted down on a bit of paper certain figures which showed that the ordinary monthly expenses of the wife, at least, that is what I infer the sheet of paper showed, would amount to £ 22 a month, and then they added a round sum of £ 12, which brought it up to £ 34, but, after some discussion, the amount was taken to be the round sum of £ 30. In cross-examination the wife said that they had not agreed to live apart until subsequent differences arose between them, and that in August, 1916, such agreement as might be made by a couple living in amity was made, the husband assessing the wife's needs and saying that he would send £ 30 per month. That is really all the evidence as to what took place between the parties. The agreement, if made at all, was a parol agreement made on August 8, 1916. The letters which have been referred to really throw no light at all upon the legal position between the parties. Perhaps the most important thing in the course of these letters is that on one occasion the wife appears to have incurred some extra expense through entertaining some friends of the husband. She asked for some more money and he sent it. That comes to nothing.

Those being the facts, what is really the position? We have to say whether on these facts there is a legal contract between these parties. In other words, we have to decide whether what took place between the parties was in the nature of a legal contract, or whether it was merely an arrangement made between the husband and the wife of the same nature as a domestic arrangement which may be made every day between any ordinary husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible nowadays for such a contract as is alleged in the present case to be made between the husband and the wife. The question is whether such a contract was made. That can only be established either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties and the transaction generally that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this: the two parties met in a friendly way and discussed what would be necessary for the support of the wife while she was detained in England, the husband being in Ceylon, and they came to the conclusion that the sum of £ 30 per month would be about right; but there is no evidence at all of any express bargain by the wife that she would in all the circumstances treat that as compensation for or in satisfaction of the obligations of the husband towards her to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract as that in this case we should be implying on the part of the wife that, whatever happened and whatever might be the change of circumstances while the husband was away, she should be content with the sum of £ 30 per month, and fetter herself by an obligation which would be binding upon her in law not to require him to pay anything more. On the other hand, we should be implying on the part of the husband a bargain on his part to pay £ 30 per month for some indefinite period whatever might be his circumstances. There again, it seems to me that it would be impossible to make any such implication. Really the matter reduces itself to an absurdity when one considers it, because, if we were to hold that there was a contract in this case, we should have to hold that with regard to all the more or less trivial concerns of life, when a wife at the request of her husband makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make this a

bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make this payment, and he was bound in honour to continue it so long as he was in a position to do so. The wife, on the other hand, as far as I can see, made no bargain at all. That is, in my judgment, sufficient to dispose of this case. It is unnecessary to consider whether if the husband failed to make the payments the wife could pledge his credit, or whether if he failed to make the payments the wife could have made some other arrangements. The only question that we have to consider is whether the wife has made out a contract which she has set out to do. In my judgment she has not. I think, therefore, that the judgment of Sargent, J. cannot stand. The appeal ought to be allowed, and judgment ought to be entered for the husband.

ATKIN, L.J. – The defence to this action on the alleged contract is that the husband says he entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make agreements between themselves, agreements such as are in dispute in this action, agreements for allowances by which the husband agrees that he will pay to his wife a certain sum of money per week or per month or per year to cover either her own expenses or the necessary expenses of the household and of the children, and in which the wife promises either expressly or impliedly to apply the allowances for the purpose for which it is given.

To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. This is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. It would be the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the courts. It would mean that when a husband made his wife a promise to give her an allowance of £ 30s, or £ 2 per week, whatever he could afford to give her for the maintenance of the household and children, and she promised so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. The small courts of this country would have to be multiplied one hundredfold if these arrangements did result in fact in legal obligations. They are not sued upon, and the reason that they are not sued upon is not because

the parties are reluctant to enforce their legal rights when the agreement is broken, but they are not sued upon because the parties in the inception of the arrangement never intended that they should be sued upon. Agreements such as these, as I say, are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold courts. The terms may be repudiated, varied, or renewed as performance proceeds, or as the disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.

The only question in the present case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plain. I think it is plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was upon the wife, and that the wife has not established any contract. The parties were living together, the wife intending to return to Ceylon. The suggestion is that she bound herself to accept, as he bound himself to pay £ 30 per month under all circumstances, and that she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the contract turns does not establish a contract. I think that the written evidence, the letters to which alone, oddly enough, the learned judge in the court below in his judgment refers, do not evidence such a contract, or apply, as they should be applied, to the oral evidence which was given by the wife which is not in dispute. For these reasons I think that the judgment of the learned judge in the court below was wrong, and that this appeal should be allowed.

[**DUKE, L.J.**, delivered judgment to the same effect: Ed].

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Lalman Shukla **v.** *Gauri Datt*

(1913) XL ALJR 489

BANERJI, J. – The facts of this case are these:- In January last the nephew of the defendant absconded from home and no trace of him was found. The defendant sent his servants to different places in search of the boy and among these was the plaintiff, who was the *munim* of his firm. He was sent to Hardwar and money was given to him for his railway fare and other expenses. After this the defendant issued hand-bills offering a reward of Rs. 501 to any one who might find out the boy. The plaintiff traced the boy to Rishikesh and there found him. He wired to the defendant who went to Hardwar and brought the boy back to Cawnpore. He gave the plaintiff a reward of two sovereigns and, afterwards, on his return to Cawnpore, gave him twenty rupees more. The plaintiff did not ask for any further payment and continued in the defendant's service for about six months, when he was dismissed. He then brought the suit, out of which this application arises, claiming Rs. 499 out of the amount of the reward offered by the defendant under the hand-bills issued by him. He alleged in his plaint that the defendant had promised to pay him the amount of the reward in addition to other gifts and travelling expenses when he sent him to Hardwar. This allegation has been found to be untrue and the record shows that the hand-bills were issued subsequently to the plaintiff's departure for Hardwar. It appears, however, that some of the defendant's hand-bills were sent to him there.

The Court below having dismissed the claim, this application for revision has been made by the plaintiff and it is claimed on his behalf that, as he traced out the boy, he is entitled to the reward offered by the defendant.

The learned advocate for the defendant contends that the plaintiff's claim can only be maintained on the basis of contract; that there must have been an acceptance of the offer and an assent to it, that there was no contract between the parties in this case and that, in any case, the plaintiff was already under an obligation to do what he did and was, therefore, not entitled to recover. On the other hand, it is contended on behalf of the plaintiff that a privity of contract was unnecessary and that neither motive nor knowledge was essential. The learned Counsel for the plaintiff relies on the case of ***Williams* v. *Carwardine*** [(1833) 4 B. & A. 621] and ***Gibbons* v. *Proctor*** [(1891) 64 L.T. 594]. These cases no doubt support the contention of the learned Counsel and the result of them seems to be that the mere performance of the act is sufficient to entitle the person performing it to obtain the reward advertised for. These cases have, however, been adversely criticised by Sir Frederick Pollock (***Law of Contracts***, 8th Edn., pp. 15 and 22) and by the American author Ashley (in his ***Law of Contracts***, pp. 16, 23 and 24). In my opinion, a suit like the present can only be founded on a contract. In order to constitute a contract, there must be an acceptance of offer and there can be no acceptance unless there is a knowledge of the offer. Motive is not essential but knowledge and intention are. In the case of a public advertisement offering a reward, the performance of the act raises an inference of acceptance. This is manifest from Section 8 of the Contract Act, which provides that "performance of the conditions of a proposal is an acceptance of the proposal." As observed by Ashley in his work on Contracts already referred to, "if there is intent to

accept, the contract arises upon performance of the requested service during the continuance of the offer and the offeree is then entitled to the reward promised" (p. 23). Where, therefore, an advertisement offering a reward for the performance of a particular act is published, and the act is performed, there is a complete contract and a claim for the reward arises on the basis of the contract.

In the present case, however, the claim cannot be regarded as one on the basis of a contract. The plaintiff was in the service of the defendant. As such servant he was sent to search for the missing boy. It was, therefore, his duty to search for the boy. It is true that it was not within the ordinary scope of his duties as a *munim* to search for a missing relative of his master, but when he agreed to go to Hardwar in search of the boy he undertook that particular duty and there was an obligation on him to search for and trace out the boy. Being under that obligation, which he had incurred before the reward in question was offered, he cannot, in my opinion, claim the reward. There was already a subsisting obligation and, therefore, the performance of the act cannot be regarded as a consideration for the defendant's promise. For the above reasons, I hold that the decision of the court below is right and I dismiss this application with costs.

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Bhagwandas Goverdhandas Kedia v. *M/s. Girdharilal Parshottamdas & Co.*

A.I.R. 1966 SC 543

J.C. SHAH, J. - Messrs. Girdharilal Parshottamdas and Company- hereinafter called "the plaintiffs" commenced an action in the City Civil Court at Ahmedabad against the Kedia Ginning Factory and Oil Mills of Khamgaon- hereinafter called "the defendants" for a decree for Rs. 31,150 on the plea that the defendants had failed to supply cotton seed cake which they had agreed to supply under an oral contract, dated July 22, 1959 negotiated between the parties by conversation on long distance telephone. The plaintiffs submitted that the cause of action for the suit arose at Ahmedabad, because the defendants had offered to sell cotton seed cake which offer was accepted by the plaintiffs at Ahmedabed, and also because the defendants were under the contract bound to supply the goods at Ahmedabad, and the defendants were to receive payment for the goods through a Bank at Ahmedabad. The defendants contended that the plaintiffs had by a message communicated by telephone offered to purchase cotton seed cake, and they (the defendants) had accepted the offer at Khamgaon, that under the contract delivery of the goods contracted for was to be made at Khamgaon, price was also to be paid at Khamgaon and that no part of the cause of action for the suit had arisen within the territorial jurisdiction of the City Civil court, Ahmedabad.

3. The defendants contend that in the case of a contract by conversation on telephone, the place where the offer is accepted is the place where the contract is made, and that Court alone has jurisdiction within the territorial jurisdiction of which the offer is accepted and the acceptance is spoken into the telephone instrument. It is submitted that the rule which determines the place where a contract is made is determined by Ss. 3 and 4 of the Indian Contract Act, and applies uniformly whatever may be the mode employed for putting the acceptance into a course of transmission, and that the decisions of the Courts in the United Kingdom, dependent not upon express statutory provisions but upon the somewhat elastic rules of common law, have no bearing in determining this question. The plaintiffs on the other hand contend that making of an offer is part of the cause of action in a suit for damages for breach of contract, and the suit lies in the Court within the jurisdiction of which the offeror has made the offer which on acceptance has resulted into a contract. Alternatively, they contend that intimation of acceptance of the offer being essential to the formation of a contract, the contract takes place where such intimation is received by the offeror.

6. The principal contention raised by the defendants raises a problem of some complexity which must be approached in the light of the relevant principles of the common law and statutory provisions contained in the Contract Act. A contract unlike a tort is not unilateral. If there be no "meeting of minds" no contract may result. There should, therefore, be an offer by one party, express or implied, and acceptance of that offer by the other in the same sense in which it was made by the other. But an agreement does not result from a mere state of mind: intent to accept an offer or even a mental resolve to accept an offer does not give rise to a contract. There must be intent to accept and some external manifestation of that intent by speech, writing or other act, and acceptance must be communicated to the offeror, unless he

has waived such intimation, or the course of negotiations implies an agreement to the contrary.

7. The Contract Act does not expressly deal with the place where a contract is made. Sections 3 and 4 of the Contract Act deal with the communication, acceptance and revocation of proposals. By S. 3 the communication of a proposal, acceptance of a proposal and revocation of a proposal and acceptance, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it. Section 4 provides:

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

The communication of an acceptance is complete-

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

The communication of a revocation is complete,-

> as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it, as against the person to whom it is made, when it comes to his knowledge."

In terms S. 4 deals not with the place where a contract takes place, but with the completion of communication of a proposal, acceptance and revocation. In determining the place where a contract takes place, the interpretation clauses in S. 2 which largely incorporate the substantive law of contract must be taken into account. A person signifying to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence is said to make a proposal: Clause (a). When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise: Cl. (b) and every promise and every set of promises, forming the consideration for each other is an agreement: Cl. (e). An agreement enforceable at law is a contract: Cl. (h). By the second clause of S. 4, the communication of an acceptance is complete as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor. This implies that where communication of an acceptance is made and it is put in a course of transmission to the proposer, the acceptance is complete as against the proposer: as against the acceptor, it becomes complete when it comes to the knowledge of the proposer. In the matter of communication of revocation it is provided that as against the person who makes the revocation it becomes complete when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it and as against the person to whom it is made when it comes to his knowledge. But S. 4 does not imply that the contract is made qua the proposer at one place and qua the acceptor at another place. The contract becomes complete as soon as the acceptance is made by the acceptor and unless otherwise agreed

expressly or by necessary implication by the adoption of a special method of intimation, when the acceptance of offer is intimated to the offeror.

8. Acceptance and intimation of acceptance of offer are, therefore, both necessary to result in a binding contract. In the case of a contract which consists of mutual promises, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise. When parties are in the presence of each other the method of communication will depend upon the nature of the offer and the circumstances in which it is made. When an offer is orally made, acceptance may be expected to be made by an oral reply, but even a nod, or other act which indubitably intimates acceptance may suffice. If the offeror receives no such intimation, even if the offeree has resolved to accept the offer a contract may not result. But on this rule is engrafted an exception based on grounds of convenience which has the merit not of logic or principle in support, but of long acceptance by judicial decisions. If the parties are not in the presence of each other, and the offeror has not prescribed a mode of communication of acceptance, insistence upon communication of acceptance of the offer by the offeree would be found to be inconvenient, when the contract is made by letters sent by post. In ***Adams* v. *Lindsell*** [(1818) I B and Ald 681], it was ruled as early as in 1818 by the Court of King's Bench in England that the contract was complete as soon as it was put into transmission. In **Adam** case, the defendants wrote a letter to the plaintiff offering to sell a quantity of wool and requiring an answer by post. The plaintiff accepted the offer and posted a letter of acceptance, which was delivered to the defendants nearly a week after they had made their offer. The defendants, however, sold the goods to a third party, after the letter of acceptance was posted but before it was received by the defendants. The defendants were held liable in damages. The Court in that case is reported to have observed that

> "if the defendants were not bound by their offer when accepted by the plaintiff's till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum".

The rule in **Adams** case, was approved by the House of Lords in ***Dunlop* v. *Vincent Higgins*** [(1848) 1 HLC 381]. The rule was based on commercial expediency, or what Cheshire calls "empirical grounds". It makes a large inroad upon the concept of consensus; "a meeting of minds" which is the basis of formation of a contract. It would be futile, however, to enter upon an academic discussion, whether the exception is justifiable in strict theory, and acceptable in principle. The exception has long been recognized in the United Kingdom and in other countries where the law of contracts is based on the common law of England. Authorities in India also exhibit a fairly uniform trend that in case of negotiations by post the contract is complete when acceptance of the offer is put into a course of transmission to the offeror: see ***Baroda Oil Cakes Traders*** case [AIR 1954 Bom. 451], and cases cited therein. A similar rule has been adopted when the offer and acceptance are by telegrams. The exception to the general rule requiring intimation of acceptance may be summarized as follows. When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram.

9. The defendants contend that the same rule applies in the case of contracts made by the conversation on telephone. The plaintiffs contend that the rule which applies to those contracts is the ordinary rule which regards a contract as complete only when acceptance is intimated to the proposer. In the case of a telephone conversation, in a sense the parties are in the presence of each other: each party is able to hear the voice of the other. There is instantaneous communication of speech intimating offer and acceptance, rejection or counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversation so as to make it analogous to that of an offer and acceptance through post or by telegraph.

10. It is true that the Posts and Telegraph Department has general control over communication by telephone and especially long distance telephones, but that is not a ground for assuming that the analogy of a contract made by post will govern this mode of making contracts. In the case of correspondence by post or telegraphic communication, a third agency intervenes and without the effective intervention of that third agency, letters or messages cannot be transmitted. In the case of a conversation by telephone, once a connection is established there is in the normal course no further intervention of another agency. Parties holding conversation on the telephone are unable to see each other: they are also physically separated in space, but they are in the hearing of each other by the aid of a mechanical contrivance which makes the voice of one heard by the other instantaneously and communication does not depend upon an external agency.

11. In the administration of the law of contracts, the Courts in India have generally been guided by the rules of the English common law applicable to contracts where no statutory provision to the contrary is in force. The Courts in the former Presidency towns by the terms of their respective letters patents, and the Courts outside the Presidency towns by Bengal Regulation III of 1793, Madras Regulation II of 1802 and Bombay Regulation IV of 1827 and by the diverse Civil Courts Acts were enjoined in cases where no specific rule existed to act according to “law or equity’ in the case of chartered High Courts and elsewhere according to justice, equity and good conscience - which expressions have been consistently interpreted to mean the rules of English common law, so far as they are applicable to the Indian society and circumstances.

12. In England the Court of Appeal has decided in ***Entores Ltd.*** **v.** ***Miles Far East Corporation*** [(1955) 2 QB327] that:

> “... Where a contract is made by instantaneous communication e.g. by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract.”

In **Entores Ltd.** case, the plaintiff made an offer from London by Telex to the agents in Holland of the defendant Corporation, whose headquarters were in New York, for the purchase of certain goods, and the offer was accepted by a communication received on the plaintiff’s Telex machine in London. On the allegation that breach of contract was committed by the defendant Corporation, the plaintiff sought leave to serve notice of a writ on the defendant Corporation in New York claiming damages for breach of contract. The defendant

Corporation contended that the contract was made in Holland. Denning L.J., who delivered the principal judgment of the Court observed at p. 332:

> "When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex communications by these means are virtually instantaneous and stand on a different footing."

After examining the negotiations made in a contract arrived at by telephone conversation in different stages, Denning L.J. observed that in the case of a telephonic conversation the contract is only complete when, the answer accepting the offer was made and that the same rule applies in the case of a contract by communication by Telex. He recorded his conclusion as follows:

> "...that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received."

13. It appears that in a large majority of European countries the rule based on the theory of consensus ad idem, is that a contract takes place where the acceptance of the offer is communicated to the offeror, and no distinction is made between contracts made by post or telegraph and by telephone or Telex. In decisions of the State Courts in the United States, conflicting views have been expressed, but the generally accepted view is that by "the technical law of contracts the contract is made in the district where the acceptance is spoken." This is based on what is called "the deeply rooted principle of common law that where the parties impliedly or expressly authorise a particular channel of communication, acceptance is effective when and where it enters that channel of communication." In the text books there is no reference to any decision of the Supreme Court of the United States of America on this question: ***American Jurisprudence***, 2nd Edn. Vol. 17, Art. 54 p. 392 and **Williston on *Contracts***, 3rd Edn. Vol. 1, p. 271.

14. Obviously the draftsman of the Indian Contract Act did not envisage use of the telephone as a means of personal conversation between parties separated in space, and could not have intended to make any rule in that behalf. The question then is whether the ordinary rule which regards a contract as completed only when acceptance is intimated should apply, or whether the exception engrafted upon the rule in respect of offers and acceptances by post and by telegrams is to be accepted. If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiation are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is in applicable.

15. The Trial Court was, therefore, right in the view which it has taken that a part of the cause of action arose within the jurisdiction of the City Civil Court, Ahmedabad, where acceptance was communicated by telephone to the plaintiffs.

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M. HIDAYATULLAH, J. - 17-A. The rules to apply in our country are statutory but the Contract Act was drafted in England and the English Common law permeates it; however, it is obvious that every new development of the Common law in England may not necessarily fit into the scheme and the words of our statute. If the language of our enactment creates a non-possumus adamant rule, which cannot be made to yield to any new theories held in foreign Courts our clear duty will be to read the statute naturally and to follow it. The Court of Appeal in England in (1955) 2 QB 327, held that a contract made by telephone is complete only where the acceptance is heard by the proposer (offeror in English Common law) because generally an acceptance must be notified to the proposer to make a binding contract and the contract emerges at the place where the acceptance is received and not at the place where it is spoken into the telephone. In so deciding, the Court of Appeal did not apply the rule obtaining in respect of contracts by correspondence or telegrams namely, that acceptance is complete as soon as a letter of acceptance is put into the box or a telegram, is handed in for dispatch and the place of acceptance is also the place where the contract is made. On reading the reasons given in support of the decision and comparing them with the language of the Indian Contract Act I am convinced that the Indian Contract Act does not admit our accepting the view of the Court of Appeal.

20. The difficulty arises because proposals and acceptances may be in praesentes or inter absentes and it is obvious that the rules must vary. In acceptance by word of mouth, when parties are face to face, the rule gives hardly any trouble. The acceptance may be by speech or sign sufficiently expressive and clear to form a communication of the intention to accept. The acceptance takes effect instantly and the contract is made at the same time and place. In the case of acceptance inter absentes the communication must be obviously by some agency. Where the proposer prescribes a mode of acceptance that mode must be followed. In other cases a usual and reasonable manner must be adopted unless the proposer waives notification.

21. Then come cases of acceptance by post, telegraph, telephone, wireless and so on. In cases of contracts by correspondence or telegram, a different rule prevails and acceptance is complete as soon as a letter of acceptance is posted or a telegram is handed in for despatch.

22. (1848) 9 ER 805 is the leading case in English Common law and it was decided prior to 1872 when the Indian Contract Act was enacted. Till 1872 there was only one case in which a contrary view was expressed ***British and American Telegraph Co.*** **v.** ***Colson*** [(1871) 6 Ex. 108], but it was disapproved in the following year in ***Harris*** case [(1872) 41 LJ Ch 621], and the later cases have always taken a different view to that in ***Colson*** case [(1871) 6 Ex 108]. In ***Henthorn*** **v.** ***Fraser*** [(1892) 2 Ch 27], Lord Heascehell considered that **Colson** case [(1871) 6 Ex 108], must be considered to be overruled. Earlier in (1879) 4 Ex.D. 216 (***Household Fire and Carriage Accident Insurance Co.*** **v.** ***Grant***) Bramwell L.J. was assailed by doubts which were answered by Thesiger L.J. in the same case:

> "A contract complete on the acceptance of an offer being posted but liable to being put an end to by any accident in the post, would be more mischievous than a contract only binding on the parties upon the acceptance actually reaching the offerer. There is no doubt that the implication of a complete, final and absolutely binding contract being formed as soon as the acceptance of an offer is posted may in some cases lead to hardship but it is difficult to adjust conflicting rights between innocent parties. An

> offeror, if he chooses, may always make the formation of the contract which he proposes, dependent on the actual communication to himself of the acceptance. If he trust on the post, and if no answer is received, he can make enquires of the person to whom the offer was addressed. ….. On the other hand if the contract is not finally concluded except in the event of the acceptance actually reaching the offeror, the door would be opened to the perpetration of fraud; besides there would be considerable delay in commercial transactions; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance has reached its destination."

It is hardly necessary to multiply examples. It is sufficient to point out that Lord Denning (then Lord Justice) in the **Entores** case, also observes:

> "When a contract is made by post it is clear law throughout the Common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made."

23. Although Lord Romily M.R. In re ***National Savings Bank Assocn. Hebbs'*** case [(1867) 4 Eq 9 at p. 12], said that the post office was the "common agent" of both parties, in the application of this special rule the post office is treated as the agent of the proposer convening his proposal and also as his agent for receiving the acceptance. The principles which underlie the exceptional rule in English Common law are:

(i) the post office is the agent of the offeror to deliver the offer and also to receive the acceptance;

(ii) no contract by post will be possible as notification will have to follow notification to make certain that each letter was duly delivered;

(iii) satisfactory evidence of posting the letter is generally available;

(iv) if the offeror denies the receipt of the letter it would be very difficult to disprove his negative; and

(v) the carrier of the letter is a third person over whom the acceptor has no control.

27. The question in the **Entores** case, was whether under the Rules of the Supreme Court the action was brought to enforce a contract or to recover damages or other relief for or in respect of the breach of a contract made within the jurisdiction of the Court (Or. 11 R. 1). As the contract consisted of an offer and its acceptance both by a telex machine, the proposer being in London and the acceptor in Amsterdam, the question was whether the contract was made at the place where the acceptor tapped out the message on his machine or at the place where the receiving machine reproduced the message in London. If it was in London a writ of Summons could issue, if in Amsterdam no writ was possible, Donovan J. held that the contract was made in London. The Court of Appeal approved the decision and discussed the question of contracts by telephone in detail and saw no difference in principle between the telex printer and the telephone and applied to both the rule applicable to contracts made by word of mouth. Unfortunately no leave to appeal to the House of Lords could be given as the matter arose in an interlocutory proceeding.

28. The leading judgment in the case was delivered by Lord Denning (then Lord Justice) with whom Lord Birkett (then Lord Justice) and Lord Parker (then Lord Justice) agreed. Lord Birkett gives no reason beyond saying that the ordinary rule of law that an acceptance must be

communicated applies to telephonic acceptance and not the special rule applicable to acceptance by post or telegraph. Lord Parker also emphasizes the ordinary rule observing that as that rule is designed for the benefit of the offeror, he may waive it, and points out that the rule about acceptance by post or telegraph is adopted on the ground of expediency. He observes that if the rule is recognized that telephone or telex communications (which are received instantaneously) become operative though not heard or received, there will remain no room for the general proposition that acceptance must be communicated. He illustrates the similarity by comparing an acceptance spoken so softly as not to be heard by the offeror when parties are face to face, with a telephone conversation in which the telephone goes dead before the conversation is over.

29. Lord Denning begins by distinguishing contracts made by telephone or telex from contracts made by post or telegraph on the ground that in the former the communication is instantaneous like the communication of an acceptance by word of mouth when parties are face to face. He observes that in verbal contracts, there is no contract if the speech is not heard and gives the example of speech drowned in noise from an aircraft. The acceptance, he points out, in such cases must be repeated again so as to be heard and then only there is a contract. Lord Denning sees nothing to distinguish contracts made on the telephone or the telex from those made by word of mouth and observes that if the line goes dead or the speech is indistinct or the telex machine fails at the receiving end, there can be no contract till the acceptance is properly repeated and received at the offeror's end. But he adds something which is so important that I prefer to quote his own words:

> "In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. [But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or in the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated]: so that the man who sends an acceptance reasonably believes that his message has been received. [The offeror in such circumstances is clearly bound, because he will be estopped] from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance-yet the sender of it reasonable believes it has got home when it has not- then I think there is no contract."

Lord Denning thus holds that a contract made on the telephone may be complete even when the acceptance is not received by the proposer. With respect I would point out that Lord Denning does not say where the contract would be complete in such a case. If nothing is heard at the receiving end how can it be said that the general rule about a communicated acceptance applies? There is no communication at all. How can it be said that the contract was complete at the acceptor's end when he heard nothing? If A says to B "Telephone your acceptance to me" and the acceptance is not effective unless A has heard it, the contract is not formed till A hears it. If A is estopped by reason of his not asking for the reply to be repeated, the making of the contract involves a fiction that A has heard the acceptance. This fiction rests on the rule of estoppel that A's conduct induced a wrong belief in B. But the question is

why should the contract be held to be concluded where A was and not on the analogy of letter and telegram where B accepted the offer? Why, in such a case, not apply the expedition theory?

30. Even in the case of the post the rule is one of assumption of a fact and little logic is involved. We say that the proposal was received and accepted at the acceptor's end. Of course, we could have said with as much apparent logic that the proposal was made and accepted at the proposer's end. It is simpler to put the acceptor to the proof that he put his acceptance in effective course of transmission, than to investigate the denial of the proposer, Again, what would happen if the proposer says that he heard differently and the acceptor proves what he said having recorded it on a tape at his end? Would what the proposer heard be the contract if it differs from what the acceptor said? Telegrams get garbled in transmission but if the proposer asks for a telegram in reply he bears the consequences.

31. It will be seen from the above discussion that there are four classes of cases which may occur when contracts are made by telephone: (1) where the acceptance is fully heard and understood; (2) where the telephone fails as a machine and the proposer does not hear the acceptor and the acceptor knows that his acceptance has not been transmitted: (3) where owning to some fault at the proposer's end the acceptance is not heard by him and he does not ask the acceptor to repeat his acceptance and the acceptor believes that the acceptance has been communicated; and (4) where the acceptance has not been heard by the proposer and he informs the acceptor about this and asks him to repeat his words. I shall take them one by one.

32. Where the speech is fully heard and understood there is binding contract and in such a case the only question is as to the place where the contract can be said to be completed. Ours is that kind of a case. When the communication fails and the acceptance is not heard, and the acceptor knows about it, there is no contract between the parties at all because communication means an effective communication or a communication reasonable in the circumstances. Parties are not ad idem at all. If a man shouts his acceptance from such long distance that it cannot a possibly be heard by the proposer he cannot claim that he accepted the offer and communicated it to the proposer as required by S. 3 of our Contract Act. In the third case, the acceptor transmits his acceptance but the same does not reach the proposer and the proposer does not ask the acceptor to repeat his message. According to Lord Denning the proposer is bound because of his default. As there is no reception at the proposer's end, logically the contract must be held to be complete at the proposer's end. Bringing in considerations of estoppel do not solve the problem for us. Under the terms of S. 3 of our Act such communication is good because the acceptor intends to communicate his acceptance and follows a usual and reasonable manner and puts his acceptance in the course of transmission to the proposer. He does not know that it has not reached. The contract then results in much the same way as in the case of acceptance by letter when the letter is lost and in the place where the acceptance was put in course of transmission. In the fourth case if the acceptor is told by the offeror that his speech cannot be heard there will be no contract because communication must be effective communication and the act of acceptor has not the effect of communicating it and he cannot claim that he acted reasonably.

33. We are really not concerned with the case of a defective machine because the facts here are that the contract was made with the machine working perfectly between the two parties. As it is proposer who is claiming that the contract was complete at his end, S. 4 of our Act must be read because it creates a special rule. It is "a rather peculiar modification" of the rule applicable to acceptance by post under the English Common law. Fortunately, the language of S. 4 covers acceptance by telephone, wireless etc. The section may be quoted at this stage.

"4. Communication when complete

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

The communication of an acceptance is complete,-

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

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

* * * * *

It will be seen that the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made but a different rule is made about acceptance. Communication of an acceptance is complete in two ways- (1) against the proposer when it is put in the course of transmission to him so as to be out of the power of the acceptor; and (2) as against the acceptor when it comes to the knowledge of the proposer. The theory of expedition which was explained above has been accepted. Section 5 of the Contract Act next lays down that a proposal may by revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards and an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards. In the third case in my above analysis this section is bound to furnish difficulties if we were to accept that the contract is only complete at the proposer's end.

34. The present is a case in which the proposer is claiming the benefit of the completion of the contract at Ahmedabad. To him the acceptor may say that the communication of the acceptance in so far as he was concerned was complete when he (the acceptor) put his acceptance in the course of transmission to him (the proposer) so as to be out of his (the acceptor's) power to recall. It is obvious that the word of acceptance was spoken at Khamgaon and the moment the acceptor spoke his acceptance he put it in course of transmission to the proposer beyond his recall. He could not revoke his acceptance thereafter. It may be that the gap of time was so short that one can say that the speech was heard instantaneously, but if we are to put new inventions into the frame of our statutory law we are bound to say that the acceptor by speaking into the telephone put his acceptance in the course of transmission to the proposer, however quick the transmission. What may be said in the English Common law, (which is capable of being moulded by judicial dicta,) we cannot always say under our statutory law because we have to guide ourselves by the language of the statute. It is contended that the communication of an acceptance is complete as against the acceptor when it comes to the knowledge of the proposer but that clause governs cases of

acceptance lost through the fault of the acceptor. For example, the acceptor cannot be allowed to say that he shouted his acceptance and communication was complete where noise from an aircraft overhead drowned his words. As against him the communication can only be complete when it comes to the knowledge of the proposer. He must communicate his acceptance reasonably. Such is not the case here. Both sides admit that the acceptance was clearly heard at Ahmedabad. The acceptance was put in the course of transmission at Khamgaon and under the words of our statute I find it difficult to say that the contract was made at Ahmedabad where the acceptance was heard and not at Khamgaon where it was spoken. It is plain that the law was framed at a time when telephones, wireless, Telstar and Early Bird were not contemplated. If time has marched and inventions have made it easy to communicate instantaneously over long distance and the language of our law does not fit the new conditions it can be modified to reject the old principles. But we cannot go against the language by accepting an interpretation given without considering the language of our Act.

35. In my opinion, the language of S. 4 of the Indian Contract Act covers the case of communication over the telephone. Our Act does not provide separately for post, telegraph, telephone or wireless. Some of these were unknown in 1872 and no attempt has been made to modify the law. It may be presumed that the language has been considered adequate to cover cases of these new inventions. Even, the Court of Appeal decision is of 1955. It is possible today not only to speak on the telephone but to record the spoken words on a tape and it is easy to prove that a particular conversation took place. Telephones now have television added to them. The rule about lost letters of acceptance was made out of expediency because it was easier in commercial circles to prove the dispatch of the letters but very difficult to disprove the denial that the letter was received. If the rule suggested is accepted it would put a very powerful defence in the hands of the proposer if his denial that he heard the speech could take away the implications of our law that acceptance is complete as soon as it is put in course of transmission to the proposer.

36. No doubt the authority of the ***Entores*** case, is there and Lord Denning recommended an uniform rule, perhaps as laid down, by the Court of Appeal. But the Court of Appeal was not called upon to construe a written law which brings in the inflexibility of its own language. It was not required to construe the words:

> "The communication of an acceptance is complete as against the proposer, when it is put in course of transmission to him so as to be out of the power of the acceptor."

[The court held that the contract was complete at Khamgaon. In the result, the appeal was allowed with costs. As per majority, the appeal was dismissed].

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Harvey v. *Facey*

[1893] AC 552

LORD MORRIS: The appellants are solicitors carrying on business in partnership at Kingston, and it appears that in the beginning of October, 1891, negotiations took place between the respondent L M Facey and the Mayor and Council of Kingston for the sale of the property in question …

[O]n the 7th of October, 1891, L M Facey was travelling in the train from Kingston to Porus, and that the appellants caused a telegram to be sent after him from Kingston addressed to him 'on the train for Porus,' in the following words: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price - answer paid;' that on the same day L M Facey replied by telegram to the appellants in the following words: 'Lowest price for Bumper Hall Pen £900'; that on the same day the appellants replied to the last-mentioned telegram by a telegram addressed to L M Facey 'on train at Porus' in the words following: 'We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession.'

… The first telegram asks two questions. The first question is as to the willingness of L M Facey to sell to the appellants; the second question asks the lowest price … L M Facey replied to the second question only, and gives his lowest price. The third telegram from the appellants treats the answer of L M Facey stating his lowest price as an unconditional offer to sell to them at the price named. Their Lordships cannot treat the telegram from L M Facey as binding him in any respect, except to the extent it does by its terms, viz, the lowest price. Everything else is left open, and the reply telegram from the appellants cannot be treated as an acceptance of an offer to sell to them; it is an offer that required to be accepted by L M Facey. The contract could only be completed if L M Facey had accepted the appellant's last telegram.

It has been contended for the appellants that L M Facey's telegram should be read as saying 'yes' to the first question put in the appellants' telegram, but there is nothing to support that contention. L M Facey's telegram gives a precise answer to a precise question, viz, the price. The contract must appear by the telegrams, whereas the appellants are obliged to contend that an acceptance of the first question is to be implied. Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry …

* * * * *

Felthouse v. *Bindley*

(1862) 11 CB 869

WILLLS J: … The horse in question had belonged to the plaintiff's nephew, John Felthouse. In December, 1860, a conversation took place between the plaintiff and his nephew relative to the purchase of the horse by the former. The uncle seems to have thought that he had on that occasion bought the horse for £30; the nephew that he had sold it for 30 guineas [£31.50]. There was clearly no complete bargain at that time.
On the 1st of January, 1861, the nephew writes, 'I saw my father on Saturday. He told me that you considered you had bought the horse for £30. If so, you are labouring under a mistake, for 30 guineas was the price I put upon him, and you never heard me say less. When you said you would have him, I considered you were aware of the price'.

To this the uncle replies on the following day , 'Your price, I admit, was 30 guineas. I offered £30; never offered more: and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at £30/15s.'

It is clear that there was no complete bargain on the 2nd of January; and it is also clear that the uncle had no right to impose upon the nephew a sale of his horse for £30/15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him: the uncle might also have retracted his offer at any time before acceptance. It stood an open offer: and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction.

The horse in question being catalogued with the rest of the stock, the auctioneer [the defendant] was told [by the nephew] that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he had named, £30/15s. but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant.

It appears to me that…there had been no bargain to pass the property in the horse to the plaintiff, and therefore that he had no right to complain of the sale.

KEATTNG J: I am of the same opinion … the only question we have to consider is whether the horse was the property of the plaintiff at the time of the sale on the 25th of February. It seems to me that nothing had been done at that time to pass the property out of the nephew and vest it in the plaintiff. A proposal had been made, but there had before that day been no acceptance binding the nephew.

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MAKING OF AN AGREEMENT-SPECIAL SITUATIONS

Union of India v. *Maddala Thathaiah*

AIR 1966 SC 1724

RAGHUBAR DAYAL, J. – The facts giving rise to this appeal by special leave, are these:

2. The Dominion of India, as the owner of the Madras and Southern Mahratta Railway, represented by the General Manager of that railway, invited tenders for the supply of jaggery to the railway grain shops. The respondent submitted his tender for the supply of 14,000 imperial maunds of cane jaggery during the months of February and March 1948. The tender form contained a note in Para 2 which was meant for the quantity required and the described dates of delivery. This note was:

> "This Administration reserves the right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract".

The Deputy General Manager of the Railways, by his letter, dated January 29, 1948, accepted this tender. The letter asked the respondent to remit a sum of Rs. 7,900 for security and said that on receipt of the remittance, official order would be placed with the respondent. In his letter, dated February 16, 1948, the Deputy General Manager reiterated the acceptance of the tender subject to the respondent's acceptance of the terms and conditions printed on the reverse of that letter. Among these terms, the terms of delivery stated: Programme of delivery to be 3,500 maunds on March 1, 1948; 3,500 maunds on March 22, 1948; 3500 mounds on April 5, 1948; and 3500 mounds on April 21, 1948. At the end of the terms and conditions was a note that the administration reserved the right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract. The dates for the delivery of the four instalments were slightly changed by a subsequent letter, dated February 28, 1948.

3. By his letter, dated March 8, 1948, the Deputy General Manager informed the respondent that the balance quantity of jaggery outstanding on date against the order, dated February 16, 1948, be treated as cancelled and the contract closed. The protests of the respondent were of no avail as the railway administration took its stand against the stipulation that the right to cancel the contract at any stage was reserved to it. Ultimately, the respondent instituted the suit against the Union of India for recovering damages resulting from breach of contract. The trial Court dismissed the suit holding that the railway administration could cancel the contract without giving any reason whenever it liked, without making itself liable to pay any damages. The High Court held that the clause reserving the right in the appellant to cancel the contract was void and in view of the trial Court having not decided the issue about damages, remanded the suit for disposal after dealing with that matter. It is against this decree that the Union of India has filed this appeal after obtaining special leave.

4. The contentions raised for the appellant are two. One is that on a proper construction of the terms of the contract, the appellant had agreed to buy only such quantity of jaggery as it might require, up to a maximum of 14,000 maunds and, therefore, there was no enforceable

obligation to purchase the entire quantity. The other contention is that the respondent had expressly agreed to the impugned clause and that, therefore, the appellant was at liberty to terminate the contract at any stage of the duration of the contract with respect to the outstanding obligations under it. The stipulation is valid and binding on the parties and it amounted to a provision in the contract itself for a discharge or determination. On the other hand it is contended for the respondent that the contract was a complete contract of the supply of a definite quantity of jaggry, viz., 14,000 maunds, on the dates mentioned in the order, dated February 16, 1948, to start with, and ultimately on the dates mentioned in the subsequent letter, dated February 28, and that the stipulation relied on was repugnant to the contract, and, even if valid, the appellant could rescind the contract only for good and reasonable ground and not arbitrarily.

5. To decide the contentions raised it is necessary to construe the true nature of the contract between the parties which has given rise to these proceedings. The relevant conditions of tender are described in Paras 2, 8 and 9 and are set out below:

> "2. Quantity required and described dates of delivery – 14,000 imperial maunds of cane jaggery are required for the months of December 1947 and January 1948 and should be delivered in equal lots of 1,750 imperial maunds each commencing from 10th December 1947 and completed on 31st January 1948.
>
> Note: This Administration reserves the right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract.
>
> 8. Security deposit – Five per cent of the tender value will be required to be paid by the successful tenderer as security deposit towards proper fulfilment of the contract. This amount will carry no interest. This should be paid in cash in addition to the earnest money already paid to the Paymaster and Cashier of this Railway, Madras, and his official receipt obtained therefor. Cheques and drafts will not be accepted in payment of security deposit. In the case of contracts or the supply of gingelly oil, the security deposit will be arranged only after 90 days have elapsed from the date of the last supply against the order.
>
> 9. Placing of order – A formal order for supply will be placed on the successful tenderer only on the undersigned being furnished with the receipt issued by the Paymaster and Cashier of this Railway for the security deposit referred to in Para 8."

Paragraph 12 provides for the rejection of supplies if they be of unacceptable quality. Paragraph 13 deals with penalties and reads thus:

> "13. Penalties – When supplies are not effected on the dates as laid down in the Official Order or when acceptable replacement of the whole or part of any consignment which is rejected in accordance with Para 12 is not made within the time prescribed the administration will take penal action against the supplier in one or more of the following ways:
>
> (a) Purchase in the open market at the risk and expenses of the supplier goods of quality contracted for, to the extent due;
> (b) Cancel any outstandings on the contract; and

(c) Forfeit the security deposit."

6. The respondent made an offer to supply the necessary quantity of jaggery during the period it was wanted and expressed its readiness to abide by the terms and conditions of the tender. He agreed to supply the jaggery at the rate mentioned in his letter. This tender was accepted by the letter, dated January 29, 1948. So far, the offer of a supply of a definite quantity of jaggery during a specified period at a certain rate and the acceptance of the offer would constitute an agreement, but would fall short of amounting to a legal contract inasmuch as the date of delivery of the jaggery was not specified. Only the period was mentioned. The agreement arrived at, therefore, could be said, as urged for the appellant, to be a contract in a popular sense with respect to the terms which would govern the order for supply of jaggery. The acceptance of the tender did not amount to the placing of the order for any definite quantity of jaggery on a definite date. Paragraph 9 of the tender referred to the placing of a formal order for the supply of jaggery after the respondent had not only made a security deposit as required by the provisions of Para 8 but had also furnished a receipt issued for that deposit to the Deputy General Manager, Grain Shops. So construed, the note in Para 2 of the tender would refer to cancel this agreement, loosely called a contract, at any stage during the tenure of that agreement without calling up the outstandings on the unexpired portion of the contract.

7. The various expressions used in this note point to the same conclusion. The expression 'tenure of the contract' contemplates the contract being of a continuing nature. It is only a contract with a sort of a tenure. The contract is to be cancelled at any stage during such a tenure, that is it, could be cancelled during the period between the acceptance of the tender and March 31, 1948, the last date for the delivery of the jaggery under the contract. The note further provided that as a result of the cancellation, the appellant will not call up the outstandings on the unexpired portion of the contract. This expression can only mean "without ordering the supply of jaggery which was to be delivered within the remaining period of the contract", that is, the period between the date of cancellation and March 31, 1948.

8. Paragraph 13 dealing with penalties draws a distinction between outstandings on the contract and the purchase of the goods to the extent not supplied by the respondent. The provision about penalty comes into operation when the supplies are not effected on the dates laid down in the official order, or when acceptable replacement of the whole or part of any assignment which is rejected is not made within the time prescribed. Clause (a) of Para 13 contemplates penal action by purchasing in the open market at the risk and expenses of the supplier, goods of the quality contracted for to the extent due, either due to the failure to supply or due to failure to replace rejected goods which had been supplied in compliance of an order. Clause (b) of para 13 contemplates a further penal action in the form of cancellation of any outstandings on the contract. Such a cancellation could only be of the balance of the supplies agreed upon but not yet supplied. If this expression was meant to cover the goods for which order had been placed but whose date of delivery had not arrived, a different expression would have been more appropriately used.

9. The appellant's letter, dated January 29, 1948, which conveyed the acceptance of the tender, directed the respondent to remit a certain sum for the security deposit and stated that

on receipt of advice of remittance official order would be placed. This is the order contemplated by Para 9 of the tender.

10. By his letter, dated February 16, 1948, the Deputy General Manager repeated in Para. 1 of the letter that the tender, dated January 27, 1948 was accepted for the supply of jaggery, only subject to the respondent's acceptance of the terms and conditions printed on the reverse. The tender had already been accepted. There was no occasion to re-open the question of the acceptance of the tender or to reinform the respondent about the acceptance of the tender or to obtain a second acceptance of the respondent to the terms and conditions of the tender. No occasion could have arisen for imposing any fresh conditions for the acceptance of the tender which had been accepted earlier.

11. Paragraph 2 of the letter contains a definite order for despatching and delivering of the consignment to the Assistant Controller of Grain Shops. The details given in the letter provided for the entire supply of 14,000 maunds to be in four equal instalments, each instalment to be delivered on a particular date. The only other condition or term in this letter is:

> "This administration reserves the right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract."

12. This is identical in terms with the note in Para 2 of the tender and can bear the same construction with respect to that portion of the goods to be supplied for which no formal order had been placed. If this note had a particular reference to the cancellation of the orders, if that was possible in law, its language would have been different. It would have referred to the right to cancel the orders about the delivery of the consignments and would have provided that the orders for such supplies which were to be made on dates subsequent to the date of cancellation would stand cancelled or that the appellant would not be bound to take delivery of such consignments which were to be delivered on dates subsequent to the cancellation of the orders. There is nothing in this letter that the formal order placed is subject to this condition. The condition governed the acceptance of the tender according to the content of Para 1 of this letter.

13. It appears that the order has been placed on a printed form which could be used also for placing an order for delivery of part of the commodity which the tenderer has agreed to supply. That seems to be the reason why that particular recital appears in the letter. It cannot possibly have any bearing on a case like the present where the railway administration has definitely placed an order for the supply of the entire quantity of the commodity for which a tender had been called.

14. In this connection we may refer to the language of the letter of the Deputy General Manager, dated March 8, 1948, which informed the respondent about the cancellation of the contract. The letter states that the balance quantity of jaggery outstanding on date against the above order, i.e., the order dated February 16, 1948, is treated as cancelled and the contract closed. This letter itself draws a distinction between the order and the contract. The contract has a reference to the agreement consisting of the offer of supply of jaggery and acceptance of the offer by the Deputy General Manager.

15. We are, therefore, of the view that the condition mentioned in the note to Paragraph 2 of the tender or in the letter, dated February 16, 1948, refers to a right in the appellant to cancel the agreement for such supply of jaggery about which no formal order had been placed by the Deputy General Manager with the respondent and does not apply to such supplies of jaggery about which a formal order had been placed specifying definite amount of jaggery to be supplied and the definite date or definite short period for its actual delivery. Once the order is placed for such supply on such dates, that order amounts to a binding contract making it incumbent on the respondent to supply jaggery in accordance with the terms of the order and also making it incumbent on the Deputy General Manager to accept the jaggery delivered in pursuance of that order.

17. Reference may also be made to what is said in '***Law of Contract***,' by Cheshire and Fifoot (5th Edition) at p. 36.

> "There is no doubt, of course, that the tender is an offer. The question, however, is whether its 'acceptance' by the corporation is an acceptance in the legal sense so as to produce a binding contract. This can be answered only by examining the language of the original invitation to tender. There are at least two possible cases. First, the corporation may have stated that it will definitely require a specific quantity of goods, no more and no less, as, for instance, where it advertises for 1,000 tons of coal to be supplied during the period January 1st to December 31st. Here the 'acceptance' of the tender is an acceptance in the legal sense, and it creates an obligation. The trader is bound to deliver, the corporation is bound to accept, 1,000 tons and the fact that delivery is to be by instalments as and when demanded does not disturb the existence of the obligation."

On the basis of this note, the acceptance of the respondent's tender by the Deputy General Manager may even account to a contract in the strict sense of the term, but we do not consider it in that sense in view of the provisions of Paras 8 and 9 of the tender requiring a deposit of security and the placing of the formal order.

18. The other case illustrated by Cheshire and Fifoot is:

> "Secondly, the corporation advertises that it may require articles of a specified description up to a maximum amount, as for instance, where it invites tenders for the supply during the coming year of coal not exceeding 1,000 tons altogether, deliveries to be made if and when demanded, the effect of the so-called 'acceptance' of the tender is very different. The trader has made what is called a standing offer. Until revocation he stands ready and willing to deliver coal up to 1,000 tons at the agreed price when the corporation from time to time demands a precise quantity. The 'acceptance' of the tender, however, does not convert the offer into a binding contract, for a contract of sale implies that the buyer has agreed to accept the goods. In the present case the corporation has not agreed to take 1,000 tons, or indeed any quantity of coal. It has merely stated that it may require supplies up to a maximum limit."
>
> "In this latter case the standing offer may be revoked at any time provided that it has not been accepted in the legal sense, and acceptance in the legal sense is complete as soon as a requisition for a definite quantity of goods is made. Each requisition by the offeree is an individual act of acceptance which creates a separate contract".

19. We construe the contract between the parties in the instant case to be of the second type. The note below Para 2 of the tender form, reserving a right to cancel an outstanding contract is then consistent with the nature of the agreement between the parties as a result of the offer of the respondent accepted by the appellant and a similar note in the formal order, dated the 16th February 1948 had no reference to the actual orders but could refer only to such contemplated supplies of goods for which no orders had been placed.

20. In view of the construction we have placed on the contract between the parties, it is not necessary to decide the other contention urged for the appellant that the stipulation in the note amounted to a term in the contract itself for the discharge of the Contract and, therefore, was valid, a contention to which the reply of the respondent is that any such term in a contract which destroys the contract itself according to the earlier terms is void as in that case there would be nothing in the alleged contract which would have been binding on the appellant.

21. We are of opinion that the order of the High Court is correct and, therefore, dismiss the appeal with costs. Appeal dismissed.

[NOTE: S. Mohan, J. in ***Tata Cellular* v. *Union of India*** [AIR 1996 SC 11] had observed:

"Para 84 : A tender is an offer. If is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender:

1. It must be unconditional; 2. Must be made at the proper place;3.Must confirm to the terms of obligation; 4. Must be made at the proper time; 5. Must be made in the proper form; 6. The person by whom the tender is made must be able and willing to perform his obligations; 7. There must be reasonable opportunity for inspection; 8. Tender must be made to the proper person; 9. It must be of full amount".]

* * * * *

Rajendra Kumar Verma v. *State of Madhya Pradesh*

AIR 1972 MP 131

BISHAMBHAR DAYAL, C.J. – This is a writ petition under Article 226 of the Constitution of India challenging the recovery being made against the petitioner in the following circumstances:

The respondents advertised for receiving tenders for the sale of Tendu-Patta (leaves) from unit No. 7, Budni. The petitioner gave a tender in pursuance of the tender notice No. 1972-X. 69 dated 25.3.1969 at the rate of Rs. 38.25 p per standard bag. He also deposited some amount as security. The tenders were to be opened on 9th April 1969 but before they were actually opened, the petitioner made an application (Annexure 'A') resiling from his tender and requested that since he has withdrawn his tender, it may not be opened at all. The tender was, however, opened as this was the only tender submitted for that unit. The Government accepted the tender and since the petitioner did not execute the purchaser's agreement, proceedings were now being taken for recovery of Rs. 24,846.12 on the allegation that the Tendu leaves of the unit were sold to somebody else later and the balance was recoverable from the petitioner.

2. The contention of the petitioner is two-fold. In the first place, as he had withdrawn his tender before it was opened and accepted, there was no tender on behalf of the petitioner.

3. The reply on behalf of the respondents is that under the tender condition No. 10 (b) (i) a tenderer may be allowed to withdraw his tender of any unit of a division before the commencement of the opening of tenders of that division on the condition that on opening the remaining tenders, there should be at least one valid tender complete in all respects available for consideration for that particular unit. In this case, since there was no other tender, the tender given by the petitioner could not be withdrawn. We are unable to accept this contention. A person who makes an offer is entitled to withdraw his offer or tender before its acceptance is intimated to him. The Government, by merely providing such a clause in tender notice could not take away that legal right of the petitioner. The fact that the petitioner had applied for withdrawal of the tender is not denied. It is, therefore, quite clear that when the tenders were opened, there was really no offer by the petitioner and, therefore, there could be no contract either impliedly or explicitly between the parties.

7. The result therefore, is that the writ petition is allowed and the demand against the petitioner is quashed. Parties shall bear their own costs. The outstanding amount of the security deposit shall be refunded to the petitioner. Petition allowed.

* * * * *

Kanhaiya Lal Aggarwal v. *Union of India*

AIR 2002 SC 2766

S. RAJENDRA BABU, J. – The first respondent invited tenders for execution of five items of work including supply, delivery and stacking of 75,000 cubic metre machine crushed track ballast as per specifications at its depot in Naurozabad and loading it into Railway wagons. The supply period was for 24 months. The conditions in the tender notice required that the rates at which supply was to be made had to be stated in words as well as in figures against each item of work as per Schedule attached thereto; that the tenders submitted with any omissions or alteration of the tender document were liable to be rejected; however, permissible corrections could be attached with due signature of the tenderers; that the tenderer should hold the offer open till such date as may be specified in the tender which was for a minimum period of 90 days from the date of opening of the tender; that contravention of the conditions would automatically result in forfeiture of security deposit; that the tender was liable to be rejected for non-compliance of any of the conditions of the tender form.

3. Five tenders were received. The appellant made his tender on 27-2-2001 with a covering letter that if his offer is accepted within the stipulated time rebate would be offered by him to the effect that in case the contract was given to him within 45 days, 60 days and 75 days, he would extend rebate of 5%, 3% and 2% respectively on the rates tendered by him. Respondent No. 5 had made a similar offer but after five days of the opening of the tender, while the appellant had made such offer of rebate even at the time of making the tender in the letter accompanying the tender documents. However, respondent No. 5 offered to reduce rates by 1.25% if accepted in 30 days and 1% if accepted in 45 days. The first respondent accepted the tender offered by the appellant on the rates subject to rebate. Agreement was entered into by him on 19-4-2001. Respondent No. 5 filed a writ petition claiming that his tender should have been accepted, as the rates offered by him are the lowest.

4. The learned single Judge, before whom acceptance of the tender offered by the appellant was challenged, took the view that the tender notice did not admit of an offer being made in the form of rebate as offered by the appellant and it was also clear that an offer made by the respondent No. 5 after the opening of the tender is of no consequence and gave the direction of taking fresh offers from the appellant and respondent No. 5. The matter was carried in appeal to the Division Bench. The Division Bench, after adverting to several decisions on the question of award of contracts, stated that the tender notice did not contemplate any attachment of conditions by giving rebate which would amount to alteration of the tender documents which is impermissible; that the tender should be unconditional and relaxation, if any, should have been notified to all the tenderers to enable them to change their rates; that all the tenderers should have been treated equally and fairly, and on that basis, took the view that the tender of respondent No. 5 is at a lower rate and hence, acceptable and set aside the order of the learned single Judge directing fresh negotiations with the parties. The Division Bench directed that supply of material by the appellant be stopped forthwith and balance material be taken from respondent No. 5 at the rate furnished by him. Hence these appeals against the order of the High Court.

5. This Court is normally reluctant to intervene in matters of entering into contracts by the Government, but if the same is found to be unreasonable, arbitrary, mala fide or is in disregard of mandatory producers it will not hesitate to nullify or rectify such actions.

6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in ***G.J. Fernandez*** **v.** ***State of Karnataka,*** [AIR 1990 SC 958].

In the present case, the short question that falls for consideration is whether the tender offered by the appellant with the rebate could have been accepted and whether such acceptance would affect the interests of any other party.

8. The letter dated 27-2-2001 accompanying the tender made by the appellant after setting out rate offered by him also set out certain circumstances with a note in the following terms:

> "Note:- I would like to offer if the tender is finalised in my favour: (a) 5% reduction in rate within 45 days; (b) 3% reduction in rate within 60 days; (c) 2% reduction in rate within 75 days; (d) to make use of the machinery at the quickest possible time."

Bureaucratic delay is a notorious fact and delay in finalising tenders will cause hardship to the tenderer. In such circumstances, if a hardened businessman makes an attractive offer of concessional rates if tender is finalized within a shorter period, it cannot be said that the rates offered are subject to conditions. The rates offered are clear and the time within which they are to be accepted is also clear. As long as such offer does not militate against the terms and conditions of inviting tender it cannot be said that such offer is not within its scope. All that is required is that offer made is to be kept open for a minimum period of 90 days. Offer in compliance of that term has been made by the appellant. The concession or rebate given is an additional inducement to accept the offer expeditiously to have a proper return on the investment made by the tenderer in the equipment and not keeping the labour idle for long periods which is part of commercial prudence. The commercial aspect of each one of the offers made by the parties will have to be ascertained and, thereafter a decision taken to accept or reject a tender.

10. Now the appellant made his offer of concessional rates along with the tender while respondent No. 5 made such offer after opening of the tenders. It is difficult to conceive that the respondent No. 5 who is a prudent businessman would not be aware of commercial practice of giving rebate or concession in the event of quick finalization of a transaction. What the appellant offered was part of the tender itself while the respondent No. 5 made such offer separately and much later. There was nothing illegal or arbitrary on the part of Railway Administration in accepting the offer of the appellant, which was made at the time of submitting the tender itself.

11. In the result, we allow these appeals by setting aside the orders made by the High Court both by the Division Bench and the learned single Judge and dismiss the writ petition.

* * * * *

Haridwar Singh v. *Bagun Sumbrui*

(1973) 3 SCC 889

K.K. MATHEW, J. –2. There is a bamboo coup known as "Bantha Bamboo coup" in Chatra North Division of Hazaribagh district. On July 22, 1970, the Forest Department of the Government of Bihar advertised for settlement of the right to exploit the coup by public auction. The auction was held in the office of the Divisional Forest Officer on August 7, 1970. Five persons including the appellant participated in the auction. Though the reserve price fixed in the tender notice was Rs. 95,000/-, the appellant's bid of Rs. 92,001/-, being the highest, was accepted by the Divisional Forest Officer. The petitioner thereafter deposited the security amount of Rs. 23,800/- and executed an agreement. The Divisional Forest Officer reported about the auction sale to the Conservator of Forests, Hazaribagh Circle, by his letter dated August 25, 1970. As the price for which the coup was provisionally settled exceeded Rs. 50,000/-, the Conservator of Forests forwarded the papers regarding the auction sale to the Deputy Secretary to Government of Bihar, Forest Department, for confirmation of the acceptance by the Government. Since the provisional settlement was made for an amount less than the reserve price, the matter was also referred to the Finance Department. The Finance Department invited comments from the Divisional Forest Officer as to why the settlement was made for a lesser amount. The Divisional Forest Officer, by his letter, dated October 30, 1970, submitted his explanation for the provisional settlement at an amount below the reserve price. When the matter was pending before the Government, the appellant expressed his willingness to take the settlement at the reserve price of Rs. 95,000/- by his communication, dated October 26, 1970. The appellant thereafter filed an application on November 3, 1970, praying for settlement of the coup on the basis of the highest bid. The Minister of Forest, by his proceedings, dated November 27, 1970, directed that the coup may be settled with the highest bidder, namely the appellant, at the reserve price. A telegram was sent by the Government to the Conservator of Forests, Hazaribagh Circle on November 28, 1970, with a copy of the same to the Conservator of Forest, Bihar, confirming the auction sale to the appellant at the reserve price of Rs. 95,000/-. As no intimation was received by the Divisional Forest Officer, he did not communicate the proceedings of the Minister to the appellant. One Md. Yakub, respondent No. 6, filed a petition on December 4, 1970, before the Government of Bihar, respondent No. 1, offering to take the settlement of the coup in question for Rs. 1,01,125/-. A telegram was sent by the Government on December 5, 1970, to the Divisional Forest Officer, directing him not to take any action on the basis of the telegram, dated November 28, 1970, sent to him in pursuance of the proceedings of the Government, dated November 27, 1970. That telegram was received by the Divisional Forest Officer on December 10, 1970, and the Divisional Forest Officer, by his letter dated December 10, 1970 informed the Government that the previous telegram, dated November 28, 1970 was not received by him and so its content was not communicated to the appellant. The whole matter was thereafter placed before the Minister of Forest and the Minister, by his proceedings, dated December 13, 1970, cancelled the settlement of the coup with the appellant and settled the same with respondent No. 6 for Rs. 1,01,125/-. The Government thereafter sent telegrams on December 21, 1970, to the Conservator of Forests and the Divisional Forest Officer,

informing them that the coup had been settled with respondent No. 6. The Divisional Forest Officer, by his letter, dated December 23, 1970, directed respondent No. 6 to deposit the security amount and to pay the first instalment. Respondent No. 6 deposited the same and executed an agreement.

3. The contention of the appellant in the writ petition was that there was a concluded contract when the bid of the appellant was accepted by the Divisional Forest Officer though that was subject to confirmation by the Government and that, when the Government confirmed the acceptance by its proceedings, dated November 27, 1970, it was no longer within the power of Government to make the settlement of the coup upon the 6th Respondent by its proceedings, dated December 13, 1970. It was also contended in the alternative that the settlement of the coup in favour of the 6th Respondent was in violation of statutory rules and, therefore, in any event, that settlement was invalid.

5. The special conditions in the tender notice makes it clear that the Divisional Forest Officer has the right to accept a bid of less than Rs. 5,000/-, that acceptance of a bid of more than Rs. 5,000/- by him is subject to confirmation by the Chief Conservator of Forests and the Forest Department of the Bihar Government, that an auction sale for an amount of more than Rs. 5,000/- would not be recognised until it is confirmed by the competent authority, and that a bid made in auction and which has been provisionally accepted by the Divisional Forest Officer shall be binding on the bidder for two months from the date of auction or till the date of rejection by the competent authority, whichever is earlier.

6. Counsel for the appellant contended that there was a conditional acceptance of the offer of the appellant by the Divisional Forest Officer, that on confirmation by the Government, that acceptance became unconditional and, therefore, there was a concluded contract when the Government confirmed the acceptance, even though the confirmation was not communicated to the appellant. In support of this, he relied on ***The Rajanagaram Village Co-operative Society*** **v.** ***Veerasami Mudaly***, [AIR 1951 Mad. 322]. There it was held that in the case of a conditional acceptance in the presence of a bidder, the condition being that it is subject to approval or confirmation by some other person, the acceptance, though conditional, has to be communicated and when that is communicated, there is no further need to communicate the approval of confirmation which is the fulfilment of the condition. It was further held that a conditional acceptance has the effect of binding the highest bidder to the contract if there is subsequent approval or confirmation by the person indicated, that he cannot resile from the contract or withdraw the offer, and if there is approval or confirmation, the contract becomes concluded and enforceable. This decision was considered in ***Somasundaram Pillai*** **v.** ***Provincial Government of Madras***, [AIR 1947 Mad. 366], where Chief Justice Leach, speaking for the court said that, to have an enforceable contract, there must be an offer and an unconditional acceptance and that a person who makes an offer has the right to withdraw it before acceptance, in the absence of a condition to the contrary supported by consideration. He further said the fact that there has been a provisional or conditional acceptance would not make any difference as a provisional or conditional acceptance cannot in itself make a binding contract.

7. The question whether by an acceptance which is conditional upon the occurrence of a future event a contract will become concluded was considered by Willston (Willston: ***On Contracts***, Vol. I, 3rd Ed., Section 77-A), and this is what he says:

> "A nice distinction may be taken here between: (1) a so-called acceptance by which the acceptor agrees to become immediately bound on a condition not named in the offer, and (2) an acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens or fails to happen. In the first case there is a counter-offer and rejection of the original offer; in the second case there is no counter-offer, since there is no assent to enter into an immediate bargain. There is, so to speak, an acceptance in escrow, which is not to take effect until the future. In the meantime, of course, neither party is bound and either may withdraw. Moreover, if the time at which the acceptance was to become effectual is unreasonably remote, the offer may lapse before the acceptance becomes effective. But if neither party withdraws and the delay is not unreasonable a contract will arise when the contingency happens or stipulated event occurs."

8. In this case, it is not the want of communication of the confirmation by the Government to the appellant that really stands in the way of there being a concluded contract, but rather the want of confirmation by the Government of the conditional acceptance by the Divisional Forest Officer. The appellant's bid was for Rs. 92,001/-. The acceptance of the bid by the Divisional Forest Officer was, therefore, subject to confirmation by Government. The proceedings of the Minister, dated November 27, 1970, would show that he did not confirm the acceptance of the offer by the Divisional Forest Officer. What the Minister did was not to confirm the acceptance made by the Divisional Forest Officer, but to accept the offer made by the appellant in his communication, dated October 26, 1970, that he would take the coup for the reserved price of Rs. 95,000/-. There was, therefore, no confirmation of the acceptance of the bid to take the coup in settlement for the amount of Rs. 92,001/-. If the offer that was accepted was the offer contained in the communication of the appellant, dated October 26, 1970, we do not think that there was any communication of the acceptance of that offer to the appellant. The telegram sent to the Conservator of Forest, Hazaribagh by the Government on November 28, 1970, cannot be considered as a communication of the acceptance of that offer to the appellant. The acceptance of the offer was not even put in the course of transmission to the appellant; and so even assuming that an acceptance need not come to the knowledge of the offeror, the appellant cannot contend that there was a concluded contract on the basis of his offer contained in his communication, dated October 26, 1970, as the acceptance of that offer was not put in the course of transmission. Quite apart from that, the appellant himself revoked the offer made by him on October 26, 1970, by his letter dated November 3, 1970, in which he stated that the coup may be settled upon him at the highest bid made by him in the auction. We are, therefore, of the opinion that there was no concluded contract between the appellant and the Government.

17. We allow the appeal to the extent indicated but make no order as to costs.

* * * * *

Indian Airlines Corporation v. *Madhuri Chowdhuri*

AIR 1965 Cal. 252

P.B. MUKHARJI, J. - 2. The suit arises out of an unfortunate and tragic air crash at Nagpur when a Dakota air plane VT-CHF crashed soon after it started flying from Nagpur to Madras. All the passengers and the crew were killed and the only person who escaped with severe injuries and burns was the Pilot, Desmond Arthur James Cartner. This accident took place on the 12th December, 1953 at about 3-25 a.m.

3. In that Aircraft travelled one Sunil Baran Chowdhury, a young man of about 28 years of age, a business man from Calcutta, who had flown from Calcutta to Nagpur and was taking his journey in that ill-fated Aircraft from Nagpur to Madras at the time of the accident. The plaintiffs in this suit are (1) the widow of the deceased Sunil Baran Chowdhury, (2) his minor son, and (3) his minor daughter. The widow as the mother of the minors acted as the next friend in the plaint. The Indian Airlines Corporation is the defendant in this suit. This suit was instituted on or about the 10th December, 1954, just before the expiry of one year from the date of the accident.

4. The plaint states that the plaintiffs are the heirs and legal representatives of the deceased Sunil Baran Chowdhury and that the action is brought for their benefit. Sunil Baran was a passenger by Air from Calcutta to Madras via Nagpur in the Aircraft of the defendant Corporation and had duly purchased the ticket. The ticket had certain terms and conditions which will be relevant later on. It is pleaded in the plaint that as a result of the accident Sunil Baran was killed. In the particulars of the accident given in the plaint it is said that the accident took place on the 12th December, 1953 at 3-25 a.m. about two miles from the end of the runway of Sonegaon Airport at Nagpur when the said plane attempted to land owing to engine trouble immediately after it had taken off from the said aerodrome. On that ground it is pleaded that the defendant is liable for damages for breach of contract in not safely carrying the passenger and for breach of duties under the Carriage by Air Act and or of the Notification thereunder. There is an alternative plea in the plaint which alleges that the deceased died of the said accident which was caused by the negligence and/or misconduct of the defendant Corporation or its agents. The plaint pleads specifically the particulars of negligence in the following terms: (a) The port engine of the plane lost power after getting air-borne causing a swing and that it was due to defective supervision and check up; (b) That the swing corrected itself when the port engine revived again; (c) In spite of failures of the port engine and/or correction thereof, the Captain and/or Pilots in charge did not follow the ordinary and usual procedure under such circumstances, namely, did not throttle back the engine and land straight ahead though there was sufficient length of runway available in front, to land and pull up even with the wheels down and certainly with the wheels up; (d) Even though the engine revived, the fact that the gear was down was overlooked by both the pilots; (e) A false starboard engine fire warning precipitated the attempt at forced landing obviously on account of defective supervision and check up. (f) The lack of sufficient intensive checks for emergency procedures during the past twelve months preceding the accident which it is alleged, if carried out, might have given the pilot confidence, apart from practice enabling him to deal coolly with an emergency of this nature.

5. On these grounds the plaintiffs claimed damages. The basis of the damage pleaded in the plaint is that the deceased belonged to a long-lived family and lost the normal expectation of a happy life at least 65 years and that he was a well known businessman and industrialist in the City of Calcutta and that his average earnings were Rs. 60,000/- a year. It is also pleaded in the plaint that the deceased had a great future and was the support of the plaintiffs and by his death they had lost all means of support and living. It was, therefore, claimed that the estate of the deceased had suffered loss and damage which were assessed at a sum of Rs. 20,00,000/-. In addition the plaintiffs claimed that the said Sunil Baran carried with him Rs. 5000/- in cash and kind which was also lost by reason of that accident.

6. In the written statement the defendant, Indian Airlines Corporation, relies on the terms and conditions of the passenger's Air Ticket dated the 11th December, 1953 issued by the defendant to the said Sunil Baran Chowdhury. In particular the defendant Corporation relies on the exemption clause as an express term and condition of the said ticket which reads inter alia as follows:

> "The carrier shall be under no liability whatsoever to the passenger, his/her heirs, legal representatives or dependants or their respective assigns for death, injury or delay to the passenger or loss, damage, detention or delay to his baggage or personal property arising out of the carriage or any other services or operations the Carrier whether or not caused or occasioned by the act, neglect or negligence or default of the Carrier, or of pilot flying operational or other staff or employees or agent of the Carrier, or otherwise howsoever and the Carrier shall be held indemnified against all claims, suits, actions, proceedings, damages, costs, charges and expenses in respect thereof arising out of or in connection with such carriage or other services or operations of the Carrier."

7. It is pleaded in the written statement that the deceased Sunil Baran knew all the said terms and conditions of the said ticket and that in any case the defendant Corporation brought to the notice of and/or took all reasonable steps to bring to the notice of the deceased passenger the existence of the said terms and conditions. The defendant denied the existence of any contract other than that mentioned in the ticket or that it committed any breach of contract or that the Carriage by Air Act applied or that it had committed any breach of duty as alleged or at all. In particular the defendant denied the allegations of negligence and misconduct.

8. The defendant Corporation also denied all charges of defective supervision or check up. It denied also that in case of immediate revival of the engine the usual or ordinary procedure was to throttle back the engine and to land straight ahead as alleged. It denied that the Captain or the Pilot in charge could land straight ahead or should have attempted to land straight ahead. It further pleaded in the written statement that the Captain and the pilots in exercise of their judgment decided on spot not to throttle back the engine and to land straight ahead as alleged. The defendant also pleaded that in any event it was at best an error in the judgment or decision of the pilot for which the defendant was not liable and that the pilot was a skilled and competent expert and he had acted bona fide reasonably and in good faith.

9. The defendant also pleaded that the Aircraft held a valid certificate of air worthiness and was regularly maintained in accordance with the approved maintenance Schedules and had the valid certificate of daily inspection, that the crew held valid licenses and were

qualified to undertake the flight and had sufficient checks and training, and that the captain had sufficient flying experience on the route. The all-up weight did not exceed the authorised take off weight. The aircraft carried sufficient fuel and oil. The engines were duly run up and tested by the pilots prior to take off and the take off run was normal. Most careful and reasonable examination of the plane was made before flight which did not reveal any defect or possibility of any failure. It also says that no mechanism has been devised whereby failure of engine of the plane could be completely eliminated. This will be found inter alia in paragraph of 11 of the written statement.

10. The defendant denied all liability to pay damages as alleged or at all. The defendant also pleaded that the alleged moveable in cash and kind amounting to Rs. 5000/-, if any, was the personal luggage of the said deceased passenger and it was in the custody and control of the said deceased and not of the defendant Corporation or the pilot and that the defendant and/or its agents or servants did not take charge of or were not in possession or control of the said moveable.

12. For the plaintiffs Sm. Madhuri Chowdhury, the widow, Anil Behary, Bhadhur, Secretary of Chand Bali Steamer Service Co. where the deceased worked, Saraj Kumar Paul, an employee in the firm of Messrs. A.C. Das Gupta and Co., Chartered Accountants, of the said Chand Bali Steamer Service Co. who produced certain balance sheets of the Company and Mr. R.N. Banerjee, Barrister-at- Law ad Liquidator of the said Chand Bali Steamer Service Co. were examined. Incidentally this witness Mr. Banerjee said that he was appointed a Liquidator of this Company, Chand Bali Steamer Service Co. in 1955. The evidence of these witnesses relates to the family status and condition of the deceased passenger and his probable or the then actual earning capacity.

13. On behalf of the defendant Corporation a large number of witnesses gave evidence. In the facts of this accident no one is alive except the pilot, to speak directly about the plane and its accident. Captain Cartner, therefore, is the most important witness on behalf of the defendant Corporation. The next important witness was Johnson Berry. He was also a pilot flying Indian Airlines Corporation Planes. In fact he was the senior Commander who had also been flying Dakotas since 1947. The importance of his evidence lies in the fact that he was present near about the spot when the accident took place. In the early morning of the 12th December, 1953, he was at Nagpur for operating the night airmail from Delhi to Nagpur and from Nagpur to Delhi. He was at that relevant time waiting at Nagpur to take night airmail back to Delhi. He was also in charge of a Dakota. His scheduled time to leave was at 3.20 a.m. This Madras bound aircraft which met with the accident was just in front of him to taxi out. Therefore, he was immediately behind this ill-fated aircraft, the distance between his plane and that plane would be hardly 100 yards. The important of his evidence, therefore, cannot be over-emphasised. Strangely enough neither his name was mentioned nor his evidence discussed by the learned trial Judge.

14. The third witness for the defendant Corporation was Herber Vivian Dequadros who is also an expert, an Engineer and at the time of giving evidence was the General Manager and Chief Engineer of Jamair Co. Private Ltd. a private limited company operating in Calcutta as a non-scheduled operator as a charter company. The next was Basanta Kumar Bajpai, who was the Assistant Aerodrome Officer under the Civil Aviation Department-

Director General of Civil Aviation, Union of India. He gave evidence inter alia to prove that Captain Cartner's license was without any blemish and that he was not only authorised to fly Dakotas but Super Constellation, Constellation and Boeing type of aircraft. Then there was the evidence of Sooda Nathan Lokanath who was the Station Engineer at Nagpur and who was also a witness before the court of enquiry. Other witnesses for the defendant Corporation were Kritanta Bhusan Gupta from the Traffic Department of the defendant Corporation who spoke about the issue of the ticket and its conditions, Chattubhai Shomnath Gajjar also a Station Engineer in Bombay employed by Deccan Airways which previously controlled this line, N. B. Patel who was a pilot in the defendant Corporation, Kaparaju Gangaraju, Deputy Chief Engineer in charge of Hyderabad Station who gave evidence showing that the aircraft in suit came to Bombay on December 11, 1953, from Begumpet, Hyderabad and before it left Begumpet inspection of the aircraft was carried out. H. R .D. Suja who was in charge of loading and/or unloading the aircraft at Nagpur and who spoke inter alia of the list of passengers on board the Madras bound plane.

15. There was also other witnesses for the defendant Corporation like Rama Rao Prahlad Rao Huilga, Area Manager of the defendant Corporation at Delhi who was in the Deccan Airways in 1947 as a Senior Captain, A. K. Rao, Aircraft Maintenance Enginner of the defendant Corporation at Begumpet, Hyderabad, from which the aircraft flew, J.B. Bayas, Controller of aero-nautical inspection, New Delhi who inter alia gave evidence to say that no device has been found out by Science or Technology as yet by which air-locking can be completely excluded; a point which will be material later on when we shall discuss the judgment under appeal, D.N. Benerjee, the Traffic Assistant of Airways India Ltd. who spoke about the notice hung up in front of the Booking office at Mission Row, Calcutta G. V. Rai, Inspector of the defendant Corporation who was at Begumpet in November, 1953 and finally S.V. Probbu who proved some signature and was Inspector on duty at Begumpet.

16. There is large body of documentary evidence including log book entries, load sheet, certificate of inspection reports and sheets, daily reports, daily routine schedules of departure, instruments and electrical routine check sheet, licenses and also the report of the court of enquiry of the accident, apart from many correspondence and newspaper reports.

17. It may be appropriate to mention here that immediately after the accident the Government of India Ministry of Communications, ordered a formal investigation in exercise of the powers conferred by Rule 75 of the Indian Aircraft Rules, 1987. Mr. N. S.Lokur was appointed the Chairman of this court of enquiry assisted by Captain K.Vishwanath of Air India international and Mr. M.G. Pradhan, Deputy Director General of Civil Aviation as assessors in the said investigation. This investigation was ordered on the 16th December, 1953 within four days of the accident. The report of this investigation and enquiry or what is called in this connection this Court of Enquiry was submitted to the Government of India on the 30th December, 1953. This is also marked as an exhibit in this suit and about its admissibility there has been some controversy which fortunately was not pressed in the long run.

18. The learned trial judge held that the exemption clause was illegal, invalid and void and he also held on the facts that Captain Cartner, the pilot, was negligent and therefore, the defendant Corporation as the employer of Captain Cartner was liable in law. On a careful

consideration of the learned Judge's decision on (1) the exemption clause and (2) the negligence of Captain Cartner, we have come to the conclusion that his decision cannot be sustained. We shall presently discuss these two questions which are crucial in this appeal.

19. In addition to these two points the learned Judge has discussed the doctrine of res ipsa loquitur and the applicability of common law in India and relying on his judgment in ***Sm Mukul Dutta Gupta* v. *Indian Airlines Corporation*** [(AIR 1962 Cal. 311)] he came to the conclusion:

> "In my judgment, the rules of justice, equity and good conscience applicable to internal carrier by air in India are not rules of common law carrier in England, but rules to be found in Carriage by Air Act, 1934. The Indian legislature has indicated that it should be applied to non international air carriage of course "subject to exception, adaptation and modification."

Although the power to except, adapt or modify was given to the Central Government, yet the learned Judge himself applied them without the Central Government acting in the matter, in the belief that it was open to him to extend that law in that manner. We are unable to accept this view and we are of the opinion that the learned trial judge's view noticed above is erroneous.

20. The most important question in this appeal is the validity or otherwise of the exemption clause. The learned trial Judge has held the exemption clause to be invalid, illegal and void on that ground that:

(a) it is against section 23 of the Indian Contract Act, although however he has found that the agreement was not bad on the ground of unreasonableness;
(b) this exemption clause cannot deprive the heirs and legal representatives of the deceased because they did not enter into this contract and therefore, such an exemption clause would be unavailing under the Fatal Accident Act under which the present suit for damages has been brought;
(c) this exemption clause is bad on the ground that somehow or other broad principles of the Warsaw Convention should be applied to India not as such but as rules of justice, equity and good conscience which according to the learned Judge this exemption clause violates. In other words, the learned trial Judge appears to take the view that the exemption clause is against the principles of some policy which though not technically applicable in this country is somehow or other against some kind of equity and good conscience and therefore will be regarded as against the public policy.

21. We are satisfied on this point that the learned Judge's decision that the exemption clause is invalid is erroneous. It is against both the principles of law as well as against decided authorities which are binding on us and which have settled the law after a long series of many decisions on the point. The only case on which the learned Judge relied for his decision on this point is ***Secy. of State* v. *Mt. Rukbminibai***, [AIR 1937 Nag. 354]. What the learned Judge failed to appreciate about that case is that it is not an authority on the exemption clause at all. In fact it does not deal with the validity or otherwise of any exemption clause of this nature or of any exemption clause in a ticket containing these

express terms exempting the liability for negligence. This case lays down the proposition that though there is a strong presumption that any rule of English law is in accordance with the principles of justice, equity and good conscience in England, yet the Court in India is entitled to examine the rules in order to find out whether the rules are in accordance with the true principles of equity. Sir Barnes Peacock said in the case ***Degumburee Dabee* v. *Eshan Chunder Sein***, [9 Suth WB 230] whether the rules were in accordance with the true principles of equity (sic) and that the Courts in India had several occasions, refused to apply a rule of English law on the ground that it was not applicable to Indian society and circumstances. The only question on which these observations were being made by the learned Judges there in the Nagpur case was how far the English doctrine of common employment applied in lndia to cases which in England would have come under the Employers Liability Act. That was the only question. There no question turned up on exemption clause in a contract or as a term or a condition in a ticket for carriage exempting liability for negligence. All these observations, therefore, about common law, equity and good conscience that are to be found there, are only obiter except in so far as they relate to the point of the doctrine of common employment. That was the only point discussed and decided there. We are satisfied that this Nagpur case is no authority for holding that in the instant appeal before us the exemption clause is illegal and invalid.

22. Before discussing the English law it will be appropriate to discuss the binding authorities and decisions so far as this court is concerned. It is laid down clearly and without any ambiguity by the Privy Council as early as 1891 in ***Irrawaddy Flotilla Co.* v. *Bugwan Das,*** [18 IA 121 (PC)] that the obligation imposed by law on common carriage in India is not founded upon contract, but on the exercise of public employment for reward. In fact, that decision of the Privy Council is a clear authority to say that the liability of common carriers in India is not affected by the Indian Contract Act 1872. Therefore, no question of testing the validity of this exemption clause with reference to section 23 of the Indian Contract Act can at all arise. The Contract Act does not profess to be a complete Code dealing with the law relating to contracts and the Privy Council says that it purports to do no more than to define and amend certain parts of the law. Lord Macnaghten, at page 129, put the law beyond any doubt in the following terms:

> "At the date of the Act of 1872, the law relating to common carriers was partly written, partly unwritten law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is duty cast upon common carriers by reason of their exercising a public employment for reward. 'A breach of this duty' says Dallas, *C.J., Bretherton v. Wood*, (1821) 8B and B 54 is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of contract to support it. If in codifying the law of contract the Legislature had found occasion to deal with tort or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear."

(23) Having regard to this decision of the Privy Council which we consider to be binding on us there is no scope left for further argument that an exemption clause of this kind is hit by

any section of the Contract Act, be it S. 23 or any other section, because the Indian Contract Act itself has no application. In fact the subsequent observation of Lord Macnaghten at p. 130 of the report puts the whole position beyond argument and controversy so far as this court is concerned, when His Lordship said:

> "The combined effect of sections 6 and 8 of the Act of 1865 (Carriers Act 1865) is that, in respect of property not of the description contained in the Schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the Appellant's construction the Act of 1872 (The Indian Contract Act) reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the Act of 1865."

24. Finally, therefore, Lord Macnaghten observed at p. 131 of the report as follows:

> "These considerations lead their Lordships to the conclusion that the Act of 1872, (Indian Contract Act) was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act."

24a. No doubt, it may be essential to point out straightway at this stage that the Carriers Act of 1865 has no application to the facts of this case because that Act deals only with property and that also not in carriage by air.

25. Mr. Dutt Roy, appearing for the plaintiff's-respondents attempted to distinguish this Privy Council decision by saying that this decision was only concerned with sections 151 and 152 of the Indian Contract Act which deal only with the bailment and therefore, was no authority on S. 23 of the Contract Act. We are unable to accept that distinction because the ratio of the decision of the Privy Council rests on the fact that the whole of the Indian Contract Act as pointed out by Lord Macnaghten did not apply to the law relating to common carriers.

26. A Division Bench of this Court also had occasion to discuss the exemption clause and its validity in an Air Ticket. That will be found in ***Indian Airlines Corporation*** **v.** ***Keshavlal F. Gandhi*** [AIR 1962 Cal. 290]. This Division Bench decision is a clear authority for the proposition that the present appellant Indian Airlines Corporation is a common carrier and that the relationship between the parties to the contract of carriage is to be governed by common law of England governing the rights and liabilities of such common carriers. This Division Bench decision proceeds to lay down that the law permits common carriers totally to contract themselves out of liabilities for loss or damage of goods carried as common carriers. Then it comes to the conclusion that parties to the contract bind themselves by the contract and it is not for the court to make a contract for the parties or to go outside the contract. The Division Bench also expressed the view that if the contract offends against the provisions of the Contract Act, e.g. if opposed to public policy, then only the court may strike down the contract, but even then it cannot make a new contract for the parties.

27. The exemption clause which the Division Bench was considering in that case also exempted the Airlines Corporation from. "any liability under the law whether to the sender or

to the consignee or to their legal representatives, in case of damage or loss or pilferage or detention from any cause whatsoever including negligence or default of pilots, agents, flying ground or other staff or employees of the carrier or breach of statutory or other regulations) whether in the course of journey or prior, or subsequent thereof, and whether while the freight be on board the aircraft or otherwise."

28. The Division Bench came to the conclusion that this contract did not offend against the provisions of the Indian Contract Act and that it gave complete immunity to the defendant Corporation from loss or damage to the goods consigned to its care for carriage.

29. The argument that section 23 of the Contract Act was not considered in that case cannot also be a reason to hold that this particular section of the Contract Act makes this exemption clause bad. In ***Bombay Steam Navigation Co*. v. *Vasudev Babruao Kamat***, [AIR 1928 Bom. 5] the view Sankaran Nair, J., in his dissenting judgment in ***Sheik Mahammad Ravuther* v. *B.I.S.N. Co Ltd*.**, [ILR 32 Mad. 95], expressing the opinion that section 23 of the Contract Act hits such exemption clause was rejected. In fact in a recent decision of the Madras High Court in ***Indian Airlines Corporation* v. *Jothaji Maniram***, [AIR 1959 Mad. 285] the point is made clear beyond doubt. There it is held that a common carrier is a person who professes himself ready to carry goods for everybody. In the case of a common carrier the liability is higher, because he is considered to be in the position of insurer with regard to the goods entrusted to him. But where it is expressly stipulated between the parties that the carrier is not a common carrier, that conclusively shows that the carrier is not liable as a common carrier. It was also distinctly laid down by that decision that even assuming that the carrier could be deemed to be a common carrier or held liable as such, it was open to such a carrier to contract himself out of liability as common carrier, or fix the limit of his liability. This Madras decision given by Ramchandra Iyer, J., reviews all the relevant decisions on this point. It also notices at page 288 of the report the view of Sankaran Nair, J. and rejects it.

30. In a recent Division Bench decision of the Assam High Court in ***Rakmanand Ajitsaria* v. *Airways (India) Ltd*.,** [AIR 1960 Ass. 71] certain important propositions of law are clearly laid down. It is an authority to say that the liability of the internal carrier by Airways who is not governed by the *Indian Carriage by Air Act*, *1934*, or by the Carriers Act, 1865 is governed by the English Common law since adopted in India and not by the Contract Act. It proceeds to lay down that under the English common law, the carrier's liability is not that of a bailee only, but that of an insurer of goods, so that the carrier is bound to account for loss or damage caused to the goods delivered to it for carriage, provided the loss or damage was not due to an act of God or the King's enemies or to some inherent vice in the thing itself. It also lays down that at the same time, the common law allows the carrier almost an equal freedom to limit its liability by any contract with the consignor. In such a case, its liability would depend upon the terms of the contract or the conditions under which the carrier accepted delivery of the goods for carriage. It provides that the terms could be very far-reaching and indeed they could claim exemption even if the loss was occasioned on account of the negligence or misconduct of its servants or even if the loss or damage was caused by any other circumstance whatsoever, in consideration of a higher or lower amount of freight charged. In unmistakable terms the learned Chief Justice of the Assam High Court says that, however amazing a contract of this kind may appear to be, yet that seems to be the

state of the law as recognized by the common law of England and adopted by the Courts in India. Lastly this decision of the Division Bench of the Assam High Court is an authority for the proposition that the clause in a contract of carriage by air giving complete immunity to the carrier from liability could not be impugned on the ground that it was hit by section 23 of the *Indian Contract Act*, because the Contract Act had no application to the case nor could it be said to be opposed to public policy. The learned Chief Justice of the Assam High Court points out that Exemption clauses of this nature have been upheld by the Courts and there being no other statutory bar as provided under the *Indian Carriers Act* or under the *Indian Carriage by Air Act*, which have no application to this case, under the common law a contract of this nature was permissible and therefore, this decision also dissents from the decision of Sankaran Nair, J. as mentioned above. Sarjoo Prosad, C. J., in this decision observes at p. 74 of the report quoted above on the point of section 23 of the Indian Contract Act as hitting the validity of such an exemption clause as follows:

> "These weighty observations of Sir Sankaran Nair compel serious attention and attract by their freshness and originality; but it seems too late now to turn away from the beaten track of judicial precedents, which have since acquired all the sanctity of a stare decisis. I am, however, unable to understand, and I say so with the utmost respect, how the learned Judge could overlook the very point which the Judicial Committee of the Privy Council had decided and held that the carrier's liability was governed by the English common law and not by the terms of the Contract Act, especially when that decision was given by the Privy Council with full consciousness of the conflict of the judicial opinion in India. That the said decision of the Judicial Committee has been subsequently followed in other cases is beyond question."

31. The Privy Council decision and all the Indian decisions, therefore, are against the finding of the learned trial Judge in this case. Looking at the English Law and High authorities of the English Law the conclusion is further reinforced.

32. Before we discuss the English Law and the English decisions on this point we may notice this that Mr. Dutt Roy for the respondent realising the mass of authorities against his contention tried to distinguish them by saying that all the these cases related to goods and not to human life. He appears to suggest, as the learned trial Judge has also said, that while for some reason or other there could be complete exemption including one for negligence in case of contract for the carriage of goods such a cause would be bad if it concerned the carriage of passengers and their life. In jurisprudence dealing with the law of Common carriers it is difficult to see how the difference could be drawn legally between goods and life.

33. Fortunately, however, this point is also decided by the high authority of the House of Lords and that also in recent times. In the leading case of ***Ludditt* v. *Ginger Coote Airways Ltd*.,** [1947 AC 233 Lord Wright at 245] after quoting the words of Maule, J., observed as follows:-

> "In this passage Maule J. is speaking of carriers of goods, but the same principle is true, mutandis, of a carrier of passengers who in law is neither an insurer nor precluded from making a special contract with his passengers."

34. Lord Wright in the same report at p. 242 accepted the classic enunciation on this point by Lord Haldane in ***Grand Trunk Ry. Co. of Canada* v. *Robinson*** [AIR 1915 PC 53] where Lord Haldane stated (at p. 55) as follows:

> "There are some principles of general application which it is necessary to bear in mind in approaching the consideration of this question. If a passenger has entered a train on mere invitation or permission from a railway company without more, and he receives injury in an accident caused by the negligence of its servants, the company is liable for damages for breach of a general duty to exercise care. Such a breach can be regarded as one either of an implied contract, or of a duty imposed by the general law, and in the latter case as in form a tort. But in either view this general duty may, subject to such statutory restrictions as exist in Canada and in England in different ways, be superseded by a specific contract which may either enlarge, diminish or exclude it. If the law authorises it, such a Contract cannot be pronounced to be unreasonable by a court of justice. The specific contract, with its incidents either expressed or attached by law, becomes in such a case the only measure of the duties between the parties, and the plaintiff cannot by any device of form get more than the contract allows him."

35. It is, therefore, clear that the distinction that the learned Counsel for the respondents attempted to make between a contract for carriage of goods and a contract for carriage of passengers cannot be sustained. Both can be limited and both can exclude liability even for negligence.

36. Without multiplying authorities on this point which in our view are almost unanimous to day we shall refer to another decision of the House of Lords in ***Hood* v. *Anchor Line (Henderson Brothers) Ltd*.,** [1918 AC 837]. The import of this decision answers some point faintly argued on behalf of the respondents how far small words printed at the foot of the document exempting liability were binding on the passenger. Lord Finlay, L.C. at pages 842-843 observed inter alia as follows:

> "In my opinion the Courts below were right, out of many authorities bearing upon the point I think it necessary to refer to three only – Henderson Stevenson, (1875) 2 HL Sc 470; ***Parker* v. *South Eastern Ry. Co*.**, [(1877) 2 CPD 416] and ***Richardson, Spence and Co.* v. *Rowntree*** [(1894) AC 217]. The first of these cases is a decision of this House that a condition printed on the back of the ticket issued by a steamship packet company absolving the company from liability of loss, injury, or delay to the passenger or his luggage was not binding on a passenger who has not read the conditions and has not had his attention directed to the conditions by anything printed on the face of the ticket, or by the carrier when issuing it. The second and the third of these cases show that if it is found that the company did what was reasonably sufficient to give notice of conditions printed on the back of a ticket the person taking the ticket would be bound by such conditions.
>
> It is quite true that, if the contract was complete, subsequent notice would not vary it, but when the passenger or his agent gets the ticket he may examine it before accepting, and if he chooses not to examine it when everything reasonable has been done to call his attention to the conditions he accepts it as it is."

37. It has been found by the learned trial Judge that these conditions in the present case exempting the carrier from liability were duly brought to the notice of the passenger and that he had every opportunity to know them. Here in the Court of Appeal we are satisfied on the record that it was so.

38. Blackburn, J., in the well known case of ***McCawley* v. *Furness Rly. Co.*** [(1872) 8 QB 57 at 57] dealing with a case of personal injury lays down the same principle that civil liability, as distinguished from criminal liability, can be excluded by an appropriate agreement, and observed as follows:

> "The duty of a carrier of passengers is to take reasonable care of a passenger, so as not to expose him to danger, and if they negligently expose him to danger, and he is killed, they might be guilty of man-slaughter, and they would certainly be liable to the relatives of the deceased in damages. But here the passenger was carried under special terms; that agreement would not take away any liability that might be incurred as to criminal proceedings, but it regulates the right of the plaintiff to recover damages. The plea states that it was agreed that the plaintiff, being a drover traveling with cattle, should travel at his own risk; that is, he takes his chance, and ,as far as having a right to recover damages, he shall not bring an action against the company for anything that may happen in the course of the carriage. It would of course be quite a different thing were an action brought for an independent wrong, such as an assault, or false imprisonment. Negligence in almost all instances would be the act of the Company's servants, and "at his own risk" would of course exclude that, and gross negligence would be within the terms of the agreement; as to willful, I am at a loss to say what that means; but any negligence for which the company would be liable (confined, as I have said, to the journey, and it is so confined by the declaration) is excluded by the agreement."

39. These weighty observations of Blackburn, J. found approval subsequently. Atkin L.J. *in* ***Rutter* v. *Palmer*** [(1922) 2 KB 87, 94] referred to the above decision. In the case of (1922) 2 KB 87 there was a clause "Customers cars are driven at customer's sole risk" and it was held that the above clause protected the defendant from liability for the negligence of his servants, and that the action failed. Discussing the general principles on this point and specially on the construction and interpretation of the words used in exemption clause, whether sufficient to exclude liability under a contract or also of tort Denning L.J. in ***White* v. *John Warwick and Co. Ltd.*** [(1953) 1 WLR 1285 at 1293] lays down the following principles:

> "In this type of case two principles are well settled. The first is that if a person desires to exempt himself from a liability which the common law imposed on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is; if there are two possible heads of liability on the part of defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence."

There however, there was no finding on negligence and a new trial was ordered for a finding on that issue.

40. Without discussing any more English case law on the point we can profitably refer to the Third Edition Vol. 4 of Halsbury's ***Laws of England***, Articles 465 and 466 at pages 186 to 188. The law is clearly formulated there.The statement of law there is that any contract which contains conditions enlarging, diminishing or excluding a carriers common law duty of care to his passengers cannot, in the absence of any statutory restriction on the imposition of such conditions, be pronounced unreasonable by a court of justice with a view to one party getting more than the contract allows him; but it would seem that conditions which are wholly unreasonable are not binding upon a passenger even if steps otherwise reasonable have been taken to give him notice of them. But then it stated that any term in a contract for the conveyance of a passenger in a public service vehicle negativing or restricting liability or imposing conditions as to the enforcement of liability in respect of the death or bodily injury of the passenger when being carried in or entering or alighting from the vehicle, is void. That means that this exemption of liability may be prevented by statute and if that is so the statute inter alia will prevail. But then the point here in India is that no Act applies to internal carriage by air. That Warsaw Convention does not apply; nor is there any statute which prevents or limits the scope or content of such an exemption clause. Therefore, it is significantly pointed out in 31 Halsbury (Third Ed.) in Article 1214 at pages 765-766 that:

> "There are no statutory terms and conditions for the carriage of passengers, but, as a common carrier could vary his liability by making a special contract, so railway undertakers can carry passengers on their own terms and conditions by means of a special contract usually made between the undertakers and the passenger by the buying of a ticket."

43. These statutory provisions in other statutes seem to indicate that the legislature in its wisdom, has not uptill now thought fit to legislate on this point about internal carriage by air in India either to limit or exclude contract for exemption of liability.

44. On this overwhelming mass of authority we are bound to hold that both in respect of Contract Act and Tort the present exemption clause is good and valid and it legally excludes all liability for negligence. We also hold that it cannot be held to be bad under Section 23 of the Contract Act as stated above.

135. For reasons stated above and on the authorities discussed this appeal must be allowed. The suit must be dismissed. We hold that the exemption clause is good, valid and legal. We also hold on the merits that there was no negligence of the defendant Corporation or of the pilot Captain Cartner.

Appeal allowed.

* * * * *

CONSIDERATION

Kedarnath Bhattacharji v. *Gorie Mahomed*

(1886) 7 I.D. 64 Cal.

[It appeared that it was thought advisable to erect a Town Hall at Howrah, provided sufficient subscriptions could be got together for the purpose. To this end the Commissioners of the Howrah Municipality set to work to obtain the necessary funds by public subscription, creating themselves, by deed, trustees of the Howrah Town Hall Fund. As soon as the subscriptions allowed, the Commissioners including the plaintiff, who was also Vice-Chairman of the Municipality, entered into a contract with a contractor for the purpose of building the Town Hall, estimates and plans were submitted to, and approved by, the Commissioners, the original estimate amounting to Rs. 26,000. This estimate, however, was increased to Rs. 40,000, and it was found that the subscriptions would cover this amount, and the original plans were therefore enlarged and altered.

The defendant was a subscriber to this fund of rupees one hundred, having signed his name in the subscription book for that amount. The defendant not having paid his subscription was sued in the Howrah Court of Small Causes by the plaintiff as Vice-Chairman and trustee and therefore as one of the persons who had made himself liable to the contractor for the costs of the building, to recover the amount entered in the subscription book.

The defendant contended that the plaintiff had no right to sue. The Judge of the Small Cause Court held that the Registrar had no power to grant leave to sue; that the Town Hall being trust property, the case was one falling under s. 437 of the Code; and that, therefore, the suit was bad *ab initio*. And on the question as to whether such a suit would otherwise lie, after referring to the case of ***Kedar Nath Mittra* v. *Alisar Rahoman*** [(10 CLR 197)] he found that the defendant was a man of no education, and it could not therefore be expected that he had put his name to the subscription book with a full knowledge of the object and utility of the Town Hall. He, therefore, found that the defendant was under no legal obligation to pay, and dismissed the suit, making his judgment contingent on the opinion of the High Court on the following points:

(1) Whether the suit as laid by the plaintiff was legally maintainable?

(2) Whether, upon the facts stated, the trustees were entitled to judgment?]

SIR W. COMER PETHERAM, C.J. – The questions which are proposed for us in this Reference from the Small Cause Court are: first, whether the suit as laid by the plaintiff is legally maintainable; and, secondly, whether, upon the facts stated in the reference, the trustees are entitled to judgment.

The facts of the case appear to be these: The plaintiff is a Municipal Commissioner of Howrah and one of the trustees of the Howrah Town Hall Fund. Some time ago, it was in contemplation to build a Town Hall in Howrah, provided the necessary funds could be raised, and upon that state of things being existent, the persons interested set to work to see what

subscriptions they could get. When the subscription list had reached a certain point, the Commissioners, including the plaintiff, entered into a contract with a contractor for the purpose of building the Town Hall, and plans of the building were submitted and passed, but as the subscription list increased, the plans increased too, and the original cost which was intended to be Rs. 26,000, has swelled up to Rs. 40,000; but for the whole Rs. 40,000 the Commissioners, including the plaintiff, have remained liable to the contractor as much as for the original contract, because the additions to the building were made by the authority of the Commissioners and with their sanction. The defendant, on being applied to, subscribed his name in the book for Rs. 100, and the question is, whether the plaintiff, as one of the persons who made himself liable under the contract to the contractor for the cost of the building, can sue, on behalf of himself and all those in the same interest with him, to recover the amount of the subscription from the defendant.

We think he can. Without reference to his being a trustee or a Municipal Commissioner, we think that under the provisions of the Code of Civil Procedure he is entitled to bring an action on behalf of himself and others jointly interested with him. If the action could be maintained on behalf of all, and there were no other section which would preclude this being done, that would cure any technical defect in the case.

Then, the question is, whether this is a suit which could be maintained by the whole of the persons who made themselves liable to the contractor if they were all joined.

It is clear that there are a great many subscriptions that cannot be recovered. A man for some reason or other puts his name down for a subscription to some charitable object, for instance, but the amount of his subscription cannot be recovered from him because there is no consideration.

But in this particular case, the state of things is this: Persons were asked to subscribe, knowing the purpose to which the money was to be applied, and they knew that on the faith of their subscription an obligation was to be incurred to pay the contractor for the work. Under these circumstances, this kind of contract arises. The subscriber by subscribing his name says, in effect, -- In consideration of your agreeing to enter into a contract to erect or yourselves erecting this building, I undertake to supply the money to pay for it up to the amount for which I subscribe my name. That is a perfectly valid contract and for good consideration; it contains all the essential elements of a contract which can be enforced in law by the persons to whom the liability is incurred. In our opinion, that is the case here, and therefore we think that both questions must be answered in the affirmative, because, as I have already said, we think that there is a contract for good consideration, which can be enforced by the proper party, and we think that the plaintiff can enforce it, because he can sue on behalf of himself and all persons in the same interest, and, therefore, we answer both questions in the affirmative, and we consider that the Judge of the Small Cause Court ought to decree the suit for the amount claimed, and we also think that the plaintiff ought to get his costs including the costs of this hearing.

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Doraiswami Iyer v. *Arunachala Ayyar*

(1935) 43 L.W. 259 (Mad.)

CORNISH, J. – This Civil Revision Petition arises out of a suit in which the trustees of a temple sought to recover a contribution promised by a subscriber to a subscription list for the repairs of a temple.

It appears upon the fact found in the lower Court that the plaintiffs – the present respondents – the trustees entered into a contract for the necessary repairs in the month of February 1928, and the maistry of the contractor was supplied with money from village common fund. As the work proceeded more money was required, and to raise this money subscriptions were invited and a subscription list formed. This was in October. The present petitioner put himself down in the list for Rs. 125, and it is to recover this sum that the suit was filed. The lower Court has decreed the suit. The plaint founds the consideration for this promise as follows: That plaintiffs relying on the promise from the subscriber incurred liabilities in repairing the temple. The question is, does this amount to consideration? The definition of consideration in the Indian Contract Act is that where at the desire of the promisor the promisee has done or abstained from doing something, such acts or abstinence is called consideration. Therefore, the definition postulates that the promisee must have acted on some thing amounting to more than a bare promise. There must be some bargain between them in respect of which the consideration has been given. In ***Kedar Nath Bhattacharji*** **v.** ***Gorie Mahomed*** [(14 Cal. 64, 67)], the position is put thus: The subscriber by subscribing his name says in effect… In consideration of your agreeing to enter into a contract to erect or yourselves erecting this building, I undertake to supply the money to pay for it upto the amount for which I subscribe my name – And it was observed that that is a perfectly good contract. I think it cannot now be accepted that the mere promise to subscribe a sum of money or the entry of such promised sum in a subscription list furnishes consideration. There must have been some request by the promisor to the promisee to do something in consideration of the promised subscription. This is the rule to be deduced from the only other case that I have been able to discover relating to the recovery of a promised subscription on the basis of a contract. That case is ***In re Hudson*** (54 L.J.Ch. 811). The promise there was to contribute a large sum of money to the Congregational Union for the payment of Chapel debts. The promisor paid large instalment of his promised contribution and then died. The congregational Union then sought to make the promisor's executors liable. The contention was that on the strength of the promise the Committee of the Union had incurred liabilities and that this amounted to consideration. It was held that the claim was unsustainable inasmuch as the promisee had not undertaken any liability as part of the bargain with the promisor. Mr. Justice Pearson in his judgment said:

> "What is the consideration for the promise which was to make it a contract? There was no consideration at all. Mr. Cookson says that there really was a consideration, because the consideration was the risks and liabilities which the parties were to undertake who composed themselves into a Committee and became the distributors of the fund. In the first place there was no duty between themselves and Mr. Hudson

> (the promisor) which they undertook at that time – there was no binding obligation between themselves and Mr. Hudson."

In the present case it is not pleaded, nor is there evidence, that there was any request by the subscriber when he put his name in the list for Rs. 125 to the plaintiffs to do the temple repairs or that there was any undertaking by them to do anything. In my opinion this was a bare promise unsupposted by consideration, and the suit ought to have been dismissed.

The Petition is allowed with costs throughout.

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Abdul Aziz v. *Masum Ali*

AIR 1914 All. 22

RICHARDS, C.J. – This appeal arises out of a suit brought by the plaintiffs against the heirs of Munshi Abdul Karim. The plaintiffs are the members of the Islam Local Agency Committee, Agra. It appears that in the year 1907, a movement was set on foot to collect money for repairing and reconstructing a mosque known as Masjid Hamman Alawardi Khan. The local agency committee themselves sanctioned a subscription of Rs. 3,000; besides this amount, Rs. 100 were paid in cash at that time by Hakim Shafi Ullah, Rs. 500 were promised by Munshi Abdul Karim and another sum of Rs. 500 was promised by Munshi Jan Mohammad. Munshi Abdul Karim was appointed treasurer. The local agency committee handed over their contribution of Rs. 3,000 to Munshi Abdul Karim and he also received the donation of Rs. 100 from Hakim Shafi Ullah. Munshi Jan Mohammad gave a cheque for Rs. 500 dated 12th September 1907. On 29th September 1907, the cheque was presented for payment, but it was returned by the Bank with a note that the endorsement was not regular. It was again presented on 12th January 1909 when the bank returned the cheque with a note that it was out of date. Munshi Abdul Karim died on 20th April 1909; the present suit was instituted against his heirs on 14th April 1910. Munshi Jan Mohammad died in May 1910. The defendants do not dispute the right of the plaintiff to recover the sum of Rs. 3,100; they have admitted this part of the plaintiff's claim all along. It is admitted on both sides that nothing has been done to carry out the repairs and reconstruction of a part of the mosque. Defence is, however, taken to the two items, viz. the Rs. 500 represented by the cheque of Munshi Jan Mohammad and the subscription of the deceased Munshi Abdul Karim. The Court of first instance granted a decree for the subscription promised by Munshi Abdul Karim but dismissed the suit in so far as it related to the claim for Rs. 500, the subscription of Munshi Jan Mohammad. The lower appellate Court granted a decree for the entire claim. It appears to us that the suit cannot be maintained in respect of either item. With regard to the subscription of Munshi Abdul Karim this was a mere gratuitous promise on his part. Under the circumstances of the present case it is admitted that if the promise had been made by an outsider it could not have been enforced. We cannot see that it makes any difference that Munshi Abdul Karim was himself the treasurer. There is no evidence that he ever set aside a sum of Rs. 500 to meet his promised subscription. As to the other item viz., the amount of Munshi Jan Mohammad's cheque, we see great difficulty in holding that a suit could have been brought against Munshi Abdul Karim in respect of this cheque during his lifetime. His undertaking of the office of treasurer was purely gratuitous. He might at any time have refused to go on with the work. It is said that he must be regarded as the agent of the committee, and that if he was the agent he was guilty of gross negligence and accordingly would have been liable for any loss the committee sustained. In our opinion Munshi Abdul Karim cannot be said to have been an agent of the committee; even if he was, it is very doubtful that he could have been held guilty of gross negligence. He had presented the cheque for payment; the mistake in the endorsement was a very natural one and the delay in re-presenting the cheque or getting a duplicate from the drawer may well be explained by the delay which took place in carrying out the proposed work. In our opinion, under the circumstances of the present case, Munshi Abdul Karim could not have been sued in his

lifetime. It is quite clear that if no suit lay against Munshi Abdul Karim in his lifetime, no suit could be brought after his death against his heirs. The result is that we allow the appeal to this extent that we vary the decree of the Court below by dismissing the claim in respect of the two items of Rs. 500 each. The appellants will get their costs of this appeal including in this, court-fees on the higher scale. In the Court below the parties will pay and receive costs in proportion to failure and success.

Appeal allowed and Decree varied.

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Venkata Chinnaya Rau v. *Venkataramaya Garu*

(1881) 1 I.J. 137 (Mad.)

INNES, J. - The plaintiffs' sister, by deed of gift on the 9th April 1877, made over certain landed property to the defendant, her daughter. By the terms of the deed which was registered, it was stipulated that an annuity of 653 rupees should be paid every year to the plaintiffs as had hitherto been paid by the donor until a village could be given them.

The defendant on the same date executed in plaintiffs' favour a Kararnama promising to give effect to the stipulation of the deed of gift by paying the annuity until she gave them a village. The annuity was not paid and the plaintiffs sued to recover it.

Various pleas were set up, one of which was that the document in favour of plaintiffs was executed under coercion. The Courts below have found, upon evidence warranting the finding, that there was no coercion, but that the document was executed and registered voluntarily by defendant.

The first question argued before us was whether the plaintiffs, who were strangers to the consideration for the promise, have a right to sue. The document executed by the defendant in favour of the plaintiffs was in these terms: "According to the terms set forth in the 12th paragraph of the dead of gift of possession, & c., I hereby agree to continue to carry out in your favour, perpetually and hereditarily, & c., the terms stated in the said paragraph."

There is great conflict in the cases on the question, but the rule deducible seems to be that the plaintiff can only sue if the consideration moved directly from him wholly or partly. In case of ***Dutton* v. *Poole***, [2 Lev. 210, 1 Ventr. 318], Sir E. Poole was about to fell timber on his estate to the value of £ 1.000 for the purpose of giving that sum to his daughter *Grisel* as her marriage portion. The eldest son interposed and promised Sir *Edward* that if he would refrain from felling the timber, he (the son) would pay *Grisel* £ 1,000. Sir *Edward* agree to this, and gave up his intention of felling the timber. On his death the son refused to fulfil his promise. The daughter *Grisel* (joining her husband) sued, and it was held she might do so for the son had the benefit of the timber and the daughter had lost her portion through the promise of the son. There is also another similar case called *Rockwood's* case in which the father, at the request of the eldest son, and on his promise to pay an annuity to each of the younger sons, refrained from charging the lands with the annuity. In this case, when on the death of the father the eldest son who came into the property refused to pay the annuity, it was held that the younger sons could sue. In these cases the consideration moved indirectly from the plaintiff to the defendant. In each case the action of the defendant operated to shut out the plaintiff from a certain benefit and to substitute a future benefit dependent on the fulfilment by him of his promise. On the other hand in ***Tweddle* v. *Atkinson*** [30 L.J.Q.B. 265] it was held that the plaintiff could not sue. The case was this the parents of the plaintiff and his wife agreed together after the marriage that each should pay a sum of money to the husband, and that the latter should have full power to sue for the money. The plaintiff in this case was held not to be a party to the consideration, and on this ground not entitled to sue. The distinction between this and the preceding cases is obvious. The plaintiff did not lose anything by the arrangement between the two parents, nor was he worse off from the non-

fulfilment of the promises than he would have been if they had not been made, nor did the promises result in any present benefit to the persons promising to the detriment of the plaintiff; so that there was no consideration moving directly or indirectly from him to the defendants. It cannot be doubted in the present case that the document A was executed by defendant in pursuance of the donation deed B, and with a view that the defendant might take the benefit of that deed.

Plaintiffs' sister, the donor, expressly stipulated that the sum she had hitherto paid should be continued to plaintiffs until they could be provided with a village, and it appears that she only ceased to pay plaintiffs the annuity herself, because the source from which it had been derived was now placed in the hands of defendant and subject to her control. By the transfer effected by B therefore, defendant gained a large estate and plaintiffs lost the yearly sum which the donor would otherwise have paid them. It seems to me that the case is on the same footing as ***Dutton* v. *Poole***, and that a consideration indirectly moved from plaintiffs to the defendant. If there was consideration moving from plaintiffs for the promise contained in A, the agreement can be enforced by plaintiffs and the Courts below were right in giving them a decree for the annual sum due and not paid.

As to the question whether the document A is sufficiently stamped it has already been admitted in evidence as duly stamped, and this Court has no power to exclude it as inadmissible, though, if it were thought the document had been wrongly stamped, we might act under Section 50 of the *Stamp* Act of 1879. I think, however, it was properly stamped as an agreement. It was executed when the Act of 1869 was in force, and is not a bond within the definition of that Act.

I would dismiss this appeal with costs.

KINDERSLEY, J.- I agree that the second appeal ought to be dismissed with costs. As to the consideration I should have had some doubt but for the very wide definition of the term "consideration" in the *Indian Contract Act*, Section 2, which is in these terms: "When at the desire of the promisor the promisee, *or any other person*, has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing something, such act, or abstinence, or promise, is called a consideration for the promise." It appears to me that the deed of gift in favour of the defendant and the contemporaneous agreement between the plaintiffs and the defendant may be regarded as one transaction, and that there was sufficient consideration for the defendant's promise within the meaning of the Contract Act.

* * * * *

Nawab Khwaja Muhammad Khan v. *Nawab Husaini Begam*

(1910) 37 I.A. 152

AMEER ALI, J. - The suit which has given rise to this appeal was brought by the plaintiff, a Mahomedan lady, against the defendant, her father-in-law, to recover arrears of certain allowance, called kharch-i-pandan, under the terms of an agreement executed by him on October 25, 1877, prior to and in consideration of her marriage with his son Rustam Ali Khan, both she and her future husband being minors at the time.

The agreement in question recites that the marriage was fixed for November 2, 1877, and that "therefore" the defendant declared of his own free will and accord that he "shall continue to pay Rs. 500 per month in perpetuity" to the plaintiff for "her betel-leaf expenses, from the date of the marriage, i.e. from the date of her reception," out of the income of certain properties therein specifically described, which he then proceeded to charge for the payment of the allowance.

Owing to the minority of the plaintiff, her "reception" into the conjugal domicile to which reference is made in the agreement does not appear to have taken place until 1883. The husband and wife lived together until 1896, when, owing to differences, she left her husband's home, and has since resided more or less continuously at Moradabad.

The defendant admitted the execution of the document on which the suit is brought, but disclaimed liability principally on two ground, namely, (1) that the plaintiff was no party to the agreement, and was consequently not entitled to maintain the action, and (2) that she had forfeited her right to the allowance thereunder by her misconduct and refusal to live with her husband.

Evidence of a sort was produced to establish the allegations of misconduct, but the Subordinate Judge considered that it was not "legally proved." In another place he expresses himself thus: "Although unchastity is not duly proved, yet I have no hesitation in holding that plaintiff's character is not free from suspicion." Their Lordships cannot help considering an opinion of this kind regarding a serious charge as unsatisfactory. Either the allegation of unchastity was established or it was not; if the evidence was not sufficient or not reliable, there was an end of the charge so far as the particular matter in issue was concerned, and it was hardly proper to give expression to what the judge calls "suspicion."

The Subordinate Judge, however, came to the conclusion that the plaintiff's refusal to live with her husband was satisfactorily proved, and, holding that on that ground she was not entitled to the allowance, he dismissed the suit.

The plaintiff thereupon appealed to the High Court, where the argument seems to have been confined solely to the question of the plaintiff's right to maintain the action, as the learned judges observe that neither side called their attention to the evidence on the record. They held that she had a clear right to sue under the agreement, and they accordingly reversed the order of the first Court and decreed the plaintiff's claim.

The defendant has appealed to His Majesty in Council, and two main objections have been urged on his behalf to the judgment and decree of the High Court.

First, it is contended, on the authority of ***Tweddle* v. *Atkinson*** [1 B. & S. 393], that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit, and that the rule of common law on the basis of which it was dismissed is not, in their Lordship's opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim.

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

It has, however, been urged with some force that the allowance for which the defendant made himself liable signifies money paid to a wife when she lives with her husband, that it is analogous in its nature to the English pin-money, over the application of which the husband has a control, and that, as the plaintiff has left her husband's home and refused to live with him, she has forfeited her right to it.

Kharch-i-pandan, which literally means "betel-box expenses," is a personal allowance, as their Lordships understand, to the wife customary among Mahomedan families of rank, especially in Upper India, fixed either before or after the marriage, and varying according to the means and position of the parties. When they are minors, as is frequently the case, the arrangement is made between the respective parents and guardians. Although there is some analogy between this allowance and the pin-money in the English system, it appears to stand on a different legal footing, arising from difference in social institutions. Pin-money, though meant for the personal expenses of the wife, has been described as "a fund which she may be made to spend during the coverture by the intercession and advice and at the instance of the husband." Their Lordships are not aware that any obligation of that nature is attached to the allowance called kharach-i-pandan. Ordinarily, of course, the money would be received and spent in the conjugal domicile, but the husband has hardly any control over the wife's application of the allowance, either in her adornment or in the consumption of the article from which it derives its name.

By the agreement on which the present suit is based the defendant binds himself unreservedly to pay to the plaintiff the fixed allowance; there is no condition that it should be paid only whilst the wife is living in the husband's home, or that his liability should cease whatever the circumstances under which she happens to leave it.

The only condition relates to the time when, and the circumstances under which, his liability would begin. That is fixed with her first entry into her husband's home, when, under the Mahomedan law, the respective matrimonial rights and obligations come into existence. The reason that no other reservation was made at the time is obvious. The plaintiff was closely related to the ruler of the native State of Rampur; and the defendant executed the

agreement in order to make a suitable provision for a lady of her position. The contingency that has since arisen could not have been contemplated by the defendant.

The plaintiff herself was examined as a witness for the defence. She states in her evidence that she has frequently been visited by her husband since she left his home. Neither he nor the defendant had come forward to contradict her statements. Nor does any step appear to have been taken on the husband's part to sue for restitution of conjugal rights, which the civil law of India permits. On the whole their Lordships are of opinion that the judgment and decree of the High Court are correct and ought to be affirmed.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed.

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CAPACITY TO CONTRACT

Mohori Bibee v. *Dhurmodas Ghose*

(1903) 30 I.A. 114

SIR FORD NORTH - On July 20, 1895, the respondent, Dharmodas Ghose, executed a mortgage in favour of Brahmo Dutt, a money-lender carrying on business at Calcutta and elsewhere, to secure the repayment of Rs. 20,000 at 12 per cent interest on some houses belonging to the respondent. The amount actually advanced is in dispute. At that time the respondent was an infant; and he did not attain twenty-one until the month of September following. Throughout the transaction Brahmo Dutt was absent from Calcutta, and the whole business was carried through for him by his attorney, Kedar Nath Mitter, the money being found by Dedraj, the local manager of Brahmo Dutt. While considering the proposed advance, Kedar Nath received information that the respondent was still a minor; and on July 15, 1895, the following letter was written and sent to him by Bhupendra Nath Bose, an attorney:

> "Dear Sir, I am instructed by S.M. Jogendranundinee Dasi, the mother and guardian appointed by the High Court under its letters patent of the person and property of Babu Dharmodas Ghose, that a mortgage of the properties of the said Babu Dharmodas Ghose is being prepared from your office. I am instructed to give you notice, which I hereby do, that the said Babu Dharmodas Ghose is still an infant under the age of twenty-one, and any one lending money to him will do so at his own risk and peril."

Kedar Nath positively denied the receipt of any such letter; but the Court of first instance and the Appellate Court both held that he did personally receive it on July 15; and the evidence is conclusive upon the point.

On the day on which the mortgage was executed, Kedar Nath got the infant to sign a long declaration, which he had prepared for him, containing a statement that he came of age on June 17; and that Babu Dedraj and Brahmo Dutt, relying on his assurance that he had attained his majority, had agreed to advance to him Rs. 20,000. There is conflicting evidence as to the time when and circumstances under which that declaration was obtained; but it is unnecessary to go into this, as both Courts below have held that Kedar Nath did not act upon, and was not misled by, that statement, and was fully aware at the time the mortgage was executed of the minority of the respondent.

On September 10, 1895, the infant, by his mother and guardian as next friend, commenced this action againt Brahmo Dutt, stating that he was under age when he executed the mortgage, and praying for a declaration that it was void and inoperative, and should be delivered up to be cancelled.

The defendant, Brahmo Dutt, put in a defence that the plaintiff was of full age when he executed the mortgage; that neither he nor Kedar Nath had any notice that the plaintiff was then an infant, that, even if he was a minor, the declaration as to his age was fraudulently made to deceive the defendant, and disentitled the plaintiff to any relief; and that in any case

the Court should not grant the plaintiff any relief without making him repay the moneys advanced.

Jenkins J., who presided in the Court of first instance, found the facts as above stated, and granted the relief asked. And the Appellate Court dismissed the appeal from him. Subsequently to the institution of the present appeal Brahmo Dutt died, and this appeal has been prosecuted by his executors.

The first of the appellants' reasons in support of the present appeal is that the Courts below were wrong in holding that the knowledge of Kedar Nath must be imputed to the defendant. In their Lordships' opinion they were obviously right. The defendant was absent from Calcutta, and personally did not take any part in the transaction. It was entirely in charge of Kedar Nath, whose full authority to act as he did is not disputed. He stood in the place of the defendant for the purposes of this mortgage; and his acts and knowledge were the acts and knowledge of his principal. It was contended that Dedraj, the defendant's gomastha, was the real representative in Calcutta of the defendant, and that he had no knowledge of the plaintiff's minority. But there is nothing in this. He no doubt made the advance out of the defendant's funds. But he says in his evidence that "Kedar Babu was acting on behalf of my master from the beginning in this matter;" and a little further on he adds that before the registration of the mortgage he did not communicate with his master on the subject of the minority. But he did know that there was a question raised as to the plaintiff's age; and he says, "I left all matters regarding the minority in the hands of Kedar Babu."

The appellants' counsel contended that the plaintiff is estopped by s. 115 of the Indian Evidence Act (I. of 1872) from setting up that he was an infant when he executed the mortgage. The section is as follows: "Estoppel. When one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy: ***Nelson* v. *Stocker*** [1 De G. & J. 458]. The same principle is recognised in the explanation to s. 19 of the Indian Contract Act, in which it is said that a fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

The point most pressed, however, on behalf of the appellants was that the Courts ought not to have decreed in the respondent's favour without ordering him to repay to the appellants the sum of Rs. 10,500, said to have been paid to him as part of the consideration for the

mortgage. And in support of this contention s. 64 of the Contract Act (IX of 1872) was relied on:

Both Courts below held that they were bound by authority to treat the contracts of infants as voidable only, and not void; but that this section only refers to contracts made by persons competent to contract, and therefore not to infants.

The general current of decision in India certainly is that ever since the passing of the Indian Contract Act the contracts of infants are voidable only. This conclusion, however, has not been arrived at without vigourous protests by various judges from time to time; nor indeed without decisions to the contrary effect. Under these circumstances, their Lordships consider themselves at liberty to act on their own view of the law as declared by the Contract Act, and they have thought it right to have the case reargued before them upon this point. They do not consider it necessary to examine in detail the numerous decisions above referred to, as in their opinion the whole question turns upon what is the true construction of the Contract Act itself. It is necessary, therefore, to consider carefully the terms of that Act; but before doing so it may be convenient to refer to the *Transfer of Property Act* (IV of 1882), s. 7 of which provides that every person competent to contract and entitled to transferable property … is competent to transfer such property … in the circumstances, to the extent, and in the manner allowed and prescribed by any law for the time being in force. That is the Act under which the present mortgage was made, and it is merely dealing with persons competent to contract; and s. 4 of that Act provides that the chapters and sections of that Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. The present case, therefore, falls within the provisions of the latter Act.

Then, to turn to the Contract Act, s. 2 provides (e) Every promise and every set of promises, forming the consideration for each other, is an agreement. (g) An agreement not enforceable by law is said to be void. An agreement enforceable by law is a contract, (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract.

Sect. 10 provides: “All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

Then s. 11 is most important, as defining who are meant by “persons competent to contract;” it is as follows: “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Looking at these sections, their Lordships are satisfied that the Act makes it essential that all contracting parties should be “competent to contract,” and expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. This is clearly borne out by later sections in the Act. Sec. 68 provides that, “If a person incapable of entering into a contract, or any one 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.” It is beyond question

that an infant falls within the class of persons here referred to as incapable of entering into a contract; and it is clear from the Act that he is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a statutory claim is created against his property. Under ss. 183 and 184 no person under the age of majority can enjoy or be an agent. Again, under ss. 247 and 248, although a person under majority may be admitted to the benefits of a partnership, he cannot be made personally liable for any of its obligations; although he may on attaining majority accept those obligations if he thinks fit to do so. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are, therefore, of opinion that in the present case there is not any such voidable contract as is dealt with in s. 64.

A new point was raised here by the appellants' counsel, founded on s. 65 of the Contract Act, a section not referred to in the Courts below, or in the cases of he appellants or respondent. It is sufficient to say that this section, like s. 64, starts from the basis of there being an agreement or contract between competent parties, and has no application to a case in which there never was, and never could have been, any contract.

It was further argued that the preamble of the Act shewed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act, so far as it goes, is exhaustive and imperative, and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.

Another enactment relied upon as a reason why the mortgage money should be returned is s. 41 of the Specific Relief Act (I of 1877), which is as follows: "Sec. 41. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require." Sec. 38. provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised.

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Khan Gul v. *Lakha Singh*

AIR 1928 Lah. 609

DALIP SINGH, J. – Plaintiffs brought a suit for possession of half a square which had been sold to them by defendant 1 for Rs. 17,500 out of which Rs. 8,000 had been paid in cash before the Sub-Registrar and Rs. 9,500 was secured by a promissory note payable on demand from the plaintiffs. The plaintiffs alleged that defendant 1 had been duly paid Rs. 17,500 because the promissory note for Rs. 9,500 in his favour had been discharged by another promissory note executed by the plaintiff in favour of the defendant's brother-in-law Muhammad Hussain at the request and with the consent of the defendant, that the plaintiffs had paid Rs. 5,500 out of the Rs. 9,500 to Muhammad Hussain and were prepared to pay the balance. Defendant 1 had refused to deliver possession of the property and the plaintiffs prayed that possession of the property sold might be delivered to them, or, in the alternative, that a decree for Rs. 17,500, the consideration money, together with interest or damages arising from breach of contract at the rate of one per cent per mensem, amounting to Rs. 1,050, i.e., for Rs. 19,000, in all, might be passed against the other property of defendant 1.

Defendant 1 pleaded minority. Defendant 2, wife of defendant 1, pleaded minority of defendant 1, and also pleaded a prior gift by defendant 1. The trial Court decreed the suit for possession holding that defendant 1 had made a false representation that he was of full age to the plaintiffs and was therefore estopped from raising the plea of minority, following the authority of ***Wasinda Ram*** **v.** ***Sita Ram*** [(1920) 1 Lah. 389]. It also held that the consideration had been duly discharged by payment of Rs. 8,000 in cash and by substitution of the promissory note in favour of the defendant by one in favour of Muhammad Hussain and that Muhammad Hussain had realized Rs. 5,500 out of this sum from the plaintiffs. It also held that the gift to the wife was of no effect and was void ab initio. Defendants have appealed.

Their counsel has urged that the facts do not show that the plaintiffs were in any way deceived by any representation made by defendant 1. He relies on the evidence of Fakir Muhammad (P.W. 3) who states that Lakha Singh, one of the plaintiffs, had told the defendant that he (defendant) should state his age to be 19 at time of registration. There can be no doubt that the defendant stated his age to be 19 at the time of registration. Except the evidence of Fakir Muhammad there is no evidence to show us that the plaintiffs knew or were in a position to know what the age of the defendant was. The defendant had previously executed other mortgages and deals of gift in which he had represented himself to be 19. In one case he had obtained a medical certificate showing that he was over 19 years of age. He admits that he stated before the Sub-Registrar that he was 19 years of age because his cousin Muhammad Hussain had asked him to give his age as 19 years. We have no reason to suppose that the plaintiffs knew that this representation was false and we do not accept the evidence of Fakir Muhammad.

The question that arises then is whether a minor is estopped from pleading minority when he has made a false representation as to his age. ***Wasinda Ram*** **v.** ***Sita Ram*** is undoubtedly an authority for the proposition that he is so estopped. On the other hand, the Calcutta High Court in ***Dhurmo Dass Ghose*** v. ***Brahmo Dutt*** [(1899) 26 Cal. 381], held that S. 115,

Evidence Act, did not apply to minors. The case went before the Privy Council and is reported as ***Mohori Bibee* v. *Dharmodass Ghose*** [(1903) 30 I.A. 114] but the Privy Council expressly did not decide this point. In ***Levene* v. *Brougham*** [(1909) 25 T.L.R. 265] the Court of Appeal in England held that there could be no estoppel in such a case. It has been contended before us that S. 115, Evidence Act, governs the matter and the word "person" in it is wide enough to include minors. I find it difficult to follow this argument because it seems to me that in every honest dealing with a minor there is presumably a representation, expressed or implied, on the part of the minor that he is competent to contract. Therefore, if the doctrine of estoppel could be applied to the case of minors there would hardly be a case in which the doctrine would not apply and the protection given by the law to minors would practically be done away with. Further, I am unable to see how the force of a statute can be avoided by what after all is a law of procedure, namely, estoppel. For these reasons, I am quite clear that there can be no estoppel in such a case, but owing to the existence of the Division Bench ruling of this Court and the importance of the matter, I would prefer to refer the question to a Full Bench. Counsel for the appellants has cited ***Leslie Ltd.* v. *Sheill*** [(1914) 3 K.B. 607] and ***Mahomed Sydol Ariffin*** v. ***Yeohoo Gark*** [AIR 1916 P.C. 242] The latter ruling is a Privy Council ruling on an appeal from the Strait Settlements in which their Lordships approved of the doctrine laid down in ***Leslie Ltd.* v. *Sheill***. At first I was of opinion that this question was covered by the Privy Council ruling and that, therefore, there was no need to refer the matter to a Full Bench, but on carefully examining ***Leslie Ltd.* v. *Sheill***. I find that the question of estoppel was not decided in that case. That question was decided in the Court of appeal in ***Levene* v. *Brougham*** and was only referred to in ***Leslie Ltd.* v. *Sheill***. The question there was whether a suit would lie for money received by a minor where the contract for loan failed on the ground of being void by statute. The ruling of the Privy Council in ***Mohammed Syedol Ariffin* v. *Yeoh Ooi Gark*** [AIR 1916 P.C. 242] further is obiter on the point and therefore, though entitled to great respect, is not absolutely binding on us. I therefore consider that the question whether a minor who has made a false representation as to his age is estopped from pleading his minority should be referred to a Full Bench for decision.

The next point arising in this case is also a difficult one. As explained above the plaintiffs had pleaded in the alternative that they should get a decree for Rs.17,500 with interest or damages. Counsel for the appellants has contended on the authority of ***Leslie Ltd.* v. *Sheill*** that in such a case there could be no restitution by the minor. On considering ***Leslie Ltd.* v. *Sheill*** I am definitely of opinion that in spite of the doubt expressed as to the correctness of ***Birstow* v. *Eastman*** [(1794) 1 Esp. 174] in that case the case itself did not decide that ***Cowern* v. *Nield*** [(1912) 2 K.B. 419] was wrongly decided. That case is directly in point, whereas ***Leslie Ltd.* v. *Sheill*** is not directly in point, because, as pointed out in ***Leslie Ltd.* v. *Sheill*** the jurisdiction in equity to force the minor to make restitution was never clearly defined and all that ***Leslie Ltd.* v. *Sheill*** held was that the jurisdiction did not extend to repayment as distinguished from restitution. On general principles of justice it would seem to me monstrous that the minor should be able both to retain the property and the benefit which he derived by making false representations to parties as to his capacity to deal with the property. I would, therefore, be inclined to hold that there is jurisdiction in the Court to compel the minor to make restitution. It has been contended before us that the position alters when the minor is plaintiff or defendant. I am quite unable to accede to this argument which

is moreover not borne out by any authority cited to us. It seems to me that where a minor is plaintiff or defendant all that the Court in effect orders is, that it refuses to allow a certain plea to prevail except upon terms. If such a jurisdiction exists it seems to me wholly immaterial whether the minor is plaintiff or defendant and it would certainly be extremely anomalous that such a question should rest on the relative position of the parties as plaintiff and defendant. The question, however, is by no means free from difficulty and undoubtedly there are expressions in ***Leslie Ltd***. **v.** ***Sheill*** which would tend to show that their Lordships in that case disapproved of certain previous cases taking the more equitable view, if I may so call it, and, I, therefore, think, in view of the importance of the question that this matter also should be referred to the Full Bench. The question would be whether a party who, when a minor, has entered into a contract by means of false representation as to his age, can whether he be defendant or plaintiff in a subsequent littigation refuse to perform the contract and at the same time retain the benefit he may have derived therefrom.

If the Full Bench hold that the minor is bound to make restitution it will be for the Division Bench to decide on the evidence how much is due.

SHADI LAL, C.J. - The questions, which have been formulated for decision by the Full Bench, are in these terms :

(I) Whether a minor, who, by falsely representing himself to be a major, has induced a person to enter into a contract, is estopped from pleading his minority to avoid the contract.

(2) Whether a party, who, when a minor, has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuse to perform the contract and at the same time retain the benefit he may have derived therefrom.

As regards the minor's capacity to enter into a contract, there was some uncertainty prior to 1903 as to whether a minor's contract was void or voidable. But all doubt on the subject has been dispelled by the judgment of their Lordships of the Privy Council in ***Mohori Bibee*** **v.** ***Dharmodas Ghose***, which declares that a person who, by reason of infancy is, as laid down by S. 11, *Contract Act*, incompetent to contract, cannot make a contract within the meaning of the Act. The transaction entered cannot be recognized by law.

The question arises whether an infant is precluded by the rule of estoppel from showing the invalidity of a transaction of this description. Now, the doctrine of estoppel is embodied in S. 115, *Evidence Act*.

There is a conflict of judicial opinion as to whether an infant comes within the ambit of the section; the Bombay High Court holding that an infant is not excepted by the language of the section while the Calcutta High Court has adopted the opposite view: vide ***Dhurmo Dass Ghose*** **v.** ***Brahmo Datt***. In the latter Calcutta case Maclean, C.J., sought to get over the comprehensive language of S. 115 by holding that the term "person" in that section applies to "one who is of full age and competent to enter into a contract." It will be observed that the expression "person" is used twice in that section, and it is clear that if in the first portion of the section it means a person sui juris, it must have the same meaning when used again in the

same section. The interpretation placed upon the word "person" by the Calcutta High Court would, no doubt, help the minor in so far as he would be able to repel the plea of estoppel when it is urged against him; but he must, at the same time, forego the benefit accruing from the doctrine of estoppel and cannot invoke the plea for his own advantage. If the word "person" means only a person competent to enter into a contract, then the section cannot be used to the advantage of the minor any more than to his detriment; in other words the doctrine of estoppel, as enacted by S. 115, must be treated as non-existent in so far a person under disability is concerned.

That a minor cannot set up the plea of estoppel as against an adult is obviously an absurd result. Now, it is a cardinal rule governing the interpretation of statutes that when the language of the legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice. But I do not think that there is any ambiguity in the term "person". In construing statutes, and indeed all written instruments, it is the duty of the Court to adhere to the grammatical and ordinary sense of the words; and the expression "person", when used in its ordinary sense, includes every person whether sui juris or under a contractual disability. As pointed out above, the same word is used again in S. 115, and there can be no doubt that it cannot, in that connexion, bear any restricted meaning. Indeed the term "person" is to be found also in S. 116, which deals with the estoppel of a tenant as against his landlord, and in numerous other sections of the *Evidence Act*, e.g. Ss. 5, 8, 10, 112, 118, 122 and 139; and a perusal of those sections leaves no doubt that it is intended to include minors as well as other persons under disability.

I must, therefore, hold that the language of S. 115 is comprehensive enough to include a minor; and if the matter rested there, I would say that an infant, who has induced another person to deal with him by falsely representing himself as of full age, should not be allowed to deny the truth of his representation. But the rule of estoppel is a rule of evidence and must be read along with and subject to the provisions of other laws. The law of estoppel is a general law applicable to all persons, while the law of contract relating to capacity to enter into a contract is directed towards a special object; and it is well established principle that, when a general intention is expressed by the legislature, and also a particular intention, which is incompatible with the general one, particular intention is considered an exception to the general one: per Best, C.J. in ***Churchill* v. *Crease*** [5 Bing 177 (180)]. This rule applies whether the general and special provisions are contained in the same statute or different statutes. Now, when the law of contract lays down that a minor shall not be liable upon a contract entered into by him, he should not be made liable upon the same contract by virtue of the general rule of estoppel. I do not go so far and to say that the language of S. 115, would, if given its full scope, render absolutely nugatory the law declaring the incapacity of a minor to make a contract; for there may be instances in which a contract though entered into with a minor has not been induced by any misrepresentation made by him and no question of estoppel can arise in such cases. There can, however, be no doubt that the rule of estoppel would take away in many cases the protection which the legislature has deliberately created for the benefit of the minors, and would make them liable on a transaction which has no existence in the eye of the law. The Court should struggle against repugnancy and should

construe an enactment as far as possible in accordance with the terms of the other statute which it does not expressly modify or repeal.

Now, both the statutes can stand together, if we apply the general rule of estoppel, as enacted by S. 115, *Evidence Act*, subject to the special law imposing disability upon the contractual capacity of an infant. This construction which recognizes an exception to the general rule, avoids all repugnancy and does not lead to any absurdity or injustice.

It is to be observed that, so far as the English law is concerned, there is no authority for the proposition that a contract, which is void under the statute on the ground of infancy, can be enforced simply because it has been entered into on the faith of a false representation as to age which the minor is precluded from denying. In the case of ***Levene* v. *Brougham*** [(1909) 25 TLR 265], the plea of estoppel was raised against the minor but was rejected by the Court of appeal. It must be remembered that, as observed by their Lordships of the Privy Council in ***Sarat Chunder Dey* v. *Gopal Chunder Laha*** [(1893) 20 Cal. 296], S. 115, Evidence Act, has not enacted as law in India anything different from the law of England on the subject of estoppel and the English decisions are therefore, relevant to the discussion of the subject before us.

In India, the rule against the application of the doctrine of estoppel to a contract void on the ground of infancy has been adopted, not only by the Calcutta High Court, but also by the High Courts at Madras, Allahabad and Patna. A Division Bench of the Lahore High Court has, however, favoured the view taken by the Bombay High Court in ***Wasinda Ram* v. *Sita Ram*** [(920) 1 Lah. 359]. I am not aware of any judgment of the Privy Council which gives expression to the considered view of their Lordships on the subject. In the case of ***Mohoree Bibee* v. *Dharmodas Ghose***, which was an appeal from the judgment of the Calcutta High Court in ***Brahmo Datt* v. *Dhurmo Dass Ghose*** [(1899) 26 Cal. 381] their Lordships refrained from expressing their opinion and disposed of the question by making the following observations:

> The Courts below seem to have decided that this section (S. 115) does not apply to infants but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and isnot misled by the untrue statement.

Nor is there anything in the judgment in ***Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark*** [AIR 1916 PC 242], which can be treated even as an obiter dictum on the subject of estoppel. That case was heard by the Privy Council on an appeal from the Supreme Court of the Straits Settlements and dealt with the Strait Settlements Ordinance (3 of 1893), which is in similar terms to the Indian Evidence Act. It was sought to establish the liability of the infant for damages on the ground of a fraudulent statement, but their Lordships held that no fraud had been established. It is clear that no case of estoppel was either set up or decided in that case.

It will be seen from the foregoing discussion that not only the English law, but also the balance of the judicial authority in India, is decidedly in favour of the rule that where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract and,

though S. 115, *Evidence Act* is general in its terms, I consider for the reasons, which I have already given, that it must be read subject to the provisions of the *Contract Act*, declaring a transaction entered into by a minor to be void. My answer to the first question referred to us is, therefore, in the negative.

Coming now to the second question: I am clear that when a contract has been induced by a false representation made by an infant as to his age, he is liable neither on the contract nor in tort, if the tort is directly connected with the contract and is the means of effecting it and parcel of the same transaction: ***The Liverpool Adelphi Loan Association* v. *Fairthurst*** [(1854) 9 Ex. 422]. It is true that infancy does not constitute a valid defence to an action on tort, but the tort, which can sustain an action for damages must be independent of the contract and must not be another name for the breach of the contract. No person can evade the law conferring immunity upon an infant from performing a contractual obligation by converting the contract into a tort for the purpose of charging the infant. As observed by Byles, J., in ***Burnard* v. *Haggie*** [(1863) 32 L.J.C.P. 189], "one cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto."

The Court has to look at the substance, and not at the form, of the action; and if it finds that the action is in reality an action ex contractu but disguised as an action ex delicto, it would decline to enforce the claim. Indeed, it has been repeatedly held in England that when an infant has induced a person to contract with him by making a false statement that he was of full age, the infant is not answerable either for the breach of the contract or for damages arising from the tort committed by him.

But a false representation by an infant that he was of full age gives rise to an equitable liability. The Court, while relieving him from the consequences of the contract may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however, debatable: if the benefit acquired by him consists of money which is not earmarked, has the Court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former? The equitable jurisdiction is founded upon the desire of the Court to do justice to both the parties by restoring them to the status quo ante, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced.

The doctrine of restitution finds expression in S. 41, *Specific Relief Act*. Suppose, A, an infant, executes an instrument of mortgage in favour of B for Rs. 1,000 borrowed by B by making a false representation as to his age. This instrument is void, and S 39, which expressly applies, not only to a voidable but also to a void, instrument, allows A to move the Court to adjudge it to be void and order it to be delivered up and cancelled. Then comes S.41, by which it is provided that on adjudging the cancellation of the instrument the Court may require A, to whom such relief is granted, to make any compensation to B which justice may require. It is beyond question that under this section the Court has the discretion to impose terms upon A and to compel him to pay Rs. 1,000 as compensation to B. The statute nowhere says that pecuniary compensation should not be allowed, when the award thereof would be

tantamount to a repayment of the money borrowed on the strength of a void transaction. Indeed, the Courts in India have ordered the minor to refund the money received by him before allowing him to recover the property sold or mortgaged to the other party.

It is true that in the case of ***Mohori Bibee*** **v.** ***Dharmodas Ghose*** [(1903) 30 I.A. 114] restitution was not allowed, but the party, who had lent the money to the minor, was aware of the minority; and their Lordships of the Privy Council, while recognizing that S. 41 does give a discretion to the Court, did not see any reason for interfering with the discretion of the lower Courts which, on the facts of the case, had declined to direct the return of the money.

There are some English cases in which an infant repudiating a transaction was held liable in equity to return the benefit he had obtained by reason of his fraud. In ***re King Ex Parte, The Unity Joint Stock Mutual Banking Association*** [(1858) 3 De. G. & J. 63], a person who had lent money to an infant on the faith of a fraudulent representation as to age, was held entitled to prove in his bankruptcy. Lord Justice Knight Bruce, while deciding that in equity the liability of the borrower had been established, made the following pertinent observations:

> The question is whether in the view of a Court of equity, according to the sense of decisions not now to be disputed, he has made himself liable to pay the debt whatever, be his liability or nonliability at law. In my opinion we are compelled to say that he has.

Cowern **v.** ***Nield*** [(1912) 2 K.B. 419] was a case in which it was decided that an infant trader, who had entered into a contract for the sale of goods and failed to deliver them after receiving their price, was not liable on the contract, but that if the plaintiff can prove that the defendant obtained his money by fraud, the action can be maintained. The Court of appeal accordingly ordered a new trial: in order that the plaintiff may have an opportunity of proving if he can, that his money was obtained from him by the defendant by fraud.

In ***Stocke*** **v.** ***Wilson*** [(1918) K.B. 235] an infant, who had obtained furniture from the plaintiff by falsely stating himself to be of age, and had sold part of it for £ 30 was directed to pay this amount as part of the relief granted, to the plaintiff.

A different view was, however, taken by the Court of appeal in ***R. Leslie Ltd.*** **v.** ***Sheill*** [(1914) 3 K.B. 607]. In that case an action for the recovery of advances made to an infant on the faith of his fraudulent representation as to his age was dismissed, because the cause of action was held in substance ex contractu. The learned Judges of the Court of appeal distinguished the judgment in ***The Unity Joint Stock Mutual Banking Association*** [(1958) 3 De. G & J 63] on the ground that it expressed the law in bankruptcy and did not lay down a doctrine of general application. With all respect, I am unable to follow the distinction. Either the liability to return the benefit obtained by fraud exists or it does not exist. If it does not, then the mere fact that the quondam infant has been subsequently adjudged a bankrupt cannot bring it into existence. If, on the other hand, the infant is in equity liable to return his ill-gotten gains his liability holds good, even if he is not subsequently adjudged to be an insolvent. It must be remembered that the relief springs, not from the circumstance that the borrower is adjudicated a bankrupt, which may be a pure accident, but from the rule of equity that a person should not be allowed to take advantage of his own fraud. It would be sheer injustice if an infant should retain, not only the property which he has agreed to sell or

mortgage, but also the money which he has obtained by perpetrating fraud. As stated by Lord Kenyon in ***Jennings* v. *Rundall*** [(1799) 8.T.R. 335], the protection given by law to the infant "was to be used as a shield and not as a sword." It must be remembered that, while in India all contracts made by an infant are void, there is no such general rule in England. For instance, a contract for necessaries is not affected by the *Infants Relief Act*, 1874, and can be validly entered into by an infant. There should, therefore, be greater scope in India than in England for the application of the equitable doctrine of restitution.

It is, however, argued that this jurisdiction can be exercised only when the minor invokes the aid of the Court as a plaintiff. If he asks the Court to cancel a transaction brought about by his own fraud, he cannot complain if the Court does justice to both the parties; and, while granting him the relief the Court compels him, at the same time, to return the advantage which he has acquired in pursuance of the void transaction. But if the minor happens to occupy the position of a defendant in an action involving the cancellation of the transaction of the above description, he should not, it is urged, be required to make restitution.

It is difficult to understand why the granting of an equitable remedy should depend upon a mere accident, namely, whether it is the minor or his adversary who has taken the initiative in bringing the transaction before the Court. The material circumstances in both the cases are exactly the same. A contract has been entered into with an infant and, as it is an invalid transaction, it must be cancelled. The Court, however, finds that the infant has, by practising fraud upon the opposite party, received property or money; and that justice requires that he should not retain the benefit derived by him from a transaction which has been declared to be ineffectual against him. The transaction has been wiped out. It is only fair that both the parties should revert to their original position. These considerations are, in no way, affected by the circumstance that one party and not the other, has moved the Court in the first instance. There is neither principle nor justice which would warrant a discrimination.

The equitable jurisdiction of the Court to other restitution rests purely upon the principle of justice, and that principle is no more applicable to a case in which he is a defendant. But when we come to the case law, we find it in an unsatisfactory state. The decisions of the High Courts in India show that when the minor succeeds in an action brought by him, he is ordinarily required to restore the benefit obtained by him by committing fraud. The same unanimity is not, however, found in cases in which he occupies the role of a defendant. In some cases of this character restitution has been allowed, e.g. ***Saral Chand Mitter* v. *Mohun Bibi*** [(1898) 25 Cal. 371], but there are several cases in which relief has not been granted against frauds committed by minors when they were defendants. The language of Ss. 39 and 41, *Specific Relief Act*, no doubt shows that the jurisdiction conferred thereby is to be exercised when the minor himself invokes the aid of the Court. The doctrine of restitution is not, however, confined to the cases covered by that section. That doctrine rests upon the salutary principle that an infant cannot be allowed by a Court of equity to take advantage of his own fraud. It is possible that, though the Court ordinarily imposes terms upon an infant guilty of fraud if he seeks its aid as a plaintiff it may decline to exercise its equitable jurisdiction if he happens to be a defendant. All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should not be granted, will consider, along with other circumstances of the case, the fact that the infant is a

defendant and not a plaintiff in the case. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted in a case where the infant happens to be a defendant.

No such distinction seems to have been drawn in the English cases. Indeed, ***Stocks* v. *Wilson*** [(1913) K.B. 235] was a case in which the infant was the defendant, and yet he was held liable to refund to the plaintiff the price of the furniture received from the latter. Similarly in ***Cowern* v. *Nield*** [(1912) 2 K.B. 419] the action was brought against the infant but it was never suggested that the circumstance of his being a defendant should make any difference in his liability.

The exact form which the relief should take must depend upon the peculiar circumstances of each case, but the contract or any stipulation therein should never be enforced. The remedy by way of restitution may sometimes involve the payment of a sum of money equal to that borrowed under the void contract. The grant of such relief is not, however, an enforcement of the contract, but a restoration of the state of affairs as they existed before the formation of the contract. The Court, while giving this relief, has not to look at the contract or to give effect to any of the stipulations contained therein. Indeed, the relief is granted, not because there is a contract which should be enforced, but because the transaction being void does not exist and the parties should revert to the condition in which they were before the transaction. This is not a performance of the contract but a negation of it. For example, the contract may provide for the payment of interest at a certain rate, but the Court does not give effect to such stipulation or to any other term of the contract. The defrauded party gets, not the remedy on the contract but the relief in equity against fraud. The mere fact that the result of granting the relief is similar to that flowing from the performance of one or more of the terms of the contract cannot constitute an adequate ground for refusing the relief, if the Court considers that justice requires that it should be granted. As stated by Knight Bruce, V.C., in ***Stikeman* v. *Dawson*** [(1881) 1 De. G. & Sm. 90] in what cases in particular a Court of "equity will thus exert itself is not easy to determine." If the infant has obtained property by fraud the Court will require him to restore it to its owner. In other cases, his estate or he, after attaining majority, may be held liable for the return of the return of the pecuniary advantage acquired by him by fraud.

For the aforesaid reasons my answer to the second question is that an infant though not liable under the contract, may in equity, be required to return the benefit he has received by making a false representation as to his age.

* * * * *

Ajudhia Prasad v. *Chandan Lal*

AIR 1937 All. 610

SULAIMAN, C.J. – This is a second appeal arising out of a suit for sale on the basis of a mortgage deed dated 15th October 1925 executed by the defendants in favour of the plaintiffs. The defendants pleaded that they were minors at the time of the mortgage deed, a certificated guardian having been appointed for them, and also pleaded that there was no necessity for contracting the debt. In the rejoinder the plaintiffs denied that the defendants were minors and also asserted that the defendants were liable to pay the amount under S. 68, Contract Act. The issues framed by the trial Court related to the minority of the defendants, the object of the debt and its proper attestation and consideration. The trial Court found that the defendants were more than 18 years of age but under 21 years, and that there was no evidence of representation either by the defendants or their father Sital Prasad. The Court held that the plaintiffs could not recover the amount under S. 68, Contract Act. The lower appellate Court held that the defendants were in fact minors, being under 21 years of age, and also held that the marriage expenses for which the money was said to have been advanced were not "necessaries," and therefore, S. 68 had no application. But it held that the respondents and their father not only concealed the fact that there was already a guardian appointed for the minors, but the father even went to the length of declaring before the Sub-Registrar that his younger son was over 18, and that the dishonest suppression of the fact that the executants were under his own guardianship indicated to the plaintiffs that they were dealing with persons competent to contract, and then remarked: "Thus in my opinion there was a fraudulent misrepresentation made by or on behalf of the respondents."

Following the ruling of the Full Bench of the Lahore High Court in ***Khan Gul* v. *Lakkha Singh***, [AIR 1928 Lah 609] it decreed the claim for the recovery of the amount with interest at the contractual rate and future interest and in default for sale of the mortgaged property. Two of us before whom this appeal came up for disposal have referred the following question of law to this Full Bench:

Where money has been borrowed by two minors under a mortgage deed at a time when they were minors, more than 18 years but less than 21 years of age, under a fraudulent concealment of the fact that the executants were minors because a guardian had been appointed for them under the Guardians and Wards Act, can the mortgage in a suit brought against them get a decree for the principal money under S. 65, Contract Act or under any other equitable principle, and can he also get a decree for sale of the mortgaged property.

In the meantime the Bench also called for a finding on another point which will be disposed of by the Division Bench separately. The majority of the learned Judges of the Lahore Full Bench based their decision on a supposed rule of equity and not on any particular section of any Act. But in the course of the arguments before us the plaintiff's claim has been based on various alternative grounds which it may be convenient to take up seriatim: It is first argued that the case is covered by S. 65, *Contract Act*. No doubt the *Contract Act* draws a distinction between an agreement and a contract. Under S. 2(g) an agreement not enforceable by law is void, while under (h) an agreement enforceable by law is a contract. S. 65 deals with agreements discovered to be void and contracts which become void. A possible view

might have been that S. 65 applies even to minors and that they can in every case, whether there is mistake, misrepresentation, fraud or not be ordered to restore any advantage that has been received or make compensation for it to the person from whom the minors received it. This would result in a suit being decreed for recovery of money received by a minor on a bond or promissory note even though the contract itself is void. The other view is that the Contract Act deals with agreements which may be void on the ground, for instance, that they are opposed to public policy or prohibited by law or they may be void because one of the parties thereto is not competent to contract, and S. 65 was really intended to deal with agreements which from their very nature were void and were either discovered to be void later on became void, and not agreements made by persons who were altogether incompetent to enter into an agreement, and the agreement was therefore a nullity from the very beginning. There is no section which in so many terms says that an agreement by a minor is void. Indeed, it was held in some earlier cases that it was only voidable: (See ***Saral Chand Mitter* v. *Mohun Bibi*** [(1898) 25 Cal 371 at p. 385)].

The question directly arose before their Lordships of the Privy Council in the leading case in ***Mohori Bibee* v. *Dharmodas Ghose*** [(1903) 30 Cal. 539]. In that case the plaintiff had brought a suit for a declaration through his next friend that a mortgage deed executed by him was void and inoperative and should be cancelled because he was a minor at the time of its execution. The plaintiff had attained the age of 18 years but had not attained the age of 21 and a certificated guardian had been appointed for him. The defendant had taken a long declaration in writing from the plaintiff as to his age and had advanced a large sum of money to him on that assurance. The defendant's agent Kedar Nath was aware of the fact that the minor was under 21 years of age but apparently the mortgagee himself was personally not. Their Lordships first held that the knowledge of the agent must be imputed to the defendant and then repelled the contention that the plaintiff minor was estopped by S. 115, *Evidence Act*, from setting up his minority on the ground that the defendant must be deemed to have known the real facts and so was not misled by the untrue statement. The point was next pressed before their Lordships of the Privy Council that before decreeing the plaintiff's claim he should be ordered to repay to the defendant the sum which had been paid to him. Their Lordships accordingly ordered that this point should be re-argued before them. It was on this account that their Lordships took up the consideration of S. 64, *Contract Act*, and after examination of Ss. 2, 10 and 11 held that the *Contract Act* makes it essential that all contracting parties should be competent to contract and that a person who by reason of his infancy is incompetent to contract cannot make a contract within the meaning of the Act. Their Lordships then referred to S. 68, *Contract Act*, and pointed out that under the Indian Law even for the necessaries supplied to a minor he is not made personally liable for them, but that the only statutory right that is created is against his property. Their Lordships also examined Ss. 183, 184, 247 and 248 in order to emphasize the position of a minor and then remarked:

The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant. Their Lordships are therefore of the opinion that in the present case there is not any such voidable contract as is dealt with in S. 64.

Their Lordships distinctly held that the agreement made by a minor was void and not only voidable, thereby overruling the previous rulings of the Calcutta High Court. The learned counsel for the defendants then relied on S. 65, *Contract Act*. With regard to this plea their Lordships made the following observation:

"A new point was raised here by the appellants' counsel founded on S. 65, *Contract Act*, a section not referred to in the Courts below, or in the cases of the appellants or respondent. It is sufficient to say that this section, like S. 64, starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was and never could have been any contract.

It was further argued that the Preamble of the Act showed that the Act was only intended to define and amend certain parts of the law relating to contracts, and that contracts by infants were left outside the Act. If this were so, it does not appear how it would help the appellants. But in their Lordships' opinion the Act so far as it goes is exhaustive and imperative; and does provide in clear language that an infant is not a person competent to bind himself by a contract of this description.

Their Lordships then proceeded to consider Ss. 41 and 38, *Specific Relief Act*. As the minor himself was the plaintiff, their Lordships remarked that these sections no doubt gave a discretion to the Court, but the Courts below in the exercise of their discretion had come to the conclusion that as the defendant had knowledge of the infancy, justice did not require an order for the return of the money. Their Lordships saw no reason for interfering with the discretion so exercised. Their Lordships then took up the rule of equity that a person who seeks equity must do equity, and referred to the decision of the Court of appeal in ***Thurstan* v. *Nottingham Permanent Benefit Building Society*** (1902) 1 Ch. 1]. There the Society had advanced to a female infant the purchase money of some property she purchased and had also agreed to make her advances to complete certain buildings thereon. On attainment of majority she brought an action to have the mortgage declared void. It was held that:

> The mortgage must be declared void and that the Society was not entitled to any repayment of the advances.

In that particular case, however, the Society had in fact obtained possession of the building; it was, therefore, held that the Society was entitled to have a lien upon the property. Their Lordships quoted the dictum of Lord Romer:

> The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which, as against that person the Legislature has declared to be void.

This case meets many of the points which have been urged on behalf of the plaintiffs. Their Lordships distinctly held that both Ss. 64 and 65 presuppose the existence of a contract within the meaning of the Act which is either void or becomes void, and that they have no application to the case where one of the parties was incompetent by reason of his minority. As regards S. 65, their Lordships distinctly said:

> This section (S. 65) starts from the basis of there being an agreement or contract between competent parties; and has no application to a case in which there never was, and never could have been, any contract.

Where, therefore, one of the parties is a minor and is incapable of contracting so that there never is and never be a contract, S. 65 can have no application to such a case as that section starts from the basis of there being an agreement of contract between competent parties. This is as clear a pronouncement as can be, and it is impossible to whittle down its effect either by suggesting that it was not necessary in that case to go into that question or that their Lordships meant to refer to only a portion of S. 65, namely, "where the contract becomes void" and not to the portion "where the agreement is discovered to be void," in laying down its inapplicability. The clear rule laid down is that neither S. 64 nor S. 65 deals with a case where a party is incompetent to enter into a contract at all, and that in such a case, therefore, there would be no question of ordering him to restore the advantage which he has received or to make compensation for what he has received.

The rule so laid down has, of course, been followed unanimously by all the High Courts in India for the last 35 years. The learned counsel for the respondents has not been able to show a single case of any High Court in India where S. 65 has been applied against a minor and a decree passed against him when he is a defendant on the ground that his contract had been void. Indeed, if such a view were to prevail, the result would be that all agreements by minors would have to be enforced indirectly against them, no matter whether there had been any mistake, misrepresentation or fraud or not; and a decree passed for restoration of the money advanced to a minor would be almost the enforcement of his liability to pay. And the decree would have to be a personal decree. This would amount to nullifying the effect of the protection which the Legislature has given to minors. It would make a minor personally liable for restoration of the advantage and payment of compensation, although S. 68, which provides for the special case of liability for necessaries, confines such liability to the minor's property and exempts his person. If we were to enforce directly the supposed liability of the minor to restore the advantage, a wide door would be opened for mischief, and persons would be free to deal with minors with the full confidence that even if the worst comes to the worst, they would get back full compensation for what they were risking. Such an interpretation of the section would involve drastic consequences, which could not have been the intention of the Legislature. It may be noted that the Contract Act has been amended since 1923 from time to time and various amendments have been introduced. The Legislature must be deemed to have been aware of the interpretation of S. 65 by the Lordships of the Privy Council, which was followed loyally and consistently by all the High Courts in India. The fact that it has not thought fit to amend the section is an indication that the Legislature has seen nothing in this interpretation to disapprove of. Even the learned Judges of Lahore in the Full Bench case [***Khan Gul* v. *Lakha Singh***], which is the sheet anchor of the plaintiffs, did not think it proper to rely on S. 65 of the Act, although they took pains to discover a ground for decreeing the claim. Indeed it appears that the learned counsel at the Bar did not even venture to urge that S. 65 was applicable.

In ***Kamta Prasad* v. *Sheo Gopal Lal*** [(1904) 96 All. 342], a Bench of this Court following the ruling in ***Mohori Bibee*** case held that Ss. 64 and 65, *Contract Act*, apply only

to contracts between competent parties and are not applicable to a case where there is not and could not have been any contract at all. There too, in the absence of any material to show that justice required the return of the amount, the learned Judges did not think it fit to impose any such condition on the plaintiff who had been a minor as could have been done under S. 41, *Specific Relief Act*. In ***Kanhai Lal* v. *Babu Ram*** [(1911) 8 ALJ 1058], a Bench of this Court held that Ss. 64 and 65, *Contract Act*, did not apply nor did S. 41, *Specific Relief Act*, apply to a case where the suit was brought against a defendant minor on a promissory note executed by him, although he had misrepresented his age to the plaintiff.

In ***Radhey Shiam* v. *Bihari Lal*** [AIR 1919 All 453], it was held that a minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud and the English case in ***Lesley Ltd.* v. *Shiell*** [(1914) 3 K.B. 607] was followed. The learned Judges agreed with the observations made in ***Lesley case***, which had been approved by their Lordships of the Privy Council, but they considered it fair to add (lest it be supposed that their decision conveyed any reflection upon the defendant) that no fraud had been really alleged or proved. That observation which was made to clear the character of the defendant did not in any way detract from the value of the ruling which was given. In ***Bindeshri Bakhsh Singh* v. *Chandika Prasad***, [AIR 1927 All 242], it was held by a Division Bench of this Court that a person who had executed a bond whilst a minor could not, unless he had attained majority, by executing a second bond of similar purport, ratify or confirm the former bond because the minor's contract was void. The case of ***Gregson* v. *Raja Sri Sri Aditya Deb*** [(1839) IT Cal. 223], which was a case of disqualified proprietor whose transactions were voidable, was distinguished. In view of these authorities it is impossible to hold that S. 65 can be availed of by the plaintiffs against the defendants. The second ground urged is that there is some sort of estoppel against the minors in view of the appellate Court's guarded finding that there was a fraudulent representation made by or on behalf of the defendants. But when the contract itself was void the plea of estoppel must fail. No estoppel can be pleaded against a statute. If the Contract Act declares that the contract by a minor is void nothing can prevent the minor from pleading that such a contract is void on the ground of his minority. In *Mohori Bibee's case*, it was not necessary for their Lordships to decide the question of estoppel, as there could be none when the defendant had been constructively aware of the minority. But their Lordships, as already pointed out, quoted the remark of Romer, L.J. that a Court of equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which as against that person the Legislature has declared to be void.

On no other ground could the plaintiff succeed in that case. The rule of equity that can be applied are well-recognized rules which have been accepted in England. It is hardly open to an Indian Court to invent a new rule of equity for the first time contrary to the principles of the English law. If the law in England is clear and there is no statutory enactment to the contrary in India, one should hesitate to introduce any supposed rule of equity in conflict with that law. In ***Gaurishankar Balmukund* v. *Chinnumiya***, [AIR 1918 PC 168], a judgment-debtor had executed a mortgage of some property during the period of the Collector's management when he had no power to make the mortgage under S. 325-A, Civil P.C. (Act 14

of 1882). Their Lordships observed with regard to the argument that the mortgage was inoperative in respect of the residue as follows:

> The limitation suggested is that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's regime had ended. It is a fact that the Collector's regime had now ended, but it is also the fact that pending his regime, namely on 22nd July 1892, the mortgage which is now founded upon was granted.

Although the regime had ended and the incompetency had ceased to exist, their Lordships held:

> In short the sole point in this appeal is whether a declaration by statute that a judgment-debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense which the words imply.

Their Lordships dismissed the plaintiff's appeal and did not give him any compensation. Cases like ***Jagar Nath Singh* v. *Lalta Prasad*** [(1909) 31 All. 21], where the plaintiff minor himself seeks relief for cancellation of a document or rescission of a contract are of course to be distinguished because there he is seeking equity and must do equity. In such cases Courts have always imposed the condition upon him to restore the benefit. The case in ***Harnath Kunwar* v. *Indar Bahadur Singh*** [AIR 1922 PC 403] is easily distinguishable, as that was a case of a transfer of an expectancy and was therefore not a saleable property under S. 6, T.P. Act. It was not a case where the transferor was incompetent by reason of minority from transferring it, but was one where the transfer was inoperative because he had no interest capable of transfer. S. 65, Contract Act, therefore clearly applies to such a case, as no question of incompetency on the ground of minority at all arose. Similarly ***Gregson* v. *Raja Sri Sri Aditya Deb*** [(1889) 17 I.A. 22] was a case of a disqualified proprietor who after having emerged from a state of disability took up and carried on transactions while he was under disability in such a way as to bind himself to the whole. The defendant had done that and more than that, for not only had he taken, and retained, the benefit of the plaintiff's payment but he had afterwards exacted from the plaintiff a part of the consideration which was to move from him. It was on those findings that their Lordships held that the defendant was bound by the contract (p. 231).

The majority of the learned Judges in the Full Bench case, ***Khan* Gul v. *Lakkha Singh*** of the Lahore High Court (supra) have based the decision exclusively on principles of equity. Sir Shadi Lal, C.J. conceded that the transaction entered into by the minor was absolutely void and could not be recognized by law as had been laid down in ***Mohori Bibee*** *case*. The learned Chief Justice considered that in ***Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark***, [(1916) 2 AC 575] there was nothing which can even be treated as an obiter dictum on the subject of estoppel and that as their Lordships had held that no fraud had been established, it was clear that no case of estoppel was either set up or decided in that case. With great respect, the learned Chief Justice apparently omitted to note that their Lordships of the Privy Council had expressed their clear approval of the ruling in ***Lesley*** *case* and laid down that a case of fraud would fail. The further finding that no fraud had been established was by way of an addition obviously to clear up the defendant's character. The rule laid down by their Lordships cannot be disposed of on the supposition that the question did not arise as no fraud had been

established. The learned Chief Justice conceded that when a contract had been induced by a false representation made by an infant as to his age, he was liable neither on the contract nor in tort because tort which can sustain an action for damages must be independent of the contract and no person can evade the law conferring immunity upon an infant by converting the contract into a tort for the purpose of charging the infant. Where an action in reality is an action *ex contractu* but disguised as an action *ex delicto*, it cannot be enforced. The learned Chief Justice considered several English cases which had been decided before ***Lesley*** case. But the decision of the Court of Appeal should be considered to be the latest pronouncement.

The learned Chief Justice remarked that he was unable to follow the distinction pointed out in ***Lesley*** *case* and thought that there was no real difference between restoring property and refunding money, except that the property can be identified, but cash cannot be traced. That there is a clear difference is well recognized in England. When a contract of transfer of property is void, and such property can be traced, the property belongs to the promisee and can be followed. There is every equity in his favour for restoring the property to him. But where the property is not traceable and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void. The distinction is too obvious to be ignored. The learned Chief Justice has distinguished the case of ***Mohori Bibee*** **v.** ***Dharmodas Ghose***, where restitution was not allowed on the ground that the party who had lent the money to the minor was aware of the minority. But that part of the judgment of their Lordships was with reference to a claim by the minor under the Specific Relief Act, in which case the Court would have a discretion to impose terms before granting the decree. It would absolutely have no application to the converse case where the defendant is being sued and is not himself asking for any relief. I regret I am unable to appreciate the applicability of the remark of Lord Kenyon quoted by the learned Chief Justice that the protection given by law to the infant "was to be used as a shield and not as a sword." Surely when the defendant is being sued and sets up the plea of minority, he is not using his minority as a sword, but is merely using it as a shield. I am unable to agree that because such a defence could deprive a creditor of his money, the defendant infant is using his minority as a sword.

In the same way I am, with great respect, quite unable to agree with the view propounded in that case that the equitable jurisdiction of the Court to order restitution is no more applicable to a case to which the minor is a plaintiff than to an action in which he is a defendant; apparently the entire basis of the judgment is that as there is authority for imposing conditions on a minor to refund the consideration when he is suing as plaintiff for the rescission or cancellation of his void contract, there is an equal justification for passing a decree for money against him when he is being sued by his creditor, though he is a defendant. With utmost respect, I would say that such a view would be contrary to the great preponderance of authority both in England and in India and would ignore the well-recognized distinction between the position of a minor when suing as a plaintiff and when he is being sued as a defendant. Tek Chand, J., also held that the minor is not estopped from pleading his minority in avoidance of the contract, but on the other question he agreed with the learned Chief Justice. The learned Judge conceded that there are dicta in several English decisions that this jurisdiction to make restitution *in integrum* is limited to those cases only in

which it is possible to compel the minor to restore the property in specie which he had obtained by fraud, and that the Courts, while holding a contract to be void, cannot order him to refund the money which he has received under it. He has also conceded that Ss. 39 and 41, Specific Relief Act, relate to those cases only in which the minor is the plaintiff, and ultimately concluded that there was no justification for making a distinction between the cases where the minor is the plaintiff and where he is the defendant. Two other learned Judges merely agreed with the learned Chief Justice. Harrison, J. delivered a dissenting judgment and pointed out that ***Cowern* v. *Neild*** [(1912) 2 K.B. 419] is authority for the proposition that unless and until the fraud can be dissociated from the contract, the plaintiff's suit must fail. He quoted the remarks made by Lord Sumner in ***Lesley*** case:

> "It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through."

The learned Judge rightly pointed out that S. 41, *Specific Relief Act*, had no application because in a suit against an infant there is no question of the cancellation of an instrument and when the minor is a plaintiff, there is a well-known principle that he who seeks equity must do equity, and therefore held that no suit of this nature, being in its essence contractual, can lead to an order for restitution by the infant on the ground of his having dishonestly induced the plaintiff to contract with him and to pay him money. The view of the learned dissenting Judge is in accordance with the opinions expressed in numerous cases. To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor against him under the cloak of equitable doctrine.

Lastly it has been suggested that the mortgage transaction may be upheld under S. 43, *T.P. Act*, particularly because that section has been amended and the words "fraudulently or" have been added before the words "erroneously represents." But the section can have no application to a case where there has been no transfer at all. In the first place, it is doubtful whether the words "authorized to transfer" can mean "competent to transfer". The section refers to "transfer" because it says "such transfer shall…. Operate," which would imply that there must be a transfer and not a void transaction. In any case, it is quite obvious that the section refers to a transfer made by an unauthorized person who subsequently acquires interest in the property transferred. A minor, though he may not be competent to transfer his property, possesses an interest in his property, which may be transferred by his guardian under certain circumstances. When he attains majority he does not subsequently acquire any interest in his property; the interest has remained vested in him all along. The section, therefore, can have no application to the case where a minor has made a mortgage during his minority and a suit is brought to enforce the mortgage against him after he has attained majority. The section is based on the principle of estoppel, which cannot be pleaded against a statute so as to prejudice a minor who enjoys the protection of the law. It was observed in ***In re Stapleford Colliery Co.*** [(1880) 14 Ch D 432 at p. 441] by Bacon, V.C.:

> But the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter parties, and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.

It follows that the mortgage deed cannot be enforced on any such ground. I would allow the appeal and dismiss the suit.

* * * * *

FREE CONSENT

Raghunath Prasad v. *Sarju Prasad*

(1923) 51 I.A. 101

LORD SHAW OF DUNFERMLINE: This is an appeal from a decree, dated November 9, 1920, of the High Court of Judicature at Patna, which varied a decree, dated September 25, 1917, of the Subordinate Judge of Arrah.

The suit is for recovery of the amount of principal and interest due by the appellant to the respondents (the plaintifis) under a mortgage of date May 27, 1910. The Subordinate Judge gave decree in the mortgage suit, but only allowed simple interest. The High Court allowed compound interest.

The substantial question raised on the appeal is whether the appellant, in the circumstances proved in the case, fell within the protective provisions of s. 2 of the Indian Contract (Amendment) Act, 1899.

It may be convenient to set out that section in full:

"2. Section 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefore, namely:-

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

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

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

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

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

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

The mortgage is dated May 27, 1910. It is for the sum of Rs. 9999 borrowed from the plaintiffs. The rate of interest is covered by the following provision: "I, the declarant, do promise that I shall pay interest on the said debt at the rate of 2 per cent per mensem on the 30th Jeth of each year. In case of non-payment of the annual interest, the interest will be taken

as principal and interest will run thereon at the rate of 2 per cent per mensem, that is, interest will be calculated on the principle of compound interest."

There can be no question that these terms were high : if payment was not made the sum due on the mortgage would speedily mount up. By the decree of the High Court which was pronounced on November 9, 1920, it is seen that the original debt of Rs. 10,000 had reached, with interest and costs calculated up to May 8, 1921, more than a lac of rupees—namely, Rs.112,885. In eleven years the stipulation for interest at 24 per cent compound had magnified the sum covered by the mortgage more than elevenfold. It is upon these facts, coupled with one other about to be mentioned, that the appellant takes his stand.

The statement in the defence admits that at the time of the execution of the mortgage the defendant was owner of one half of a valuable joint family property. The owner of the other half was his father. Father and son had quarrelled. Serious allegations are made by the son against the father; whereas it appears that the father had instituted criminal proceedings against the son. Shortly before the date of the mortgage the defendant had borrowed Rs. 1000 from the plaintiffs, so as to enable him to defend himself in these criminal proceedings. It is alleged that they caused him great mental distress, and that he required more money to conduct his litigations. That is the story.

Evidence was taken in the case. It is sufficient to say that the defendant gave no evidence at all. It is quite plain that no Court can accept a story thus unproved by its author as establishing a case either of mental distress or of undue influence under the Indian Contract Act. The only case which the appellant has in the case derived from the contents of the mortgage itself.

Their Lordships think it desirable to make clear their views upon, in particular, s. 16, sub-s. 3, of the Contract Act as amended. By that section three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached – namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties? Were they such as to put one in a position to dominate the will of the other. Having this distinction and order in view the authorities appear to their Lordships to be easily properly interpreted.

In the judgment of this Board in ***Dhanipal Das*** v. ***Maneshar Bakhsh Singh*** [(1906) L.R. 33 I.A. 118] the outstanding effect was that the borrower who mortgaged the estate was actually, at the date of the transaction, under the control of the Court of Wards. He was treated, to use the language of Lord Davey, as "under a peculiar disability" and placed in a position of helplessness, and the lender was proved to have been aware of that and, therefore, in a position to dominate the borrower's will. Lord Davey thus expressed the Board's view

(*ibid.* 126): "Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondnt for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the respondent within the meaning of the amended s. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent."

It is sufficient to say that the borrower in the present case was sui juris; had the full power of the bargaining and of burdening his estate, that his estate was not under the Court of Wards, and that he lay under no disability. With regard to his helplessness nothing whatsoever is proved in the case except the bare fact that he, being a man of wealth as owner of one-half of certain joint family property, wished to obtain and did obtain certain moneys on loan. The only relation between the parties that was proved was simply that they were lender and borrower.

In ***Sundar Koer*** v. ***Sham Krishen*** {L.R. 34 I.A. 9, 16} the exact point was referred to by Lord Davey in the course of the judgment read by him: "There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned counsel for the appellant argued that the mortgagees were thereby placed in a position 'to dominate the will' of the mortgagor. Their Lordships are not prepared to hold that urgent need of money on the part of the borrower will itself place the parties in that position."

This precisely fits the situation of these parties. It has not been proved – it might be said that it has not even been attempted to be proved – that the lender was in a position to dominate the will of the borrower.

In these circumstances, even though the bargain had been unconscionable (and it has the appearance of being so), a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. In the present case, for the reasons stated, these stages are not reached.

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate of 2 per cent per mensem from the date of the execution of the bond until September 25, 1917, and thereafter simple interest at the rate of 6 per cent per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed, as they will humbly advise His Majesty accordingly.

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SUBHAS CHANDRA v. *GANGA PRASAD*

AIR 1967 SC 878

G.K. MITTER, J. – This is an appeal from a judgment and decree of the High Court of Calcutta on a certificate granted by it reversing a decision of the Subordinate Judge of Bankura dismissing the plaintiff's suit for declaring that a deed of settlement (Nirupan Patra) executed by the plaintiff's father and the plaintiff's sister in favour of the plaintiff's brother's son registered on July 22, 1944 in respect of properties situated in village Lokepur was fraudulent, collusive and invalid and for cancellation of the said document. The Judges of the High Court proceeded on the basis that in the circumstances of the case and in view of the relationship of the parties the trial court should have made a presumption that the donee had influence over the donor and should have asked for proof from the respondents before the High Court that the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which would justify the court in holding that the gift was the result of a free exercise of the donor's will. The High Court went on to presume from the great age of the donor that his intelligence or understanding must have deteriorated with advancing years and consequently it was for the court to presume that he was under the influence of his younger son at the date of the gift. It was contended before us by the learned Additional Solicitor-General appearing for the appellant that the judgment of the High Court had proceeded on an entirely erroneous basis and that there was no sufficient pleading of undue influence nor was there any evidence adduced at the trial to make out a case of undue influence and in the vital issue raised before the learned Subordinate Judge the expression "undue influence" was not even used.

(2) The main facts which have come out in the evidence are as follows. The plaintiff's father, Prasanna Kumar, owned certain lands in two villages, namely, Parbatipur and Lokepur, holding an eight annas share in each. The exact valuation of the properties is not known, but it would not be wrong to assume that the Lokepur properties, the subject matter of the suit, were more valuable. Prasanna Kumar died in January or February, 1948 when he was about 90 years of age. He had two sons, namely, Ganga Prasad, the plaintiff, and Balaram, the second defendant in the suit, besides a daughter Swarnalata and an only grandson Subhash Chandra, who was the first defendant in the suit. Ganga Prasad had no son. He had served in the Medical School at Bankura from 1932 to 1934. Thereafter he worked as a contractor for one year. From November 1944 to 1948 he served in Searsole Raj Estate. The family consisted of Prasanna Kumar and his wife, their two sons and their wives, besides the grandson Subhas Chandra and Prasanna's daughter Swarnalata who became a widow in her childhood and was residing with her parents. It appears that Balaram always lived with his father and was never employed elsewhere. According to the plaintiff's own evidence he was looking after the property of his father so long as he was at Bankura. The Lokepur properties were put to auction in execution of a decree for arrears of rent and were purchased by Prasanna benami in the name of Swarnalata. The deed of gift shows that the transaction was entered into out of natural love and affection of the donor for the donee and for the respect and reverence which the grandson bore to the grandfather. There is no direct evidence as to whether the plaintiff was present in Bankura at the time when this deed was executed and

registered. It is the plaintiff's case that he was not. The suit was filed in 1952 more than eight years after the date of the transaction and more than four years after the death of Prasanna. There is a considerable body of evidence that in between 1944 and 1948 a number of settlements of different plots of land in village Lokepur had been effected by Balaram acting as the natural guardian of his son Subhas Chandra and in all of them the Nirupan Patra had been recited and in each case Prasanna had signed as an attesting witness. These settlements were made jointly with the other co-sharers of Prasanna. In 1947 the Municipal Commissioners of Bankura filed a suit against Prasanna for recovery of arrears of taxes. Prasanna filed his written statement in that suit stating that he had no interest in the property. After Prasanna's death the Municipal Commissioners did not serve the plaintiff with a writ of summons in the suit but obtained a decree only against Balaram *ex parte*. The plaintiff attended the funeral ceremony of his father in 1948, but he alleges that he never came to know of any of the settlements of land in Lokepur after 1944. He admitted never having paid any rent to the superior landlords and stated that he came to know about the deed of settlement some two years before the institution of the suit from his cousins none of whom were called as witnesses.

(3) We may now proceed to consider what are the essential ingredients of undue influence and how a plaintiff who seeks relief on this ground should proceed to prove his case and when the defendant is called upon to show that the contract or gift was not induced by undue influence. The instant case is one of gift but it is well settled that the law as to undue influence is the same in the case of a gift *inter vivos* as in the case of a contract.

(4) Under S. 16(1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor, and (2) has the donee used that position to obtain an unfair advantage over the donor?

(5) Sub-section (2) of the section is illustrative as to when a person is to be considered to be in a position to dominate the will of another. These are *inter alia* (a) where the donee holds a real or apparent authority over the donor or where he stands in a fiduciary relation to the donor, or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(6) Sub-section (3) of the section throws the burden of proving that a contract was not induced by undue influence on the person benefiting by it when two factors are found against him, namely that he is in a position to dominate the will of another and the transaction appears on the face of it or on the evidence induced to be unconscionable.

(7) The three stages for consideration of a case of undue influence were expounded in the case of ***Raghunath Prasad*** v. ***Sarju Prasad*** (AIR 1924 PC 60) in the following words:

> "In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached – namely, the issue whether the

> contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.
>
> Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other?"

(8) It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. As was pointed out by the Judicial Committee of the Privy Council in ***Poosathurai*** v. ***Kappanna Chettiar*** (AIR 1920 PC 65, 66):

> "It is mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But whether by the law of India or the law of England more than mere influence must be proved so as to render influence, in the language of law, "undue."

(9) The law in India as to undue influence as embodied in S. 16 of the Contract Act is based on the English Common Law as noted in the judgments of this Court in ***Ladli Prasad Jaiswal*** v. ***Karnal Distillery Co. Ltd.*** (AIR 1963 SC 1279, 1290). According to Halsbury's ***Laws of England***, Third Edition, Vol. 17, p. 673, Art. 1298, "where there is no relationship shown to exist from which undue influence is presumed, that influence must be proved." Article 1299, p. 674 of the same volume shows that "there is no presumption of imposition or fraud merely because a donor is old or of weak character." The nature of relations from the existence of which undue influence is presumed is considered at pages 678 to 681 of the same volume. The learned author notes at p. 679 that "there is no presumption of undue influence in the case of a gift to a son, grandson, or son-in-law, although made during the donor's illness and a few days before his death." Generally speaking the relation of solicitor and client, trustee and *cestui que* trust, spiritual adviser and devotee, medical attendant and patient, parent and child are those in which such a presumption arises. Section 16(2) of the Contract Act shows that such a situation can arise wherever the donee stands in a fiduciary relationship to the donor or holds a real or apparent authority over him.

(18) It will be noted that the High Court did not come to a finding that Balaram was in a position to dominate the will of his father (Subhas his son being only about 14 years of age at the date of the deed of gift). Nor did the High Court find that the transaction was an unconscionable one. The learned Judges made presumptions which were neither warranted by law nor supported by facts. Indeed, it appears to us that the learned Judges reached the third stage referred to in the case of AIR 1924 PC 60 completely overlooking the first two stages.

(25) There was practically no evidence about the domination of Balaram over Prasanna at the time of the execution of the deed of gift or even thereafter. Prasanna, according to the evidence, seems to have been a person who was taking an active interest in the management

of the property even shortly before his death. The circumstances obtaining in the family in the year 1944 do not show that the impugned transaction was of such a nature as to shock one's conscience. The plaintiff had no son. For a good many years before 1944 he had been making a living elsewhere. According to his own admission in cross-examination, he owned a jungle in his own right (the area being given by the defendant as 80 bighas) and was therefore possessed of separate property in which his brother or nephew had no interest. There were other joint properties in the village of Parbatipur which were not the subject-matter of the deed of gift. It may be that they were not as valuable as the Lokepur properties. The circumstance that a grandfather made a gift of a portion of his properties to his only grandson a few years before his death is not on the face of it an unconscionable transaction. Moreover, we cannot lose sight of the fact that if Balaram was exercising undue influence over his father he did not go to the length of having the deed of gift in his own name. In this he was certainly acting very unwisely because it was not out of the range of possibility that Subhas after attaining majority might have nothing to do with his father.

(26) Once we come to the conclusion that the presumptions made by the learned Judges of the High Court were not warranted by law and that they did not take a view of the evidence adduced at the trial different from that of the Subordinate Judge on the facts of this case we must hold that the whole approach of the learned Judges of the High Court was wrong and as such their decision cannot be upheld.

(27) The learned Additional Solicitor General also wanted to argue that the suit was defective because the plaintiff was out of possession and had not asked for a decree for possession in his plaint as he was bound to do if he was asking for a declaration of title to the property. It is to be noted that we did not think it necessary to go into this question and did not allow him to place the evidence on this point before us as we were of the view that the case of undue influence had not been sufficiently alleged either on the pleadings or substantiated on the evidence adduced.

(28) The result is that the appeal is allowed, the judgment and decree of the High Court set aside and that of the trial Court restored.

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Lakshmi Amma v. *Talengalanarayana Bhatta*

(1970) 3 SCC 159

A.N. GROVER, J. – 2. The suit out of which the appeal has arisen was instituted in the name of Narasimha Bhatta who was stated to be of weak intellect by his next friend and daughter Adithiamma for a declaration that the will, dated September 30, 1955, said to have been executed by him was invalid and also for the cancellation of the deed of settlement, dated December 13, 1955, which had also been executed by Narasimha Bhatta in favour of the first respondent and for other incidental reliefs.

The case as laid in the plaint was that the plaintiff, who was of advanced age, was suffering from diabetes for a long time and his physical and mental condition was very weak. Respondent No. 1 was at first unsuccessful in getting a will executed by him by which he bequeathed almost all his properties to the said respondent. In December 1955, he was taken to Mangalore by respondent No. 1 and there the latter managed to get executed Ex. B-3 by him. By this deed of settlement the entire properties which were considerable were given to respondent No. 1, the plaintiff reserving only a life interest for himself besides making some provision for the maintenance of his wife Lakshmiamma. Respondent No. 1 was able to obtain benefits under the settlement deed for himself owing to the weak intellect and old age of the plaintiff. A declaration was thus claimed that the will and the settlement deed were null and void and were not binding on the plaintiff. Respondent No. 1 contested the suit. He denied the existence of the will and maintained that the deed of settlement was not executed under undue influence or when the plaintiff was in a weak state of mind.

3. A number of issues were framed on the pleadings of the parties. The Trial Court by its judgment dated, March 31, 1959, decreed the suit holding that the will was invalid and that the deed of settlement Ex. B-3 was also invalid. It was held that the plaintiff was a person of weak intellect and was not in a position to take care of himself and manage his affairs properly on the date of the execution of the aforesaid documents. The respondent preferred an appeal to the High Court. After hearing the parties the High Court directed that the evidence of three persons, two of whom were doctors and the third was a document writer, should be recorded by the Trial Court and the record submitted to it. After the receipt of the record the appeal was again heard. During the pendency of the appeal the plaintiff died on October 8, 1959 and his widow Lakshmiamma and two daughters, Adithiamma and Parmeswariamma, were impleaded as legal representatives by an order, dated November 30, 1959. The High Court reversed the judgment of the Court below holding that the gift contained in Ex. B-3 was a spontaneous act of the plaintiff and he had exercised an independent will in the matter of its execution.

4. It appears that before the High Court the decision of the Trial Court relating to the will was not challenged. At any rate since the will was never produced, the sole question which we are called upon to decide is whether the deed of settlement Ex. B-3 was executed in circumstances which rendered it invalid and void. It was stated in this document that on September 30, 1955 a will had been executed by the executant but he considered it advisable to execute a settlement deed in respect of his immovable and moveable properties and also for the discharge of his debts etc., it was stated, was being done in supersession of the will. It

was stated that respondent No. 1 had been nursing the executant and looking after him and therefore he was conferring full rights over his properties on him subject to certain conditions. He was to have full right to enjoy the said properties and collect their income till his lifetime. After his death Narayana Bhatta was entitled to take possession of his properties and get the Pattas executed in his name and he was to have absolute and perpetual rights in them. Lakshmiamma was to be maintained by Narayana Bhatta. If she found it inconvenient to live with him he was to pay to her annually till her death two candies of Areca which was to be the first charge on the properties. The following portion of the deed may be reproduced:

> "Besides, only the right of enjoying the properties till my lifetime and collecting their income and using the same for myself, I have no other right, title or interest whatsoever over the properties. I have no right to cancel this deed for any other reason, and such right also I have completely lost and to this intent this deed of settlement has been executed by me out of my free will and pleasure."

5. The first noticeable feature is that the deed of settlement on the face of it was an unnatural and unconscionable document. Narasimha Bhatta made negligible provision for his wife who was his third wife, the first two having died before he married her. She was left mainly to the mercy of the respondent No. 1. Admittedly there was a residential house and no provision was made regarding her right to reside in that house till her death. Apparently there was no reason why he should have left nothing to his two daughters or to his other grand-children and give his entire estate to only one grandson namely respondent No. 1.

6. The circumstances leading to the execution of the deed may next be considered. It is common ground that Narasimha Bhatta was in his seventies at the time of its execution. He was suffering from diabetes which had rendered him weak in body. He was living in his house in a village called Sodhankur. He was taken in a taxi accompanied by his wife by respondent No. 1 to Mangalore. There he was admitted into Ramakrishna Nursing Home where he remained from December 10 to December 18, 1955. An application was made to the Joint Sub-Registrar, Mangalore, for registering the document at the Nursing Home on December 15, 1955, apparently on the ground that Narasimha Bhatta was not in a fit condition to go to the office of the Registrar. The deed of settlement was then presented to the Joint Sub-Registrar on that very day between 5 and 6 p.m. and the registration proceedings took place there. It was subsequently registered in the book kept by the Joint Sub-Registrar on December 16, 1955.

7. According to the Trial Court Upendra Naik D.W. 5 was the brain behind respondent No. 1 in the matter of getting Ex. B-3 executed and registered which contained dispositions in favour of respondent No. 1. Upendra Naik was an attesting witness and according to him and respondent No. 1 it was Narasimha Bhatta himself who gave the instructions to draft the document; a draft was prepared which was read over to him and Ex. B-3 was written only after the draft had been approved by him and that respondent No. 1 was not even present at the time the draft was prepared or the document was registered. The scribe had originally not been examined in the Trial Court. Under the directions of the High Court his statement was recorded on July 12, 1961. According to him no draft was prepared and that he wrote out the document Ex. B-3 at his own house. He put his own signature also as an attesting witness at his own house. He deposed that he wrote out the document Ex. B-3 on December 13, 1955,

when certain documents of title were handed over to him. Respondent No. 1 and another person Adakla Ramayya Naik who was his friend came to him and it was Ramayya Naik who asked him to write out Ex. B-3. He further stated that he met Narasimha Bhatta only on the date of the registration and not on the date when he wrote out Ex. B-3. He had known Narasimha Bhatta from a long time and used to write out documents for him. He stated that normally he consulted the person on whose behalf the document was to be written but in this particular case Ramayya Naik told him that Narasimha Bhatta was in the Nursing Home and that Naik himself would give instructions for preparing the document.

8. It would, therefore, appear that Narasimha Bhatta was not even consulted by the scribe nor was any draft made with his approval which was given to the scribe from which he prepared the document Ex. B-3. The Trial Judge did not place any reliance and in our opinion, rightly on the evidence of K. Shaik Ummar, D.W. 4, the Joint Sub-Registrar of Mangalore. His statement has not impressed us as reliable. He said that the wife of Narasimha Bhatta, namely, Lakshmiamma was present during the proceedings for registration and she raised no objection to the document being registered. He admitted that the hands of the executor were trembling at the time he appended signature. There had been a number of complaints against him and with regard to one of them it was stated by him, "I was Sub-Registrar, Kasaragod between 1946 and 1948, at the time I registered a deed authorising adoption. It was an authority given by Mr. K.P. Subba Rao to his wife. It was registered at the residence of the executant in the evening hours. A little earlier the same day I had attended another house registration at Kumbla about 8 or 10 miles from here. To go there one has to cross a river also. There was a complaint against me that Subba Rao's registration took place at night at a time when he was unconscious. I do not know whether the said Subba Rao died the next day. The District Registrar held an enquiry in the matter."

9. We may next advert to the evidence of Lakshmiamma, the wife of Narasimha Bhatta who was also present at the Nursing Home at the time of the execution of document Ex. B-3. According to her statement in the beginning of 1955 Narasimha Bhatta who was suffering from diabetes had a fall after which his left arm and left leg could not be moved by him. His mental faculties were also affected. Since then his condition was getting worse. Five or six months before he fell down respondent No. 1 managed to get a will executed by him in which the dispositions were mainly in his favour. When the will was executed Narasimha Bhatta was not in a condition in which he could understand what he was doing. As regards the registration proceedings in the Nursing Home, she stated, that it was the first respondent who gave the document into the hands of an officer who asked Narasimha Bhatta to sign the document and also to affix his thumb impression. Narasimha Bhatta looked scared but respondent No. 1 shouted "sign this and give your thumb impression, grandfather." According to her she protested against the document being executed in this manner but respondent No. 1 told her to keep quiet. In spite of a lengthy cross-examination nothing was brought out to show why this lady who is the grandmother of respondent No. 1 and who would be expected to be impartial in the dispute between her children and grand-children should perjure herself and make a false statement. It is true that she would be interested, to a certain extent, in getting the document cancelled or set aside but we see no reason to brush aside her statement with regard to the condition of Narasimha Bhatta at the time the

document was executed and the circumstances in which it was got registered. It may be mentioned that the Trial Court also relied on her evidence. We do not find any cogent of convincing reasons in the judgment of the High Court for disbelieving Lakshmiamma nor are we satisfied that the reasons given for accepting the evidence of Upendra Naik D.W. 5 and discarding the testimony of the Scribe C.W. 1 are satisfactory. It is also difficult to comprehend how the High Court thought that the terms of Ex. B-3 were not unconscionable enough as to raise a fair amount of suspicion in the matter. In view of the unnatural character of the dispositions made in Ex. B-3 coupled with the other facts and circumstances mentioned above the burden shifted to respondent No. 1 to establish that Ex. B-3 was executed by Narasimha Bhatta voluntarily and without any external pressure or influence while he was not of infirm mind and was fully aware of the dispositions of gifts which he was making in favour of respondent No. 1.

10. On behalf of respondent No. 1 main reliance has been placed on the evidence of certain doctors who were the attesting witnesses. The first was Dr. K.P. Ganesan D.W. 1. He was a highly qualified doctor and according to his statement he was taken to the house of Narasimha Bhatta in the village (Sodhankur) to examine him accompanied by Dr. Vishwanath Shetty. It was stated by Dr. Ganesan that he was not suffering from partial paralysis and was able to understand the questions put to him. This was towards the end of 1955. He examined him again in the Nursing Home at Mangalore where he found him mentally healthy. He had also attested the document Ex. B-3. He could not produce any record of the examination made by him nor was any record of the Nursing Home produced at the trial. He admitted that he had never attested any document like Ex. B-3 before and he attested the same at the request of respondent No. 1. He admitted that he did not conduct any examination of Narasimha Bhatta with a view to discover his capacity to execute the document nor did he know the contents of the documents. The impression he got was that it was a will. The evidence of Dr. Ganesan was not accepted by the Trial Court in view of the discrepancy between his statement and that of Dr. U.P. Mallayya D.W. 7 as also the lack of responsibility shown by the doctor in attesting a will or a document of the nature of Ex. B-3 in the manner enjoined by certain books on medical jurisprudence and in particular Taylor's Medical Jurisprudence. The view of the Trial Court was that these doctors had not given any satisfactory explanation as to why they did not properly examine the mental condition of Narasimha Bhatta at the time he executed the document and that they had merely done the attestation and had never cared to ascertain whether the signature had been subscribed by the executant while he was of a sound disposing mind. Now Dr. Ganesan was a consulting physician of the Nursing Home. He was quite guarded in his statement relating to the mental condition of Narasimha Bhatta because he stated that when he first examined him towards the end of 1955 in the village which was only a short time before he was taken to Mangalore Nursing Home he found him mentally alright to the best of his knowledge. He further stated that there was no reason to suspect any mental deformity in the executant at the time he attested the document. Dr. M. Subraya Prabhu C.W. 2 who was working as a doctor in the Nursing Home in 1955 deposed that case sheets were maintained in the hospital and that the case sheet relating to Narasimha Bhatta had been taken by Dr. U.P. Mallayya at the time the latter was examined as a witness. According to Dr. Prabhu, Narasimha Bhatta would sometimes answer questions put to him and sometimes his wife used to answer the questions

put by the doctor. The case sheets, if produced, would have shown what were the exact ailments from which Narasimha Bhatta was suffering when he was in the Nursing Home and what treatment was given to him under the directions of Dr. Ganesan who maintained that his suspicion was that a liver abscess had ruptured into the lung due to dysentry. In the absence of the record of the Nursing Home or any other record we find it difficult to accept what Dr. Ganesan has stated about the mental condition of Narasimha Bhatta at the time when the document Ex. B-3 was executed and registered. Dr. U.P. Mallayya's evidence was also not believed by the Trial Court and after going through his evidence we are not satisfied that his statement could be relied upon with regard to the true condition, physical as well as mental, of Narasimha Bhatta at the time Ex. B-3 was executed.

11. On behalf of the plaintiff certain doctors were produced. The Trial Court had, while deciding the question whether the suit should be permitted to proceed in forma pauperis, recorded an order on March 15, 1957. In those proceedings Dr. Kambli had been examined as a witness. That doctor treated Narasimha Bhatta from March 6, 1956 to March 12, 1956 and he had issued a certificate Ex. A-1 wherein it was stated that Narasimha Bhatta was in a weak condition and was subject to loss of memory attended by mental derangement and dotage. The observation of the Trial Court itself was that when Narasimha Bhatta, under its directions, was brought to the Court on March 11, 1957, he looked blank and did not answer when the Court asked him what his name was. According to what Narasimha Bhatta stated he was 25 or 30 years of age, at that time. He could not tell the name of his wife and he was bodily carried by two persons to the Judge's chamber. It was, therefore, found that he was a person of weak mind and was incapable of making his own decisions and conducting his affairs. It may be that the condition of Narasimha Bhatta on March 11, 1957 may not throw much light on what his condition was in December 1955 but the evidence of Dr. Kambli who had examined him only a couple of months after the execution of the document shows that Narasimha Bhatta was suffering from various symptoms which are to be found in a case of advanced senility particularly when a person is also suffering from a disease like diabetes – a wasting disease.

12. We are satisfied that Narasimha Bhatta who was of advanced age and was in a state of senility and who was suffering from diabetes and other ailments was taken by respondent No. 1 who had gone to reside in the house at Sodhankur village a little earlier in a taxi along with Lakshmiamma to the Nursing Home in Mangalore where he was got admitted as a patient. No draft was prepared with the approval or under the directions of Narasimha Bhatta nor were any instructions given by him to the Scribe in the matter of drawing up of the document Ex. B-3. An application was also made to the Joint Sub-Registrar, Mangalore for registering the document at the Nursing Home by someone whose name has not been disclosed nor has the application been produced to enable the Court to find out the reasons for which a prayer was made that the registration be done at the Nursing Home. Lakshmiamma, the wife of Narasimha Bhatta who was the only other close relation present, has stated in categorical terms that the document was got executed by using pressure on Narasimha Bhatta while he was of an infirm mind and was not in a fit condition to realize what he was doing. The hospital record was not produced nor did the doctor who attended on Narasimha Bhatta at the Nursing Home produce any authentic data or record to support their testimony. Even

the writ was not produced by respondent No. 1 presumably because it must have contained recitals about the weak state of health of Narasimha Bhatta. The dispositions which were made by Ex. B-3, as already pointed out before, were altogether unnatural and no valid reason or explanation has been given why Narasimha Bhatta should have given everything to respondent No. 1 and even deprived himself of the right to deal with the property as an owner during his lifetime. All these facts and circumstances raised a grave suspicion as to the genuineness of the execution of the document Ex. B-3 and it was for respondent No. 1 to dispel the same. In our opinion he has entirely failed to do so with the result that the appeal must succeed and it is allowed with costs in this Court.

* * * * *

Tarsem Singh v. *Sukhminder Singh*

(1998) 3 SCC 471

S. SAGHIR AHMAD, J. - 3. The petitioner, who owned 48 kanals 11 marlas of agricultural land in Village Panjetha, Tehsil and District Patiala, entered into a contract for sale of that land with the respondent on 20-5-1988 @ Rs 24,000 per acre. At the time of the execution of the agreement, an amount of Rs 77,000 was paid to the petitioner as earnest money. Since the petitioner did not execute the sale deed in favour of the respondent in terms of the agreement although the respondent was ready and willing to perform his part of the contract, the latter, namely, the respondent filed the suit for specific performance against the petitioner which was decreed by the trial court. The decree was modified in appeal by the Additional Distirct Judge who was of the opinion that the parties to the agreement, namely, the petitioner and respondent both suffered from a mistake of fact as to the area of the land which was proposed to be sold as also the price (sale consideration) whether it was to be paid at the rate of per "bigha" or per "kanal". The lower appellate court also found that the respondent was not ready and willing to perform his part of the contract. Consequently, the decree for specific performance was not passed but a decree for refund of the earnest money of Rs. 77,000 was passed against the petitioner. This was upheld by the High Court.

4. Learned counsel for the petitioner has contended that since the lower appellate court has recorded a finding that the respondent was not ready and willing to perform his part of the contract inasmuch as the balance of the sale consideration was not offered by him to the petitioner, the lower appellate court as also the High Court, which upheld the judgment of the lower appellate court, were in error in passing a decree for return of the amount of earnest money particularly as the parties had expressly stipulated in the agreement for sale that if the sale deed was not obtained by the respondent on payment of the balance amount of sale consideration, the amount of earnest money, advanced by the respondent, shall stand forfeited.

5. In order to decide this question, we have to proceed on certain admitted facts which are to the effect that there was an agreement for sale between the parties concerning agricultural land measuring 48 kanals 11 marlas which was proposed to be sold at the rate of Rs. 24,000 per bigha or kanal and that an amount of Rs 77,000 was paid as earnest money. The sale deed was to be obtained on or before 15-10-1988 by offering the balance of the sale consideration to the petitioner before the Sub-Registrar Patiala. There was a stipulation in the agreement that if the respondent failed to pay the balance amount of sale consideration, the earnest money shall stand forfeited.

6. During the pendency of the appeal before the Additional District Judge, the respondent made certain amendments in the plaint which have been set out in the judgment of the lower appellate court as under:

"(a) He corrected the area of the suit land as 48 bighas 11 biswas, instead of 48 kanals 11 biswas.

(b) In para 3 of the plaint, he corrected the figure of Rs. 1,56,150 to Rs 2,35,750.

(c) He also added following para 3-A to the amended plaint.

The land is mortgaged with Canara Bank by the defendant for Rs. 20,000. The defendant be directed to deposit the due amount to the Canara Bank or the plaintiff be authorised to retain the mortgage money.

(d) He also added the following lines to para 9 of the plaint.

The plaintiff met Tarsem Singh in the month of September 1988 and offered him the money with request to get the sale deed registered in his favour but he refused to do so.

(e) He also added the following lines to para 19 of the plaint-

The value of the suit for the purpose of court fee and jurisdiction is Rs. 2,40,000 on which court fee stamps of Rs. 4686 is fixed.

7. The lower appellate court also recorded additional evidence. Thereafter, the lower appellate court proceeded to record the findings as under:

> "24. It is rightly submitted by the learned counsel for the appellant that the case of the appellant is hoisted twice over with his own petard. If the total price of the land agreed to be sold was Rs. 2,35,750 as per amended plaint, then from the original plaint and evidence of the respondent in the trial court, it is clear that he was never ready and willing to pay the full sale price of Rs. 2,35,750 to the appellant for the land in contract, and that what he was ready and willing to pay at all material points of time before he filed application for amendment of the plaint in this Court, was only Rs. 1,56,150.
>
> 25. Of course, with the advantage of hindsight and as a clever but clumsy afterthought Sukhminder Singh-respondent PW 1 stated in this Court on 30-4-1993 that when he attended the office of the Sub-Registrar for execution of the sale deed on 30.4.1993 he was having Rs. one lakh in his possession. However it does not redeem his suit for specific performance because for the reasons already stated, it is abundantly clear that till before filing the application for amendment of the plaint, in this Court, the respondent was only willing to pay the total sale price of Rs. 1,56,150 to the appellant, and not the full sale consideration of Rs. 2,35,750. Therefore, in the peculiar facts and circumstances of the case, it would be difficult to hold that he had throughout been ready and willing to perform his part of the contract.
>
> 26. Another forensic cross which the respondent must bear is that even from his original pleadings and the amended pleadings, it is clear that both the parties were under a mistake of fact insofar as the area of land agreed to be sold was concerned. As luck would have it, none of them was sure whether it was 48 kanals 11 marlas, or 48 bighas 11 biswas. Therefore, the contract became void under Section 22 of the Contract Act. Besides this where the description, area and other particulars of the property are not absolutely definite, precise, certain and exact, no decree for specific performance of sale can be passed."

8. The lower appellate court further proceeded to say as under:

> "On the analysis presented above it is absolutely clear that the parties were never ad idem as to the exact area of the land agreed to be sold."

9. It was on account of the above findings that the decree for return of the earnest money of Rs. 77,000 paid to the petitioner was passed particularly as the petitioner was found to be under a legal obligation to return that amount together with interest at the rate of 6% per annum from the date of contract till the date of actual refund.

10. The findings that the parties were suffering from a mistake of fact as to the area and the rate at which the property was agreed to be sold has been upheld by the High Court which summarily dismissed the second appeal filed by the petitioner questioning the finding of the courts below.

11. What is the effect and impact of "Mistake of Fact" on the agreement in question may now be examined.

12. "Contract" is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposal. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreements set out in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(*h*) provides that "an agreement enforceable by law is a contract". Section 2(*g*) sets out that "an agreement not enforceable by law is said to be void."

13. Before we proceed to consider what are lawful agreements or what voidable or void contracts are, we may point out that it is not necessary under law that every contract must be in writing. There can be an equally binding contract between the parties on the basis of oral agreement unless there is a law which requires the agreement to be in writing.

[The court reproduced section 10.]

15. The essentials of contract set out in Section 10 above are: (1) Free consent of the parties; (2) Competence of parties to contract; (3) Lawful consideration; (4) Lawful object

16. Competence to contract is set out in Section 11 which provides that every person is competent to contract who is of the age of majority and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Section 12 provides that a person will be treated to be of sound mind if, at the time when he makes the contract, he is capable of understanding it and forming a rational judgment as to its effect upon his interests.

21. This section provides that an agreement would be void if both the parties to the agreement were under a mistake as to a matter of fact essential to the agreement. The mistake has to be mutual and in order that the agreement be treated as void, both the parties must be shown to be suffering from mistake of fact. Unilateral mistake is outside the scope of this section.

22. The other requirement is that the mistake, apart from being mutual, should be in respect of a matter which is essential to the agreement.

23. Learned counsel for the petitioner contended that a mistake of fact with regard to the "price" or the "area" would not be a matter essential to the agreement, at least in the instant case, as the only dispute between the parties was with regard to the price of the land, whether the price to be paid for the area calculated in terms of "bighas" or "kanals."

24. "Bigha" and "kanal" are different units of measurement. In the northern part of the country, the land is measured in some states either in terms of "bighas" or in terms of

"kanals". Both convey different impressions regarding area of the land. The finding of the lower appellate court is to the effect that the parties were not ad idem with respect to the unit of measurement. While the defendant intended to sell it in terms of "kanals", the plaintiff intended to purchase it in terms of "bighas". Therefore, the dispute was not with regard to the unit of measurement only. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement for sale, or, to put it differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties were suffering did not relate to a matter essential to the agreement cannot be accepted.

25. Learned counsel for the petitioner has contended that lower appellate court or the High Court were not justified in passing a decree for the refund of Rs. 77,000 which was paid as earnest money to the petitioner as there was a specific stipulation in the agreement for sale that if the respondent did not perform his part of the contract and did not obtain the sale deed after paying the balance amount of sale consideration within the time specified in the agreement, the earnest money would stand forfeited. It is contended that since the respondent did not offer the balance amount of sale consideration and did not obtain the sale deed in terms of the agreement, the amount of earnest money was rightly forfeited and a decree for its refund could not have been legally passed.

27. Section 73 stipulates a valid and binding contract between the parties. It deals with one of the remedies available for the breach of contract. It is provided that where a party sustains a loss on account of breach of contract, he is entitled to receive, from the party who has broken the contract, compensation for such loss or damage.

28. Under Section 74 of the Act, however, the parties to the agreement stipulate either a particular amount which is to be paid in case of breach or an amount may be mentioned to be paid 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, to receive from the party who has committed the breach of contract, compensation not exceeding the amount mentioned in the agreement or the penalty stipulated therein. But this section also contemplates a valid and binding agreement between the parties. Since the stipulation for forfeiture of the earnest money is part of the contract, it is necessary for the enforcement of that stipulation, that the contract between the parties is valid. If the forfeiture clause is contained in an agreement which is void an account of the fact that the parties were not ad idem and were suffering from mistake of fact in respect of a matter which was essential to the contract, it cannot be enforced as the agreement itself is void under Section 20 of the Contract Act. A void agreement cannot be split up. None of the parties to the agreement can be permitted to seek enforcement of a part only of the contract through a court of law. If the agreement is void, all its terms are void and none of the terms, except in certain known exceptions, specially where the clause is treated to constitute a separate and independent agreement, severable from the main agreement, can be enforced separately and independently.

29. Since, in the instant case, it has been as a fact by the courts below the agreement in question was void from its inception as the parties suffered from mutual mistake with regard to the area and price of the plots of land agreed to be sold, the forfeiture clause would, for that reason, also be void and, therefore, the petitioner could not legally forfeit the amount and seek the enforcement of forfeiture clause, even by way of defence, in a suit instituted for specific performance by the respondent.

31. This section, which is based on equitable doctrine, provides for the restitution of any benefit received under a void agreement or contract and, therefore, mandates that any "person" which obviously would include a party to the agreement, who has received any advantage under an agreement which is discovered to be void or under a contract which becomes void, has to restore such advantage or to pay compensation for it, to the person from whom he received that advantage or benefit.

32. Learned counsel for the appellant has contended that Section 65 would apply to a situation where the agreement is "discovered to be void" or where the contract "becomes void" and to an agreement which is void from its inception. This argument cannot be allowed to prevail.

33. Mutual consent, which should also be a free consent, as defined in Sections 13 and 14 of the Act, is the sine qua non of a valid agreement. One of the essential elements which go to constitute a free consent is that a thing is understood in the same sense by a party as is understood by the other party. It may often be that the parties may realise, after having entered into the agreement or after having signed the contract, that one of the matters which was essential to the agreement, was not understood by them in the same sense and that both of them were carrying totally different impressions of that matter at the time of entering into the agreement or executing the document. Such realisation would have the effect of invalidating the agreement under Section 20 of the Act. On such realisation, it can be legitimately said that the agreement was "discovered to be void". The words "discovered to be void", therefore, comprehend a situation in which the parties were suffering from a mistake of fact from the very beginning but had not realised, at the time of entering into the agreement or signing of the document, that they were suffering from any such mistake and had, therefore, acted bona fide on such agreement. The agreement in such a case would be void from its inception, though discovered to be so at a much later stage.

34. The Privy Council in ***Thakurain Harnath Kaur*** v. ***Thakur Indar Bahadur Singh*** (AIR 1922 PC 403), while considering the provisions of Section 65 held that:

> "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 and 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 that sense from its inception as distinct from a contract that becomes void."

35. This case before the Privy Council also related to sale of certain villages for which some money had been paid in advance. The sale was found to be inoperative as there was a misapprehension as to the rights of the transferor in the villages which he purported to sell and that the true nature of those rights was discovered much later. In this background, the Privy Council held the agreement to have been "discovered to be void". The Privy Council, therefore, passed a decree for compensation in favour of the vendee and in assessing that compensation, the sum of money, which was advanced, was included in the amount of compensation decreed with 6% interest payable from the date of suit.

36. To the same effect is an old decision of the Calcutta High Court in ***Ram Chandra Misra*** v**. *Ganesh Chandra Gangopadhya*** (AIR 1917 Cal. 786), in which it was held that an agreement entered into under a mistake and misapprehension as to the relative and respective rights of the parties thereto is liable to be set aside as having proceeded upon a common mistake. In this case, there was an agreement for lease of the mogoli brahmatter rights of the defendants in certain plots of land. Both the parties were under the impression that the brahmatter rights carried with them the mineral rights. It was subsequently discovered that brahmatter rights did not carry mineral rights. The High Court held that the agreement became void under Section 20 of the Contract Act as soon as the mistake was discovered and, therefore, the plaintiffs were entitled to refund of money advanced under a contract which was subsequently discovered to be void.

37. We may point out that there are many facets of this question, as for example [and there are many more examples) the agreement being void for any of the reasons set out in Sections 23 and 24, in which case even the refund of the amount already paid under that agreement may not be ordered. But, as pointed out above, we are dealing only with a matter in which one party had received an advantage under an agreement which was "discovered to be void" on account of Section 20 of the Act. It is to this limited extent that we say that, on the principle contained in Section 65 of the Act, the petitioner having received Rs. 77,000 as earnest money from the respondent in pursuance of that agreement, is bound to refund the said amount to the respondent. A decree for refund of this amount was, therefore, rightly passed by the lower appellate court.

* * * * *

LIMITATIONS ON FREEDOM OF CONTRACT

Gherulal Parakh v. *Mahadeodas Maiya*

AIR 1959 SC 781

K. SUBBA RAO, J. – This appeal filed against the judgment of the High Court of Judicature at Calcutta raises the question of the legality of a partnership to carry on business in wagering contracts.

(2) The facts lie in a small compass. They, omitting those not germane to the controversy before us, are as follows: The appellant, Gherulal Parakh and the first respondent, Mahadeodas Maiya, managers of two joint families entered into a partnership to carry on wagering contracts with two firms of Hapur, namely, Messrs. Mulchand Gulzarimull and Baldeosahay Surajmull. It was agreed between the partners that the said contracts would be made in the name of the respondents on behalf of the firm and that the profit and loss resulting from the transactions would be borne by them in equal shares. In implementation of the said agreement, the first respondent entered into 32 contracts with Mulchand and 49 contracts with Baldeosahay and the net result of all these transactions was a loss, with the result that the first respondent had to pay to the Hapur merchants the entire amount due to them. As the appellant denied his liability to bear his share of the loss, the first respondent along with his sons filed O. S. No. 18 of 1937 in the Court of the Subordinate Judge, Darjeeling, for the recovery of half of the loss incurred in the transactions with Mulchand. In the plaint he reserved his right to claim any further amount in respect of transactions with Mulchand that might be found due to him after the accounts were finally settled with him. That suit was referred to arbitration and on the basis of the award, the Subordinate Judge made a decree in favour of the first respondent and his sons for sum of Rs. 3,375. After the final accounts were settled between the first respondent and the two merchants of Hapur and after the amounts due to them were paid, the first respondent instituted a suit, out of which the present appeal arises, in the Court of the Subordinate Judge, Darjeeling, for the recovery of a sum of Rs. 5,300 with interest thereon. Subsequently the plaint was amended and by the amended plaint the respondents asked for the same relief on the basis that the firm had been dissolved. The appellant and his sons, inter alia, pleaded in defence that the agreement between the parties to enter into wagering contracts was unlawful under S. 23 of the Contract Act, that as the partnership was not registered, the suit was barred under S. 69(1) of the Partnership Act and that in any event the suit was barred under O.2, Rule 2 of the Code of Civil Procedure. The learned Subordinate Judge found that the agreement between the parties was to enter into wagering contracts depending upon the rise and fall of the market and that the said agreement was void as the said object was forbidden by law and opposed to public policy. He also found that the claim in respect of the transactions with Mulchand so far as it was not included in the earlier suit was not barred under O. 2, Rule 2, Code of Civil Procedure as the cause of action in respect of that part of the claim did not arise at the time the said suit was filed. He further found that the partnership was between the two joint families of the appellant and the first respondent respectively that there could not be in law

such a partnership and that therefore S. 69 of the Partnership Act was not applicable. In the result, he dismissed the suit with costs.

(3) On appeal, the learned Judges of the High Court held that the partnership was not between the two joint families but was only between the two managers of the said families and therefore it was valid. They found that the partnership to do business was only for a single venture with each one of the two merchants of Hapur and for a single season and that the said partnership was dissolved after the season was over and therefore the suit for accounts of the dissolved firm was not hit by the provisions of sub-sections (1) and (2) of S. 69 of the Partnership Act. They further found that the object of the partners was to deal in differences and that though the said transactions, being in the nature of wager, were void under S. 30 of the Indian Contract Act the object was not unlawful within the meaning of S. 23 of the said Act.

(4) In regard to the claim, the learned Judges found that there was no satisfactory evidence as regards the payment by the first respondent on account of loss incurred in the contracts with Mulchand but it was established that he paid a sum of Rs. 7,615 on account of loss in the contracts entered into with Baldeosahay. In the result, the High Court gave a decree to the first respondent for a sum of Rs. 3,807-8-0 and disallowed interest thereon for the reason that as the suit in substance was one for accounts of a dissolved firm, there was no liability in the circumstances of the case to pay interest. In the result, the High Court gave a decree in favour of the first respondent for the said amount together with another small item and dismissed the suit as regards "the plaintiffs other that the first respondent and the defendants other than the appellant".

(5) Before we consider the questions of law raised in the case, it would be convenient at the outset to dispose of questions of fact raised by either party. The learned Counsel for the appellant contends that the finding of the learned Judges of the High Court that the partnership stood dissolved after the season was over was not supported by the pleadings or the evidence adduced in the case. In the plaint as originally drafted and presented to the Court, there was no express reference to the fact that the business was dissolved and no relief was asked for accounts of the dissolved firm. But the plaint discloses that the parties jointly entered into contracts with two merchants between March 23, 1937 and June 17, 1937, that the plaintiffs obtained complete accounts of profit and loss on the aforesaid transactions from the said merchants after June 17, 1937 and that they issued a notice to the defendants to pay them a sum of Rs. 4,146-4-3 being half of the total payments made by them on account of the said contracts and that the defendants denied their liability. The suit was filed for recovery of the said amount. The defendant filed a written-statement on June 12, 1940, but did not raise the plea based on S. 69 of the Partnership Act. He filed an additional written-statement on November 9, 1941 expressly setting up the plea. Thereafter the plaintiffs prayed for the amendment of the plaint by adding the following to the plaint as paragraph 10:

> "That even Section 69 of the Indian Partnership Act is not a bar to the present suit as the joint business referred to above was dissolved and in this suit the Court is required only to go into the accounts of the said joint business".

On August 14, 1942, the defendant filed a further additional written-statement alleging that the allegations in paragraph 2 were not true and that as no date of the alleged dissolution had been mentioned in the plaint, the plaintiffs' case based on the said alleged dissolution was not maintainable. It would be seen from the aforesaid pleadings that although an express allegation of the fact of dissolution of the partnership was only made by an amendment on November 17, 1941, the plaint as originally presented contained all the facts sustaining the said plea. The defendants in their written-statement, inter alia, denied that there was any partnership to enter into forward contracts with the said two merchants and that therefore consistent with their case they did not specifically deny the said facts. The said facts, except in regard to the question whether the partnership was between the two families or only between the two managers of the families on which there was difference of view between the Court of the Subordinate Judge and the High Court, were concurrently found by both the Courts. It follows from the said findings that the partnership was only in respect of forward contracts with two specified individuals and for a particular season. But it is said that the said findings were not based on any evidence in the case. It is true that the documents did not clearly indicate any period limiting the operation of the partnership, but from the attitude adopted by the defendants in the earlier suit ending in an award and that adopted in the present pleadings, the nature of the transactions and the conduct of the parties, no other conclusion was possible than that arrived at by the High Court. If so, S. 42 of the Partnership Act directly applies to this case. Under that section in the absence of a contract to the contrary, a firm is dissolved, if it is constituted to carry out one or more adventures or undertakings, by completion thereof. In this case, the partnership was constituted to carry out contracts with specified persons during a particular season and as the said contracts were closed, the partnership was dissolved.

(6) At this stage a point raised by the learned Counsel for the respondents may conveniently be disposed of. The learned Counsel contends that neither the learned Subordinate Judge nor the learned Judges of the High Court found that the first respondent entered into any wagering transactions with either of the two merchants of Hapur and therefore no question of illegality arises in this case. The law on the subject is well settled and does not call for any citation of cases. To constitute a wagering contract there must be proof that the contract was entered into upon terms that the performance of the contract should not be demanded, but only the difference in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference in prices on the happening of an event. Relying upon the said legal position, it is contended that there is no evidence in the case to establish that there was a common intention between the first respondent and the Hapur merchants not to take delivery of possession but only to gamble in difference in prices. This argument, if we may say so, is not really germane to the question raised in this case. The suit was filed on the basis of a dissolved partnership for accounts. The defendants contended that the object of the partnership was to carry on wagering transactions i.e., only to gamble in differences without any intention to give or take delivery of goods. The Courts, on the evidence, both direct and circumstantial, came to the conclusion that the partnership agreement was entered into with the object of carrying on wagering transactions wherein there was no intention to ask for or to take delivery of goods but only to deal with differences. That is a concurrent finding of fact,

and following the usual practice of this Court, we must accept it. We, therefore, proceed on the basis that the appellant and the first respondent entered into a partnership for carrying on wagering transactions and the claim related only to the loss incurred in respect of those transactions.

(7) Now we come to the main and substantial point in the case. The problem presented, with its different facts, is whether the said agreement of partnership is unlawful within the meaning of S. 23 of the Indian Contract Act. Section 23 of the said Act, omitting portions unnecessary for the present purpose, reads as follows:

"The consideration or object of an agreement is lawful, unless-

> It is forbidden by law, or … the court regards it as immoral, or opposed to public policy."

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." Under this section, the object of an agreement, whether it is of partnership or otherwise, is unlawful if it is forbidden by law or the Court regards it as immoral or opposed to public policy and in such cases the agreement itself is void.

The learned Counsel for the appellant advances his argument under three sub-heads: (i) the object is forbidden by law, (ii) it is opposed to public policy, and (iii) it is immoral. We shall consider each one of them separately.

(8) Re (i) **forbidden by law**: Under S. 30 of the Indian Contract Act, agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made. Sir William Anson's definition of "wager" as a promise to give money or money's worth upon the determination or ascertainment of an uncertain event accurately brings out the concept of wager declared void by S. 30 of the Contract Act. As a contract which provides for payment of differences only without any intention on the part of either of the parties to give or take delivery of the goods is admittedly a wager within the meaning of S. 30 of the Contract Act, the argument proceeds, such a transaction, being void under the said section, is also forbidden by law within the meaning of S. 23 of the Contract Act. The question, shortly stated, is whether what is void can be equated with what is forbidden by law. This argument is not a new one, but has been raised in England as well as in India and has uniformly been rejected. In England the law relating to gaming and wagering contracts is contained in the Gaming Acts of 1845 and 1892.

While the Act of 1845 declared all kinds of wagers or games null and void, it only prohibited the recovery of money or valuable thing won upon any wager or deposited with stakeholders. On the other hand, the Act of 1892 further declared that moneys paid under or in respect of wagering contracts dealt with by the Act of 1845 are not recoverable and no commission or reward in respect of any wager can be claimed in a court of law by agents employed to bet on behalf of their principals. The law of England till the passing of the Act of 1892 was analogous to that in India and the English law on the subject governing a similar

situation would be of considerable help in deciding the present case. Sir William Anderson in his book on ***"Law of Contracts***" succinctly states the legal position thus, at page 205:

> "…the law may either actually forbid an agreement to be made, or it may merely say that if it is made the Courts will not enforce it. In the former case it is illegal; in the latter only void; but inasmuch as legal contracts are also void, though void contracts are not necessarily illegal, the distinction is for most purposes not important, and even judges seem sometimes to treat the two terms as inter-changeable."

The learned author proceeds to apply the paid general principles to wagers and observes, at page 212, thus;

> "Wagers being only void, no taint of legality attached to a transaction, whereby one man employed another to made bets for him; the ordinary rules which govern the relation of employer and employed applied in such a case."

Pollock and Mulla in their book on Indian Contract define the phrase "forbidden by law" in S. 23 thus, at page 158:

> "An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the Legislature or a principle of unwritten law. But in India, where the criminal law is codified, acts forbidden by law seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature."

(18) The same view was expressed by the Indian Courts in cases decided after the enactment of the Contract Act. An agent who paid the amount of betting lost by him was allowed to recover the same from his principal in ***Pringle* v. *Jafar Khan***, ILR 5 All. 443. The reason for that decision is given at page 445:

> "There was nothing illegal in the contract; betting at horse-races could not be said to be illegal in the sense of tainting any transaction connected with it. This distinction between an agreement which is only void and one in which the consideration is also unlawful is made in the Contract Act. Section 23 points out in what cases the consideration of an agreement is unlawful, and in such cases the agreement is also void, that is, not enforceable at law. Section 30 refers to cases in which the agreement is only void, though the consideration is not necessarily unlawful. There is no reason why the plaintiff should not recover the sum paid by him……."

In ***Shibho Mal* v. *Lachman Das***, ILR 23 All. 165, an agent who paid the losses on the wagering transactions was allowed to recover the amounts he paid from his principal. In ***Beni Madho Das* v. *Kaunsal Kishor,*** ILR 22 All. 452, the plaintiff who lent money to the defendant to enable him to pay off a gambling debt was given a decree to recover the same from the defendant. Where two partners entered into a contract of wager with a third party and one partner had satisfied his own and his co-partner's liability under the contract, the Nagpur High Court in ***Md. Gulam Mustafakhan* v. *Padamsi***, AIR 1923 Nag. 48, held that the partner who paid the amount could legally claim the other partner's share of the loss. The learned Judge reiterated the same principle accepted in the decisions cited supra, when he said at page 49.

"Section 30 of the Indian Contract Act does not affect agreements or transactions collateral to wagers..." The said decisions were based upon the well-settled principle that a wagering contract was only void, but not illegal, and therefore a collateral contract could be enforced.

(19) Before closing this branch of the discussion, it may be convenient to consider a subsidiary point raised by the learned Counsel for the appellant that though a contract of partnership was not illegal, in the matter of accounting, the loss paid by one of the partners on wagering transactions, could not be taken into consideration. Reliance is placed in support of this contention on Chitty's ***Contract,*** p. 495, para. 908, which reads:

> "Inasmuch as betting is not in itself illegal, the law does not refuse to recognize a partnership formed for the purpose of betting. Upon the dissolution of such a partnership an account may be ordered. Each partner has right to recover his share of the capital subscribed, so far as it has not been spent; but he cannot claim an account of profits or repayments of amounts advanced by him which have actually been applied in paying the bets of the partnership."

In support of this view, two decisions are cited. They are: 1896-1 Ch 496 and ***Saffery*** **v.** ***Mayer*** (1901) 1 KB 11. The first case has already been considered by us. There, Chitty J. in giving a decree for account left open the question of the legality of certain transactions till it arose on the taking of the account. Far from helping the appellant, the observations and the actual decision in that case support the respondent's contention. The reservation of the question of particular transactions presumably related only to the transactions prohibited by the Betting Act, 1853. Such of the transactions which were so prohibited by the Betting Act would be illegal and therefore the contract of partnership could not operate on such transactions. The case of (1901) 1KB 11, related to a suit for recovery of money advanced by one person to another for the purpose of betting on horses on their joint account. The appellate Court held that by reason of the provisions of the Gaming Act, 1892, the action was not maintainable. This decision clearly turned upon the provisions of the Gaming Act, 1892. Smith M.R. observed that the plaintiff paid the money to the defendant in respect of a contract rendered null and void and therefore it was not recoverable under the second limb of that section. The other Lord Justices also based their judgments on the express words of the Gaming Act, 1892. It will be also interesting to note that the Court of Appeal further pointed out that Chitty J. in **Thwaites'** case (1896) I Ch. 496, in deciding in the way he did omitted to consider the effect of the provisions of the Gaming Act, 1892, on the question of maintainability of the action before him. The aforesaid passage in Chitty's ***Contract*** must be understood only in the context of the provisions of the Gaming Act, 1892.

(20) The aforesaid discussion yields the following results: (1) Under the common law of England a contract of wager is valid and therefore both the primary contract as well as the collateral agreement in respect thereof are enforceable: (2) after the enactment of the Gaming Act, 1845, a wager is made void but not illegal in the sense of being forbidden by law, and thereafter a primary agreement of wager is void but a collateral agreement is enforceable; (3) there was a conflict on the question whether the second part of S. 18 of the Gaming Act, 1845, would cover a case for the recovery of money or valuable thing alleged to be won upon any wager under a substituted contract between the same parties: the House of Lords in **Hill's**

Case 1949-2 All ER 452, had finally resolved the conflict by holding that such a claim was not sustainable whether it was made under the original contract of wager between the parties or under a substituted agreement between them; (4) under the Gaming Act, 1892, in view of its wide and comprehensive phraseology, even collateral contracts, including partnership agreements, are not enforceable; (5) S. 30 of the Indian Contracts Act is based upon the provisions of S. 18 of the Gaming Act, 1845, and though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under S. 23 of the Contract Act; and (6) partnership being an agreement within the meaning of S. 23 of Indian Contracts Act, it is not unlawful, though its object is to carry on wagering transactions. We, therefore, hold that in the present case the partnership is not unlawful within the meaning of S. 23(a) of the Contract Act.

(21) Re (ii) – **Public Policy:** The learned Counsel for the appellant contends that the concept of public policy is very comprehensive and that in India, particularly after independence, its content should be measured having regard to political, social and economic policies of a welfare State, and the traditions of this ancient country reflected in Srutis, Smritis and Nibands. Before adverting to the argument of the learned Counsel, it would be convenient at the outset to ascertain the meaning of this concept and to note how the Courts in England and India have applied it to different situations. Cheshire and Fifoot in their book on "***Law of Contract***" and 3rd Edn., observe at page 280 thus:

> "The public interest which it is designed to protect are so comprehensive and heterogeneous, and opinions as to what is injurious must of necessity vary so greatly with the social and moral convictions, and at times even with the political views, of different judges, that it forms a treacherous and unstable ground for legal decision…..These questions have agitated the Courts in the past, but the present state of the law would appear to be reasonably clear. Two observations may be made with some degree of assurance.
>
> First, although the rules already established by precedent must be moulded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the principles laid down in previous decisions. He must expound, not expand, this particular branch of the law.
>
> Secondly, even though the contract is one which *prima facie* falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable. The doctrine, as Lord Atkin remarked in a leading case, "should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of few judicial minds….. In popular language…..the contract should be given the benefit of the doubt."

Anson in his ***Law of Contracts*** states the same rule thus, at p. 216:

> "Jessel, M.R. in 1875, stated a principle which is still valid for the Courts, when he said: 'You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract; and it is in reconciling freedom of contract with other

public interests which are regarded as of not less importance that the difficulty in these cases arises…..

We may say, however, that the policy of the law has, on certain subjects, been worked into a set of tolerably definite rules. The application of these to particular instances necessarily varies with the conditions of the times and the progressive development of public opinion and morality, but as Lord Wright has said, 'public policy', like any other branch of the Common Law, ought to be, and I think is, governed by the judicial use of precedents. If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true; but the same is true of the principles of the Common Law generally."

In ***Halsbury's Laws of England***, 3rd Edn., Vol. 8, of the doctrine is stated at p. 130 thus:

"Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy…. It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

A few of the leading cases on the subject reflected in the authoritative statements of law by the various authors may also be useful to demarcate the limits of this illusive concept.

(22) Parke B. in ***Egerton* v. *Brownlow*** (1853) 4 HLC 121: which is a leading judgment on the subject, describes the doctrine of public policy thus at p. 123:

"[P]ublic policy is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; written from the statutes; the unwritten or common law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of recognised law, and we are therefore bound by them, but we are not thereby authorised to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise."

(23) The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.

(24) This leads us to the question whether in England or in India a definite principle of public policy has been evolved or recognized invalidating wagers. So far as England is concerned, the passages from textbooks extracted and the decisions discussed in connection with the first point clearly establish that there has never been such a rule of public policy in that country. Courts under the common law of England till the year 1845 enforced such contracts even between parties to the transaction. They held that wagers were not illegal. After the passing of the English Gaming Act. 1845 (8 and 9 Vict. c. 109) such contracts were declared void. Even so, the Courts held that though a wagering contract was void, it was not illegal and therefore an agreement collateral to the wagering contract could be enforced. Only after the enactment of the Gaming Act 1892 (55 Vict. c. 9) the collateral contracts also became unenforceable by reason of the express words of that Act. Indeed, in some of the decisions cited supra the question of public policy was specifically raised and negatived by Court: See 1878-4 QBD 685, 1908-2 KB 696; and 1921-2 KB 351. It is therefore abundantly clear that the common law of England did not recognize any principle of public policy declaring wagering contracts illegal.

(25) The legal position is the same in India. The Indian Courts, both before and after the passing of the Act 21 of 1848 and also after the enactment of the Contract Act, have held that the wagering contracts are not illegal and the collateral contracts in respect of them are enforceable. We have already referred to these in dealing with the first point and we need not cover the ground once again except to cite a passage from the decision of the Judicial Committee in 4 Moo Ind App 339 (PC), which is directly on point. Their Lordships in considering the applicability of the doctrine of public policy to a wagering contract observed at p. 350:

> "We are of opinion, that, although, to a certain degree, it might create a temptation to do what was wrong, we are not to presume that the parties would commit a crime; and as it did not interfere with the performance of any duty, and as if the parties were not induced by it to commit a crime, neither the interests of individuals or of the Government could be affected by it, we cannot say that it is contrary to public policy."

There is not a single decision after the above cited case, which was decided in 1846, up to the present day wherein the Courts either declared wagering contracts as illegal or refused to enforce any collateral contract in respect of such wagers, on the ground of public policy. It may, therefore, be stated without any contradiction that the common law of England in respect of wagers was followed in India and it has always been held that such contracts, though void after the Act of 1848, were not illegal. Nor the legislatures of the States excepting Bombay made any attempt to bring the law in India in line with that obtaining in England after the Gaming Act, 1892. The Contract Act was passed in the year 1872. At the time of the passing of the Contract Act, there was a Central Act, Act 21 of 1848, principally based on the English Gaming Act, 1845. There was also the Bombay Wagers (Amendment) Act 1865, amending the former Act in terms analogous to those later enacted by the Gaming Act 1892. Though the Contract Act repealed the Act 21 of 1848, it did not incorporate in it the provisions similar to those of the Bombay Act; nor was any amendment made subsequent to the passing of the English Gaming Act, 1892. The legislature must be deemed to have had the knowledge of the state of law in England, and, therefore, we may assume that it did not think fit to make wagers illegal or to hit at collateral contracts. The policy of law in India has therefore been to sustain the legality of wagers.

(26) The history of the law of gambling in India would also show that though gaming in certain respects was controlled, it has never been absolutely prohibited. These Acts do not prohibit gaming in its entirety, but aim at suppressing gaming in private houses when carried on for profit or gain of the owner of occupier thereof and also gaming in public. Gaming without contravening the provisions of the said Act is legal. Wherever the State intended to declare a particular form of gaming illegal, it made an express statute to that effect: See S. 29-A of the Indian Penal Code. In other respects, gaming and wagering are allowed in India. It is also common knowledge that horse races are allowed throughout India and the State also derives revenue therefrom.

(27) The next question posed by the learned Counsel for the appellant is whether under the Hindu Law it can be said that gambling contracts are held to be illegal. The learned Counsel relies upon the observations of this Court in ***State of Bombay* v. *R.M.D. Chamarbaugwala*,** AIR 1957 SC 699. The question raised in that case was whether the Bombay Lotteries and Prize Competition Control and Tax (Amendment) Act of 1952 extending the definition of "Prize Competition" contained in S. 2(1)(d) of the Bombay Lotteries and Prize Competition Control and Tax Act, of 1948, so as to include prize competition carried on through newspapers printed and published outside the State, was constitutionally valid. It was contended, *inter alia*, that the Act offended the fundamental right of the respondents, who were conducting prize competitions, under Art. 19(1) (g) of the Constitution and also violated the freedom of inter-State trade under Art. 301 thereof. This Court held that the gambling activities in their very nature and essence were extra-commercium and could not either be trade or commerce within the meaning of the aforesaid provisions and therefore neither the fundamental right of the respondents under Art. 19(1)(g) or their right to freedom of inter-State trade under Art. 301 is violated. In that context Das C. J. has collected all the Hindu Law texts from Rigveda. Mahabharata, Manu, Brihaspati, Yagnavalkya etc., (at pp. 719-720 of AIR). It is unnecessary to restate them here, but it is

clear from those texts that Hindu sacred books condemned gambling in unambiguous terms. But the question is whether those ancient textbooks remain only as pious wishes of our ancestors or whether they were enforced in the recent centuries. All the branches of the Hindu Law have not been administered by Courts in India; only questions regarding succession, inheritance, marriage, and religious usages and institutions are decided according to the Hindu Law, except in so far as such law has been altered by legislative enactment. Besides the matters above referred to, there are certain additional matters to which the Hindu Law is applied to the Hindus, in some cases by virtue of express legislation and in others on the principle of justice, equity and good conscience. These matters are adoption, guardianship, family relations, will, gifts and partition. As to these matters also the Hindu Law is to be applied subject to such alterations as have been made by legislative enactments; See Mulla's Hindu Law, para. 3 - p. 2. In other respects the ancient Hindu Law was not enforced in Indian Courts and it may be said that they became obsolete. Admittedly there has not been a single instance in recorded cases holding gambling or wagering contracts illegal on the ground that they are contrary to public policy as they offended the principles of ancient Hindu Law. In the circumstances, we find it difficult to import the tenets of Hindu Law to give a novel content to the doctrine of public policy in respect of contracts of gaming ad wagering.

(28) To summarize: The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in England, collateral contracts were enforced till the passing of the Gaming Act of 1892, and in India, except in the state of Bombay, they have been enforced even after the passing of the Act 21 of 1848, which was substituted by S. 30 of the Contract Act. The moral prohibitions in Hindu Law text against gambling were not only not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. Indeed, some of the gambling practices are a perennial source of income to the State. In the circumstances it is not possible to hold that there is any definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, we cannot say that wager is one of such instances of exceptional gravity, for it has been recognized for centuries and has been tolerated by the public and the State alike. If it is has any such tendency, it is for the legislature to make a law prohibiting such contracts and declaring them illegal and not for this Court to resort to judicial legislation.

(29) Re. Point 3 - Immorality: The argument under this head is rather broadly stated by the learned Counsel for the appellant. The learned Counsel attempts to draw an analogy from the Hindu Law relating to the doctrine of pious obligation of sons to discharge their father's debts and contends that what the Hindu Law considers to be immoral in that context may appropriately be applied to a case under S. 23 of the Contract Act. Neither any authority is cited nor any legal basis is suggested for importing the doctrine of Hindu Law into the domain of contracts. Section 23 of the Contract Act is inspired by the common law of

England and it would be more useful to refer to the English Law than to the Hindu Law texts dealing with a different matter. Anson in his Law of Contracts states at p. 222 thus:

> "The only aspect of immorality with which Courts of Law have dealt is sexual immorality……"

Halsbury in his ***Laws of England***, 3rd Edn. Vol. 8, makes a similar statement, at 138:

> "A contract which is made upon an immoral consideration or for an immoral purpose is unenforceable, and there is no distinction in this respect between immoral and illegal contracts. The immorality here alluded to is sexual immorality."

In the ***Law of Contracts*** by Cheshire and Fifoot, 3rd Edn., it is stated at p. 279:

> "Although Lord Mansfield laid it down that a contract contra bonos mores is illegal, the law in this connection gives no extended meaning to morality, but concerns itself only with what is sexually reprehensible."

In the book on the ***Indian Contract Act*** by Pollock and Mulla it is stated at p. 157:

> "The epithet "immoral" points in legal usage, to conduct or purposes which the State, though dispproving them, is unable, or not advised, visit with direct punishment."

The learned authors confined its operation to acts which are considered to be immoral according to the standards of immorality approved by Courts. The case law both in England and India confines the operation of the doctrine to sexual immorality. To cite only some instances: settlements in consideration of concubinage, contracts of sale or hire of things to be used in a brothel or by a prostitute for purposes incidental to her profession, agreements to pay money for future illicit cohabitation, promises in regard to marriage for consideration, or contracts facilitating divorce are all held to be void on the ground that the object is immoral.

(30) The word "immoral" is a very comprehensive word. Ordinarily it takes in every aspect of personal conduct deviating from the standard norms of life. It may also be said that what is repugnant to good conscience is immoral. Its varying content depends upon time, place and the stage of civilization of a particular society. In short, no universal standard can be laid down and any law based on such fluid concept defeats its own purpose. The provisions of S. 23 of the Contract Act indicate the legislative intention to give it a restricted meaning. Its juxtaposition with an equally illusive concept, public policy, indicates that it is used in a restricted sense; otherwise there would be overlapping of the two concepts. In its wide sense what is immoral may be against public policy, for public policy covers political, social and economic ground of objection. Decided cases and authoritative textbook writers, therefore, confined it, with every justification, only to sexual immorality. The other limitation imposed on the word by the statute, namely, "courts consider immoral," brings out the idea that it is also a branch of the common law like the doctrine of public policy, and, therefore, should be confined to the principles recognised and settled by Courts. Precedents confine the said concept only to sexual immorality and no case has been brought to our notice where it has been applied to any head other than sexual immorality. In the circumstances, we cannot evolve a new head so as to bring in wagers within its fold.

(31) Lastly it is contended by the learned Counsel for the appellant that wager is extra-commercium and therefore there cannot be in law partnership for wager within the meaning

of S. 4 of the Partnership Act; for partnership under that section is relationship between persons who have agreed to share the profits of a business. Reliance is placed in respect of this contention on the decision of this Court in AIR 1957 SC 699. This question was not raised in the pleadings. No issue was framed in respect of it. No such case was argued before the learned Subordinate Judge or in the High Court; nor was this point raised in the application for certificate for leave to appeal to the Supreme Court filed in the High Court. Indeed, the learned Advocate appearing for the appellant in the High Court stated that his client intended to raise one question only, namely, whether the partnership formed for the purpose of carrying on a business in differences was illegal within the meaning of S. 23 of the Contract Act. Further this plea was not specifically disclosed in the statement of case filed by the appellant in this Court. If this contention had been raised at the earliest point of time, it would have been open to the respondents to ask for a suitable amendment of the plaint to sustain their claim. In the circumstances, we do not think that we could with justification allow the appellant to raise this new plea for the first time before us, as it would cause irreparable prejudice to the respondents. We express no opinion on this point.

[For the foregoing reasons, the court held that the suit partnership was not unlawful within the meaning of S. 23 of the Indian Contract Act. In the result, the appeal failed].

* * * * *

Niranjan Shankar Golikari v. *Century Spinning & Manufacturing Co. Ltd.*

AIR 1967 SC 1098

J.M. SHELAT, J. – The respondent company manufactures amongst other things tyre cord yarn at its plant at Kalyan known as the Century Rayon. Under an agreement dated January 19, 1961 Algemene Kunstzijde Unie of Holland (hereinafter referred to as AKU) and Vereinigte Clanzstoff Fabrikan AG of West Germany (hereinafter referred to as VCF) agreed to transfer their technical know-how to the respondent company to be used exclusively for the respondent company's tyre cord yarn plant at Kalyan in consideration of 1,40,000 Deutsche Marks payable to them by the respondent company. Clause 4 of that agreement provided that the Century Rayon should keep secret until the termination of the agreement and during three years thereafter all technical information, knowledge, know-how, experience, data and documents passed on by the said AKU and VCF and the Century Rayon should undertake to enter into corresponding secrecy arrangements with its employees. The respondent company thereafter invited applications for appointments in its said plant including appointments as Shift Supervisors. On 3.12.1962 the appellant sent his application stating therein his qualifications. By its letter dated March 1, 1963 the respondent company offered the appellant the post of a Shift Supervisor in the said tyre cord division stating that if the appellant were to accept the said offer he would be required to sign a contract in standard form for a term of five years. On March 5, 1963 the appellant accepted the said offer agreeing to execute the said standard contract. On March 16, 1963 he joined the respondent company and executed on that day the said contract Ex. 28.

Clause 6 of the agreement provided -

> "The employee shall, during the period of his employment and any renewal thereof, honestly, faithfully, diligently and efficiently to the utmost of his power and skill
>
> (a) * * * * *
>
> (b) devote the whole of his time and energy exclusively to the business and affairs of the company and shall not engage directly or indirectly in any business or serve whether as principal, agent, partner or employee or in any other capacity either full time or part time in any business whatsoever other than that of the company."

Clause 9 provided that during the continuance of his employment as well as thereafter the employee shall keep confidential and prevent divulgence of any and all information, instruments, documents, etc. of the company that might come to his knowledge. Clause 14 provided that if the company were to close its business or curtail its activities due to circumstances beyond its control and if it found that it was no longer possible to employ the employee any further it should have option to terminate his services by giving him three months' notice or three months' salary in lieu thereof. Clause 17 provided as follows:

> "In the event of the employee leaving, abandoning or resigning the service of the company in breach of the terms of the agreement before the expiry of the said period of five years he shall not directly or indirectly engage in or carry on of his own accord or in partnership with others the business at present being carried on by the

company and he shall not serve in any capacity, whatsoever or be associated with any person, firm or company carrying on such business for the remainder of the said period and in addition pay to the company as liquidated damages an amount equal to the salaries the employee would have received during the period of six months thereafter and shall further reimburse to the company any amount that the company may have spent on the employee's training."

(2) The appellant received training from March to December 1963 and acquired during that training, knowledge of the technique, processes and the machinery evolved by the said collaborations as also of certain documents supplied by them to the respondent company which as aforesaid were to be kept secret and in respect of which the respondent company had undertaken to obtain, secrecy undertakings from its employees. According to the evidence, the appellant as a Shift Supervisor was responsible for the running of Shift work, control of labour and in particular with the specifications given by the said AKU.

(3) No difficulty arose between the appellant and the respondent company until about September 1964. The appellant thereafter remained absent from the 6th to the 9th October, 1964 without obtaining leave therefor. On the 10th October, he took casual leave. On October 12, he applied for 28 days privilege leave from October 14, 1964. On October 31, he was offered salary for 9 days that he had worked during that month. On November 7, 1964, he informed the respondent company that he had resigned from October 31, 1964. The respondent company by its letter of November 23, 1964 asked him to resume work stating that his said resignation had not been accepted. On November 28, 1964 the appellant replied that he had already obtained another employment.

(4) It is clear from the evidence that in October he was negotiating with Rajasthan Rayon Company at Kotah which was also manufacturing tyre cord yarn and got himself employed there at a higher salary of Rs. 560 per month than what he was getting from the respondent company. The respondent company thereupon filed a suit in the Court at Kalyan claiming inter alta an injunction restraining the appellant from serving in any capacity whatsoever or being associated with any person, firm or company including the said Rajasthan Rayon till March 15, 1968. The Company also claimed Rs. 2,410 as damages being the salary for six months under Clause 17 of the said agreement and a perpetual injunction restraining him from divulging any or all information, instruments, documents, reports, trade secrets, manufacturing process, know-how, etc. which may have come to his knowledge. The appellant, while admitting that he was employed as a Shift Supervisor, denied that he was a specialist or a technical personnel asserting that his only duty was to supervise and control labour and to report deviations of temperature etc. He also alleged that the said agreement was unconscionable, oppressive and executed under coercion and challenged its validity on the ground that it was opposed to public policy. He challenged in particular Clauses 9 and 17 of the said agreement on the ground that whereas Clause 9 was too wide as it was operative not for a fixed period but for life time and included not only trade secrets but each and every aspect of information, Clause 17 precluded him from serving elsewhere in any capacity whatsoever which meant a restraint on his right to trade or to carry on business, profession or vocation and that such a term was unnecessary for the protection of the respondent company's interests as an employer.

(5) The Trial Court on a consideration of the evidence led by the parties held: (1) that the respondent company had established that the appellant had availed himself of the training imparted by the said AKU in relation to the manufacture of tyre cord, the yarn, the operation of the spinning machines and that he was made familiar with their know-how, secrets, techniques and information; (2) that his duties were not merely to supervise labour or to report deviations of temperature as alleged by him; (3) that the said agreement was not void or unenforceable; (4) that he committed breach of the said agreement; (5) that as a result of the said breach the respondent company suffered loss and inconvenience and was entitled to damages under Clause 17 and lastly that the company was entitled to an injunction. On these findings the Trial Court passed the following order -

"(1) The injunction is granted against the defendant and he is restrained from getting in the employ of or being engaged or connected as a Shift Supervisor in the Manufacture of tyre cord yarn or as an employee under any title discharging substantially the same duties as a Shift Supervisor in Rajasthan Rayon, Kotah or any other company or firm or individual in any part of India for the term ending 15th March 1968.

(2) The defendant is further restrained during the said period and, thereafter, from divulging any of the secrets, processes or information relating to the manufacture of tyre cord yarn by continuous spinning process obtained by him in the course of and as a result of his employment with the plaintiff."

(6) It is clear that the injunction restrained the appellant only from serving as a Shift Supervisor and in a concern manufacturing tyre cord yarn by continuous spinning process or as an employee under any designation substantially discharging duties of a Shift Supervisor. It was also confined to the period of the agreement and in any concern in India manufacturing tyre cord yarn.

(7) In the appeal filed by him in the High Court, the plea taken by him as to undue influence and coercion was given up. The High Court agreeing with the Trial Court, found that the evidence of Dr. Chalishhazar, Mehta and John Jacob established that the appellant had been imparted training for about nine months during the course of which information regarding the special processes and details of the machinery evolved by the said collaborators had been divulged to him. It also found that as a result of his getting himself employed in the said rival company, not only the benefit of training given to him at the cost of the respondent company would be lost to it but that the knowledge acquired by him in regard to the said continuous spinning process intended for the exclusive use of the respondent company was likely to be made available to the rival company which also was interested in the continuous spinning process of tyre cord. The High Court further found that though the machinery employed by the said Rajasthan Rayon might not be the same as that in the respondent company's plant the know-how which the appellant acquired could be used for ensuring continuous spinning yarn. The High Court further found that Rajasthan Rayon started production of tyre cord yard from January 1965, that is, two or three months after the appellant joined them along with two other employees of the respondent company, that the cumulative effect of the evidence was that the appellant had gained enough knowledge and experience in the specialised continuous spinning process in the tyre cord yarn division of the respondent company and that it was evident that he left the respondent company's

employment only because the said Rajasthan Rayon promised him a more lucrative employment. The High Court concluded that it was not difficult to imagine why the appellant's services were considered useful by his new employers and that the apprehension of the respondent company that his employment with the rival company was fraught with considerable damage to their interest was well founded and justified its prayer for an injunction restraining him from undertaking an employment with the said rival manufacturers.

(8) As regards the challenge to the validity of Clauses 9 and 17, the High Court held that though the said agreement was with the respondent company and the company carried on other businesses as well, the employment was in the business of Century Rayon. The appellant was employed as a Shift Supervisor in that business only, the training given to him was exclusively for the spinning department of the tyre cord division and his letter of acceptance was also in relation to the post of a Shift Supervisor in that department. The High Court therefore concluded that Clauses 9 and 17 related only to the business in the tyre cord division and therefore restraints contained in those clauses meant prohibition against divulging information received by the appellant while working in that Division and that Clause 17 also meant a restraint in relation to the work carried on in the said spinning department. Therefore the inhibitions contained in those clauses were not blanket restrictions as alleged by the appellant, and that the prohibition in Clause 17 operated only in the event of the appellant leaving, abandoning or resigning his service during the term of and in breach of the said agreement. On this reasoning it held that Clause 17, besides not being general, was a reasonable restriction to protect the interests of the respondent company particularly as the company had spent considerable amount in training, secrets of know-how of specialised processes were divulged to him and the foreign collaborators had agreed to disclose their specialised processes only on the respondent company's undertaking to obtain corresponding secrecy clauses from its employees and on the guarantee that those processes would be exclusively used for the business of the respondent company. Furthermore, Clause 17 did not prohibit the appellant even from seeking similar employment from any other manufacturer after the contractual period was over. The High Court lastly found that there was no indication at all that if the appellant was prevented from being employed in a similar capacity elsewhere he would be forced to idleness or that such a restraint would compel the appellant to go back to the company which would indirectly result in specific performance of the contract of personal service.

(9) Counsel for the appellant raised the following three contentions: (1) that the said agreement constituted a restraint on trade and was therefore opposed to public policy, (2) that in order to be valid and enforceable the covenant in question should be reasonable in space and time and to the extent necessary to protect the employer's right of property, and (3) that the injunction to enforce a negative stipulation can only be granted for the legitimate purpose of safeguarding the trade secrets of the employer. He argued that these conditions were lacking in the present case and therefore the respondent company was not entitled to the enforcement of the said stipulation.

(10) As to what constitutes restraint of trade is summarised in Halsbury's ***Laws of England*** (3rd ed.) Vol. 38, at page 15 and onwards. It is a general principle of the common

law that a person is entitled to exercise his lawful trade or calling as and when he wills and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract as it is public policy to oppose all restraints upon liberty of individual action which are injurious to the interests of the State. This principle is not confined to restraint of trade in the ordinary meaning of the word "trade" and includes restraints on the right of being employed. The Court takes a far stricter view of covenants between master and servant than it does of similar covenants between vendor and purchaser or in partnership agreements. An employer, for instance, is not entitled to protect himself against competition on the part of an employee after the employment has ceased but a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor. This principle is based on the footing that an employer has no legitimate interest in preventing an employee after he leaves his service from entering the service of a competitor merely on the ground that he is a competitor. [***Kores Manufacturing Co. Ltd.*** v. ***Kolok Manufacturing Co. Ltd.*** 1959 Ch 108, 126]. The attitude of the Courts as regards public policy however has not been inflexible. Decisions on public policy have been subject to change and development with the change in trade and in economic thought and the general principle once applicable to agreements in restraints of trade have been considerably modified by later decisions. The rule now is that restraints whether general or partial may be good if they are reasonable. A restraint upon freedom of contract must be shown to be reasonably necessary for the purpose of freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it [***E. Underwood & Son Ltd.*** v. ***Barker*** [(1899) 1 Ch 300]. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object. In such a case the general principle of freedom of trade must be applied with due regard to the principle that public policy requires for men of full age and understanding the utmost freedom of contract and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors [***Fitch*** v. ***Dewes*** [(1921) 2 AC 158, 162-167]. Where an agreement is challenged on the ground of its being a restraint of trade the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once, this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract

(11) The Courts however have drawn a distinction between restraints applicable during the term of the contract of employment and those that apply after its cessation (Halsbury's ***Laws of England*** (3rd ed.), Vol. 38, p. 31). But in ***W.H. Milsted & Son Ltd***. v. ***Hamp and Ross & Glendinning Ltd***. (1927) 1927 WN 233, where the contract of service was terminable only by notice by the employer, Eve J., held it to be bad as being wholly one-sided. But where the contract is not assailable on any such ground, a stipulation therein that the employee shall devote his whole time to the employer, and shall not during the term of the contract serve any other employer would generally be enforceable. In ***Gaumont British Picture Coporation Ltd***. v. ***Alexander*** (1936) 2 All ER 1686, clause 8 of the agreement provided that:

> "the engagement is an exclusive engagement by the corporation of the entire service of the artiste for the period mentioned in Clause 2 and accordingly the artiste agrees with the corporation that from the date hereof until the expiration of her said engagement the artiste shall not without receiving the previous consent of the corporation do any work or perform or render any services whatsoever to any person, firm or company other than the corporation and its sublessees".

On a contention that this clause was a restraint of trade, Porter J., held that restrictions placed upon an employee under a contract of service could take effect during the period of contract and are not in general against public policy. But the learned Judge at p. 1692 observed that a contract would be thought to be contrary to public policy if there were a restraint, such as a restraint of trade, which would be unjustifiable for the business of the claimants in the case. He however added that he did not know of any case, although it was possible, there might be one, where circumstances might arise in which it would be held that a restraint during the progress of the contract itself was an undue restraint. He also observed that though for the most part, those who contract with persons and enter into contracts which one might for this purpose describe as contracts of service, have generally imposed upon them the position that they should occupy themselves solely in the business of those whom they serve but that it would be a question largely of evidence how far the protection of clauses of that kind would extend, at any rate during the existence of the contract of service. Therefore, though as a general rule restraints placed upon an employee are not against public policy, there might, according to the learned Judge, be cases where a covenant might exceed the requirement of protection of the employer and the Court might in such cases refuse to enforce such a covenant by injunction. In ***William Robinson & Co. Ltd.*** v. ***Heuer*** (1898) 2 Ch. 451, the contract provided that Heuer would not during this engagement without the previous consent in writing of William Robinson & Co.,

> "carry on or be engaged directly or indirectly, as principal, agent, servant or otherwise, in any trade, business of calling, either relating to goods of any description sold or manufactured by the said W. Robinson & Co. Ltd., … or in any other business whatsoever."

Lindley M.R. there observed that there was no authority whatsoever to show that the said agreement was illegal, that is to say, that it was unreasonable or went further than was reasonably necessary for the protection of the plaintiffs. It was confined to the period of the engagement, and meant simply that "so long as you are in our employ you shall not work for anybody else or engage in any other business." There was, therefore, according to him, nothing unreasonable in such an agreement. Applying these observations Branson J., in ***Warner Brothers Pictures*** v. ***Nelson*** (1937) 1 KB 209, held a covenant of a similar nature not to be void. The defendant, a film artiste, entered into a contract with the plaintiffs' film producers, for fifty-two weeks, renewable for a further period of fifty-two weeks at the option of the plaintiffs, whereby she agreed to render her exclusive service as such artiste to the plaintiffs, and by way of negative stipulation not to render, during the period of the contract, such services to any other person. In breach of the agreement she entered into a contract to perform as a film artiste for a third person. It was held that in such a case an injunction would

issue though it might be limited to a period and in terms which the Court in its discretion thought reasonable.

(12) A similar distinction has also been drawn by Courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act. In ***Brahmaputra Tea Co. Ltd.*** v. ***Scarth*** (1885) ILR 11 Cal. 545 the condition under which the covenantee was partially restrained from competing after the term of his engagement was over with his former employer was held to be bad but the condition by which he bound himself during the term of his agreement, not, directly or indirectly to compete with his employer was held good. At page 550 of the report the Court observed that an agreement of service by which a person binds himself during the term of the agreement not to take service with any one else, or directly or indirectly take part in, promote or aid any business in direct competition with that of his employer was not hit by Section 27. The Court observed:

> "An agreement to serve a person exclusively for a definite term is a lawful agreement, and it is difficult to see how that can be unlawful which is essential to its fulfilment, and to the due protection of the interests of the employer, while the agreement is in force."

In ***V.N. Deshpande*** v. ***Arvind Mills Co. Ltd.*** (AIR 1946 Bom 423) an agreement of service contained both a positive covenant, viz., that the employee shall devote his whole-time attention to the service of the employers and also a negative covenant preventing the employee from working elsewhere during the term of the agreement. Relying on (1903) 5 Bom LR 878 (*supra)*, the learned Judges observed that illustrations (c) and (d) to Section 57 of the Specific Relief Act in terms recognised such contracts and the existence of negative covenants therein and that therefore the contention that the existence of such a negative covenant in a service agreement made the agreement void on the ground that it was in restraint of trade and contrary to Section 27 of the Contract Act had no validity.

(13) Counsel for the appellant, however, relied on ***Ehrman*** v. ***Bartholomew*** (1898) 1 Ch. 671 as an illustration where the negative stipulation in the contract was held to be unreasonable and therefore unenforceable. Chapter 3 of the agreement these provided that the employee shall devote the whole of his time during the usual business hours in the transaction of the business of the firm and shall not in any manner directly or indirectly engage or employ himself in any other business, or transact any business with or for any person or persons other than the firm during the continuance of this agreement. Clause 13 of the agreement further provided that after the termination of the employment by any means, the employee should not, either on his sole account or jointly with any other person, directly or indirectly supply any of the then or past customers of the firm with wines etc., or solicit for orders any such customers and should not be employed in any capacity whatsoever or be concerned, engaged or employed in any business of a wine or spirit merchant in which any former partner of the firm was engaged. Romer J., held these clauses to be unreasonable on the ground that Clause 3 was to operate for a period of 10 years or for so much of that period as the employer chose and that the word "business" therein mentioned could not be held limited by the context to a wine merchant's business or in any similar way. So that the Court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him

do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. The other decision relied on by him was 1913 AC 724 (Supra). This was a case of a negative covenant not to serve elsewhere for three years after the termination of the contract. In this case the court applied the test of what was reasonable for the protection of the plaintiffs' interest. It was also not a case of the employee possessing any special talent but that of a mere canvasser. This decision, however, cannot assist us as the negative covenant therein was to operate after the termination of the contract. ***Hebert Morris Ltd.*** v. ***Saxelby*** (1916) 1 AC 688 and ***Attwood*** v. ***Lamont*** (1920) 3 KB 571 are also cases where the restrictive covenants were to apply after the termination of the employment. In ***Commercial Plastics Ltd.*** v. ***Vincent*** (1964) 3 All ER 546 also the negative covenant was to operate for a year after the employee left the employment and the Court held that the restriction was void inasmuch as it went beyond what was reasonably necessary for the protection of the employer's legitimate interests.

(14) These decisions do not fall within the class of cases where the negative covenant operated during and for the period of employment as in ***Gaumont Corporation's*** *c*ase, where the covenant was held not to be a restraint of trade or against public policy unless the agreement was wholly one-sided and therefore unconscionable as in 1927 WN 233 (*supra*) or where the negative covenant was such that an injunction to enforce it would indirectly compel the employee either to idleness or to serve the employer, a thing which the court would not order as in 1898-1 Ch. 671 (Supra). There is, however, the decision of a Single Judge of the Calcutta High Court in ***Gopal Paper Mills Ltd.*** v. ***Surendra K. Ganeshdas Malhotra***, AIR 1962 Cal. 61, a case of breach of a negative covenant during the period of employment. This decision, in our view, was rightly distinguished by the High Court as the period of contract there was as much as 20 years and the contract gave the employer an arbitrary power to terminate the service without notice if the employer decided not to retain the employee during the three years of apprenticeship or thereafter if the employee failed to perform his duties to the satisfaction of the employer who had absolute discretion to decide whether the employee did so and the employer's certificate that he did not, was to be conclusive as between the parties. Such a contract would clearly fall in the class of contracts held void as being one-sided as in 1927 WN 233 (*supra*). The decision in AIR 1962 Cal. 61 therefore cannot further the appellant's case.

(15) The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided as in the case of ***W.H. Milsted & Son Ltd***. Both the Trial Court and the High Court have found, and in our view, rightly, that the negative covenant in the present case restricted as it is to the period of employment and to

work similar or substantially similar to the one carried on by the appellant when he was in the employ of the respondent company was reasonable and necessary for the protection of the company's interests and not such as the court would refuse to enforce. There is therefore no validity in the contention that the negative covenant contained in Clause 17 amounted to a restraint of trade and therefore against public policy.

(16) The next question is whether the injunction in the terms in which it is framed should have been granted. There is no doubt that the courts have a wide discretion to enforce by injunction a negative covenant. Both the courts below have concurrently found that the apprehension of the respondent company that information regarding the special processes and the special machinery imparted to and acquired by the appellant during the period of training and thereafter might be divulged was justified; that the information and knowledge disclosed to him during this period was different from the general knowledge and experience that he might have gained while in the service of the respondent company and that it was against his disclosing the former to the rival company which required protection. It was argued however that the terms of Clause 17 were too wide and that the court cannot sever the good from the bad and issue an injunction to the extent that was good. But the rule against severance applies to cases where the covenant is bad in law and it is in such cases that the court is precluded from severing the good from the bad. But there is nothing to prevent the court from granting a limited injunction to the extent that is necessary to protect the employer's interests where the negative stipulation is not void. There is also nothing to show that if the negative covenant is enforced the appellant would be driven to idleness or would be compelled to go back to the respondent company. It may be that if he is not permitted to get himself employed in another similar employment he might perhaps get a lesser remuneration than the one agreed to by Rajasthan Rayon. But that is no consideration against enforcing the covenant. The evidence is clear that the appellant has torn the agreement to pieces only because he was offered a higher remuneration. Obviously he cannot be heard to say that no injunction should be granted against him to enforce the negative covenant which is not opposed to public policy. The injunction issued against him is restricted as to time, the nature of employment and as to area and cannot therefore be said to be too wide or unreasonable or unnecessary for the protection of the interests of the respondent company.

(17) As regards Clause 9 the injunction is to restrain him from divulging any and all information, instruments, documents, reports, etc. which may have come to his knowledge while he was serving the respondent company. No serious objection was taken by Mr. Sen against this injunction and therefore we need say no more about it.

(18) The appeal fails and is dismissed with costs.

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Central Inland Water Transport Corporation Limited
v. *Brojo Nath Ganguly*

(1986) 3 SCC 156 (AIR 1986 SC 1571)

D.P. MADON, J. - 8. The first respondent in Civil Appeal 4412 of 1985, Brojo Nath Ganguly, was, at the date when the said Scheme of Arrangement became effective, working in the said Company and his services were taken over by the Corporation and he was appointed on September 8, 1967, as a Deputy Chief Accounts Officer. The first respondent in Civil Appeal 4413 of 1985, Tarun Kanti Sengupta, was also working in the said Company and his services were also taken over by the Corporation and he was appointed on September 8, 1967, as Chief Engineer on the ship "River Ganga". It is unnecessary to refer at this stage to the terms and conditions of the letters of appointment issued to these two respondents as they have been subsequently superseded by service rules framed by the Corporation except to state that under the said letters of appointment the age of superannuation was fifty-five years unless the Corporation agreed to retain them beyond this period. The said letters of appointment also provided that these respondents would be subject to the service rules and regulations including the conduct rules. Service rules were framed by the Corporation for the first time in 1970 and were replaced by new rules in 1979.

9. We are concerned in these appeals with the "Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules" of 1979 framed by the Corporation. These rules will hereinafter be referred to in short as "the said Rules". The said Rules apply to all employees in the service of the Corporation in all units in West Bengal, Bihar, Assam or in other State or Union Territory except those employees who are covered by the standing orders under the Industrial Employment (Standing Orders) Act, 1946, or those employees in respect of whom the Board of Directors has issued separate orders. Rule 9 of the said Rules deals with termination of employment for acts other than misdemeanour. The relevant provisions of the said Rule 9 relating to permanent employees are as follows:

> 9. Termination of employment for Acts other than misdemeanour -
>
> (i) The employment of a permanent employee shall be subject to termination on three months' notice on either side. The notice shall be in writing on either side. The Company may pay the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.
>
> (ii) The services of a permanent employee can be terminated on the grounds of "services no longer required in the interest of the Company" without assigning any reason. A permanent employee whose services are terminated under this clause shall be paid 15 days' basic pay and dearness allowance for each completed year of continuous service in the Company as compensation. In addition he will be entitled to encashment of leave to his credit."

69. The first point which falls for consideration on this part of the case is whether Rule 9(i) is unconscionable. In order to ascertain this, we must first examine the facts leading to the making of the said Rules and then the setting in which Rule 9(i) occurs. To recapitulate briefly, each of the contesting respondents was in the service of the Rivers Steam Navigation

Company Limited. Their services were taken over by the Corporation after the Scheme of Arrangement was sanctioned by the Calcutta High Court. Under the said Scheme of Arrangement if their services had not been taken over, they would have been entitled to compensation payable to them, either under the Industrial Disputes Act, 1947, or otherwise legally admissible, by the said company, and the Government of India was to provide to the said company the amount of such compensation. Under the letters of appointment issued to these respondents, the age of superannuation was fifty-five. Thereafter, Service Rules were framed by the Corporation in 1970 which were replaced in 1979 by new rules namely, the said Rules. The said Rules did not apply to employees covered by the Industrial Employment (Standing Orders) Act, 1946, that is, to workmen, or to those in respect of whom the Board of Directors had issued separate orders. At all relevant times, these respondents were employed mainly in a managerial capacity. No separate orders were issued by the Board of Directors in their case. These respondents were, therefore, admittedly governed by the said Rules. Under Rule 10 of the said Rules, they were to retire from the service of the Corporation on completion of the age of fifty-eight years though in exceptional cases and in the interest of the Corporation an extension might have been granted to them with the prior approval of the Chairman-cum-Managing Director and the Board of Directors of the Corporation. The said Rules, however, provide four different modes in which the services of the respondents could have been terminated earlier than the age of superannuation, namely, the completion of the age of fifty-eight years. These modes are those provided in Rule 9(*i*), Rule 9(*ii*), sub-clause (*iv*) of clause (*b*) of Rule 36 read with Rule 38, and Rule 37. Of these four modes, the first two apply to permanent employees and the other two apply to all employees. Rule 6 classifies employees as either Permanent or Probationary or Temporary or Casual or Trainee. Clause (*i*) of Rule 6 defines the expression "Permanent employee" as meaning "an employee whose services have been confirmed in writing according to the Recruitment and Promotion Rules". Under Rule 9(*i*) which has been extracted above, the employment of a permanent employee is to be subject to termination on three months' notice in writing on either side. If the Corporation gives such a notice of termination, it may pay to the employee the equivalent of three months' basic pay and dearness allowance, if any, in lieu of notice, and where a permanent employee terminates the employment without giving due notice, the Corporation may deduct a like amount from the amount due or payable to the employee. Under Rule 11, an employee who wishes to leave the service of the Corporation by resigning therefrom, is to give to the Corporation the same notice as the Corporation is required to give to him under Rule 9, that is, a three months' notice in writing. Under Rule 9(*ii*), the services of a permanent employee can be terminated on the ground of "Services no longer required in the interest of the Company" (that is, the Corporation). In such a case, a permanent employee whose service is terminated under this clause is to be paid fifteen days' basic pay and dearness allowance for each completed year of continuous service in the Corporation and he is also to be entitled to encashment of leave to his credit. Rule 36 prescribes the penalties which can be imposed, "for good and sufficient reasons and as hereinafter provided" in the said Rules, on an employee for his misconduct. Clause (*a*) of Rule 36 sets out the minor penalties and clause (*b*) of Rule 36 sets out the major penalties. Under sub-clause (*iv*) of clause (*b*) of Rule 36, dismissal from service is a major penalty. None of the major penalties including the penalty of dismissal is to be imposed except after holding an inquiry in

accordance with the provisions of Rule 38 and until after the inquiring authority, where it is not itself the disciplinary authority, has forwarded to the disciplinary authority the records of the inquiry together with its report, and the disciplinary authority has taken its decision as provided in Rule 39. Rule 40 prescribes the procedure to be followed in imposing minor penalties. Under Rule 43, notwithstanding anything contained in Rules 38, 39 or 40, the disciplinary authority may dispense with the disciplinary inquiry in the three cases set out in Rule 43 and impose upon an employee either a major or minor penalty. We have reproduced Rule 43 earlier. Rule 45 provides for an appeal against an order imposing any of the penalties specified in Rule 36. Under Rule 37, the Corporation has the right to terminate the service of any employee at any time without any notice if the employee is found guilty of any insubordination, intemperance or other misconduct or of any breach of any rules pertaining to service or conduct or non-performance of his duties. The said Rules do not require that any disciplinary inquiry should be held before terminating an employee's service under Rule 37.

70. Each of the contesting respondents in these appeals was asked to submit his written explanation to the various allegations made against him. Ganguly, the first respondent in Civil Appeal 4412 of 1985, gave a detailed reply to the said show cause notice. Sengupta, the first respondent in Civil Appeal 4413 of 1985, denied the charges made against him and asked for inspection of the documents and copies of statements of witnesses mentioned in the charge sheet served upon him to enable him to file his written statement. Without holding any inquiry into the allegations made against them, the services of each of them were terminated by the said letter dated February 26, 1983, under Rule 9(***i***). The action was not taken either under Rule 36 or Rule 37 nor was either of them dismissed after applying to his case Rule 43 and dispensing with the disciplinary inquiry.

71. It was submitted on behalf of the appellants that there was nothing unconscionable about Rule 9(*i*), that Rule 9(*i*) was not a *nudum pactum* for it was supported by mutuality inasmuch as it conferred an equal right upon both parties to terminate the contract of employment, that the grounds which render an agreement void and unenforceable are set out in the Indian Contract Act, 1872 (Act 9 of 1872), that unconscionability was not mentioned in the Indian Contract Act as one of the grounds which invalidates an agreement, that the power conferred by Rule 9(i) was necessary for the proper functioning of the administration of the Corporation, that in the case of the respondents this power was exercised by the Chairman-cum-Managing Director of the Corporation, and that a person holding the highest office in the Corporation was not likely to abuse the power conferred by Rule 9(*i*).

72. The submissions of the contesting respondents, on the other hand, were that the parties did not stand on an equal footing and did not enjoy the same bargaining power, that the contract contained in the service rules was one imposed upon these respondents, that the power conferred by Rule 9(*i*) was arbitrary and uncanalized as it did not set out any guidelines for the exercise of that power and that even assuming it may not be void as a contract, in any event it offended Article 14 as it conferred an absolute and arbitrary power upon the Corporation.

73. As the question before us is of the validity of clause (*i*) of Rule 9, we will refrain from expressing any opinion with respect to validity of clause (*ii*) of Rule 9 or Rule 37 or 40 but will confine ourselves only to Rule 9(*i*).

74. The said Rules constitute a part of the contract of employment between the Corporation and its employees to whom the said Rules apply, and they thus form a part of the contract of employment between the Corporation and each of the two contesting respondents. The validity of Rule 9(*i*) would, therefore, first fall to be tested by the principles of the law of contracts.

75. Under Section 19 of the Indian Contract Act, when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. It is not the case of either of the contesting respondents that there was any coercion brought to bear upon him or that any fraud or misrepresentation had been practised upon him. Under Section 19-A, when consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused and the court may set aside any such contract either absolutely or if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just.

We need not trouble ourselves with the other sections of the Indian Contract Act except Section 23 and 24. Section 23 states that the consideration or object of an agreement is lawful unless inter alia the court regards it as opposed to public policy. This section further provides that every agreement of which the object or consideration is unlawful is void. Under Section 24, if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void. The agreement is, however, not always void in its entirety for it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The general rule was stated by Wiles, J., in ***Pickering*** v. ***Ilfracombe Ry.Co.*** (1868) LR 3 Cl 235, as follows: (at page 250)

> The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.

76. Under which head would an unconscionable bargain fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. No case of the type before us appears to have fallen for decision under the law of contracts before any court in India nor has any case on all fours of a court in any other country been pointed out to us. The word "unconscionable" is defined in the ***Shorter Oxford English Dictionary*****,** Third Edition, Volume II, page 2288; when used with reference to action etc. as "showing no regard for conscience; irreconcilable with what is right or reasonable". An unconscionable bargain would, therefore, be one which is irreconcilable with what is right or reasonable.

77. Although certain types of contracts were illegal or void, as the case may be, at Common Law, for instance, those contrary to public policy or to commit a legal wrong such as a crime or a tort, the general rule was of freedom of contract. This rule was given full play in the nineteenth century on the ground that the parties were the best judges of their own

interests, and if they freely and voluntarily entered into a contract, the only function of the court was to enforce it. It was considered immaterial that one party was economically in a stronger bargaining position than the other; and if such a party introduced qualifications and exceptions to his liability in clauses which are today known as "exemption clauses" and the other party accepted them, then full effect would be given to what the parties agreed. Equity, however, interfered in many cases of harsh or unconscionable bargains, such as, in the law relating to penalties, forfeitures and mortgages. It also interfered to set aside harsh or unconscionable contracts for salvage services rendered to a vessel in distress, or unconscionable contracts with expectant heirs in which a person, usually a money-lender, gave ready cash to the heir in return for the property which he expects to inherit and thus to get such property at a gross undervalue. It also interfered with harsh or unconscionable contracts entered into with poor and ignorant persons who had not received independent advice (See ***Chitty on Contracts***, 25th Ed., Vol. I, paragraphs 4 and 516).

78. Legislation has also interfered in many cases to prevent one party to a contract from taking undue or unfair advantage of the other. Instances of this type of legislation are usury laws, debt relief laws and laws regulating the hours of work and conditions of service of workmen and their unfair discharge from service, and control orders directing a party to sell a particular essential commodity to another.

79. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in ***Chitty on Contracts*****,** Twenty-fifth Edition, Volume I, in paragraph 4, and are as follows:

> These ideas have to a large extent lost their appeal today. "Freedom of contract", it has been said, "is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large." Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called *"contracts d'adhesion"* by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.
>
> Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedure for consultation, and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except

> by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of "inequality of bargaining power".

What the French call *"contracts d'adhesion"*, the American call "adhesion contracts" or "contracts of adhesion". An "adhesion contract" is defined in ***Black's Law Dictionary***, Fifth Edition, at page 38, as follows:

> *Adhesion contract.* – Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms. Not every such contract is unconscionable.

80. The position under the American Law is stated in *Reinstatement of the Law – Second* as adopted and promulgated by the American Law Institute, Volume II which deals with the law of contracts, in Section 208 at page 107, as follows:

> Sec. 208. *Unconscionable Contract or Term*
>
> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.
>
> In the Comments given under that section it is stated at page 107:
>
> Like the obligation of good faith and fair dealing (Sec. 205), the policy against unconscionable contracts or terms applies to a wide variety of types of conduct. The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Policing against unconscionable contracts or terms has sometimes been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. Uniform Commercial Code para 2-302 Comment 1 …A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favourable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms (emphasis supplied).

There is a statute in the United States called the Universal Commercial Code which is applicable to contracts relating to sales of goods. Though this statute is inapplicable to contracts not involving sales of goods, it has proved very influential in, what are called in the United States, "non-sales" cases. It has many times been used either by analogy or because it was felt to embody a general accepted social attitude of fairness going beyond its statutory application to sales of goods. In the Reporter's Note to the said Section 208, it is stated at page 112:

> It is to be emphasised that a contract of adhesion is not unconscionable per se, and that all unconscionable contracts are not contracts of adhesion. Nonetheless, the more standardised the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability (emphasis supplied).

The position has been thus summed up by John R. Peden in "**The Law of Unjust Contracts**" published by Butterworths in 1982, at pages 28-29:

> …Unconscionability represents the end of a cycle commencing with the Aristotelian concept of justice and the Roman law *laesio enormis*, which in turn formed the basis for the medieval church's concept of a just price and condemnation of usury. These philosophies permeated the exercise, during the seventeenth and eighteenth centuries, of the Chancery court's discretionary powers under which it upset all kinds of unfair transactions. Subsequently the movement towards economic individualism in the nineteenth century hardened the exercise of these powers by emphasising the freedom of the parties to make their own contract. While the principle of *pacta sunt servanda* held dominance, the consensual theory still recognised exceptions where one party was overborne by a fiduciary, or entered a contract under duress or as the result of fraud. However, these exceptions were limited and had to be strictly proved.
>
> It is suggested that the judicial and legislative trend during the last 30 years in both civil and common law jurisdictions has almost brought the wheel full circle. Both courts and parliaments have provided greater protection for weaker parties from harsh contracts. In several jurisdictions this included a general power to grant relief from unconscionable contracts, thereby providing a launching point from which the courts have the opportunity to develop a modern doctrine of unconscionability. American decisions on Article 2.302 of the UCC have already gone some distance into this new arena…"

The expression "*laesio enormis*" used in the above passage refers to *"laesio ultra dimidium vel enormis"* which in Roman law meant the injury sustained by one of the parties to an onerous contract when he had been overreached by the other to the extent of more than one-half of the value of the subject-matter, as for example, when a vendor had not received half the value of property sold, or the purchaser had paid more than double value. The maxim *"pacta sunt servanda"* referred to in the above passage means "contracts are to be kept".

81. It would appear from certain recent English cases that the courts in that country have also begun to recognise the possibility of an unconscionable bargain which could be brought about by economic duress even between parties who may not in economic terms be situate

differently. Read commentary on certain cases in Chitty on Contracts 25th edition, vol I, para 486).

82. Another jurisprudential concept of comparatively modern origin which has affected the law of contracts is the theory of "distributive justice". According to this doctrine, distributive fairness and justice in the possession of wealth and property can be achieved not only by taxation but also by regulatory control of private and contractual transactions even though this might involve some sacrifice of individual liberty. In ***Lingappa Pochanna Appelwar*** v. ***State of Maharashtra*** (1985) 1 SCC 479, this Court, while upholding the constitutionality of the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974, said (at page 493, para 16):

> The present legislation is a typical illustration of the concept of distributive justice, as modern jurisprudence know it. Legislators, judges and administrators are now familiar with the concept of distributive justice. Our Constitution permits and even directs the State to administer what may be termed 'distributive justice'. The concept of distributive justice in the sphere of law-making connotes, inter alia, the removal of economic inequalities and rectifying the injustice resulting from dealings or transactions between unequals in society. Law should be used as an instrument of distributive justice to achieve a fair division of wealth among the members of society based upon the principle: 'From each according to his capacity, to each according to his needs'. Distributive justice comprehends more than achieving lessening of inequalities by differential taxation, giving debt relief or distribution of property owned by one to many who have none by imposing ceiling on holdings, both agricultural and urban, or by direct regulation of contractual transactions by forbidding certain transactions and perhaps, by requiring others. It also means that those who have been deprived of their properties by unconscionable bargains should be restored their property. All such laws may take the form of forced redistribution of wealth as a means of achieving a fair division of material resources among the members of society or there may be legislative control of unfair agreements (emphasis supplied).

When our Constitution states that it is being enacted in order to give to all the citizens of India "JUSTICE, social, economic and political", when clause (1) of Article 38 of the Constitution directs the State to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which social, economic and political justice shall inform all the institutions of the national life, when clause (2) of Article 38 directs the State, in particular, to minimize the inequalities in income, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations, and when Article 39 directs the State that it shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and that there should be equal pay for equal work for both men and women, it is the doctrine of distributive justice which is speaking through these words of the Constitution.

83. Yet another theory which has made its emergence in recent years in the sphere of the law of contracts is the test of reasonableness or fairness of a clause in a contract where there is inequality of bargaining power. Lord Denning, MR, appears to have been the propounder, and perhaps the originator – at least in England, of this theory. In ***Gillespie Brothers & Co. Ltd.*** v. ***Roy Bowles Transport Ltd.*** (1973) Q.B. 400, 416, where the question was whether an indemnity clause in a contract, on its true construction, relieved the indemnifier from liability arising to the indemnified from his own negligence, Lord Denning said (at pages 415-416):

> The time may come when this process of 'construing' the contract can be pursued no further. The words are too clear to permit of it. Are the courts then powerless? Are they to permit the party to enforce his unreasonable clause, even when it is so unreasonable, or applied so unreasonably, as to be unconscionable? When it gets to this point, I would say, as I said many years ago:
>
> 'there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused': ***John Lee & Son (Grantham) Ltd.*** v. ***Railway Executive*** (1949) 2 All ER 581, 584
>
> It will not allow a party to exempt himself from his liability at common law when it would be quite unconscionable for him to do so (emphasis supplied).

In the above case the Court of Appeal negatived the defence of the indemnifier that the indemnity clause did not cover the negligence of the indemnified. It was in ***Lloyds Bank Ltd.*** v. ***Bindy*** (1974) 3 All ER 757, that Lord Denning first clearly enunciated his theory of "inequality of bargaining power". He began his discussion on this part of the case by stating (at page 763):

> There are cases in our books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the court. (emphasis supplied)

He then referred to various categories of cases and ultimately deduced therefrom a general principle in these words (at page 765):

> Gathering all together, I would suggest that *through all these instances there runs a single thread*. They rest on '*inequality* of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-

> interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases (emphasis supplied).

84. Though the House of Lords does not yet appear to have unanimously accepted this theory, the observations of Lord Diplock in ***A. Schroeder Music Publishing Co. Ltd.*** v. ***Macaulay*** (formerly ***Instone***) (1974) 1 WLR 1308, are a clear pointer towards this direction. In that case a song writer had entered into an agreement with a music publisher in the standard form whereby the publishers engaged the song writer's exclusive services during the term of the agreement, which was five years. Under the said agreement, the song writer assigned to the publisher the full copyright for the whole world in his musical compositions during the said term. By another term of the said agreement, if the total royalties during the term of the agreement exceeded £ 5,000 the agreement was to stand automatically extended by a further period of five years. Under the said agreement, the publisher could determine the agreement at any time by one month's written notice but no corresponding right was given to the song writer. Further, while the publisher had the right to assign the agreement, the song writer agreed not to assign his rights without the publisher's prior written consent. The song writer brought an action claiming, inter alia, a declaration that the agreement was contrary to public policy and void. Plowman, J., who heard the action granted the declaration which was sought and the Court of Appeal affirmed his judgment. An appeal filed by the publishers against the judgment of the Court of Appeal was dismissed by the House of Lords. The Law Lords held that the said agreement was void as it was in restraint of trade and thus contrary to public policy. In his speech Lord Diplock, however, outlined the theory of reasonableness or fairness of a bargain. The following observations of his on this part of the case require to be reproduced *in extenso* (at pages 1315-16):

> My Lords, the contract under consideration in this appeal is one whereby the respondent accepted restrictions upon the way in which he would exploit his earning power as a song writer for the next ten years. Because this can be classified as a contract in restraint of trade the restrictions that the respondent accepted fell within one of those limited categories of contractual promises in respect of which the courts still retain the power to relieve the promisor of his legal duty to fulfil them. In order to determine whether this case is one in which that power ought to be exercised, what your Lordships have in fact been doing has been to assess the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to extract from the song writer promises that were unfairly onerous to him. Your Lordships have not been concerned to inquire whether the public have in fact been deprived of the fruit of the song writer's talents by reason of the restrictions, nor to assess the likelihood that they would be so deprived in the future if the contract were permitted to run its full course.

It is, in my view, salutary to acknowledge that in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain

from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that the unconscionable. Under the influence of Bentham and of *laisaiz faire* the courts in the 19th century abandoned the practice of applying the public policy against unconscionable bargains to contracts generally, as they had formerly done to any contract considered to be usurious; but the policy survived in its application to penalty clauses and to relief against forfeiture and also to the special category of contracts in restraint of trade. If one looks at the reasoning of 19th-century judges in cases about contracts in restraint of trade one finds lip service paid to current economic theories, but if one looks at what they said in the light of what they did, one finds that they struck down a bargain if they thought it was unconscionable as between the parties to it and upheld it if they thought that it was not.

> So I would hold that the question to be answered as respect a contract in restraint of trade of the kind with which this appeal is concerned is: "Was the bargain fair?" The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract must be taken into consideration (emphasis supplied).

Lord Diplock then proceeded to point out that there are two kinds of standard forms of contracts. The first is of contracts which contain standard clauses which "have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade". He then proceeded to state: "If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable". Referring to the other kind of standard form of contract Lord Diplock said (at page 1316):

> The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands. The ticket cases in the 19th century provide what are probably the first examples. The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it'.
>
> To be in a position to adopt this attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power (emphasis supplied).

85. The observations of Lord Denning, MR, in ***Levison*** v. ***Patent Steam Carpet Co. Ltd.*** [(1978) QB 69] are also useful and require to be quoted. These observations are as follows (at page 79):

> In such circumstances as here the Law Commission in 1975 recommended that a term which exempts the stronger party from his ordinary common law liability should not be given effect except when it is reasonable: see The Law Commission and the Scottish Law Commission Report, Exemption Clauses, Second Report (1975) (August 5, 1975), Law Com. No. 69 (H.C. 605), pp. 62, 174; and there is a Bill now before Parliament which gives effect to the test of reasonableness. This is a gratifying piece of law reform: but I do not think we need wait for that Bill to be passed into law. You never know what may happen to a Bill. Meanwhile the common law has its own principles ready to hand. In ***Gillespie Bros. & Co. Ltd.*** v. ***Roy Bowles Transport Ltd.*** (*supra*), I suggested that an exemption or limitation clause should not be given effect if it was unreasonable, or if it would be unreasonable to apply it in the circumstances of the case. I see no reason why this should not be applied today, at any rate in contracts in standard forms where there is inequality of bargaining power.

86. The Bill referred to by Lord Denning in the above passage, when enacted, became the Unfair Contract Terms Act, 1977. This statute does not apply to all contracts but only to certain classes of them. It also does not apply to contracts entered into before the date on which it came into force, namely, February 1, 1978; but subject to this it applies to liability for any loss or damage which is suffered on or after that date. It strikes at clauses excluding or restricting liability in certain classes of contracts and torts and introduces in respect of clauses of this type the test of reasonableness and prescribes the guidelines for determining their reasonableness. The detailed provisions of this statute do not concern us but they are worth a study.

87. In ***Photo Production Ltd.*** v. ***Securicor Transport Ltd.*** [(1980) AC 827], a case before the Unfair Contract Terms Act, 1977, was enacted, the House of Lords upheld an exemption clause in a contract on the defendants' printed form containing standard conditions. The decision appears to proceed on the ground that the parties were businessmen and did not possess unequal bargaining power. The House of Lords did not in that case reject the test of reasonableness or fairness of a clause in a contract where the parties are not equal in bargaining position. On the contrary, the speeches of Lord Wilberforce, Lord Diplock and Lord Scarman would seem to show that the House of Lords in a fit case would accept that test. Lord Wilberforce in his speech, after referring to the Unfair Contract Terms Act, 1977, said (at page 843):

> This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only in the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions (emphasis supplied).

Lord Diplock said (at page 850-51):

> Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather than another, is a relevant consideration in deciding what meaning the words were intended by the parties to bear (emphasis supplied).

Lord Scarman, while agreeing with Lord Wilberforce, described (at page 853) the action out of which the appeal before the House had arisen as "a commercial dispute between parties well able to look after themselves" and then added: "In such a situation what the parties agreed (expressly or impliedly) is what matters; and the duty of the courts is to construe their contract according to its tenor".

88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognised, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, Section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages... which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.

89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of 19th century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample underfoot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Article 14. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining

power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances.

91. Is a contract of the type mentioned above to be adjudged voidable or void? If it was induced by undue influence, then under Section 19-A of the Indian Contract Act, it would be voidable. It is, however, rarely that contracts of the types to which the principle formulated by us above applies are induced by undue influence as defined by Section 16(1) of the Indian Contract Act, even though at times they are between parties one of whom holds a real or apparent authority over the other. In the vast majority of cases, however, such contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Such contracts will not fall within the four corners of the definition of "undue influence" given in Section 16(1). Further, the majority of such contracts are in a standard or prescribed form or consist of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. Contracts in prescribed or standard forms or which embody a set of rules as part of the contract are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group or groups of persons, if they are unconscionable, unfair and unreasonable, are injurious to the public interest. To say that such a contract is only voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to court to have the contract adjudged voidable. This would only result in multiplicity of litigation which no court should encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge-made, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act, 1872. In order that such a contract should be void, it must fall under one of the relevant sections of the Indian Contract Act. The only relevant provision in the Indian Contract Act which can apply is section 23 when it states that "The consideration or object of an agreement is lawful, unless ... the court regards it as ... opposed to public policy."

92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought – "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in ***Janson*** v. ***Driefontein Consolidated Gold Mines Ltd.*** [(1902) AC 484, 500]: "Public policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in ***Richardson*** v. ***Mellish*** [(1824-34) All ER 258, 266] described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you". The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in ***Enderby Town Football Club Ltd.*** v. ***Football Assn. Ltd.*** [(1971) Ch 591, 606]; "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his *"History of English Law"*, Volume III, page 55, has said:

> In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquired some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of ***A. Schroeder Music Publishing Co. Ltd.*** v. ***Macaulay*** (*supra*), however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In ***Kedar Nath Motani*** v. ***Prahlad Rai*** [AIR 1960 SC 213], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

> The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void.

100. The Corporation is a large organization. It has offices in various parts of West Bengal, Bihar and Assam, as shown by the said Rules, and possibly in other States also. The said Rules form part of the contract of employment between the Corporation and its employees who are not workmen. These employees had no powerful workmen's Union to support them. They had no voice in the framing of the said Rules. They had no choice but to accept the said Rules as part of their contract of employment. There is gross disparity between the Corporation and its employees, whether they be workmen or officers. The Corporation can afford to dispense with the services of an officer. It will find hundreds of others to take his place but an officer cannot afford to lose his job because if he does so, there are not hundreds of jobs waiting for him. A clause such as clause (***i***) of Rule 9 is against right and reason. It is wholly unconscionable. It has been entered into between parties between whom there is gross inequality of bargaining power. Rule 9(***i***) is a term of the contract between the Corporation and all its officers. It affects a large number of persons and it squarely falls within the principle formulated by us above. Several statutory authorities have a clause similar to Rule 9(***i***) in their contracts of employment. As appears from the decided cases, the West Bengal State Electricity Board and Air India International have it. Several government companies apart from the Corporation (which is the first appellant before us) must be having it. There are 970 government companies with paid-up capital of Rs. 16,414.9

crores as stated in the written arguments submitted on behalf of the Union of India. The government and its agencies and instrumentalities constitute the largest employer in the country. A clause such as Rule 9(i) in a contract of employment affecting large sections of the public is harmful and injurious to the public interest for it tends to create a sense of insecurity in the minds of those to whom it applies and consequently it is against public good. Such a clause, therefore, is opposed to public policy and being opposed to public policy, it is void under Section 23 of the Indian Contract Act.

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Dhurandhar Prasad Singh **v.** *Jai Prakash University*

AIR 2001 SC 2552

[Distinction between the expressions 'void' and 'voidable'.]

B.N. AGARWAL, J. - 16. The expressions 'void and voidable' have been subject-matter of consideration before English Courts times without number. In the case of ***Durayappah* v. *Fernando*** (1967) 2 All ER 152, the dissolution of Municipal Council by the Minister was challenged. Question had arisen before the Privy Council as to whether a third party could challenge such a decision. It was held that if the decision was complete nullity, it could be challenged by anyone, anywhere. The Court observed at page 158 thus:

> In the case of In re McC. (A minor), (1985) 1 AC 528, the House of Lords followed the dictum of Lord Coke in the Marshalsea Case quoting a passage from the said judgment which was rendered in 1613 where it was laid down that where the whole proceeding is coram non judice which means void ab initio, the action will lie without any regard to the precept or process. The Court laid down at page 536 thus:
>
> "Consider two extremes of a very wide spectrum. Jurisdiction meant one thing to Lord Coke in 1613 when he said in the Marshalsea Case (1613) 10 Co Rep 68b, at p. 76a:
>
> when a Court has jurisdiction of the cause, and, proceeds inverso ordine or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is coram non judice, and actions will lie against them without any regard of the precept or process..."

The Court of the Marshalsea in that case acted without jurisdiction because, its jurisdiction being limited to members of the King's household, it entertained a suit between two citizens neither of whom was a member of the King's household. Arising out of those proceedings a party arrested "by process of the Marshalsea" could maintain an action for false imprisonment against, inter alios, "the Marshal who directed the execution of the process." This is but an early and perhaps the most quoted example of the application of a principle illustrated by many later cases where the question whether a Court or other tribunal of limited jurisdiction has acted without jurisdiction (coram non judice) can be determined by considering whether at the outset of the proceedings that Court had jurisdiction to entertain the proceedings at all. So much is implicit in the Lord Coke's phrase "jurisdiction of the cause."

17. In another decision, in the case of ***Director of Public Prosecutions* v. *Head***, 1959 AC 83, House of Lords was considering validity of an order passed by Secretary of the State in appeal preferred against judgment of acquittal passed in a criminal case. The Court of Criminal Appeal quashed the conviction on the ground that the aforesaid order of Secretary was null and void and while upholding the decision of the Court of Criminal Appeal, the House of Lords observed at page 111 thus:

> "This contention seems to me to raise the whole question of void or voidable for if the original order was void, it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without more ado. The continuation

> orders would be nullities too, because you cannot continue a nullity. The licence to Miss Henderson would be a nullity. So would all the dealings with her property under Section 64 of the Act of 1913. None of the orders would be admissible in evidence. The Secretary of State would, I fancy, be liable in damages for all of the 10 years during which she was unlawfully detained, since it could all be said to flow from his negligent act; see Section 16 of the Mental Treatment Act, 1930.
>
> But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it."

18. This question was examined by Court of Appeal in the case of ***R.*** v. ***Paddington Valuation Officer and another***, ***Ex parte Peachey Property Corporation, Ltd***. (1965) 2 All ER 836, where the valuation list was challenged on the ground that the same was void altogether. On these facts, Lord Denning, M.R. laid down the law observing at page 841 thus:

> "It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null and void without more ado. The other kind is when the invalidity does not make the list void altogether, but only voidable. In that case it stands unless and until it is set aside. In the present case the valuation list is not, and never has been, a nullity. At most the first respondent-acting within his jurisdiction – exercised that jurisdiction erroneously. That makes the list voidable and not void. It remains good until it is set aside."

19. De Smith, Woolf and Jowell in their treatise ***Judicial Review of Administrative Action***. Fifth Edition, paragraph 5-044, has summarised the concept of void and voidable as follows:

> "Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems arose from the premise that if an act, order or decision is ultra vires in the sense of outside jurisdiction, it was said to be invalid or null and void. If it is intra vires it was, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record."

20. Cilve Lewis in his works ***Judicial Remedies in Public Law*** at page 131 has explained the expressions "void and voidable" as follows:

> "A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant."

21. Thus the expressions "void and voidable" have been subject-matter of consideration on innumerable occasions by Courts. The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void

and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is good transaction against the whole world. So far the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as apparent state of affairs is real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.

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DISCHARGE OF A CONTRACT

Satyabrata Ghose v. *Mugneeram Bangur & Co.*

AIR 1954 SC 44

B.K. MUKHERJEA, J. – The facts giving rise to this appeal are, for the most part, uncontroverted and the dispute between the parties centres round the short point as to whether a contract for sale of land to which this litigation relates, was discharged and came to an end by reason of certain supervening circumstances which affected the performance of a material part of it.

To appreciate the merits of the controversy, it will be necessary to give a brief narrative of the material facts. The defendant company, which is the main respondent in this appeal, is the owner of a large tract of land situated in the vicinity of the Dhakuria Lakes within Greater Calcutta. The company started a scheme for development of this land for residential purposes which was described as Lake Colony Scheme No. 1 and in furtherance of the scheme the entire area was divided into a large number of plots for the sale of which offers were invited from intending purchasers.

The company's plan of work seemed to be, to enter into agreements with different purchasers for sale of these plots of land and accept from them only a small portion of the consideration money by way of earnest at the time of the agreement. 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 would be called upon to complete the conveyance by payment of the balance of the consideration money. Bejoy Krishna Roy, who was defendant No. 2 in the suit and figures as a 'pro forma' respondent in this appeal, was one of such purchasers who entered into a contract with the company for purchase of a plot of land covered by the scheme. His contract is dated the 5th of August 1940 and he paid Rs. 101 as earnest money.

In the receipt granted by the vendor for this earnest money, the terms of the agreement are thus set out:

> "Received with thanks from Babu Bejoy Krishna Roy of 28, Tollygunge Circular Road, Tollygunge, the sum of Rs. 101 (Rupees one hundred and one only) as earnest money having agreed to sell him or his nominee 5 K. more or less in plot No. 76 on 20 and 30 ft. road in Premises No. Lake Colony Scheme No. 1, Southern Block at the average rate of Rs. 1,000 (Rupees one thousand only) per Cotta.
>
> The conveyance must be completed within one month from the date of completion of roads on payment of the balance of the consideration money, time being deemed as the essence of the contract. In case of default this agreement will be considered as cancelled with forfeiture of earnest money.

Terms of payment: - One-third to be paid at the time of registration and the balance within six years bearing Rs. 6 per cent interest per annum."

On November 30, 1941 the plaintiff appellant was made a nominee by the purchaser for purposes of the contract and although he brought the present suit in the character of a nominee, it has been held by the trial judge as well as by the lower appellate court, that he was really an assignee of Bejoy Krishna Roy in respect to the latter's rights under the contract. Some time before this date, there was an order passed by the Collector, 24-Parganas on 12th of November, 1941, under Rule 79 of the Defence of India Rules, on the strength of which a portion of the land covered by the scheme was requisitioned for military purposes.

Another part of the land was requisitioned by the Government on 20th of December, 1941, while a third order of requisition, which related to the balance of the land comprised in the scheme, was passed sometime later. In November 1943 the company addressed a letter to Bejoy Krishna Roy informing him of the requisitioning of the lands by the Government and stating 'inter alia' that a considerable portion of the land appertaining to the scheme was taken possession of by the Government and there was no knowing how long the Government would retain possession of the same. The construction of the proposed roads and drains, therefore, could not be taken up during the continuance of the war and possibly for many years after its termination.

In these circumstances, the company decided to treat the agreement for sale with the addressee as cancelled and give him the option of taking back the earnest money within one month from the receipt of the letter. There was an offer made in the alternative that in case the purchaser refused to treat the contract as cancelled, he could, if he liked, complete the conveyance within one month from the receipt of the letter by paying the balance of the consideration money and take the land in the condition in which it existed at that time, the company undertaking to construct the roads and the drains, as circumstances might permit, after the termination of the war.

The letter ended by saying that in the event of the addressee not accepting either of the two alternatives, the agreement would be deemed to be cancelled and the earnest money would stand forfeited. This letter was handed over by Bejoy Krishna to his nominee, the plaintiff, and there was some correspondence after that, between the plaintiff on the one hand and the company on the other through their respective lawyers into the details of which it is not necessary to enter. It is enough to state that the plaintiff refused to accept either of the two alternatives offered by the company and stated categorically that the latter was bound by the terms of the agreement from which it could not, in law, resile.

On 18th of January 1946 the suit, out of which this appeal arises, was commenced by the plaintiff against the defendant company, to which Bejoy Krishna Roy was made a party defendant and the prayers in the plaint were for a two-fold declaration, namely, (1) that the contract dated the 5th of August 1940 between the first and the second defendant, or rather his nominee, the plaintiff, was still subsisting; and (2) that the plaintiff was entitled to get a conveyance executed and registered by the defendant on payment of the consideration money mentioned in the agreement and in the manner and under the conditions specified therein.

The suit was resisted by the defendant company who raised a large number of defences in answer to the plaintiff's claim, most of which are not relevant for our present purpose. The most material plea was that the contract of sale stood discharged by frustration as it became impossible by reason of the supervening events to perform a material part of it.

The trial judge by his judgment dated October 10, 1947 overruled all the pleas taken by the defendant and decreed the plaintiff's suit. An appeal taken by the defendant to the court of the District Judge of 24 Parganas was dismissed on the 25th February 1949 and the judgment of the trial court was affirmed. The defendant company thereupon preferred a second appeal to the High Court which was heard by a Division Bench consisting of Das Gupta and Lahiri, JJ.

The only question canvassed before the High Court was whether the contract of sale was frustrated by reason of the requisition orders issued by the Government. The learned Judges answered this question in the affirmative in favour of the defendant and on that ground alone dismissed the plaintiff's suit. The plaintiff has now come before us on the strength of a certificate granted by the High Court under Article 133(1)(c) of the Constitution of India.

The learned Attorney General, who appeared in support of the appeal, has put forward a three-fold contention on behalf of his client. He has contended in the first place that the doctrine of English law relating to frustration of contract, upon which the learned Judges of the High Court based their decision, has no application to India in view of the statutory provision contained in section 56 of the Indian Contract Act.

It is argued in the second place, that even if the English law applies, it can have no application to contracts for sale of land and that is in fact the opinion expressed by the English Judges themselves. His third and the last argument is that on the admitted facts and circumstances of this case there was no frustrating event which could be said to have taken away the basis of the contract or rendered its performance impossible in any sense of the word.

The first argument advanced by the learned Attorney General raises a somewhat debatable point regarding the true scope and effect of Section 56 of the Indian Contract Act and to what extent, if any, it incorporates the English rule of frustration of contracts.

Section 56 occurs in Chapter IV of the Indian Contract Act which relates to performance of contracts and it purports to deal with one class of circumstances under which performance of a contract is excused or dispensed with on the ground of the contract being void. The section stands as follows:

"An agreement to do an act impossible in itself is void.

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.

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."

The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general, and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment.

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.

Although various theories have been propounded by the Judges and jurists in England regarding the juridical basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of the contract, in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

The parties shall be excused, as Lord Loreburn says, see – ***Tamplin Steamship Co. Ltd.*** v. ***Anglo-Mexican Petroleum Products Co. Ltd.***, 1916-2 AC 397 at p. 403 (A),

> "If substantially the whole contract becomes impossible of performance or in other words 'impracticable' by some cause for which neither was responsible."

In - ***Joseph Constantine Steamship Line Ltd.*** v. ***Imperial Smelting Corporation Ltd.***, 1942 AC 154 at p. 168 (B), Viscount Maugham observed that

> "the doctrine of frustration is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made."

Lord Porter agreed with this view and rested the doctrine on the same basis.

The question was considered and discussed by a Division Bench of the Nagpur High Court in, ***Kesari Chand*** v. ***Governor General in Council***, ILR (1949) Nag. 718, and it was held that the doctrine of frustration comes into play when a contract becomes impossible of performance, after it is made, on account of circumstances beyond the control of the parties. The doctrine is a special case of impossibility and as such comes under section 56 of the Indian Contract Act. We are in entire agreement with this view which is fortified by a recent pronouncement of this court in, ***Ganga Saran*** v. ***Ram Charan***, AIR 1952 SC 9 at 11, where Fazl Ali, J., in speaking about frustration observed in his judgment as follows:

> "It seems necessary for us to emphasise that so far as the courts in this country are concerned, they must look primarily to the law as embodied in sections 32 and 56 of the Indian Contract Act, 1872."

We hold, therefore, that the doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of the Indian Contract Act. It would be incorrect to say that section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that, to the extent that the Indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles of English law 'dehors' these statutory provisions. The decisions of the English courts possess only a persuasive value and may be helpful in showing how the courts in England have decided cases under circumstances similar to those which have come before our courts.

It seems necessary however to clear up some misconception which is likely to arise because of the complexities of the English law on the subject. The law of frustration in England developed, as is well known, under the guise of reading implied terms into contracts. The court implies a term or exception and treats that as part of the contract. In the case of ***Taylor*** v. ***Caldwell*** (1863) 3 B & S 826 (E), Blackburn, J. first formulated the doctrine in its modern form. The court there was dealing with a case where a music hall in which one of the contracting parties had agreed to give concerts on certain specified days was accidentally burnt by fire.

It was held that such a contract must be regarded

> "as subject to an 'implied condition' that the parties shall be excused, in case, before breach, performance becomes 'impossible' from perishing of the thing without default of the contractor."

Again, in ***Robinson*** v. ***Davison*** (1871) 6 Ex 269, there was a contract between the plaintiff and the defendant's wife (as the agent of her husband) that she should play the piano at a concert to be given by the plaintiff on a specified day. On the day in question she was unable to perform through illness. The contract did not contain any term as to what was to be done in case of her being too ill to perform.

In an action against the defendant for breach of contract, it was held that the wife's illness and the consequent incapacity excused her and that the contract was in its nature not absolute but conditional upon her being well enough to perform. Bramwell, B. pointed out in course of his judgment that in holding that the illness of the defendant incapacitated her from performing the agreement the court was not really engrafting a new term upon an express contract. It was not that the obligation was absolute in the original agreement and a new condition was subsequently added to it; the whole question was whether the original contract was absolute or conditional and having regard to the terms of the bargain, it must be held to be conditional.

The English law passed through various stages of development since then and the principles enunciated in the various decided authorities cannot be said to be in any way uniform. In many of the pronouncements of the highest courts in England the doctrine of frustration was held "to be a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands," vide ***Hirji Mulji*** v. ***Cheong Yue Steamship***

Co. Ltd., 1926 AC 497, 510. The court, it is said, cannot claim to exercise a dispensing power or to modify or alter contracts. But when an unexpected event or change of circumstance occurs, the possibility of which the parties did not contemplate, the meaning of the contract is taken to be not what the parties actually intended, but what they as fair and reasonable men would presumably have intended and agreed upon, if having such possibility in view they had made express provision as to their rights and liabilities in the event of such occurrence – Vide ***Dahl*** v. ***Nelson Donkin & Co.*** (1881) 6 AC 38, 59.

As Lord Wright observed in 1942 AC 154 at 185,

> "In ascertaining to 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."

Lord Wright clarified the position still further in the later case of ***Denny Mott and Dickson Ltd.*** v. ***James B. Fraser & Co. Ltd.***, 1944 AC 265 at 275, where he made the following observations:

> "Though it has been constantly said by High authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed.
>
> The doctrine is invented by the court in order to supplement the defects of the actual contract … 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."

In the recent case of ***British Movietonews Ltd.*** v. ***London and District Cinemas Ltd.*** (1951) 1 KB 190, Denning, L.J. in the Court of Appeal took the view expressed by Lord Wright as stated above as meaning that

> "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 gone."

The learned Judge went on to say,

> "when we can excuse an unforeseen 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. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that he who clings to the letter clings to the dry and barren shell and misses the truth and substance of the matter. We have of late paid heed to this warning, and we must pay like heed now."

This decision of the Court of Appeal was reversed by the House of Lords and Viscount Simon in course of his judgment expressed disapproval of the way in which the law was stated by Denning, L.J. It was held that there was no change in the law as a result of which the courts could exercise a wider power in this regard than they used to do previously. "The principle remains the same" thus observed His Lordship:

> "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's*** case and as has been repeatedly asserted by other masters of law", 1952 AC 166 at 184.

These differences in the way of formulating legal theories really do not concern us so long as we have a statutory provision in the Indian Contracts 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 the 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.

In the latest decision of the House of Lords, referred to above, the Lord Chancellor puts the whole doctrine upon the principle of construction. But the question of construction may manifest itself in two totally different ways. In one class of cases the question may simply be, as to what the parties themselves had actually intended; and whether or not there was a condition in the contract itself, express or implied, which operated, according to the agreement of the parties themselves, to release them from their obligations; this would be a question of construction pure and simple and the ordinary rules of construction would have to be applied to find out what the real intention of the parties was.

According to the Indian Contract Act, a promise may be express or implied vide Section 9. In cases, therefore, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of section 56 altogether. Although in English law these cases are treated as cases of frustration, in India they would be dealt with under section 32 of the Indian Contract Act which deals with contingent contracts or similar other provisions contained in the Act.

In the large majority of cases however the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose of basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. Here there is no question of finding out an implied term agreed to by the parties embodying a provision for discharge, because the parties did not think about the matter at all nor could possibly have any intention regarding it.

When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. The court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object – vide ***Morgan*** v. ***Manser*** (1947) 2 All ER 666. This may be called a rule of construction by English Judges but it is certainly not a principle of giving effect to the intention of the party which underlies all rules of construction. This is really a rule of positive law and as such comes within the purview of section 56 of the Indian Contract Act.

It must be pointed out here that if the parties do contemplate the possibility of an intervening circumstance which might affect the performance of the contract, but expressly stipulate that the contract would stand despite such circumstance, there can be no case of frustration because the basis of the contract being to demand performance despite the happening of a particular event, it cannot disappear when that event happens. As Lord Atkinson said in ***Matthey*** v. ***Curling***, (1922) 2 AC 180 at 234,

> "a person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or the King's enemies …. Or 'vis major'."

This being the legal position, a contention in the extreme form that the doctrine of frustration as recognised in English law does not come at all within the purview of section 56 of the Indian Contract Act cannot be accepted.

The second contention raised by the Attorney-General can be disposed of in few words. It is true that in England the judicial opinion generally expressed is, that the doctrine of frustration does not operate in the case of contracts for the sale of land. Vide ***Hillingdon Estates Co.*** v. ***Stonefield Estates Ltd.*** (1952)1 All ER 853. But the reason underlying this view is that under the English law as soon as there is a concluded contract by A to sell land to B at certain price, B becomes, in equity, the owner of the land subject to his obligation to pay the purchase money. On the other hand, A in spite of his having the legal estate holds the same in trust for the purchaser and whatever rights he still retains in the land are referable to his right to recover and receive the purchase money. The rule of frustration can only put an end to purely contractual obligations, but it cannot destroy an estate in land which has already accrued in favour of a contracting party.

According to the Indian law, which is embodied in section 54 of the Transfer of Property Act, a contract for sale of land does not of itself create any interest in the property which is the subject-matter of the contract. The obligations of the parties to a contract for sale of land are, therefore, the same as in other ordinary contracts and consequently there is no conceivable reason why the doctrine of frustration should not be applicable to contracts for sale of land in India. This contention of the Attorney-General must, therefore, fail.

We now come to the last and most important point in this case which raises the question as to whether, as a result of the requisition orders, under which the lands comprised in the development scheme of the defendant company were requisitioned by Government, the

contract of sale between the defendant company and the plaintiff's predecessor stood dissolved by frustration or in other words became impossible of performance.

It is well settled and not disputed before us 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: Per Lord Wright in 1944 AC 265 at p. 274 (I). What happens generally in such cases and has happened here is that one party claims that the contract has been frustrated while the other party denies it. The issue has got to be decided by the court 'ex post facto' on the actual circumstances of the case – 1944 AC 265 at 274.

We will now proceed to examine the nature and terms of the contract before us and the circumstances under which it was entered into to determine whether or not the disturbing element, which is alleged to have happened, here has substantially prevented the performance of the contract as a whole.

It may be stated at the outset that the contract before us cannot be looked upon as an ordinary contract for sale and purchase of a piece of land; it is an integral part of a development scheme started by the defendant company and is one of the many contracts that have been entered into by a large number of persons with the company. The object of the company was undoubtedly to develop a fairly extensive area which was still undeveloped and make it usable for residential purposes by making roads and constructing drains through it. The purchaser, on the other hand, wanted the land in regard to which he entered into the contract to be developed and made ready for building purposes before he could be called upon to complete the purchase.

The most material thing which deserves notice is, that there is absolutely no time limit within which the roads and drains are to be made. The learned District Judge of Alipore, who heard the appeal, from the trial court's judgment found it as a fact, on the evidence in the record, that there was not even an understanding between the parties on this point. As a matter of fact, the first requisition order was passed nearly 15 months after the contract was made and apparently no work was done by the defendant company in the meantime. Another important thing that requires notice in this connection is that the war was already on, when the parties entered into the contract. Requisition orders for taking temporary possession of lands for war purposes were normal events during this period.

Apart from requisition orders there were other difficulties in doing construction work at that time because of the scarcity of materials and the various restrictions which the Government had imposed in respect of them. That there were certain risks and difficulties involved in carrying on operations like these, could not but be in the contemplation of the parties at the time when they entered into the contract, and that is probably the reason why no definite time limit was mentioned in the contract within which the roads and drains are to be completed. This was left entirely to the convenience of the company and as a matter of fact the purchaser did not feel concerned about it. It is against this background that we are to consider to what extent the passing of the requisition orders affected the performance of the contract in the present case.

The company, it must be admitted, had not commenced the development work when the requisition order was passed in November 1941. There was no question, therefore, of any work or service being interrupted for an indefinite period of time. 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 and the requisitioning authority could, in law, occupy the position of a licensee in regard to the requisitioned property. The order might continue during the whole period of the war and even for some time after that or it could have been withdrawn before the war terminated.

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 impossible within the specified time and this would seriously affect the object and purpose of the venture. But when 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 kinds which would make the carrying on 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 learned Judges of the High Court in deciding the case against the plaintiff relied entirely on the time factor. It is true that the parties could not contemplate an absolute unlimited period of time to fulfil their contract. They might certainly have in mind a period of time which was reasonable having regard to the nature and magnitude of the work to be done as well as the conditions of war prevailing at that time.

In our opinion, having regard to the nature and terms of the contract, the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and last though not the least the total absence of any definite period of time agreed to by the parties within which the work was to be completed, it cannot be said that the requisition order vitally affected the contract or made its performance impossible.

In our opinion, the events which have happened here cannot be said to have made the performance of the contract impossible and the contract has not been frustrated at all. The result is that the appeal is allowed, the judgment and decree of the High Court of Calcutta are set aside and those of the courts below restored.

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M/s. Alopi Parshad and Sons Ltd. v. *Union of India*

AIR 1960 SC 588

J.C. SHAH, J. – On May 3, 1937, M/s. Alopi Parshad and Sons Ltd., who will hereinafter be referred to as the Agents, were, under an agreement in writing, appointed by the Governor-General for India in Council, as from October 1, 1937, agents for purchasing ghee required for the use of the Army personnel. The Government of India, by cl. 12 of the agreement, undertook to pay to the Agents the actual expenses incurred for purchasing ghee, cost of empty tins, expenses incurred on clearance of Government tins from the railway, export land-customs duty levied on ghee purchased and exported from markets situated in Indian States, octroi duty, terminal tax or other local rates on ghee, and certain charges incurred by the Agents.

(3) Pursuant to the agreement, the Agents supplied from time to time ghee to the Government of India, as required. In September, 1939, the World War II broke out, and there was an enormous increase in the demand by the Government of ghee. On June 20, 1942, the original agreement was, by mutual consent, revised, and in respect of the establishment and contingencies, the uniform rate of annas 14 and 6 pies per hundred pounds of accepted ghee, was substituted by a graded scale: for the first 5 thousand tons, the Agents were to be paid at the rate of Re. 0-14-6 per hundred pounds, for the next five thousand tons, at the rate of annas 8 per hundred pounds, and at the rate of annas 4 per hundred pounds, for supplies exceeding ten thousand tons. Even in respect of remuneration for services, a graded scale was substituted.

(4) By their communication dated December 6, 1943, the Agents demanded that the remuneration, establishment and contingencies, and mandi and financing charges, be enhanced. In respect of the buying remuneration, they proposed a 25 per cent increase; in respect of establishment and contingencies, they proposed an increase of 20 per cent; and in respect of mandi and financing charges, an increase of 112 per cent. This revision of the rates was claimed on the plea that the existing rates, fixed in peace time, were "entirely superseded by the totally altered conditions obtaining in war time". To this letter, no immediate reply was given by the Government of India, and the Agents continued to supply ghee till May, 1945. On May 17, 1945, the Government of India, purporting to exercise their option under cl. 9 of the agreement, served the Agents with a notice of termination of the agreement.

(12) On March 1, 1954, the Agents submitted their claim, contending that the supplementary agreement dated June 20, 1942, was void and not binding upon them, and that, in any event, on the representations made on December 6, 1943, and from time to time thereafter, they were assured by the Chief Director of Purchases that the claim made by them would be favourably considered by the Government of India, and relying on these assurances, they continued to supply ghee in quantities demanded by the Government after incurring "heavy extra expenditure." They also claimed that they were constantly demanding an increase in the mandi and financing charges, but the Chief Director of Purchases, who was duly authorized in that behalf by the Government, gave repeated verbal assurances that their

demands would be satisfied, and requested them to continue supplies for the successful prosecution of the war.

This claim of the Agents was resisted by the Government of India. Inter alia, it was denied that any assurances were given by the Director of Purchases, or that the Agents continued to supply ghee relying upon such alleged assurances.

(20) Mr. Chatterjee, on behalf of the Agents, submitted that the circumstances existing at the time when the terms of the contract were settled, were "entirely displaced" by reason of the commencement of hostilities in the Second World War, and the terms of the contract agreed upon in the light of circumstances existing in May, 1937, could not, in view of the turn of events which were never in the contemplation of the parties, remain binding upon the Agents. This argument is untrue in fact and unsupportable in law. The contract was modified on June 20, 1942, by mutual consent, and the modification was made nearly three years after the commencement of the hostilities. The Agents were fully aware of the altered circumstances at the date when the modified schedule for payment of overhead charges, contingencies and buying remuneration, was agreed upon. Again, a contract is not frustrated merely because the circumstances in which the contract was made, are altered.

(21) Performance of the contract had not become impossible or unlawful; the contract was in fact performed by the Agents, and they have received remuneration expressly stipulated to be paid therein. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

"The parties to an executory contract are often faced, in the course of carrying out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, 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. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is just and reasonable" (Lord Wright in ***Constantine Steamship Line Ltd.*** v. ***Imperial Smelting Corporation Ltd.***, 1942 AC 154 at 186) or one 'which justice demands' (Lord Sumner in ***Hirji Mulji*** v. ***Cheong Yue Steamship Co. Ltd.***, (1926) AC 497, 510), this result is arrived at by putting a just construction upon the contract in accordance with an 'implication … from the presumed common intention of the parties': speech of Lord Simon in ***British Movietonews Ltd.*** v. ***London and District Cinemas Ltd.***, 1952 AC 166 at 185 and 186.

(22) 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. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon a party may ignore the express covenants on

account of an uncontemplated turn of events since the date of the contract. Mr. Chatterjee strenuously contended that in England, a rule has in recent years been evolved which did not attach to contracts the same sanctity which the earlier decisions had attached, and in support of his contention, he relied upon the observations made in ***British Movietonews Ltd.*** v. ***London and District Cinemas Ltd.*** (1951) 1 KB 190, 201. In that case, Denning L.J. is reported to have observed:

> "[N]o matter that a contract is framed in words which taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplations of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the uncontemplated turn of events, but will do therein what is just and reasonable."

But the observations made by Denning, L.J., upon which reliance has been placed, proceeded substantially upon misapprehension of what was decided in ***Parkinson and Co. Ltd.*** v. ***Commissioners of Works*** (1949) 2 KB 632, on which the learned Lord Justice placed considerable reliance. The view taken by him was negatived in appeal to the House of Lords in the ***British Movietonews*** case – (1952) A.C. 166 – already referred to. In India, in the codified law of contracts, there is nothing which justifies the view that a change of circumstances, "completely outside the contemplation of parties" at the time when the contract was entered into, will justify a court, while holding the parties bound by the contract, in departing from the express terms thereof. 1949-2 KB 632 was a case in which on the true interpretation of a contract, it was held, though it was not so expressly provided, that the profits of a private contractor, who had entered into a contract with the Commissioners of Works to make certain building constructions and such other additional constructions as may be demanded by the latter, were restricted to a fixed amount only if the additional quantity of work did not substantially exceed in value a specified sum. The Court in that case held that a term must be implied in the contract that the Commissioners should not be entitled to require work materially in excess of the specified sum. In that case, the Court did not proceed upon any such general principle as was assumed by Denning, L.J. in 1951-1 KB 190.

(23) We are, therefore, unable to agree with the contention of Mr. Chatterjee that the arbitrators were justified in ignoring the express terms of the contract prescribing remuneration payable to the Agents, and in proceeding upon the basis of quantum meruit.

(24) Relying upon S. 222 of the Indian Contract Act, by which duty to indemnify the agent against the consequences of all lawful acts done in exercise of the authority conferred, is imposed upon the employer, the arbitrators could not award compensation to the Agents in excess of the expressly stipulated consideration. The claim made by the Agents was not for indemnity for consequences of acts lawfully done by them on behalf of the Government of India; it was a claim for charges incurred by them in excess of those stipulated. Such a claim was not a claim for indemnity, but a claim for enhancement of the rate of the agreed consideration. Assuming that the Agents relied upon assurances alleged to be given by the Director in-charge of Purchases, in the absence of an express covenant modifying the contract

which governed the relations of the Agents with the Government of India, vague assurances could not modify the contract. 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 the contract. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum meruit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum mercuit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum mercuit is but reasonable compensation awarded on implication of a contract to remunerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable.

(26) We, accordingly, agree with the view of the High Court that the Award of the arbitrators was liable to be set aside because of an error apparent on the face of the award. In this view, the appeal fails and is dismissed with costs.

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Punj Sons Pvt. Ltd. v. *Union of India*

AIR 1986 Del. 158

R.N. AGGARWAL, J. – The relevant facts for the decision of this suit are that on 1st May 969 the petitioner-objector Messrs Punj Sons Private Ltd., New Delhi, entered into a contract with the claimant Union of India for the supply of 8420 milk containers 20 litres quantity. The containers according to the contract were to be coated with "hot dip tin coating." On 13th May 1969 the petitioner wrote to the Director General of Supplies and Disposals for the issue of quota certificate for tin which is to be used for hot dip tin coating of the milk containers. The petitioners on 2nd June 1969 addressed a communication to the Director General of Technical Development for the issue of release orders for procurement of tin ingots. The petitioner wrote in the letter that they had a contract with the Director General of Supplies and Disposals for supply of 8420 milk containers of the capacity of 20 litres and for the execution of the said contract 5 metric tonnes of tin ingots were urgently required for hot dip tin coating of the containers. The office of the Director General of Supplies and Disposals recommended to the Director General of Technical Development for the issue of the release orders for the procurement of tin ingots. The arbitration record shows that thereafter the correspondence continued between the parties but the Director General of Technical Development or the M.M.T.C. did not pass any order for the release of the tin ingots.

2. On 21st August, 1970 the petitioner wrote to the Director General of Supplies and Disposals that they understand that the release orders for tin ingots can only be issued to them after a provision to this effect is made in the A/T by the department and, therefore, requested that the necessary amendment may be made in the A/T. On 24th September, 1970 the respondent replied that there was no stipulation in the A/T for assistance for procurement of tin ingots and that on an ex gratia basis the request could be considered provided price reduction is made. The department, further, wrote that the above was without prejudice to the rights and remedies available to the purchasers under the terms of the contract.

3. On 15th October, 1970 the petitioner replied that in view of the increase in the price of raw materials as well as labour it is not possible for them to offer any price reduction and pleaded that the quota certificate for tin ingot may be issued. On 28th November, 1970 the respondent cancelled the contract and wrote to the petitioner as follows:

> "As you have failed to supply the stores against the subject A/T, the same is hereby cancelled at your risk and expense. The extra cost involved in the repurchase of the store will be intimated to you separately and you will be liable to pay the same on demand.
>
> This is, however, without prejudice to the rights and remedies of the purchaser under the contract."

4. The relevant facts further are that in December, 1970 a risk purchase tender was floated by the respondent. The petitioner submitted their tender and quoted the rate at Rs. 65/- per container. Another party also made a similar offer. For certain reasons not relevant to the decision of this petition the tenders were not accepted. The respondent thereafter again invited tenders and a company by the name M/s. Can Manufacturing Company Pvt. Ltd., Bombay made an offer at Rs. 70/- per container but this transaction also did not go through.

5. On 6th December, 1975 the respondent wrote letter to a number of firms asking the rates on which they had sold/purchased IK E Containers Milk 0306 – 20 Litres as on 15th September, 1970. Only one firm that is Delhi Brass & Metal Works on 6th December, 1975 wrote to the Director General of Supplies and Disposals stating that as on 15th September, 1970 the price was Rs. 90/- per container. The letter is a little important and it reads as under:

> "With reference to your letter No. SMH-2/10142/510/11-11-68/III/333 dated 21st November, 1975, we give below the price of the container milk 20 litres as required by you around 15-9-1970.
>
> 1. Container Milk 20 Litres @ Rs. 90 each (Rupees Ninety each).
>
> This is for your information that this is however, without any commitment from our side."

On 13th February 1976, the respondent claimed a sum of Rs. 3,13,224/- by way of damages from the petitioner. The said claim was refuted by the petitioner vide their letter dated 24th April, 1976.

The disputes were referred to the arbitration of Dr. Bakhshish Singh, Additional Legal Adviser to the Government of India, Ministry of Law. The arbitrator by a non-speaking award awarded a sum of Rs. 3,13,224/- to the Union of India.

8. The petitioner has challenged the legality and validity of the award mainly on the ground that to complete the contract the tin ingots were necessary for the hot dip tin coating for the manufacture of the milk cans and that since the tin ingots were a canalised item and were not available in the market it was not possible to carry out the contract without the government releasing the required quantity of tin ingots and that in spite of earnest endeavours made by the petitioner the petitioners were not able to obtain an order for the release of the required quota of tin ingots from the Director General of Technical Development or the M.M.T.C. and, therefore, the contract became impossible of performance and stood frustrated. The petitioner also pleaded that the respondent/claimant had never made any risk purchase against the A/T in question and, therefore, had not suffered any loss and, therefore, there was no question of any award of damages in their favour. It was also contended that the assessment of the damages at Rs. 3,13,224/- was without any basis.

9. The claimant-respondent in reply to the objections have pleaded that there was no condition or stipulation in the tender or the A/T for arranging release order/import licence for tin ingots. It is further stated that no understanding was given to the objector in this regard. The respondent admitted that the ingots were not available but pleaded that the claimant was not obliged under the contract to make available the tin ingots. As regards the risk purchase tender submitted by the objector the claimant admitted that the tender submitted by the objector was the lowest but pleaded that the said transaction did not go through since the objector did not agree to withdraw some inconvenient terms and also did not agree to furnish 10% security deposit in advance. The respondent has stated that fresh tenders were invited against which the objector firm did not send their tender and the order was placed on M/s. Can Manufacturing Company Pvt. Ltd., Bombay at the rate of Rs. 70/- but since it was not a valid risk purchase, therefore, the claim of the respondent for general damages is legal and valid.

10. The objector in their rejoinder pleaded that the milk cans were to be manufactured as per specification No. IND/GS/1182 which stipulated "hot dip tin coating" of the milk cans by using tin ingots and that the tin ingots were essentially required for the manufacture of the store and this being a canalised item prior to acceptance of quotation, it could only be issued to the objector by the Mineral & Metal Trading Corporation of India Ltd., only against the recommendation of the Union of India and/or its department and that since the respondent failed to obtain the release of the required quantity of the ingots in favour of the objector it became impossible for the objector to perform the contract as the objector could not have obtained this material in the open market. The objector further pleaded that the tin ingots form integral part of the performance of the contract which admittedly could not be procured by the objector from the open market and unless the claimant got the release orders issued it was impossible to perform the contract.

11. On the facts stated above and the contentions raised in the pleadings, the crucial question that requires determination is whether the contract stood frustrated in law.

12. The undisputed facts in the case are that under the contract "hot dip tin coating" of the milk cans was essential. The hot dip tin coating was to be done by using tin ingots. The Union of India in their reply to the objections as well as in the affidavit of Shri M.A. Khan dated 9th July 1984 have admitted that tin ingots was not available in the market. The objector has categorically stated that the tin ingots was a canalised item even prior to acceptance of quotation and that the said item could only be issued to the objector by the Mineral and Metal Trading Corporation of India Ltd. on the recommendation of the Union of India and/or its department. The above assertion of the objector has not been disputed by the Union of India. The correspondence between the parties to which I have adverted earlier clearly shows that immediately after the acceptance of the tender the objector had asked the Director General of Supplies and Disposals to obtain the release of the necessary quota of tin ingots for completing the contract. Efforts were made by the Director General of Supplies and Disposals to obtain the release of the required quota of tin ingots but he somehow did not succeed in obtaining the orders of release from the concerned authority. The objector had requested the Director General of Supplies and Disposals to make an amendment in the A/T but this was also not done because of the reasons already stated in the earlier part of the judgment. It was in these conditions that the objector failed to carry out their obligations under the contract.

13. There is thus no manner of doubt that the contract became impossible of performance because of the non-availability of one of the essential items that is tin ingots, which was essential for the manufacture and supply of the contracted store. The learned counsel for the Union of India contended that there was no condition or stipulation in the agreement regarding the supply of tin ingots by the claimant and the objector was bound under the contract to supply the contracted store within the stipulated period. I do not agree in this contention. The parties very well knew at the time of entering into the contract that tin ingots was required for "hot dip tin coating" of the cans. It is clear from the record that tin ingots was a canalised item and it could not be procured from the open market without a release order. In the circumstances, the condition of the supply of tin ingots can be implied from the nature of the contract. The objector repeatedly asked the Director General of Supplies and

Disposals to obtain the necessary quota of tin ingots but the Director General of Supplies and Disposals failed to obtain the release of the necessary quota of tin ingots. It is thus clear that the contract became impossible of performance because of the non-availability of the tin ingots and this was beyond the control of the promisor.

The contract would be clearly hit by paragraph 2 of Section 56 of the Contract Act.

15. The above view finds support from the case ***Sannidhi Gundayya*** v. ***Illoori Subbaya***, AIR 1927 Mad. 89. The facts of the said case were that the defendant therein had contracted with the plaintiff to deliver certain bags of rice to him. The contract contemplated delivery by railway wagons. As a war measure the Government had imposed wagon restrictions and priority certificates all over the Presidency and this interfered with the free and easy transport of rice. The existence of these restrictions was well known to the parties. Owing to the shortage of wagons on account of the enforcement of the rules, the defendant was not able to perform the contract and he pleaded impossibility of performance as defence to the suit. A Division Bench of the Madras High Court held:

> "[T]he law does not imply an absolute obligation to do what which the law forbids, and the reasonable view to take of the contract would be that the seller agreed to supply the promised number of bags of rice if, after using his best endeavours he was able to secure the necessary number of wagons. The obligation to perform the contract was not therefore absolute, but impliedly conditional."

16. For the reasons stated, I am of the view that the contract had become impossible of performance and, therefore, rendered void. The award clearly suffers from the legal infirmity mentioned above.

17. Shri Chandhiok, learned counsel for the objector, next contended that the arbitrator has committed a serious misconduct in assessing the damages on the basis of a letter dated 6th December 1975 by Delhi Brass and Metal Works stating that the price of a 20 litre milk container as on 15-9-1970 was Rs. 90/- each. There seems to be substance in this contention. The contract was cancelled on 28th November 1970. Thereafter, the Director General of Supplies and Disposals called for tenders on the basis of risk purchase. The objector had submitted their tender but this for the reasons already stated was not accepted. Thereafter, fresh tenders were called and a tender at the rate of Rs. 70/- per container was received but this also did not mature. On 21st November 1975 the Director General of Supplies and Disposals adopted a queer method of finding out the rates of supply of the stores as on 15-9-1970. A circular was sent to a number of firms asking for rates of milk containers of the description IK E-0306 – 20 litres as on 15-9-1970. Only M/s. Delhi Brass and Metal Works replied on 6th December 1975 giving the rate as on 15-9-1970 at Rs. 90/- per piece. The firm in the reply added that this was only for information and it was without any commitment from their side.

18. The above was the only evidence for fixing the damages. The description of the store given in the circular is IK E-0306. The description of the store given in the A/T is IK-F-0306 – 20 litres. The Delhi Brass and Metal Works produced no evidence of their having purchased or sold milk containers of the description given in the contract on the alleged date of breach, that is 15th September 1970. There is no evidence of any actual transaction having

been conducted by the Delhi Brass and Metal Works regarding the store in question as on 15th September 1970. There has been, in my opinion, a serious misconduct in assessing the damages on the basis of the letter dated 6th December 1975 written by the Delhi Brass and Metal Works.

19. The claimant in support of their case had examined Shri Jaishi Ram. Shri Jaishi Ram clearly stated that the Union of India had suffered no actual loss. There was no repurchase of the contracted stores.

20. For the reasons stated above, I find that the award is bad and legally not sustainable. I allow the objections and quash the award.

* * * * *

Easun Engineering Co. Ltd. v. *The Fertilizers & Chemicals Travancore Ltd.*

AIR 1991 Mad. 158

A. ABDUL HADI, J. – The O.P. No. 72/1980 by the Fertilizers and Chemical Travancore Limited (Division of FACT Engineering and Design Organization) hereinafter referred to as FEDO prays for setting aside the Award (filed into Court in O.P. No. 314/1979 by the Umpire, who passed the same on 12-4-1979 in favour of the first respondent herein, namely, Easun Engineering Company Ltd., hereinafter referred to as EASUN) in so far as it has allowed the claims of EASUN and for remitting the matter back to the Second Respondent-Umpire for reconsideration and making a fresh award in respect of the claims of FEDO which have been disallowed in the said Award.

2. The abovesaid award was passed in the following circumstances:

FEDO by its purchase order dated 5-2-1973 and subsequent amendments to it by letters dated 3-3-1973 and 7-3-1973 entered into contract with EASUN for the supply and installation of eighteen numbers of Power Transformers etc. But only six transformers were supplied by EASUN and the resultant dispute that arose between the parties was finally referred to the Second Respondent as Umpire by the Order passed by this Court on 19-9-1977 in Application No. 2785 of 1977 in C.S. No. 366 of 1975.

3. As per the amended claim filed by EASUN before the second respondent-Umpire, they had claimed a sum of Rs. 13,07,417/- under Annexure A to their claim, a sum of Rs. 10,30,716/- under Annexure B to their claim and a sum of Rs. 3,06,000/- under Annexure C to their claim, totalling in all a sum of Rs. 26,44,243/-. On the other hand, FEDO had made a counter-claim of Rs. 12,33,325-75.

4. The award states that the abovesaid contract between the parties is a firm price contract and the prices indicated in the contract are firm without any escalation on any account till the contract is completely executed and the equipments are delivered at the project site at Cochin. Such delivery of equipments should commence after ten months from the date of purchase order and shall be completed in the fourteenth month. The time of delivery is the essence of the contract and FEDO is entitled to liquidated damages for any delay on the part of EASUN. It is also provided that the liquidated damage would not be applicable in case of delay caused due to "force majeure." It was further provided that if EASUN failed to conform to fabrication schedule without sufficient cause, FEDO could terminate the contract and reassign to other suppliers.

5. FEDO terminated the contract by their letters dated 3.9.1975 and 18.9.1975. It is the case of EASUN that FEDO has terminated the contract unilaterally without sufficient and justifiable reason in spite of the fact that EASUN had discharged their contractual obligations and that FEDO has committed breach of contract. Hence, the above referred to damages were claimed as per Annexures A, B and C to the claim.

6. On the other hand, FEDO's case is that EASUN had failed to perform the contract as per the conditions of the purchase order accepted by them, that FEDO had no other

alternative excepting to terminate its contract and that since EASUN has committed breach of the contract, FEDO is entitled to claim damages from EASUN as mentioned above.

7. According to the contract, the delivery should have commenced on 19.10.1973 and completed by 19.2.1974 and the erection and commissioning completed by 19.6.1974. Admittedly, six numbers out of 18 were despatched on various dates commencing from 14.6.1974 to 17.3.1975, the value of the transformers despatched and delivered was about two-thirds of the value of the entire transformers, namely, amount Rs. 17,00,000/- and the rest of the transformers namely, 12 were not supplied, though out of them 4 were tested in July and September 1974.

8. EASUN contended that they were prevented from supplying, due to force majeure conditions namely, strikes, power cut and phenomenal increase in the cost of transformer oil due to War conditions etc. It is not in dispute that there was delay in delivering the transformers. It is also not in dispute that FEDO had granted extension of time on several requests made by EASUN till 31-3-1975. That is why, the Umpire has also made it clear in the Award that it is not open to FEDO to depend upon delays for the termination of the contract prior to 31.3.1975. The Award also points out that it is significant that FEDO did not claim liquidated damages for the above delay, in their above referred to counter-claim, probably for the reason that FEDO had condoned the delay and gave extension of time. The Award also finds that the price increase in transformer oil was so enormous the increase having risen to 400% because due to War conditions in the Middle East and the Ordinance by Government of India imposing higher Excise duties. So, after analysing the evidence, both documentary and oral, the Umpire comes to the conclusion that despite the contract being a firm price contract, EASUN was justified in asking for variation of price in transformer oil, in view of the abovesaid force majeure conditions. The Umpire also found that under the contract, even though, as stated above, liquidated damages are provided in favour of FEDO, the relevant clause itself provides that liquidated damages will not be applicable in case of delay caused due to force majeure conditions. As already pointed out, FEDO did not claim liquidated damages and the Umpire also points out in the Award that it is strange FEDO in their written statement while making their counter-claim has not even stated why they were not claiming liquidated damages, in spite of their contention that the termination of the contract was due to delay in the performance of contract by EASUN. The Umpire infers the existence of force majeure condition, also from the abovesaid non-claim of liquidated damages by FEDO.

9. The Award also extracts Clause 18 of the purchase order, which runs as follows:

> "Clause 18: Force Majeure: Neither the supplier nor FEDO shall be considered in default in performance of their obligation under the contract so long as such performance is prevented or delayed because of strikes, war, hostilities, revolution, civil commotion, epidemics, accidents, fire, wind, flood because of any law and other proclamation, regulation or ordinance of Government or because of any Act of God or for any other cause which is beyond the control of the parties affected."

The Umpire agreed with the contention of the EASUN that price in transformer oil was unexpected, unforeseen and beyond their control, and, therefore, it must be deemed to be a force majeure condition. He did not concur with the contention of FEDO that even assuming

that there was price increase due to conditions mentioned by EASUN, it would not come within the purview of force majeure clause, as the said clause would apply only so long as such performance is prevented or delayed and that the said increase has not "prevented or delayed" the performance of the obligations by EASUN under the contract. The Umpire came to the said conclusion that because the price increase was not marginal, but was as much as 400% it was caused due to the abovesaid force majeure conditions. Therefore, the Umpire concluded in the award the EASUN had not failed to conform to the fabrication schedule without sufficient cause and FEDO was not justified in terminating the contract unilaterally.

10. Then, regarding the quantum of the claim made by EASUN the award disallowed the claim under Annexure B. So far as Annexure-A claim the Umpire awarded a sum of Rs. 3,68,120/- for the price variation applicable to the abovesaid six transformers delivered to FEDO in accordance with IEMA formula (other than the transformer oil), a sum of Rs. 2,36,584/- for the price increase on oil in respect of the said transformers delivered and a sum of Rs. 1,56,210/- towards 10% retention amount on the six transformers. It has also awarded interest at the rate of 12% per annum on these amounts from the date of the claim, namely, 13-11-1976. The award grants also Annexure-C claim of Rs. 1,91,000/- towards the amount due by FEDO for supplies other than transformers and wages to engineers and overhead 100%, together with interest at 12% per annum from the date of the claim, namely, 13-11-1976.

11. Since the breach of contract was held to have been committed by FEDO, FEDO's counter-claim was disallowed by the Umpire. However, FEDO was held to be entitled to a sum of Rs. 26,961/- towards the facilities and services rendered by FEDO to EASUN with interest at 12% per annum from the date of claim, namely, 19-1-1977.

12. While so, the main attack by the learned counsel for FEDO to set aside the award and remit it back to the Umpire for making an award in respect of FEDO's claim is, that though the Umpire held that the contract in question was a firm price contract, he committed an error apparent on the face of the record by applying the price variation in respect of these six transformers supplied.

13. Learned counsel mainly relied on a decision reported in ***M/s. Alopi Parshad*** v. ***Union of India***, AIR 1960 SC 588. The contract in question in the abovesaid Supreme Court case was a firm price contract, relating to supply of ghee to the Union of India and the price of ghee abnormally rose up due to World War-II and the supplier claimed payment at higher than the stipulated rate on the basis of equity and that was negatived by the Supreme Court. The Supreme Court after referring to S. 56 of the Contract Act, which provides that (para 21):

> "a contract to do an act which, after the contract is made, becomes impossible.... becomes void when the act becomes impossible....."

no doubt observes that:

> "The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity."

However, the Supreme Court in the above decision itself points out thus:

> "If, on the other hand, a consideration of the terms of the contract in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

It is this latter observation which would apply to the present case. No doubt, here also, the main grievance of EASUN was the increase in the price of transformer oil subsequent to the contract. But the increase cannot be described as anything which would be normal in the ordinary trade conditions. But it is very much abnormal being 400% increase due to certain unexpected War condition. So, it can be safely concluded that "fundamentally different situation," "unexpectedly emerged" as observed by the Supreme Court in the abovesaid passage. Therefore, as concluded by the Supreme Court, the contract ceases to bind the parties at that point, "not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation." The actual decision in the abovesaid Supreme Court case turns on its facts, because the Supreme Court found that there was only a "vague plea of equity" for setting aside the terms of the contract.

14. Further, dealing with the terms 'impossible' under S. 56 of the Contract Act, the Supreme Court in ***Satyabrata*** v. ***Mugneeram***, AIR 1954 SC 44 observed as follows (para 9):

> "The word 'impossible' has not been used in the sense of physical or literal impossibility. The performance of an act may be impracticable and unless from the point of view of the object and 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 promissor finds it impossible to do the act which he promised to do." So, in the present case, it can be safely held that the abovesaid abnormal increase in price due to war condition, is an untoward event or change of circumstances which "totally upsets the very foundation upon which parties rested their bargain." Therefore, EASUN can be said to be finding itself impossible to supply the transformers which it promised to do. The abovesaid principle laid down in ***Satyabrata*** v. ***Mugneeram***, AIR 1954 SC 44 and also in the English decision ***Templin Steamship Co. Ltd.*** v. ***Anglo Mexican Petroleum Products Co. Ltd.***(1916) 2 AC 397, 403 was followed by the Supreme Court in later decisions also reported in ***Smt. Sushila Devi*** v. ***Hari Singh***, AIR 1971 SC 1756 and ***Govind Bhai*** v. ***Gulam Abbas***, AIR 1977 SC 1019. In the circumstances, I do not think that there is any error apparent on the face of the record, in the award passed by the Umpire-Second Respondent.

15. Learned counsel for EASUN also contended that when a specific question of law was referred to the arbitrator and a decision is given by the arbitrator on that question of law, no party to the arbitration will be allowed to set it aside even if the point decided by the arbitrator is erroneous in law. For this proposition, he cited a decision in ***M/s. Tarapore Ltd.*** v. ***Cochin Shipyard Ltd., Cochin***, AIR 1984 SC 1072. But, in the present case, as rightly contended by the learned counsel for FEDO, no specific question of law was referred to. The question that was referred to was whether the unilateral termination of the contract by FEDO

was justified and whether EASUN was entitled to make the claim made by it, in view of the abnormal increase in the price of transformer oil etc. In deciding that particular question, the Umpire could have decided a point of law incidentally. In such a case, if the arbitrator commits an error of law apparent on the face of the record, it can be corrected by the Court. In the decision in AIR 1984 SC 1072 what was specifically referred to the arbitrator was, a pure question of law, and, in such a situation, the Supreme Court pointed out that even assuming that the decision of the arbitrator there was erroneous, it cannot be corrected by the Court, if there is any error of law apparent on the face of the record. On this point, there can be no dispute. This legal position has been made clear in very many decisions, including AIR 1984 SC p. 1072 itself. So, having held that there is no error apparent on the face of the record, in the award in question, I dismiss this O.P. No. 272/1980, and, in O.P. No. 314/1979 pass a decree in terms of the said award with interest @ 12% p.a. from the date of decree till realisation.

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REMEDIES FOR BREACH OF CONTRACT

Hadley v. *Baxendale*

(1843-60) All ER Rep.460

The first count of the declaration stated that, before and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in partnership, and were proprietors and occupiers of the City Stream Mills, Gloucester. They were possessed of steam-engine by means of which they worked the mills, and therein cleaned corn, ground the same into meal, and dressed the same into flour, sharps, and bran. The crank shaft of the steam-engine was broken, with the result that the engine was prevented from working, and the plaintiffs were desirous of having a new crank shaft made. They had ordered the shaft of W. Joyce Greenwich, Kent, who had contracted to make it, but before Messrs Joyce & Co. could complete the new shaft it was necessary that the broken shaft should be forwarded to their works at Greenwich in order that the new shaft might be made so as to fit the other parts of the engine which were not injured and so that it might be substituted for the broken shaft. The defendants were common carriers of goods and chattels for hire from Gloucester to Greenwich, carrying on business under the name of "Pickford & Co.," and the plaintiffs, at the request of the defendants, delivered to them as such carriers the broken shaft to be conveyed by the defendants from Gloucester to Messrs Joyce & Co., at Greenwich for reward to the defendants. The plaintiffs alleged that in consideration thereof the defendants promised to convey the shaft from Gloucester to Greenwich and on the second day after the delivery of the shaft by the plaintiffs to the defendants to deliver it to Messrs Joyce & Co., but that the defendants did not deliver the shaft to Messrs Joyce & Co. on the second day, but neglected so to do for the space of seven days after the shaft had been delivered to them. In the second count the plaintiffs alleged that the defendants undertook to deliver the shaft to Messrs Joyce & Co. within a reasonable time, but had failed to do so. The plaintiffs further said that by reason of the promises, the completing of the new shaft was delayed for five days, with the result that the plaintiffs were prevented from working their steam-mills, and from cleaning corn, and grinding the same into meal, and were unable to supply many of their customers with flour, sharps, and bran during that period, were obliged to buy flour to supply some of their other customers, were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen to whom they were compelled to pay wages during that period. They claimed £300 damages. The defendants denied liability on the first count, and with regard to the second they paid £25 into court in satisfaction of the plaintiff's claim under that count. At the trial before Crompton J., at Gloucester Assizes, it appeared that on May 13, a servant of the plaintiff, whom they had sent to defendant's office told the defendant's clerk, who was there, that the mill was stopped and the shaft must be sent immediately, and that, in answer to the inquiry when the shaft would be taken, the defendant's clerk said that if it was sent up by twelve O' clock any day it would be delivered at Greenwich on the following day. On May 14, the shaft was taken to the defendant's office, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4s. was paid for its carriage for the whole

distance. At the same time the defendant's clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed 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, and the working of their mill delayed and they lost the profits they would otherwise have received. The defendants objected that the damage alleged was too remote, and that the defendants were not liable with respect to it. The learned Judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

The defendants obtained a rule nisi for new trial on the ground of misdirection.

ALDERSON, B. – We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions, and, in ***Blake*** v. ***Midland Rail Co.*** (1852) 18 Q.B. 93, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at nisi prius. In ***Alder*** v. ***Keighley***, (1846) 15 M&W 117, Pollock, C.B. said:

> "There are certain established rules according to which the jury ought to find, and here there is a clear rule that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

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 as 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. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.

The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in not making a good title to land,

are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognisant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. In the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made were that the article to be carried was the broken shaft of a mill and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have not effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, that the want of a new was the only cause of the stoppage of the mill, and that the loss of profit really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But 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, and these special circumstances were here never communicated by the plaintiffs to the defendants.

It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

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A. K. A. S. Jamal v. *Moolla Dawood, Sons, and Company*

(1915) 20 C.W.N. 105

LORD WRENBURY - Under six contracts made at various dates between April and August 1911 the Plaintiff (the Appellant) was seller to the Defendants of certain 23,500 shares at prices amounting in the aggregate of Rs. 1,84,125-10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of reselling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at the Exchange at the next meeting," etc.

By 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by today our client will be forced to sell the said shares by public auction on or about the 2nd proximo, responsible for all losses sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925-10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated: "We have now to give you notice that our client intends to resell these shares and to institute a suit against you for the recovery of any loss which may result from that course."

Negotiations ensued between the parties which extended to 26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows:-

"We are instructed by Mr. A.K.A.S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company, Limited, at your request, in order that his claim might, if possible, be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1, 09,219-6 is paid to him by way of compensation before the end of this week.

The amount claimed is arrived at by deducting Rs. 74,906-4, the value of 23,500 shares at 4s. 3d. from Rs. 1, 84,125-10, the agreed price of the shares".

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218-12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s 3d. a share) on the date of the breach the 30th December 1911. This is (with a trifling variance) the same sum and arrived at in the same way as the Rs. 1,09,219-6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, viz, on the 28th February, the seller commenced to make sale of the shares. He sold them all at various dates from the 26th February onwards. In one case the sale was at less than 4s. 3d. (***viz***., at 4s.). In one case it was at 4s. 3d. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the

increased prices in fact realised over the market price on the 30th December, the date of the breach. The Appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to resale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships, opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. If the seller availed himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the Plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a resale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to resale.

The question therefore is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach- with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach – or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a Plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent 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 the date the Plaintiff could do something or did something which mitigated the damage, the Defendant is entitled to the benefit of it. ***Staniforth*** v. ***Lyall*** (7 Bing, 169 (1830), is an illustration of this. But the fact that by reason of the loss of the contract which the Defendant has failed to perform the Plaintiff obtains the benefit of another contract which is of value of him, does not entitle the Defendant to the benefit of the latter contract. ***Yates*** v. ***Whyt***e (4 Bring. N. C 272 (1838), ***Bradburn*** v. ***Great Western Railway Co.*** (LR 10 Ex. 1 (1874)) and ***Jebsen*** v. ***East and West Indian Dock Co.*** (L.R. 10 C.P. 300(1875)).

The decision in ***Rodocanachi*** v. ***Milburn*** (18 Q.B.D. 67 (1886)), that market value at the date of the breach is the decisive element, was upheld in the House of Lords in ***Williams*** v. ***Agius*** ((1914) A.C. 510). The breach in ***Rodocanachi*** v. ***Milburn*** was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer. Sec. 73 it is but declaratory of the right to damages which has been discussed in course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller's loss at the date of the breach was and remained the differences between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, ***viz***., the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original Court and in the Appeal Court discharged, and judgment entered for the Plaintiff according to his plaint, and that the Respondent ought to pay the costs in the Courts below and of this appeal.

* * * * *

Karsandas H. Thacker v. *M/S. The Saran Engineering Co. Ltd.*

AIR 1965 SC 1981

RAGHUBAR DAYAL, J. – Karsandas H. Thacker, appellant, sued the respondent for the recovery of Rs. 20,700/- for damages for breach of contract. He alleged that he entered into a contract with the respondent for the supply of 200 tons of scrap iron in July 1952 through correspondence, that the respondent did not deliver the scrap iron and expressed his inability to comply with the contract by its letter dated January 30, 1953. In the meantime, the appellant had entered into a contract with M/s. Export Corporation, Calcutta for supplying them 200 tons of scrap iron. On account of the breach of contract by the respondent, the appellant could not comply with his contract with M/s. Export Corporation which in its turn, purchased the necessary scrap iron from the open market and obtained from the appellant the difference in the amount they had to pay and what they would have paid to the appellant in pursuance of the contract.

(2) The respondent contested the suit on grounds *inter alia* that there had been no completed contract between the parties and that the appellant suffered no damages. The controlled price of scrap iron on January 30, 1953, was the same as it was in July 1952 when the contract was made. It was further contended for the defendant that it was not liable to make good the damages the appellant had to pay to the Export Corporation as the appellant had entered into the contract on the basis of principal to principal and had not disclosed that he was purchasing scrap iron for the Export Corporation or for the purpose of export.

(3) The trial Court accepted the plaintiff's case that there was a completed contract between the parties, that the respondent broke the contract and that the appellant was entitled to the damages claimed. It accordingly decreed the suit. On appeal by the respondent, the High Court reversed the decree. It held that there had been a completed contract between the parties on October 25, 1952, but held that the respondent was not responsible for committing breach of contract as it could not perform the contract on account of the laches of the appellant and that the appellant suffered no damages in view of the controlled price for scrap iron being the same on January 30, 1953 as it was in July 1952. The result was that the appellant's suit was dismissed. The High Court granted the necessary certificate under Art. 133(1)(a) of the Constitution and that is how the appeal has been presented to this Court.

(4) It has been urged for the appellant that the Iron and Steel (Scrap Control) Order, 1943, hereinafter called the Scrap Control Order, and consequently the controlled price of scrap iron, applied to cases of sale of scrap iron for use within the country and did not apply to sales of scrap iron for purposes of export. We do not find anything in the Defence of India Rules, 1939, under which the Scrap Control Order was issued in 1943, or in the Essential Supplies (Temporary Powers) Act, 1946, that the Control Orders would not apply to sales of controlled articles for export. Rule 81 of the Defence of India Rules, 1939, authorised the Central Government, *inter alia*, to provide by order for maintaining supplies and services essential to the life of the community, for the controlling of the prices at which articles or things of any description whatsoever may be sold and there is nothing to suggest that this control of prices was to apply only to sales of any articles within the country and not for

purposes of export. Similarly, S. 3(1) of the Essential Supplies (Temporary Powers) Act, 1946, provided that the Central Government may, by notified order, provide for regulation or prohibition of production, supply and distribution of any essential commodity and for trade and commerce therein, in so far as it appears to be necessary and expedient for maintaining or increasing supplies of any essential commodity or securing its equitable distribution or availability at fair prices.

(5) There is nothing in the terms of the Scrap Control Order or the Notification issued under cl. 8 thereof by the Controller at the relevant period, viz., Notification No. S.R.O. 1007 dated 30-6-1951, Part II, Section 3, fixing the controlled price of scrap iron among other things, to exclude from its purview sale of scrap iron for purposes of export.

(6) Reference is made for the appellant to what is stated in a letter from the Iron and Steel Controller, Government of India, to the appellant in March 1954. Letter Exhibit 6 was in reply to a letter from the appellant and stated that there was no statutory price for scrap iron meant for export. This statement might be about the position in March 1954. There is nothing in this letter to show that the statutory price of scrap iron meant for export was not covered by the Control Order in 1952.

(7) Another letter from the Deputy Assistant Iron and Steel Controller to the appellant in August-September 1954, Exhibit 1(Y), in reply to a telegram from the appellant, said that the Scrap Control Order was not applicable to scraps meant for export and added:

> "Scraps which are permitted for export are generally collected from uncontrolled sources by the exporters."

Two things are to be noted. One is that it is not clear from this letter whether the Scrap Control Order was not applicable to scraps meant for export in 1952 and the other is that some sort of permission appeared to have been necessary for exporting scrap iron and that scrap iron for export was generally collected from uncontrolled sources, that is to say, ordinarily the Controller did not authorise purchase of scrap iron for export from controlled sources.

(8) The Notification fixing the prices for the sale of scrap iron was applicable for the prices to be charged by persons other than controlled sources. It follows that purchases for exports from uncontrolled sources also offended against the provisions of cl. 8(4) of the Scrap Control Order if they charged prices higher than those fixed. Clause 8 empowered the Controller, with the approval of the Central Government, to publish by notification in the Official Gazette, prices for different classes of scrap. Sub-clause (4) thereof provided that no person could sell or otherwise dispose of and no person could acquire any scrap at prices in excess of those notified or fixed by the Controller under that clause.

(9) We now deal with the quantum of damages. The appellant claimed damages at an amount equal to the difference between the price paid by his vendees, viz. the Export Corporation, and the price he would have paid to the respondent for 200 tons of scrap iron. He is not entitled to calculate damages on this basis, unless he had entered into the contract with the respondent after informing the latter that he was purchasing the scrap for export, if there was no controlled price applicable to purchases for export. There is nothing on the record to establish that the defendant was told, before the contract was entered into, that the

appellant was purchasing the scrap iron for export. There is nothing about it in the correspondence which concluded the contract. The first indirect indication of the scrap being required for export could be had by the respondent late in October 1952 when it was informed that the scrap iron was to be despatched to the Export Corporation. The respondent could have possibly inferred then that the scrap iron it was to sell to the appellant was meant for export. Such information to it was belated. Its liability to damages for breach of contract on the basis of the market price of scrap iron for export would not depend on its belated knowledge but would depend on its knowledge of the fact at the time it entered into the contract.

(10) The plaintiff stated in para 7 of the plaint that the plaintiff, to the knowledge of the defendant company, sold the said 200 tons of iron scrap purchased from the defendant to M/s. Export Corporation who required the same for shipping purposes. This statement does not refer to the time when the defendant had the knowledge that the scrap iron was required for shipping purposes. From the contents of the correspondence, such knowledge, as already mentioned, could be possibly had by the defendant after October 25, 1952. Further, this statement in the plaint refers to the knowledge of the sale to the Export Corporation and does not directly refer to his knowledge about the scrap iron being required for export. The respondent, in its written statement, denied the statements in para 7 of the plaint.

(11) In his deposition, the appellant stated that the defendant company knew that he had sold the goods to the Export Corporation and the Export Corporation wanted the goods for shipping, but in cross-examination, had to state that he himself had no concern or interest in the business of the Export Corporation, that he purchased the scrap iron from the defendant company on his own accord and that he had sold 200 tons of scrap iron to the Export Corporation on October 25, 1952. It is clear therefore that the respondent company could not have possibly known in July 1952 when the contract was made that the appellant was purchasing scrap iron for export through the Export Corporation. The appellant himself stated in cross-examination that he talked of selling to the Export Corporation after the close of the negotiation with defendant on July 25, 1952.

(12) The only other material on which the appellant relies in support of his contention is that he had purchased to the knowledge of the respondent company scrap iron for export, is the use of the expression ‘very fancy price’ in the first letter he had written to the respondent on June 9, 1952. The letter said:

> “We take pleasure to inform you that we are at present purchasing the scrap iron of the following descriptions at a very fancy price.”

and required the respondent to communicate the exact quantity of each of the items mentioned in that letter, available for sale, together with their lowest price. It is urged that when prices were controlled, a suggestion to purchase at a very fancy price was a clear indication of the appellant’s purchasing the various items for purposes of export. The offer to purchase at a very fancy price appears to be very remote and slender basis for coming to the conclusion that the respondent company must have known that the appellant wanted to purchase the items for export. The effect of the Controller’s fixing the prices is only this that nobody can lawfully charge a price higher than the fixed price. The seller is however at

liberty to sell the article at any price lower than the price fixed. It is therefore that the appellant had asked the respondent to quote their lowest prices. Readiness to pay a very fancy price could therefore mean a good price within the price limit fixed by the Controller.

(13) We are therefore of opinion that the High Court was right in coming to the conclusion that the defendant respondent did not know that the appellant was purchasing scrap iron for export. The appellant, on the breach of contract by the respondent, was entitled, under S. 73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under S. 73 of the Contract Act, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Now, the loss which could have naturally arisen in the usual course of things from the breach of contract by the respondent in the present case would be nil. The appellant agreed to purchase scrap iron from the respondent at Rs. 100 per ton. It may be presumed that he was paying Rs. 70, the controlled price, and Rs. 30, the balance, for other incidental charges. On account of the non-delivery of scrap iron, he 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 and therefore he could not have suffered any loss on account of the breach of contract by the respondent. The actual loss, which, according to the appellant, he suffered on account of the breach of contract by the respondent was the result of his contracting to sell 200 tons of scrap iron for export to Export Corporation, It may be assumed that, as stated, the market price of scrap iron for export on January 30, 1953, was the price paid by the Export Corporation for the purchase of scrap iron that day. As the parties did not know and could not have known when the contract was made in July 1952 that the scrap iron would be ultimately sold by the appellant to the Export Corporation, the parties could not have known of the likelihood of the loss actually suffered by the appellant, according to him, on account of the failure of the respondent to fulfil the contract.

(14) Illustration (k) to S. 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to the third parties.

(15) We therefore hold that the High Court was right in holding that the appellant suffered no such damage which he could recover from the respondent.

In view of what we have said above, it is not necessary to discuss whether the correspondence between the parties in June-July 1952 made out a completed contract or not and whether the appellant committed breach of contract or not.

(17) The result is that the appeal fails and is dismissed with cost.

* * * * *

Maula Bux v. *Union of India*

AIR 1970 SC 1955

J.C. SHAH, ACTG., C.J. – Maula Bux – hereinafter called 'the plaintiff' – entered into a contract with the Government of India on February 20, 1947, to supply potatoes at the Military Headquarters, U.P. Area, and deposited an amount of Rs. 10,000 as security for due performance of the contract. Clause 8 of the contract ran as follows:

"The officer sanctioning the contract may rescind his contract by notice to me/us writing:

(iv) If I/we decline, neglect or delay to comply with any demand or requisition or in any other way fail to perform or observe any condition of the contract.

In case of such rescission, my/our security deposit (or such portion thereof as the officer sanctioning the contract shall consider fit or adequate) shall stand forfeited and be absolutely at the disposal of Government, without prejudice to any other remedy or action that the Government may have to take * * *

In the case of such rescission, the Government shall be entitled to recover from me/us on demand any extra expense the Government may put to in obtaining supplies/ services hereby agreed to be supplied, from elsewhere in any manner mentioned in clause 7(ii) hereof, for the remainder of the period for which this contract was entered into, without prejudice to any other remedy the Government may have."

The plaintiff having made persistent default in making "regular and full supplies" of the commodities agreed to be supplied, the Government of India rescinded the contracts, and forfeited the amounts deposited by the plaintiff.

2. The plaintiff commenced an action against the Union of India in the Court of the Civil Judge, Lucknow, for a decree for Rs. 20,000 being the amounts deposited with the Government of India for due performance of the contracts and interest thereon at the rate of 6 per cent per annum. The Trial Court decreed the suit. The Court held that the Government of India was justified in rescinding the contracts, but they could not forfeit the amounts of deposit, for they had not suffered any loss in consequence of the default committed by the plaintiff. The High Court of Allahabad in appeal modified the decree, and awarded Rs. 416.25 only with interest at the rate of 3 per cent from the date of the suit. The plaintiff has appealed to this Court with special leave.

3. The Trial Court found in decreeing the plaintiff's suit that there was no evidence at all to prove what loss, if any, was suffered by the Government of India in consequence of the plaintiff's default, and on that account amounts deposited as security were not liable to be forfeited. In the view of the High Court, forfeiture of a sum deposited by way of security for due performance of a contract, where the amount forfeited is not unreasonable, S. 74 of the Contract Act has no application. The Court observed that the decision of this Court in ***Fateh Chand*** v. ***Balkishan Dass*** (1964) 1 SCR 515) 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 constitute penalty contemplated under S. 74 of the Indian Contract Act, that even if it be held that the security deposited in the case was a stipulation by

way of penalty, the Government was entitled to receive from the plaintiff reasonable compensation not exceeding that amount, whether or not actual damage or loss was proved to have been caused, and that even in the absence of evidence to prove the actual damage or loss to the Government "here were circumstances in the case which indicated that the amount of Rs. 10,000 in the case of potato contract and Rs. 8,500 in the case of poultry contract may be taken as not exceeding the reasonable compensation for the breach of contract by the plaintiff." The High Court further observed that the contract was for supply of large quantities of potatoes, poultry and fish, which would not ordinarily be available in the market, and "had to be procured in case of breach of contract everyday with great inconvenience" and in the circumstances the Court "could take judicial notice of the fact that 1947-48 was the period when the prices were rising and it would not have been easy to procure the supplies at the rates contracted for." The High Court concluded:

> "[T]aking into consideration the amount of inconvenience and the difficulties and the rising rate of prices, it would not be unfair if in case of such breach for the supply of such huge amounts of potatoes and poultry, we consider an amount of Rs. 18,500 by way of damages as being not unreasonable."

4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt, in "The Dictionary of English Law" at p. 689: "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 or have made up their minds." As observed by the Judicial Committee in ***Chiranjit Singh*** v. ***Har Swarup***, AIR 1926 PC 1:

> "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."

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest-money.

5. There is authority, no doubt coloured by the view which was taken in English case, that Section 74 of the Contract Act has no application to cases of deposit for due performance of a contract which is stipulated to be forfeited for breach: ***Natesa Aiyer*** v. ***Appavu Padavachi*** (AIR 1915 Mad. 896)(FB); ***Singer Manufacturing Co.*** v. ***Raja Prosad*** (1909) ILR 36 Cal. 960; ***Manian Pattar*** v. ***Madras Rly. Co.*** (1906) ILR 29 Mad 118. But this view is no longer good law in view of the judgment of this Court in ***Fateh Chand's case*** (AIR 1963 SC 1405). This Court observed (at 1411):

> "Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty ***** The

measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for."

6. The Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggreived party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received for the performance of 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. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. 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 which expressly provides for forfeiture, 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."

7. Forfeiture of earnest money under a contract for sale of property – movable or immovable – if the amount is reasonable, does not fall within Section 74. That has been decided in several cases: AIR 1926 P. C. 1; ***Roshan Lal*** v. ***Delhi Cloth and General Mills Co. Ltd***. ***Delhi*** (1911) ILR 33 All 16; ***Muhammad Habibullah*** v. ***Muhammad Shafi***, ILR 41. All 324; ***Bishan Chand*** v. ***Radha Kishan Das***, (1897) ILR 19 All. 489. 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 to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.

8. Counsel for the Union, however, urged that in the present case Rs.10,000 in respect of the Potato contract and Rupees 8,500 in respect of the poultry contract were genuine pre-estimates of damages which the Union was likely to suffer as a result of breach of contract, and the plaintiff was not entitled to any relief against forfeiture. Reliance in support of this contention was placed upon the expression (used in Section 74 of the Contract Act) "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." It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In

case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him.

9. In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made.

11. On the view taken by us it must be held that the High Court was in error in disallowing the plaintiff's case.

13. We set aside the decree passed by the High Court and substitute the following decree:

> "The Union of India do pay to the plaintiff Rs. 18,500 with interest at the rate of 3 per cent per annum from the date of the suit till payment."

The plaintiff was guilty of breach of the contracts. Considerable inconvenience was caused to the Military authorities because of the failure on the part of the plaintiff to supply the food-stuff contracted to be supplied. Even though there is no evidence of the rates at which the goods were purchased, we are of the view, having regard to the circumstances of the case, that the fairest order is that each party to bear its own costs throughout.

* * * * *

Shri Hanuman Cotton Mills v. *Tata Air Craft Limited*

1969 (3) SCC 522

C.A. VAIDIALINGAM, J. – 2. The appellants, who were dealing also in the purchase of new and second hand machinery, on coming to know from an advertisement in a Daily that the defendant-respondent was offering for sale aero-scrap, addressed a letter, dated November 6, 1946 to the respondent intimating their desire to purchase the materials advertised for sale and stating that one of their representatives would be contacting them shortly. Obviously, the parties must have met and decided about the purchase, as is seen from the letter, dated November 18, 1946 addressed by the General Manager of the respondent, to the appellants. That letter refers to a discussion that the parties had on that day and the respondents confirmed having sold to the appellants the entire lot of aero-scrap lying at Panagarh, on the terms and conditions mentioned in the letter. The material was stated to be in Dump No. 1 near the flight line at Panagarh and the approximate quantity was 4,000 tons of aero-scrap, more or less. The letter refers to the appellants having agreed to pay Rs. 10 lakhs as price of the materials in the said Dump No. 1, against which the receipt, by cheque, of a sum of Rs. 2,50,000/- was acknowledged by the respondent. There is a further reference to the fact that the appellants had agreed to pay the balance of Rs. 7,50,000/- that day itself. The letter also refers to the fact that the price mentioned does not include sales-tax to be paid by the appellants and to certain other matters, which are not relevant for the purpose of the appeal. The letter further says: "The company's terms of business apply to this contract and a copy of this is enclosed herewith." We shall refer to the relevant clauses in the company's terms of business, referred to in this letter, a little later. It is enough to note, at this stage that those terms of business have been made part of the terms and conditions governing the contract.

3. On the same day, the appellants sent a reply to the respondent, acknowledging the letter. The appellants said that they noted that the respondent wants to sell the aero-scrap as it is and that it wanted the appellants to pay the full value, viz., the balance of Rs. 7,50,000/- at once. The appellants confirmed the arrangement contained in the respondent's letter; but regarding payment, the appellants said that they agree to pay the balance amount in two instalments, viz. Rs. 2,50,000/- on or before November 22, 1946 and the balance of Rs. 5,00,000/- on or before December 14, 1946. They also further stated that they shall commence taking delivery after making full payment. The respondents by its letter, dated November 20, 1946 acknowledged the receipt of the appellants' letter, dated November 18, 1946 together with the modifications contained therein. But the respondent emphasised that the other terms and conditions will be as mentioned in its letter of November 18, 1946.

4. On November 22, 1946, the appellants sent a communication, purporting to be in continuation of their letter, dated November 18, 1946. In this letter they state that the transaction has been closed without inspecting the materials, merely on the assurance of the respondent that the quantity of aero-scrap was about 4,100 tons. The appellants further state that they have since obtained information that the quantity stated to be available is not on the spot and therefore they cannot do the business. Under the circumstances, they request the

respondent to treat their letter, dated November 18, 1946 as cancelled and to return the sum of Rs. 2,50,000/- already paid by them.

5. The respondent sent several letters to the appellants asking them to pay the balance amount and take delivery of the goods; but the appellants refused to pay any further amount to the respondent. The respondent ultimately forfeited the entire sum of Rs. 2,50,000/- which, according to it, was earnest money and then cancelled the contract.

6. Now that we have referred to the material correspondence that took place between the parties as well as the final action of the defendant of forfeiting the amount, it is now necessary to advert to certain clauses in the Company's terms of business which, as mentioned earlier, have been made by the defendant's letter, dated November 18, 1946 as part of the terms and conditions of the contract. We have also referred to the fact that the appellants in their reply, dated November 18, 1946 have accepted the same.

7. The respondent's terms of business contain various clauses, of which Clauses 9 and 10 are relevant for our purpose. They are:

"9. *Deposits*

The buyer shall deposit with the Company 25% of the total value of the stores at the time of placing the order. The deposit shall remain with the Company as earnest money and shall be adjusted in the final bills, no interest shall be payable to the buyer by the Company on such amounts held as earnest money.

10. *Time and method of payment*

(a) The buyer shall, before actual delivery is taken or the stores despatched under conditions and pay the full value of the stores for which his offer has been accepted less the deposit as hereinbefore contained after which a Shipping Ticket will be issued by the Company in the name of the buyer. The buyer shall sign his copy of the Shipping Ticket before the same is presented to the Depot concerned for taking delivery of the stores concerned.

(b) If the buyer shall make default in making payment for the stores in accordance with the provisions of this contract the Company may without prejudice to its rights under Clause II thereof or other remedies in law forfeit unconditionally the earnest money paid by the buyer and cancel the contract by notice in writing to the buyer and resell the stores at such time and in such manner as the Company thinks best and recover from the buyer any loss incurred on such re-sale. The Company shall, in addition be entitled to recover from the buyer any cost of storage, warehousing or removal of the stores from one place to another and any expenses in connection with such a re-sale or attempted re-sale thereof. Profit, if any, on re-sale as aforesaid, shall belong to the Company."

From the above clauses, it will be seen that a buyer has to deposit with the Company 25% of the total value and that deposit is to remain with the company as earnest money to be adjusted in the final bills. The buyer is bound to pay the full value less the deposit, before taking delivery of the stores. In case of default by the buyer, the company is entitled to forfeit unconditionally the earnest money paid by a buyer and cancel the contract.

8. The appellants instituted suit No. 2745 of 1947 in the Original Side of the Calcutta High Court against the respondents for recovery of the sum of Rs. 2,50,000/- together with interest. The plaintiffs pleaded that there had been no concluded agreement entered into between the parties and even when the matter was in the stage of proposal and counter-proposal, the plaintiffs had withdrawn from the negotiations. They alleged that even if there was a concluded contract, the same was vitiated by the false and untrue representations made by the respondents regarding the quantity of scrap material available and the plaintiffs had been induced to enter into the agreement on such false representations. Hence the plaintiffs were entitled to avoid the contract and they have avoided the same. They pleaded that the respondents were never ready and willing to perform their part of the contract. Even on the assumption that the plaintiffs had wrongfully repudiated the contract, such repudiation was accepted by the defendant by putting an end to the contract. The respondents were not entitled to forfeit the sum of Rs. 2,50,000/- as the latter cannot take advantage of their own wrongful conduct. In any event, the sum of Rs. 2,50,000/- represents money had and received by the defendants to and for the use of the plaintiffs. The plaintiffs, in consequence, prayed for a decree directing the defendants to refund the sum of Rs. 2,50,000/- together with interest at 6% from November 18, 1946.

9. The defendants contested the claim of the plaintiffs. They pleaded that a concluded contract has been entered into between the parties as per two letters, dated November 18 and November 20, 1946. The appellants had agreed to buy the lot of scraps lying in Dump No. 1 for Rs. 10,00,000/- of which Rs. 2,50,000/- was paid as deposit. The defendants had agreed to the balance amount being paid in as instalments asked for by the plaintiffs in their letter of November 18, 1946. The defendants further pleaded that there has been no misrepresentation made by them but the plaintiffs, without any justification, repudiated the contract by their letter, dated November 22, 1946. As the plaintiffs wrongfully repudiated the contract, the defendants, as they are entitled to in law, forfeited the sum of Rs. 2,50,000/- paid by the plaintiff as earnest money, under the terms of business of the Company which had become part of the contract entered into between the parties. The defendants further pleaded that they have always been ready and willing to perform their part of the contract and that they, in fact, even after the plaintiff repudiated the contract, called upon them to pay the balance amount and take delivery of the articles. But the plaintiffs persisted in their wilful refusal to perform their part and therefore the defendants had no alternative but to forfeit the earnest money and conduct a resale of the goods. The defendants further pleaded that the appellants had to pay them a sum of Rs. 42,499/- for the loss and damage sustained by the defendants. They further urged that the plaintiffs were not entitled to claim the refund of the sum of Rs. 2,50,000/- or any part thereof which had been paid as earnest money and forfeited according to law, and the terms of contract by the defendants.

10. Though the plaintiffs have raised various contentions in the plaint, it is seen from the judgments of the learned Single Judge and the Division Bench, on appeal, that the appellants conceded that they committed breach of contract and that the defendants have been at all material times ready and willing to perform their part of the contract. The plea that the plaintiffs entered into the contract under a mistake of fact and that they were induced, to so enter into the contract due to the misrepresentation of the defendants regarding the quantity of

scrap available, was also given up. The appellants have also accepted the position that there has been a concluded contract between the parties and the said contract was concluded by the correspondence between the parties consisting of the letters, dated November 18, 1946 and November 20, 1946. The plaintiffs have further abandoned the plea that the defendants were not ready and willing to perform their part of the contract. Therefore, the two questions that ultimately survived for consideration by the Court were: (1) as to whether the sum of Rs. 2,50,000/- was paid by the plaintiffs as and by way of part payment or as earnest deposit; and (2) as to whether the defendants were entitled to forfeit the said amount.

11. The learned Single Judge and, on appeal, the Division Bench, have held that the sum of Rs. 2,50,000/- paid by the appellants was so paid as and by way of deposit or earnest money and that it is only when the plaintiffs pay the entire price of the goods and perform the conditions of the contract that the deposit of Rs. 2,50,000/- will go towards the payment of the price. It is the further view of the Courts that the amount representing earnest money is primarily a security for the performance of the contract and, in the absence of any provision to the contrary in the contract, the defendants are entitled to forfeit the deposit amount when the plaintiffs have committed a breach of contract. In this view, the defendants' right to forfeit the sum of Rs. 2,50,000/- was accepted and it has been held that the plaintiffs are not entitled to claim refund of the said amount. The plaintiffs' suit, in the result, was dismissed by the learned Single Judge and, on appeal, the decree of dismissal has been confirmed.

12. On behalf of the appellants Mr. Maheshwari, learned counsel, has raised two contentions: (1) That the amount of Rs. 2,50,000/- paid by the plaintiffs and sought to be recovered in the suit is not by way of a deposit or as earnest money and that, on the other hand, it is part of the purchase price and therefore the defendants are not entitled to forfeit the said amount, (2) In this case, it must be considered that the sum of Rs.2,50,000/- has been named in the contract as the amount to be paid in case of breach or in the alternative the contract contains a stipulation by way of penalty regarding forfeiture of the said amount and therefore the defendants will be entitled, if at all, to receive only reasonable compensation under Section 74 of the Contract Act and the Courts erred in not considering this aspect. Under this head, the counsel also urged that even a forfeiture of earnest money can only be, if the amount is considered reasonable and in this case the amount which represents 25% of the total price cannot be considered to be reasonable and hence the appellants are entitled to relief in law.

13. The learned Attorney-General, on behalf of the respondents, pointed out that the material correspondence between the parties, by which the contract was concluded, read along with the terms of business will clearly show that the sum of Rs. 2,50,000/- paid by the appellants was as earnest. It was further pointed out that the position in law is that the earnest money is part of the purchase price when the transaction goes through and is performed and that on the other hand it is forfeited when the transaction falls through by reason of the fault or failure of the vendee. The learned Attorney-General invited us to certain decisions laying down the salient features of 'earnest deposit' and the right of the party to whom the amount has been paid to forfeit when the opposite party has committed a breach of contract. Regarding the second contention of the appellant, the learned Attorney-General pointed out that the appellants never raised any contention that the amount of Rs. 2,50,000/- deposited by

the appellants is to be treated as a sum named in the contract as the amount to be paid in case of breach or that the contract must be considered to contain any stipulation by way of penalty. He also pointed out that the question of reasonableness or otherwise of the earnest deposit forfeited in this case, was never raised by the appellant at any stage of the proceedings in the High Court. Therefore, Section 74 of the Contract Act has no application.

14. The first question that arises for consideration is whether the payment of Rs.2,50,000/- by the appellants was by way of deposit or earnest money. Before we advert to the documents evidencing the contract in this case, it is necessary to find out what in law constitutes a deposit or payment by way of earnest money and what the rights and liabilities of the parties are, in respect of such deposit or earnest money.

[After analysing decided cases and text books, the Court proceeded:]

21. From a review of the decisions, the following principles emerge regarding "earnest":

(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

22. Having due regard to the principles enunciated above, we shall now consider the relevant claims in the contract between the parties in the case before us, to ascertain whether the amount of Rs. 2,50,000/- paid by the appellant constitutes earnest money and if so whether the respondents were justified in law in forfeiting the same.

23. We have already referred to the letter, dated November 18, 1946 written by the respondents to the appellants confirming the sale of scrap lying in Dump No. 1. That letter states that the total price for which the appellants agreed to purchase the scrap material is Rs. 10,00,000/- against which a sum of Rs. 2,50,000/- had been paid and the balance amount was to be paid that day itself. In the reply sent by the appellant on the same day, they confirmed the arrangement referred to by the respondents but, regarding the payment of the balance amount, they agreed to pay the same in two instalments. The letter of November 18, 1946 to the appellants clearly refers to the fact that the Company's Terms of Business applied to the contract and a copy of the said terms was also sent to the respondents. The respondents, by confirming the arrangement, by their letter of November 18, 1946 were fully aware that the terms of business of the respondent company formed part of the contract entered into between the parties. We have also referred earlier, to Clauses 9 and 10 of the Terms of Business of the respondents. Clause 9 requires the buyer to deposit 25% of the total value of the goods at the time of placing the order. That clause also further provides that the deposit shall remain with the company "as earnest money," to be adjusted in the final bills. It further provides that no interest is payable to the buyer by the company "on such amounts held as earnest money." There is no controversy in this case that the appellants deposited the sum of Rs.2,50,000/-

under this clause nine, representing 25% of the purchase price of Rs.10,00,000/-. It is therefore clear that this amount deposited by the appellant is a deposit "as earnest money."

24. Mr. Maheshwari drew our attention to the letter, dated November 18, 1946 sent by the respondents to the appellants wherein the respondents have stated that the appellants have agreed to pay Rs. 10,00,000/- for all the materials in Dump No. 1 against which a cheque for Rs. 2,50,000/- has been paid and that the appellants further agreed to pay the balance of Rs. 7,50,000/- that day itself. This statement, according to the learned counsel, will clearly show that the sum of Rs. 2,50,000/- has been paid as part payment towards the total price, pure and simple, and there is no question of any payment by way of earnest money. But this contention ignores the last recital in the said letter wherein it has been specifically stated that the terms of business of the respondent company applied to the contract. This condition has also been accepted by the appellants in their reply, dated November 18, 1946. Therefore the position is this, that the terms of business of the respondent company have been incorporated as part of the letter and has been embodied in the terms of contract between the parties. Clause 9, to which we have already referred, clearly shows that 25% of the total value is to be deposited and that amount is to remain with the respondents as earnest money. It is again emphasized in Clause 9 that the amount so deposited as earnest will not bear any interest, but will be only adjusted in the final bills. Therefore, the amount of Rs. 2,50,000/- deposited by the appellants, representing 25% of the total of Rs.10,00,000/-, is "earnest money" under Clause 9 of the Terms of Business.

25. We have also earlier referred to Clause 10 of the Terms of Business which relates to the time and method of payment. Under Clause 10(b) a right is given to the respondents when the buyer makes default in making payment according to the contract, to forfeit unconditionally the earnest money paid by the buyer. That clause further provides that this forfeiture of earnest money is without prejudice to the other right of the respondents in law. We have referred to the fact that though the appellants raised pleas that they have not committed any breach of contract and that on the other hand the respondents were the parties in breach, these contentions were not pursued and had been abandoned before the High Court. Further, as noted by the High Court, the appellants conceded that they had committed a breach of the contract. If so, as rightly held by the High Court, under Clause 10(b) the respondents were entitled to forfeit the earnest money of Rs. 2,50,000/-.

26. Before closing the discussion on this aspect, it is necessary to note that in the case before the Privy Council, in ***Chiranjit Singh*** v. ***Har Swarup***, AIR 1926 PC 1, 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 by two cheques the sum of Rs.1,65,000/- against the purchase price of Rs. 4,76,000/-. The receipt of the sum of Rs. 1,65,000/- granted by the seller was also stated to be only towards the sale price. But, nevertheless, the High Court, as well as the Judicial Committee, trated 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 read with the Terms of Business of the company, 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 respondents to forfeit the same, under the

terms of the contract, when the appellants admittedly had committed breach of the contract, cannot be assailed. The first contention for the appellants therefore fails.

27. The second contention of Mr. Maheshwari, noted earlier, is really based upon Sections 73 and 74, the respondents will be entitled only to compensation for any loss or damage caused to them by the breach of the contract, committed by the appellants. Counsel also very strongly relied upon Section 74 of the Contract Act. According to him, the sum of Rs. 2,50,000/-, referred to in the contract, must be treated as the amount to be paid in case of a breach. In the alternative, counsel also urged that the provision in the contract regarding the forfeiture of the said amount, should be treated as a term containing a stipulation by way of a penalty. Under any of these circumstances, the remedy of the aggrieved party would be to get compensation which is adjudged reasonable by the Court. Counsel also urged that "earnest money," unless it is considered to be a reasonable amount, could not be forfeited in law.

28. The learned Attorney General very strongly urged that the pleas covered by the second contention of the appellant had never been raised in the pleadings nor in the contentions urged before the High Court. The question of the quantum of earnest deposit which was forfeited being unreasonable or the forfeiture being by way of penalty, were never raised by the appellants. The Attorney General also pointed out that as noted by the High Court the appellants led no evidence at all and, after abandoning the various pleas taken in the plaint, the only question pressed before the High Court was that the deposit was not by way of earnest and hence the amount could not be forfeited. Unless the appellants had pleaded and established that there was unreasonableness attached to the amount required to be deposited under the contract or that the clause regarding forfeiture amounted to a stipulation by way of a penalty, the respondents had no opportunity to satisfy the Court that no question of unreasonableness of the stipulation being by way of penalty arises. He further urged that the question of unreasonableness or otherwise regarding earnest money does not at all arise when it is forfeited according to the terms of the contract.

29. In our opinion the learned Attorney General is well founded in his contention that the appellants raised no such contentions covered by the second point, noted above. It is therefore unnecessary for us to go into the question as to whether the amount deposited by the appellants, in this case, by way of earnest and forfeited as such, can be considered to be reasonable or not. We express no opinion on the question as to whether the element of unreasonableness can ever be considered regarding the forfeiture of an amount deposited by way of earnest and if so what are the necessary factors to be taken into account in considering the reasonableness or otherwise of the amount deposited by way of earnest. If the appellants were contesting the claim on any such grounds, they should have laid the foundation for the same by raising appropriate pleas and also led proper evidence regarding the same, so that the respondents would have had an opportunity of meeting such a claim.

30. In this view, it is unnecessary for us to consider the decision of this Court in ***Maula Bux*** v. ***Union of India***, AIR 1970 SC 1955, relied on by the appellants and wherein there is an observation to the effect:

> "Forfeiture of earnest money under a contract for sale of property – moveable or immoveable – if the amount is reasonable, does not fall within Section 74 (of the Indian

Contract Act). That has been decided in several cases. ***Kunwar Chiranjit Singh*** v. ***Har Swarup*** (supra); ***Roshan Lal*** v. ***The Delhi Cloth and General Mills Co. Ltd. Delhi***, ILR 33 All 166; ***Muhammad Habibullah*** v. ***Muhammad Shafi***, ILR 41 All 324; ***Bishan Chand*** v. ***Radha Kishan Das***, ILR 19 All 489. These cases are easily explained, for forfeiture of 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 to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

31. The learned Attorney General has pointed out that the decisions referred to in the above quotation do not lay down that the test of reasonableness applies to an earnest deposit and its forfeiture. He has also pointed out that this Court, in the above decision, did not agree with the view of the High Court that the deposit, the recovery of which was sued for by the plaintiff therein, was earnest money. The learned Attorney General also referred us to various decisions, wherein, according to him, though the amounts deposited by way of earnest were fairly large in proportion to the total price fixed under the contract, nevertheless the forfeiture of those amounts were not interfered with by the Courts. But, as we have already mentioned, we do not propose to go into those aspects in the case on hand. As mentioned earlier, the appellants never raised any contention that the forfeiture of the amount amounted to a penalty or that the amount forfeited is so large that the forfeiture is bad in law. Nor have they raised any contention that the amount of deposit is so unreasonable and therefore, forfeiture of the entire amount is not justified. The decision in ***Maula Bux's*** *c*ase (supra) had no occasion to consider the question of reasonableness or otherwise of the earnest deposit being forfeited. Because, from the said judgment it is clear that this Court did not agree with the view of the High Court that the deposits made, and which were under consideration, were paid as earnest money. It is under those circumstances that this Court proceeded to consider the applicability of Section 74 of the Contract Act.

32. Mr. Maheshwari has relied upon the decision of this Court in ***Fateh Chand*** v. ***Balkishan Das*** (1964) 1 SCR 515, wherein, according to him, this Court has held, under similar circumstances, that the stipulation under the contract regarding forfeiture of the amount deposited is a stipulation by way of penalty attracting Section 74 of the Contract Act. On this assumption, counsel urged that there is a duty, statutorily imposed upon Courts by Section 74 of the Contract Act not to enforce the penalty clause but only to award reasonable compensation. This aspect, he urges, has been totally missed by the High Court.

33. We are not inclined to accept this contention of the learned counsel. This Court had to consider, in the said decision, two questions: (i) whether the plaintiff therein was entitled to forfeit a sum of Rs. 1,000/- paid as earnest money on default committed by the buyer; and (ii) whether the plaintiff was further entitled to forfeit the entire sum of Rs.24,000/- paid by the buyer under the contract which recognised such right. This Court held that the plaintiff was entitled to forfeit the sum of Rs. 1,000/- paid as earnest money, when default was committed by the buyer. But, regarding the second item of Rs.24,000/- this Court held that the same cannot be treated as earnest and therefore the rights of the parties would have to be adjudged under Section 74 of the Contract Act. In view of this conclusion the Court further had to

consider the relief that the plaintiff had to get when breach of contract was committed by the buyer and, in dealing with this question, it observed at p. 526:

> "Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty under Section 74 is by Section 74 reasonable compensation not exceeding the penalty stipulated for."

Again, at p. 528 it observed:

> "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. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. 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 which expressly provides for forfeiture, 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."

The Court further observed at p. 529:

> "There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

> Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties predetermined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with claim of the party complaining of breach of contract."

This Court applied Section 74 of the Contract Act, and ultimately fixed a particular amount which the plaintiff would be entitled to as reasonable compensation in the circumstances.

34. Mr. Maheshwari placed considerable reliance on the above extracts in support of his contention and urged that the recitals regarding forfeiture of the amount of Rs.2,50,000/- shows that the contract contains a stipulation by way of penalty and therefore Section 74 is attracted. It is not possible to accept this contention. As we have already pointed out, this Court, in the above decision, recognised the principle that earnest money can be forfeited, but in dealing with the rest of the amount which was not, admittedly, earnest money, Section 74 was applied. In the case before us the entire amount, as evidenced by the contract and as held by us earlier, is earnest money and therefore the above decision does not apply.

38. In the result, the appeal fails and is dismissed with costs.

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Ghaziabad Development Authority v. *Union of India*

AIR 2000 SC 2003

R.C. LAHOTI, J. – 2. In this batch of appeals, Ghaziabad Development Authority constituted under Section 4 of the Uttar Pradesh Urban Planning and Development Act, 1973 is the appellant. The Authority has from time to time promoted and advertised several schemes for allotment of developed plots for construction of apartments and/or flats for occupation by the allottees. Several persons who had subscribed to the schemes approached different forums complaining of failure or unreasonable delay in accomplishing the schemes. Some have filed complaints before the Monopoly and Restrictive Trade Practices Commission and some have raised disputes before the Consumer Disputes Redressal Forum. In two cases civil writ petitions under Article 226 of the Constitution were filed before the High Court seeking refund of the amount paid or deposited by the petitioner with the Authority. In all the cases under appeal the Court or Commission or Forum concerned has found the appellant-Authority guilty of failure to perform the promise held out to the claimants and therefore directed the amount paid or deposited by the respective claimants to be returned with interest. In the cases filed before the High Court of Allahabad there was a term in the brochure issued by the Authority that in the event of the applicant withdrawing its offer or surrendering the same no interest whatsoever would be payable to the claimants. The High Court has held such term of the brochure to be unconscionable and arbitrary and hence violative of Article 14 of the Constitution. The High Court has directed the amount due and payable to be refunded with interest calculated at the rate of 12 per cent per annum from the date of deposit to the date of refund. In all the other appeals before us the impugned order passed by the Commission or the Forum directs payment of the amount due and payable to the respective claimants with interest at the rate of 18 per cent per annum. In Civil Appeal No. 8316 of 1995, ***G.D.A***. v. ***Brijesh Mehta***, the MRTP Commission has held the claimants entitled to an amount of Rs. 50,000/- payable as compensation for 'mental agony' suffered by the claimants for failure of the Authority to make available the plot as promised by it.

3. As all these appeals raise the following common questions of law, they have been heard together and are being disposed of by this common judgment. The questions arising for decision are:

(i) Whether compensation can be awarded for mental agony suffered by the claimants?
(ii) Whether in the absence of any contract or promise held out by the Ghaziabad Development Authority any amount by way of interest can be directed to be paid on the amount found due and payable by the Authority to the claimants?
(iii) If so, the rate at which the interest can be ordered to be paid?

4. In C.A. No. 8316/1995, Ghaziabad Development Authority had announced a scheme for allotment of developed plots which was known as "Indirapuram Scheme." The Authority informed the claimants that a plot of 35 sq. meters was reserved for them, the estimated cost of which plot was Rs. 4,20,000/- payable in specified instalments. An allotment of plot was also informed. Then at one point of time the claimants were informed that due to some unavoidable reasons and the development work not having been completed there has been

delay in handing over possession. Having waited for an unreasonable length of time the claimants approached the MRTP Commission.

5. When a development authority announces a scheme for allotment of plots, the brochure issued for public information is an invitation to offer. Several members of public may make applications for availing benefit of the scheme. Such applications are offers. Some of the offers having been accepted subject to rules of priority or preference laid down by the authority result into a contract between the applicant and the Authority. The legal relationship governing the performance and consequences flowing from breach would be worked out under the provisions of the Contract Act and the Specific Relief Act except to the extent governed by the law applicable to the Authority floating the scheme. In case of breach of contract damages may be claimed by one party from the other who has broken its contractual obligation in some way or the other. The damages may be liquidated or unliquidated. Liquidated damages are such damages as have been agreed upon and fixed by the parties in anticipation of the breach. Unliquidated damages are such damages as are required to be assessed. Broadly the principle underlying assessment of damages is to put the aggrieved party monetarily in the same position as far as possible in which it would have been if the contract would have been performed. Here the rule as to remoteness of damages comes into play. Such loss may be compensated as the parties could have contemplated at the time of entering into the contract. The party held liable to compensation shall be obliged to compensate for such losses as directly flow from its breach. Chitty on Contracts (27th Edition, Vol. I, para 26.041) states – "Normally, no damages in contract will be awarded for injury to the plaintiff's feelings, or for his mental distress, anguish, annoyance, loss of reputation or social discredit caused by the breach of contract …. The exception is limited to contract whose performance is "to provide piece of mind or freedom from distress" ... Damages may also be awarded for nervous shock or any anxiety state (an actual breakdown in health) suffered by the plaintiff, if that was, at the time the contract was made, within the contemplation of the parties as a not unlikely consequence of the breach of contract. Despite these developments, however, the Court of Appeal has refused to award damages for injured feelings to a wrongfully dismissed employee, and confirmed that damages for anguish and vexation caused by breach of contract cannot be awarded in an ordinary commercial contract."

6. The ordinary heads of damages allowable in contracts for sale of land are settled. A vendor who breaks the contract by failing to convey the land to the purchaser is liable to damages for the purchaser's loss of bargain by paying the market value of the property at the fixed time for completion less the contract price. The purchaser may claim the loss of profit he intended to make from a particular use of the land if the vendor had actual or imputed knowledge thereof. 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 (See Chitty on Contract, Ibid, para 26.045).

7. In our opinion, compensation for mental agony could not have been awarded as has been done by the MRTP Commission.

8. However, the learned counsel for the respondents has invited our attention to ***Lucknow Development Authority*** v. ***M.K. Gupta*** (AIR 1994 SC 787) wherein this Court has upheld the

award by the Commission of a compensation of Rs. 10,000/- for mental harassment. The basis for such award is to be found in paras 10 and 11 wherein this Court has stated *inter alia* "Where it is found that exercise of discretion was malafide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. When the citizen seeks to recover compensation from a public authority in respect of injuries suffered by him for capricious exercise of power and the National Commission finds it duly proved then it has a statutory obligation to award the same." The Court has further directed the responsibility for the wrong done to the citizens to be fixed on the officers who were responsible for causing harassment and agony to the claimants and then recover the amount of compensation from the salary of officers found responsible. The judgment clearly shows the liability having been fixed not within the realm of the law of contracts but under the principles of administrative law. We do not find any such case having been pleaded much less made out before the Commission. Indeed, no such finding has been arrived at by the Commission as was reached by this Court in the case of ***Lucknow Development Authority*** (*supra*). The award of compensation of Rs. 50,000/- for mental agony suffered by the claimants is held liable to be set aside.

9. The next question is the award of interest and the rate thereof. It is true that the terms of the brochure issued by the Authority relevant to any of the cases under appeal and the correspondence between the parties do not make out an express or implied contract for payment of interest by the Authority to the claimants. Any provision contained in the Consumer Protection Act, 1986, the Monopolies and Restrictive Trade Practices Act, 1969 and U.P. Urban Planning and Development Act, 1973 enabling the award of such interest has not been brought to our notice. The learned counsel for the claimants have placed reliance on a recent decision of this Court in ***Sovintorg (India) Ltd.*** v. ***State Bank of India, New Delhi***, (AIR 1999 SC 2963) wherein in similar circumstances the National Consumer Disputes Redressal Commission directed the amount deposited by the claimants to be returned with interest at the rate of 12 per cent per annum. This Court enhanced the rate of interest to 15 per cent per annum. To sustain the direction for payment of interest reliance was placed on behalf of the claimants on Section 34 of the C.P.C. and payment of interest at the rate at which moneys are lent or advanced by National Banks in relation to commercial transactions was demanded. This Court did not agree. However, it was observed (Para 6):

> "There was no contract between the parties regarding payment of interest on delayed deposit or on account of delay on the part of the opposite party to render the services. Interest cannot be claimed under Section 34 of the Civil Procedure Code as its provisions have not been specifically made applicable to the proceedings under the Act. We, however, find that the general provision of Section 34 being based upon justice, equity and good conscience would authorise the Redressal Forums and Commissions to also grant interest appropriately under the circumstances of each case. Interest may also be awarded in lieu of compensation or damages in appropriate cases. The interest can also be awarded on equitable grounds."
>
> "The State Commission as well as the National Commission were, therefore, justified in awarding the interest to the appellant but in the circumstances of the

> case we feel that grant of interest at the rte of 12% was inadequate as admittedly the applicant was deprived of the user of a sum of Rs. one lakh for over a period of seven years. During the aforesaid period, the appellant had to suffer the winding-up proceedings under the Companies Act, allegedly on the ground of financial crunch. We are of the opinion that awarding interest at the rate of 15 per cent per annum would have served the ends of justice.

10. We are therefore of the opinion that interest on equitable grounds can be awarded in appropriate cases. In ***Sovintorg (India) Ltd.'s*** case (AIR 1999 SC 2963) the rate of 15 per cent per annum was considered adequate to serve the ends of justice. The Court was apparently influenced by the fact that the claimant had to suffer winding-up proceedings under the Companies Act and the defendant must be made to share part of the blame. However, in the cases before us, the parties have not tendered any evidence enabling formation of option on the rate of interest which can be considered ideal to be adopted. The rate of interest awarded in equity should neither be too high or too low. In our opinion awarding interest at the rate of 12 per cent per annum would be just and proper and meet the ends of justice in the cases under consideration. The provision contained in the brochure issued by the Development Authority that it shall not be liable to pay any interest in the event of an occasion arising for return of the amount should be held to be applicable only to such cases in which the claimant is itself responsible for creating circumstances providing occasion for the refund. In the cases under appeal the fault has been found with the Authority. The Authority does not therefore have any justification for resisting refund of the claimants' amount with interest.

11. For the foregoing reasons, the direction made by the MRTP Commission for payment of Rs. 50,000/- as compensation to mental agony suffered by the claimants respondents in Civil Appeal No. 8316/1995 is set aside. In all the other cases the direction for payment of interest at the rate of 18 per cent shall stand modified to pay interest at the rate of 12 per cent per annum. All the appeals and contempt petitions stand disposed of accordingly.

* * * * *

Oil & Natural Gas Corporation Ltd. v. *Saw Pipes Ltd.*

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M.B. SHAH, J. – 16. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions.

[*After referring to the observations of the Supreme Court regtarding the concept of 'public policy', the court proceeded*]

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of ***A. Schroeder Music Public Co. Ltd.*** v. ***Macaulay*** [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In ***Kedar Nath Motani*** v. ***Prahlad Rai*** [(1960) 1 SCR 861], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said (at page 873):

> The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved,

> then unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and required to be adjudged void."

18. Further, in ***Renusagar Power Co. Ltd.*** v. ***General Electric Co.*** [1994 Supp. (1) SCC 644], this Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which *inter alia* provided that a foreign award may not be enforced under the said act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the Public Policy. After elaborate discussion, the Court arrived at the conclusion that Public Policy comprehended in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the 'Public Policy of India' and does not cover the public policy of any other country. For giving meaning to the term 'Public Policy,' the Court observed thus:

> "66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the Law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the grounds that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

19. The Court finally held that:

> "76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act."

20. This Court in ***Murlidhar Agarwal*** v. ***State of U.P.*** [1974 (2) SCC 472] while dealing with the concept of 'public policy' observed thus:

> "31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.
>
> 32. …The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hide-bound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results… The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the Judges and if they have to fulfill their functions as Judges, it could hardly be lodged elsewhere."

48. From the aforesaid Sections, it can be held that when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss which naturally arise in the usual course of things from such breach. These sections further contemplate that if parties know when they made the contract that a particular loss is likely to result from such breach they can agree for payment of such compensation. In such a case, there may not be any necessity of leading evidence for proving damages, unless the Court arrives at the conclusion that no loss is likely to occur because of such breach. Further, in case where Court arrives at the conclusion that the term contemplating damages is by way of penalty, the Court may grant reasonable compensation not exceeding the amount so named in the contract on proof of damages. However, when the terms of the contract are clear and unambiguous then its meaning is to be gathered only from the words therein. In a case where agreement is executed by experts in the field, it would be difficult to hold that the intention of the parties was different from the language used therein. In such a case, it is for party who contends that stipulated amount is not reasonable compensation, to prove the same.

49. Now, we would refer to various decisions on the subject. In ***Fateh Chand*** v. ***Balkishan Das*** (1964) 1 SCR 515, the plaintiff made a claim to forfeit a sum of Rs. 2500/- received by him from the defendant. The sum of Rs. 2500/- considered of two items – Rs. 1000/- received as earnest money and Rs. 24000/- agreed to be paid by the defendant as out of sale price against the delivery of possession of the property. With regard to earnest money, the Court held that the plaintiff was entitled to forfeit the same. With regard to claim of remaining sum of Rs. 24000/-, the Court referred to Section 74 of Indian Contract Act and observed that Section 74 deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty. The Court observed thus:

> "The measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated,

> jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages;" it does not justify the award of compensation when in consequence of the breach no legal inquiry at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the brea*ch.*

49A. The Court further observed as under:

> [D]uty not to enforce the penalty claimed but only to award reasonable compensation is statutorily imposed upon courts by S. 74. 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 which expressly provides for forfeiture, 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."

50. From the aforesaid decision, it is clear that the Court was not dealing with a case where contract named a sum to be paid in case of breach but with a case where the contract contained stipulation by way of penalty.

51. The aforesaid case and other cases were referred to by three Judge Bench in ***Maula Bux*** v. ***Union of India*** (1969) 2 SCC 554, wherein the Court held thus:

> "[I]t is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

52. In ***Union of India*** v. ***Rampur Distillery and Chemical Co. Ltd.*** (1973) 1 SCC 649 also, two Judge Bench of this Court referred to *Maula Bux's case* and observed thus:

> "It was held by this Court that forfeiture of earnest money under a contract for sale of property does not fall within Section 70 of the Contract Act, if the amount is

> reasonable, because the forfeiture of a reasonable sum paid as earnest money does not amount to the imposition of a penalty. But, "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 to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

53. In ***Union of*** India v. ***Raman Iron Foundry*** (1974) 2 SCC 231, this Court considered clause 18 of the Contract between the parties and arrived at the conclusion that it applied only where the purchaser has a claim for a sum presently due and payable by the contractor. Thereafter, the Court observed thus:

> "11. Having discussed the proper interpretation of Clause 18, we may now turn to consider what is the real nature of the claim for recovery of which the appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under Clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages. Section 74 of the Indian Contract Act eliminates 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. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has 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 amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore, makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not *eo instanti* incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages."

54. Firstly, it is to be stated that in the aforesaid case Court has not referred to earlier decision rendered by the five Judge Bench in *Fateh Chand's case* or the decision rendered by the three Judge Bench in ***Maula Bux's*** case. Further, in ***M/s. H.M. Kamaluddin Ansari and Co.*** v. ***Union of India*** [(1983) 4 SCC 417], three Judge Bench of this Court has over-ruled

the decision in ***Raman Iron Foundry's*** case (*supra*) and the Court while interpreting similar term of the contract observed that it gives wider power to Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the Standard Contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

55. In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned counsel for the appellant. However, the learned senior counsel Mr. Dave submitted that even if the award passed by the arbital tribunal is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and or facts, the Court would refuse to interfere with such award.

56. It is true that if the arbital tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the Court would have no jurisdiction to interfere with the award. But, this would depend upon reference made to the arbitrator: (a) If there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the Court could interfere; (b) It is also settled law that in case of reasoned award, the Court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; (c) If a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as to permit of its being set aside, unless the Court is satisfied that the arbitrator had proceeded illegally.

57. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the arbital tribunal was not with regard to interpretation of question of law. It was only a general reference with regard to claim of respondent. Hence, if the award is erroneous on the basis of record with regard to proposition of law or its application, the Court will have jurisdiction to interfere with the same.

58. Dealing with the similar question, this Court in ***M/s. Alopi Parshad & Sons Ltd.*** v. ***The Union of India*** [(1960) 2 SCR 793] observed that the extent of jurisdiction of the Court to set aside the award on the ground of an error in making the award is well defined and held thus:

> "The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there is found some legal proposition which is the basis of the award and which is erroneous – ***Champsey Bhara and Co.*** v. ***Jivaraj Balloo Spinning and Weaving Company Limited*** [L.R. 50 IA 324]. If however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit of its being set aside. *In the matter of an arbitration between King and Duveen and others*

[LR (1913) 2 KBD 32] and ***Government of Kelantan*** v. ***Duff Development Company Limited*** [L.R. 1923 AC 395].

Thereafter, the Court held that if there was a general reference and not a specific reference on any question of law then the award can be set aside if it is demonstrated to be erroneous on the face of it. The Court, in that case, considering Section 56 of the Indian Contract Act held that the Indian Contract Act does not enable a party to contract to *ignore the express provisions thereof and* to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity and that the *arbitrators were not justified in ignoring the expressed terms of the contract prescribing the remuneration payable to the agents*. The aforesaid law has been followed continuously.

59. There is also elaborate discussion on this aspect in ***Union of India*** v. ***A.I. Rallia Ram*** [(1964) 3 SCR 164] wherein the Court succinctly observed as under:

> "[B]ut it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous. An error in law on the face of the award means: "you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a 'reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound." *Champsey Bhara and Company* v. *Jivaraj Balloo Spinning and Weaving Company Ltd.* [(1932) L.R. 501 I.A. 324]. But this rule does not apply where questions of law are specifically referred to the arbitrator for his decisions: the award of the arbitrator on those questions in binding upon the parties, for by referring specific questions the parties desire to have a decision from the arbitrator on those questions rather than from the Court, and the Court will not unless it is satisfied that the arbitrator had proceeded illegally interfere with the decision."

60. The Court thereafter referred to the decision rendered in ***Seth Thawardas Pherumal*** v. ***The Union of India*** [(1955) 2 SCR 48] wherein Bose, J. delivering the judgment of the Court had observed:

> "Therefore, when a question of law is the point at issue, unless both sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the reward is not ousted. The mere fact that both parties submit incidental arguments about point of law in the course of the proceedings is not enough."

The learned Judge also observed at p. 59 after referring to ***F.R. Absalom Ltd.*** v. ***Great Western (London) Garden Village Society*** [1933] AC 592, 616:

> Simply because the matter was referred to incidentally in the pleadings and arguments in support of, or against, *the general issue about liability for damages, that is not enough to clothe the arbitrator with exclusive jurisdiction on a point of law*."

61. The Court also referred to the test indicated by Lord Russell of Killowen in ***F.R. Absalom Ltd.*** v. ***Great Western (London) Garden Village Society Ltd.*** and observed that the said case adequately brings out a distinction between a specific reference on a question of law, and a question of law arising for determination by the arbitrator in the decision of the dispute. The Court quoted the following observations with approval:

> "{I}t is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. x x x x The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

62. Further, in ***Maharashtra State Electricity Board*** v. ***Sterlite Industries (India)*** [(2001) 8 SCC 482], the Court observed as under:

> "9. The position in law has been noticed by this Court in ***Union of India*** v. ***A.L. Rallia Ram*** (AIR 1963 SC 1685) and ***Madanlal Roshanlal Mahajan*** v. ***Hukumchand Mills Ltd.*** [(1967) 1 SCR 105] to the effect that the arbitrator's award both on facts and law is final that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award the following observations in ***Champsey Bhara & Co.*** v. ***Jivaraj Balloo Spg. and Wvg. Co. Ltd.*** [(1922-23) 50 IA 324] a decision of the Privy Council, are relevant (IA p. 331).
>
> > "An error in law on the face of the award means, in Their Lordship's view, that you can find in the award on a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous".
>
> 10. In ***Arosan Enterprises Ltd.*** v. ***Union of India*** [1999 (9) SCC 449], this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference in the award based on an erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator."

63. Next question is – whether the legal proposition which is the basis of the award for arriving at the conclusion that ONGC was not entitled to recover the stipulated liquidated damages as it has failed to establish that it has suffered any loss is erroneous on the face of it? The arbital tribunal after considering the decisions rendered by this Court in the case of ***Fateh***

Chand, Maula Bux and ***Rampur Distillery*** (*supra*) arrived at the conclusion that "in view of these three decisions of the Supreme Court, it is clear that it was for the respondents to establish that they had suffered any loss because of the breach committed by the claimant in the supply of goods under contract between the parties after 14th November, 1996. In the words we have emphasized in *Maula Bux decision*, it is clear that if loss in terms of money can be determined, the party claiming the compensation 'must prove' the loss suffered by him."

64. Thereafter the arbital tribunal referred to the evidence and the following statement made by the witness Das:

> "The re-deployment plan was made keeping in mind several constraints including shortage of casing pipes."

65. Further, the arbitral tribunal came to the conclusion that under these circumstances, the shortage of casing pipes of 26" diameter and 30" diameter pipes was not the only reason which led to redeployment of rig Trident II to Platform B 121. The arbital tribunal also appreciated the other evidence and held that the attempt on the part of the ONGC to show that production of gas on Platform B 121 was delayed because of the late supply of goods by the claimant failed. Thereafter, the arbitral tribunal considered the contention raised by the learned counsel for the ONGC that the amount of 10% which had been deducted by way of liquidated damages for the late supply of goods under the contract was not by way of penalty. In response thereto, it was pointed out that *it was not the case of* learned counsel Mr. Setalwad on behalf of the claimants that "these stipulations in the contract for deduction of liquidated damages was by way of penalty." Further, the arbital tribunal observed that in view of the decisions rendered in *Fateh Chand* and *Maula Bux* cases, "all that we are required to consider is whether the respondents have established their case of actual loss in money terms because of the delay in the supply of the Casing Pipes under the contract between the parties." Finally, the arbitral tribunal held that as the appellant has failed to prove the loss suffered because of delay in supply of goods as set out in the contract between the parties, it is required to refund the amount deducted by way of liquidated damages from the specified amount payable to the respondent.

66. It is apparent from the aforesaid reasoning recorded by the arbital tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in ***Fateh Chand's*** case (*supra*) wherein it is specifically held that jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, *inter alia* [relevant for the present case] provides that 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, the party complaining of breach is entitled, whether or not actual 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. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive

reasonable compensation whether or not actual loss is proved to have been caused by such beach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is whether by such breach party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

67. In ***Maula Bux's*** case (*supra*), plaintiff-Maula Bux entered into a contract with the Government of India to supply potatoes at the Military Head Quarters, U.P. Area and deposited an amount of Rs.10000/- as security for due performance of the contract. He entered into another contract with the Government of India to supply at the same place poultry, eggs and fish for one year and deposited an amount of Rs. 8500/- for due performance of the contract. Plaintiff having made persistent default in making regular and full supplies of the commodities agreed to be supplied, the Government rescinded the contracts and forfeited the amounts deposited by the plaintiff, because under the terms of the agreement, the amounts deposited by the plaintiff as security for the due performance of the contracts were to stand forfeited in case plaintiff neglected to perform his part of the contract. In context of these facts, Court held that it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. Hence, claim for damages was not granted.

68. In *Maula Bux's case* (supra), the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach.

69. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly, in the present case, delay took place in deployment or rigs and on that basis actual production of gas from platform B-121

had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, respondent was informed that it would be required to pay stipulated damages.

70. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73, and therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequences of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

71. For the reasons stated above, the impugned award directing the appellant to refund the amount deducted for the breach as per contractual terms requires to be set aside and is hereby set aside.

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QUASI-CONTRACTS

State of West Bengal v. *B.K. Mondal and Sons*

AIR 1962 SC 779

P.B. GAJENDRAGADKAR, J. – This appeal by special leave arises out of a suit filed by the respondent B.K. Mondal and Sons against the appellant the State of West Bengal on the Original Side of the Calcutta High Court claiming a sum of Rs. 19,325/- for works done by it for the appellant. This claim was made out in two ways. It was alleged that the works in question had been done by the respondent in terms of a contract entered into between the parties and as such the appellant was liable to pay the amount due for the said works. In the alternative it was alleged that if the contract in question was invalid then the respondent's claim fell under S. 70 of the Indian Contract Act. The respondent had lawfully done such works not intending to act gratuitously in that behalf and the appellant had enjoyed the benefit thereof.

(2) The respondent's case was that on February 8, 1944, it offered to put up certain temporary storage godowns at Arambagh in the District of Hooghly for the use of the Civil Supplies Department of the State of Bengal and the said offer was accepted by the said department by a letter dated February 12, 1944. Accordingly the respondent completed the said construction and its bill for Rs. 39,476/- was duly paid in July 1944. Meanwhile, on April 7, 1944, the respondent was requested by the Sub-Divisional Officer, Arambagh, to submit its estimate for the construction of a kutcha road, guard room, office, kitchen and room for clerks at Arambagh for the Department of Civil Supplies. The respondent alleged that the Additional Deputy Director of Civil Supplies visited Arambagh on April 20, 1944, and instructed the respondent to proceed with the construction in accordance with the estimates submitted by it. Accordingly the respondent completed the said constructions and a bill for Rs. 2,322/8/- was submitted in that behalf to the Assistant Director of Civil Supplies on April 27, 1944. Thereafter the Sub-Divisional Officer, Arambagh required the construction of certain storage sheds at Khanakul and the Assistant Director of Civil Supplies wrote to the respondent on April 18, 1944, asking it to proceed with the construction of the said storage sheds. This work also was completed by the respondent in due course and for the said work a bill for Rs. 17,003/- was submitted. In the present suit the respondent claimed that the two bills submitted by it in which the respondent had claimed Rs. 2,322/8/- and Rs. 17,003/- respectively had remained unpaid and that was the basis of the present claim.

(3) The appellant denied all the material allegations made by the respondent in its plaint. It alleged that the requests in pursuance of which the respondent claims to have made the several constructions were invalid and unauthorised and did not constitute a valid contract binding the appellant under S. 175(3) of the Government of India Act, 1935 (hereafter called the Act). It pleaded that there was no privity of contract between the respondent and itself and it denied its liability for the entire claim. The written statement filed by the appellant was very vague and general in terms and no specific or detailed pleas had been set out by the appellant in its pleading.

(4) However, G.K. Mitter, J., who tried the suit, framed five material issues on the pleadings and recorded his findings on them. He held that having regard to the provisions of S. 175(3) of the Act there was no valid and binding contract between the respondent and the appellant for the construction of huts and sheds at Khanakul and Arambagh. This finding was in favour of the appellant. He held that the respondent's claim against the appellant was, however, justified under S. 70 of the Indian Contract Act, and he came to the conclusion that the said claim was not barred by limitation. He also rejected the plea of the appellant that the liability of the Province of Bengal had not devolved upon the appellant under the provisions of the Indian Independence (Rights, Property and Liabilities) Order, 1947. Thus, on these three points the findings of the trial judge were against the appellant. It appears that at the trial the respondent had also relied upon S. 65 of the Indian Contract Act in support of its claim. The learned judge held that S. 65 did not apply to the facts of the case and so the finding on this point was in favour of the appellant. The result was that the respondent's claim was upheld under S. 70 of the Contract Act and a decree for the amount claimed by it was accordingly passed in its favour.

(5) The appellant disputed the correctness and validity of the said decree by preferring an appeal to the Calcutta High Court in its civil appellate jurisdiction. The said appeal was heard by S.R. Das Gupta and Bachawat, JJ. The two learned Judges who heard the said appeal delivered separate though concurring judgments and substantially confirmed the material findings recorded by the trial court. In the result the appeal preferred by the appellant was dismissed. The appellant then applied for a certificate to come to this Court but the High Court rejected its application. Thereupon the appellant moved this Court for a special certificate and on obtaining it has come to this Court; and the principal point which has been urged before us by Mr. Sen on behalf of the appellant is that S. 70 of the Contract Act does not apply to the present case.

(12) Mr. Sen's argument is that in dealing with the question about the effect of the contravention of S. 175(3) of the Act and the applicability of S. 70 of the Contract Act the decision in the case of ***Lawford*** 1903-1 KB 772 is irrelevant while that in the case of ***H. Young & Co***. 1882-8 AC 517 is relevant and material because we are concerned with the contravention of a statutory provision and not with the contravention of the provision of the rule of common law. We are not impressed by this argument. The question which the appellant has raised for our decision falls to be considered in the light of the provisions of S. 70 and has to be answered on a fair and reasonable construction of the relevant terms of the said section. In such a case, where we are dealing with the problem of construing a specific statutory provision it would be unreasonable to invoke the assistance of English decisions dealing with the statutory provisions contained in English law. As Lord Sinha has observed in delivering the judgment of the Privy Council in ***Ramanandi Kuer*** v. ***Kalawati Kuer*** (AIR 1928 PC 2), "it has been often pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded." If the words used in the Indian statute are obscure or ambiguous perhaps it may be permissible in interpreting them to examine the background of the law or to derive assistance from English

decisions bearing on the point; but where the words are clear and unambiguous it would be unreasonable to interpret them in the light of the alleged background of the statute and to attempt to see that their interpretation conforms to the said background. That is why, in dealing with the point raised before us we must primarily look to the law as embodied in S. 70 and see to put upon it a fair and reasonable construction.

(14) It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person, for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied, S. 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivers something to another, it will be open to the latter person to refuse to accept the thing or to return it; in that case S. 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again S. 70 would not apply. In other words, the person said to be made liable under S. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under S. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse, for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but, if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and S. 70 can be invoked. Section 70 occurs in Chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. That being so, reverting to the facts of the present case once again, after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by S. 70.

(15) It is, however, urged by Mr. Sen that the recognition of the respondent's claim for compensation virtually permits the circumvention of the mandatory provisions of S. 175(3), because, he argues, the work done by the respondent is no more than the performance of a so-called contract which is contrary to the said provisions and that cannot be the true intent of S. 70. It is thus clear that this argument proceeds on the assumption that if a decree is passed in favour of the respondent for compensation as alternatively claimed by it would in substance amount to treating the invalid contract as being valid. In our opinion, this argument is not well-founded. It is true that the provisions of S. 175(3) are mandatory and if any contract is made in contravention of the said provisions the said contract would be invalid; but it must be remembered that the cause of action for the alternative claim of the respondent is not the breach of any contract by the appellant; in fact, the alternative claim is based on the assumption that the contract in pursuance of which the respondent made the constructions in question was ineffective and as such amounted to no contract at all. The respondent says that it has done some work which has been accepted and enjoyed by the appellant and it is the voluntary acceptance and enjoyment of the said work which is the cause of action for the alternative claim. Can it be said that when the respondent built the warehouse, for instance, without a valid contract between it and the appellant it was doing something contrary to S. 175(3)? As we have already made it clear even if the respondent built the warehouse he could not have forced the appellant to accept it and the appellant may well have asked it to demolish the warehouse and take away the materials. Therefore, the mere act of constructing the warehouse on the part of the respondent cannot be said to contravene the provisions of S. 175(3). In this connection it may be relevant to consider illustration (a) to S. 70. The said illustration shows that if A, a tradesman leaves goods at B's house by mistake, and B treats the goods as his own he is bound to pay A for them. Now, if we assume that B stands for the State Government, can it be said that A was contravening the provisions of S. 175(3) when by mistake he left the goods at the house of B? The answer to this question is obviously in the negative. Therefore, if goods are delivered by A to the State Government by mistake and the State Government accepts the goods and enjoys them, a claim for compensation can be made by A against the State Government, and in entertaining the said claim the Court could not be upholding the contravention of S. 175(3) at all either directly or indirectly. Once it is realised that the cause of action for a claim for compensation under S. 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 the said work it would not be difficult to hold that S. 70 does not treat as valid the contravention of S. 175(3) of the Act. That being so, the principal argument urged by Mr. Sen that the respondent's construction of S. 70 nullifies the effect of S. 175(3) of the Act cannot be accepted.

(16) It is true that S. 70 requires that a person should lawfully do something or lawfully deliver something to another. The word "lawfully" is not a surplusage and must be treated as an essential part of the requirement of S. 70. What then does the word "lawfully" in S. 70 denote? Mr. Sen contends that the word "lawfully" in S. 70 must be read in the light of S. 23 of the said Act; and he argues that a thing cannot be said to have been done lawfully if the doing of it is forbidden by law. However, even if this test is applied it is not possible to hold that the delivery of a thing or a doing of a thing the acceptance and enjoyment of which gives rise to a claim for compensation under S. 70 is forbidden by S. 175(3) of the Act; and so the

interpretation of the word "lawfully" suggested by Mr. Sen does not show that S. 70 cannot be applied to the facts in the present case.

(17) Another argument has been placed before us on the strength of the word "lawfully" and that is based upon the observations of Mr. Justice Straight in ***Chedi Lal*** v. ***Bhagwan Das***, ILR 11 All 234. Dealing with the construction of S. 70 Straight, J., observed: "I presume that the Legislature intended something when it used the word "lawfully" and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done." It is urged that in the light of this test it cannot be said that the respondent held such a relation to the appellant as to be able to claim compensation from the appellant. With respect, we are not satisfied that the test laid down by Straight, J., can be said to be justified by the terms of S. 70. It is of course true that between the person claiming compensation and person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawfully" in S. 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise to the claim for compensation. This aspect of the matter has not been properly brought into the picture when Straight, J., laid down the test on which Mr. Sen's argument is based. If the said test is literally applied then it is open to the comment that if one person is entitled by reason of the relationship as therein contemplated to receive compensation from the other S. 70 would be hardly necessary. Therefore, in our opinion, all that the word "lawfully" in the context indicates is that after something is delivered or something is done by one person for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of S. 70 gives rise to a claim for compensation.

(18) There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Section 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therefore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under S. 70 must be voluntary. It would thus be noticed that this requirement affords sufficient and effective safeguard against spurious claims based on unauthorised acts. If the act done by the respondent was unauthorised and spurious the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation. It is unnecessary to repeat that in cases falling under S. 70 there is no scope for claims for specific performance or for damages for breach of contract. In the very nature of things claims for compensation are based on the footing that there has been no contract and

that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of contract.

(19) In regard to the claim made against the Government of a State under S. 70 it may be that in many cases the work done or the goods delivered are the result of a request made by some officer or other on behalf of the said Government. In such a case, the request may be ineffective or invalid for the reason that the officer making the request was not authorised under S. 175(3), or, if the said officer was authorised to make the said request the request becomes inoperative because it was not followed up by a contract executed in the manner prescribed by S. 175(3). In either case, the thing has been delivered or the work has been done without a contract and that brings in S. 70. A request is thus not an element of S. 70 at all though the existence of an invalid request may not make S. 70 inapplicable. An invalid request is in law no request at all, and so the conduct of the parties has to be judged on the basis that there was no subsisting contract between them at the material time. Dealing with the case on this basis we have to enquire whether the requisite conditions prescribed by S. 70 have been satisfied. If they are satisfied then a claim for compensation can and must be entertained. In this connection it is necessary to emphasise that what S. 70 provides is that compensation has to be paid in respect of the goods delivered or the work done. The alternative to the compensation thus provides the restoration of the thing so delivered or done. In the present case there has been no dispute about the amount of compensation but normally a claim for compensation made under S. 70 may not mean the same thing as a claim for damages for breach of contract if a contract was subsisting between the parties. Thus considered it would, we think, not be reasonable to suggest that in recognising the claim for compensation under S. 70 we are either directly or indirectly nullifying the effect of S. 175(3) of the Act or treating as valid a contract which is invalid. The fields covered by the two provisions are separate and distinct; S. 175(3) deals with contracts and provides how they should be made. Section 70 deals with cases where there is no valid contract and provides for compensation to be paid in a case where the three requisite conditions prescribed by it are satisfied. We are, therefore, satisfied that there is no conflict between the two provisions.

(20) It is well-known that in the 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 may have to act in emergency, and on many occasions, in the pursuit of the welfare policy of the State government officers may have to enter into contract orally or through correspondence without strictly complying with the provisions of S. 175(3) of the Act. If, in all these cases, what is done in pursuance of the contracts is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper S. 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 S. 175(3). If it was held that S. 70 was inapplicable in regard to such dealings by government officers it would lead to extremely unreasonable consequences and may even hamper, if not wholly bring to a standstill the efficient working of the Government from day to day. We are referring to this aspect of the matter not with a view to detract from the binding character of the provisions of S. 175(3) of the Act but to point out that like ordinary citizens even the State Government is subject to the provisions of S. 70, and if it has accepted

the things delivered to it or enjoyed the work done for it, such acceptance and enjoyment would afford a valid basis for claims of compensation against it. Claims based on a contract validly made under S.175(3) must, therefore, be distinguished from claims for compensation made under S. 70, and if that distinction is borne in mind there would be no difficulty in rejecting the argument that S. 70 treats as valid the contravention of S. 175(3) of the Act. In a sense it may be said that S. 70 should be read as supplementing the provisions of S. 175(3) of the Act.

(21) There is one more argument which yet remains to be considered. Mr. Sen ingeniously suggested that the position of the appellant is like that of a minor in the matter of its capacity to make a contract, and he argues that just as a minor is outside the purview of S. 70 so would be the appellant. It is true as has been held by the Privy Council in ***Mohori Bibee*** v. ***Dharmodas Ghose***, 30 IA 114 (PC), that a minor, like a lunatic, is incompetent to contract, and so where he purports to enter into a contract the alleged contract is void and neither S. 64 nor S. 65 of the Contract Act can apply to it. It is also true that S. 68 of the Contract Act specifically provides that certain claims for necessaries can be made against a minor and so a minor cannot be sued for compensation under S. 70 of the Contract Act (Vide: ***Bankay Behari Prasad*** v. ***Mahendra Prasad*** (AIR 1940 Pat 324)(FB). Mr. Sen pressed into service the analogy of the minor and contends that the result of S. 175(3) of the Act is to make the appellant incompetent to enter into a contract unless the contract is made as required by S. 175(3). In our opinion, this argument is not well founded. Section 175(1) provides for and recognises the power of the Province to purchase or acquire property for the purposes there specified and to make contracts. No doubt S. 175(3) provides for the making of contracts in the specified manner. We are not satisfied that on reading S. 175 as a whole it would be possible to entertain the argument that the appellant is in the position of a minor for the purpose of S. 70 of the Contract Act. Incidentally, the minor is excluded from the operation of S. 70 for the reason that his case has been specifically provided for by S. 68. What S. 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Government. Therefore, we do not think it would be possible to accept the very broad argument that the State Government is outside the purview of S. 70. Besides, in the case of a minor, even the voluntary acceptance of the benefit of work done or thing delivered which is the foundation of the claim under S. 70 would not be present, and so, on principle S. 70 cannot be invoked against a minor.

(22) The question about the scope and effect of S. 70 and its applicability to cases of invalid contracts made by the Provincial Government or by corporations has been the subject-matter of several judicial decisions in this country; and it may be stated broadly that the preponderance of opinion is in favour of the view which we are inclined to take.

(23) Before we part with this point we think it would be useful to refer to the observations made by Jenkins, C.J., in dealing with the scope of the provisions of S. 70 in ***Suchand Ghosal*** v. ***Balaram Mardana***, ILR 38 Cal. 1. "The terms of S. 70," said Jenkins, C.J.

> "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."

(24) Turning to the facts of this case it is clear that both the Courts have found that the acts done by the respondent were done in fact in pursuance of the requests invalidly made by the relevant officers of the appellant, and so they must be deemed to have been done without a contract. It was not disputed in the Courts below that the acts done by the respondent have been accepted by the appellant and the buildings constructed have been used by it. In fact, both the learned judges of the Appellate Court have expressly pointed out that the appellant did not contest this part of the respondent's case. "I should mention," says S.R. Das Gupta, J., "that the appellant did not contest before us the quantum decreed in favour of the plaintiff;" and Bachawat, J. has observed that

> "the materials from the record also show that the Government urgently needed the work which was done by the respondent and that the Government accepted it as soon as it was done and used it for its benefit."

In fact the learned judge adds that "the learned Advocate-General frankly confessed that this is a case where the Province of Bengal was under a moral obligation to pay the respondent," and has further added his comment that

> "an obligation of this kind which is apart from the provisions of S. 70 of the Indian Contract Act a moral and natural obligation is by the provisions of the section converted into a legal obligation."

Therefore, once we reach the conclusion that S. 70 can be invoked by the respondent against the appellant, on the findings there is no doubt that the requisite conditions of the said section have been satisfied. That being so, the Courts below were right in decreeing the respondent's claim.

A.K. SARKAR, J. – (26) We also think that this appeal should fail.

(27) In 1944, the respondent, a firm of contractors, had at the request of certain officers of the Government of Bengal as it then existed, done certain construction work for that Government and the latter had taken the benefit of that work. These officers, however, had not been authorised by the Government to make the request on its behalf and the respondent was aware of such lack of authority all along. These facts are not in controversy.

(28) As the respondent did not receive payment for the work, it filed a suit in the Original Side of the High Court at Calcutta in 1949 against the Province of West Bengal for a decree for moneys in respect of the work. The High Court, both in the original hearing and appeal, held that there was no contract between the respondent and the Government in respect of the work on which the suit might be decreed but the respondent was entitled to compensation under S. 70 of the Contract Act and that the liability to pay that compensation which was originally of the Government of Bengal, had under the Indian Independence (Rights, Properties and Liabilities) Order, 1947, devolved on the Province of West Bengal (now the State of West Bengal) which came into existence on the partition of India. In the result the respondent's suit succeeded. The State of West Bengal has appealed against the decision of the High Court.

(29) The only question argued in this appeal is whether the High Court was right in passing a decree under S. 70 of the Contract Act. We think it was.

(31) G.K. Mitter, J., who heard the suit in the first instance, observed, in regard to S. 70 that,

> "The requisites for entitling a person to compensation for work done are: (i) that it should be lawfully done, (ii) that it should not be intended to be done gratuitously and (iii) that the person for whom the work is done should enjoy the benefit thereof."

We agree with this analysis of the section and the view of the High Court that the necessary requisites exist in the present case.

(32) In this Court the case was argued on behalf of the appellant on the basis that the High Court was in error in holding that, relief under S. 70 can be granted where the Government has the benefit of work done under a contract with it which was not made in terms of S. 175(3) of the Government of India Act, 1935, and was, therefore, invalid. Various authorities, both English and Indian, were cited in support of this argument. We think it unnecessary to discuss them as the basis on which the present contention is advanced does not exist in this case. Nor do we think that the High Court decided the case on that basis.

(33) It is clear from the findings of the High Court, to which we shall presently refer, that there was in fact no agreement, valid or invalid, between the respondent and the Government. It follows that the work had not been done under any agreement with the Government. No question, therefore, arises as to the validity or invalidity of an agreement with the Government because of a failure to comply with the terms of S. 175(3) of the Government of India Act nor as to the applicability of S. 70 of the Contract Act for granting compensation for work done under a contract with the Government which is invalid because it had not been made in the manner prescribed by S. 175(3).

(34) The reason why we say that there was no agreement whatever between the Government and the respondent is that the agreement could in the present case have been made only through the officers but these officers did not, to the knowledge of the respondent, possess the authority of the Government to bind it by a contract. That was what the High Court held, as would appear from the observations of the learned Judges which we will now set out. G.K. Mitter, J., said, "The plaintiff never had any doubt about the fact that no agreement of any kind had been entered into between it and the Province of Bengal" and

> "The plaintiff knew right from the beginning, that the officers who were requesting the plaintiff to proceed with the work, had no authority to enter into a binding contract with the plaintiff and that they were awaiting sanction from higher officials which they hoped to get."

The learned Judges of the appellate bench also took the same view, Bachavat, J., observing,

> "Neither of these officers had any authority from the Province of Bengal to make the request to the plaintiff. There was no agreement either express or implied between the plaintiff and the Province of Bengal. There is, therefore, no agreement which is void or which is discovered to be void."

The learned Judges no doubt, referred to S. 175(3) of the Government of India Act but that was obviously because arguments based on it had been advanced before them. They distinguished the case of 89 Cal LJ 342, in which it had been held that S. 70 of the Contract Act had no application where work was done under a request which had resulted in a void agreement, on the ground that in the present case there had been no request from the Government as the persons making the request had no authority to do so for the Government and so no question of an agreement with the Government, which was void, arose. It is wrong, to contend, as the learned advocate for the appellant did that the learned Judges of the High Court decided the case on the basis that S. 70 is applicable where work is done for the Government under an invalid contract with it. No doubt the learned Judges dealt with certain cases dealing with the question of work done under an invalid contract but that was because those cases had been cited at the bar.

(35) We are not, therefore, called upon in the present case to pronounce upon the question whether compensation under S. 70 of the Contract Act can be awarded where goods are delivered to, or work done for, the Government under a contract with it which is invalid for the reason that it had not been made in the terms prescribed by S. 175(3) of the Government of India Act and we do not do so.

(36) Now, if the work was done at the request of the officers of the Government who had no authority to make the request for the Government and the respondent was aware of this, it would follow that the work had been done at the request made by the officers in their personal capacity. In such a case it seems to us that if the request resulted in a contract between the officers and the respondent under which the officers were personally bound to pay the respondent reasonable remuneration for the work, then it would be a very debatable question whether the respondent would have any claim against the Government under S. 70. We say debatable because we have grave doubts if the section was intended to give a person in the position of the respondent who had a remedy against the officers personally under a contract with them, a remedy against the Government for the same thing in addition to the remedy under the contract. We, however, need say no more on this aspect of the matter for we do not think that any contract had in the present case come into existence between the officers and the respondent.

(37) It is true that when one requests another to do work for him a tacit promise to pay reasonable remuneration for the work may be inferred in certain circumstances and that promise may result in a contract when the work is done which may be enforced. This may also be the case when the request is to do the work for another's benefit, for consideration for the promise would in either case be the detriment suffered by the promisee by doing the work. The following illustration may be given from Pollock on Contracts (18th Edition) p. 9 - "The passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fair." We would suppose the position would be the same where a person expressly asks the ferryman to carry him or another over without saying anything about the remuneration to be paid for the carriage; in each of these cases the person making the request would be tacitly promising to pay the ferryman his usual fare.

(38) A tacit promise of this kind may however be inferred only if the circumstances are such that from them a man of business and experience would consider it reasonable to infer it.

It is an inference of fact and not which any law requires to be made. An interesting passage from Cheshire and Fifoot's Law of Contract (5th Edition) p. 30 may be quoted here: "It would be ludicrous to suppose that businessmen couch their communications in the form of a catechism or reduce their negotiations to such a species of interrogatory as was formulated in the Roman stipulatio. The rules which the Judges have elaborated from the promise of offer and acceptance are neither the rigid deduction of logic nor the inspiration of natural justice. They are only presumptions, drawn from experience, to be applied in so far as they serve the ultimate object of establishing the phenomena of agreement…."

(39) Now, on the facts of this case we are entirely unable to infer any tacit promise by the officers to pay personally for the work done. As the High Court pointed out, the officers made it clear, of which indeed the respondent itself was fully aware, that the payment would be by the Government, and, therefore, that they themselves would have no liability. They said that the respondent's "estimates have been submitted to the Deputy Director for formal sanction which when received will be communicated to them. Meanwhile they must not delay the work." The Deputy Director presumably was the officer authorised to grant the sanction. He however was not one of the officers who had made the request for the work. The respondent was fully aware that the work was needed for the Government and the officers had no personal interest in it. And what is most important is that the respondent never itself thought that the officers had made any personal promise to pay. Throughout, the respondent had been requesting the Government to sanction the orders placed by the officers, submitting estimates for the work to the Government and requesting the latter for payment; not once did he look to the officers for any liability in respect of the work done under their orders. The respondent had on previous occasions done work for the Government on similar requests and had never thought that the officers had thereby undertaken any personal liability. If it itself did not get that impression, no other person of experience could reasonably infer in the same circumstances a tacit promise by the officers to pay personally. It is of some interest to point out that the learned advocate for the appellant never even suggested that there was such a contract. We find it impossible in such circumstances to think that there was any tacit promise by the officers personally to pay for the work or any contract between them and the respondent in respect of it.

(40) It is also not possible to say on the materials on the record that the officers promised to the respondent that they would secure payment for the work done. We think Bachawat, J., of the appellate bench of the High Court correctly put the position when he said - The work was certainly done at the request of these officers but it was done under circumstances in which it is not possible to imply that the officers personally promised to pay for the work done. There is, therefore, no scope for any argument that the work was done in course of performance of a contract between the plaintiff and the officers who requested him to do the work… The materials on the record clearly show that the plaintiff did the work for the Province of Bengal. Credit was given to the Province of Bengal and not to the officers. It is impossible to say on the materials on the record that work was done for the officers". If the other learned Judges of the High Court did not expressly refer to this aspect of the case that was clearly because it was not argued by the advocates; it was obviously not a point which any advocate could reasonably advance on the facts of this case.

(41) We are however not to be understood as saying that in no case can Government officers undertake personal liability to contractors in the position of the respondent. Each case must depend on its own facts. Circumstances may conceivably exist where it would be reasonable to infer a personal undertaking by the officers to pay a contractor doing work for the Government. All that we decide is that such is not the present case.

(42) The position then is that the respondent had done the work for the Government without any contract with anybody. The question is, are the three requisites of S. 70, as very correctly formulated by G.K. Mitter, J., satisfied? We think they are. There is no dispute that Government had taken the benefit of the work. We also feel no doubt that the respondent did not intend to do the work gratuitously. It submitted its estimate for the work and was very prompt in submitting its bill after the work was done. It had earlier in similar circumstances without proper contract with the Government done work for it at the request of its officers and received payment from the Government. It was a firm of contractors whose trade it was to carry out works of construction for payment and the Government was aware of this. There is no reason to think that in the present case, it did the work gratuitously. On its part the Government never thought that the work had been done gratuitously for it raised objections to the bill submitted by the respondent on grounds of bad quality of the work and that it had been done without proper sanction. The Government urgently needed the work and no sooner was it completed, it promptly put it to its use. It was plainly fully aware that the work was done for it by a party whose trade was to work for remuneration and who had previously done similar work and had been paid for it by the Government.

(43) The request by the officers does not affect the question that arises in this case. It had no compelling effect and no effect as a promise and in fact no effect at all. Its practical use was to inform the respondent that the Government needed the work immediately and it would give a sanction in respect of it in due course and pay for it when done, an information on which the respondent readily acted as it gave it a chance to do more business. So the work was done by the respondent really out of its free choice by way of its business and with the intention of getting paid for it.

(44) We also feel no doubt that the work was done lawfully. It was work which the Government badly needed. We will assume for the present purpose, as the learned advocate for the appellant said, that work done under a contract with the Government which is invalid in view of the provision of S. 175(3) of the Government of India Act, is work unlawfully done. The learned advocate contended that would be because thereby S. 175(3) of the Government of India Act would be evaded which is the same thing as doing that which the section forbids. Assume that is so. But that section does not say that if the work is done for the Government without any contract or agreement at all and voluntarily, as was done in the present case, that work would not have been lawfully done. Government is free not to take the benefit of such work. There is no law, and none has been pointed out to us, which makes the doing of such work unlawful. No other reason was given or strikes us for saying that the work was not lawfully done. There is no law, as Bachawat, J., said, that Government cannot take any work except under a contract in respect of it made in terms of S. 175(3) of the Government of India Act. That section may forbid a Government to take work under a contract which is invalid because not in terms of it, but it does not make it unlawful for the

Government to take the benefit of work done for it without any contract at all. We should suppose that if the doing of the work was unlawful the Government would not have accepted the benefit of it. In the present case, the Government needed the work badly and we do not see how then the Government can say that the work was not done lawfully. We therefore think that the work was done lawfully.

(45) It was contended that the obligation under S. 70 of the Contract Act arises only in circumstances in which English law would have created an obligation on the basis of an implied contract or a quasi-contract and that there could be no implied contract or quasi-contract with the Government because a contract could be made with it only in accordance with S. 175(3) of the Government of India Act. Now it has been repeatedly held that a resort to English law is not justified for deciding a question arising on our statute unless the statute is such that it cannot be reasonably understood without the assistance of English law. Indeed, there is good authority for saying that S. 70 was framed in the form in which it appears with a view to avoid the niceties of English law on the subject, arising largely from historical reasons and to make the position simple and free from fictions of law and consequent complication: see Pollock on Contracts (18th ed.) p. 10. Furthermore, we do not see that S. 175(3) in any way prevents a contract with the Government being implied or a Government from incurring an obligation under a quasi-contract. A contract implied in law or a quasi-contract is not a real contract or, as it is called, a consensual contract and S. 175(3) is concerned only with such contracts. The section says that "all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed" in a certain manner and "shall be executed on behalf of the Governor-General or Governor by such person and in such manner as he may direct or authorise." It therefore applies to consensual contracts which the Government makes and not to something which is also called a contract but which the law brings into existence by a fiction irrespective of the parties having agreed to it. Now by its terms S. 70 of the Contract Act must be applied where its requisites exist; if it is necessary to imply a contract or to contemplate the existence of a quasi-contract for applying the section that must be done and we do not think that S. 175(3) of the Government of India Act prevents that, nor are we aware of any other impediment in this regard. This argument must also fail.

THE END