

Indian Contract Act, 1872

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Preliminary

1. Shot title.

This Act may be called the Indian Contract Act, 1872.

Extent, Commencement.-It extends to the whole of India¹[except the State of Jammu and Kashmir]; and it shall come into force on the first day of September 1872.

Saving.-²[* * *] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

1. **Subs. by Act 3 of 1951, sec. 3 and Sch., for “except Part B States”.**
2. **The words “The enactments mentioned in the Schedule hereto are repealed to the extent specified in the third column thereof, but” rep. by Act 10 of 1914, sec. 3 and Sch. 11.**

2. Interpretation -clause

In this Act the following words and expressions are used in the following senses, unless contrary intention appears from the context:

- a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- b) When a 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;
- c) The person making the proposal is called the “promissory”, and the person accepting the proposal is called “promise”,
- d) When, at the desire of the promissory, 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;
- e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

- f) Promises which form the consideration or part of the consideration for each other, are called reciprocal promises;
- g) An agreement not enforceable by law is said to be void;
- h) 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 the other or others, is a voidable contract;
- j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

COMMENTS

At the desire of the promissory

Suit would lie for the recovery of a promised subscription where on the faith of the promise, the promise entered into a contract with a contractor; *Kedarnath Bhattacharji v. Gorie Mohamed*, (1886) ILR 14 Cal 64.

Consideration and motive

A promise founded on motive of generosity, prudence and natural duty is a promise without consideration; *Abdul Aziz v. Masum Ali*, (1914) ALJR 36 All 268.

Contract

A contract comes into existence only when all the terms and conditions have been finalized. If the facts of a particular case show that execution of a written contract was a condition precedent for coming into force of the contract between the parties, then it cannot be said that any concluded contract in absence of a written contract being executed has come into force between the parties; *J.K. Industries Ltd. v. Mohan Investments and Properties Pvt. Ltd.*, AIR 1992 Del 305.

Proposal: Offer and statement of intention

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 signature or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful; *Tarsem Singh v. Sukhmider Singh*, AIR 1998 SC 1400.

Valid consideration

The consideration should be something which not only the parties regard but the law can also regard as having some value. It must be real and not illusory, whether adequate or not; *Chidambara v. P.S. Renga*, AIR 1965 SC 193: (1966) 1 SCR 168.

When Strangers may not sue – the general rule

A person not a party to a contract can sue on it; *Venkata Chinnaya Rau Garu v. Venkataramaya Garu*, 1881 ILR 4 Mad 137.

Creating legal relations

If there being no agreement, there was no breach of contract committed by the respondent and also that since there was no breach of contract, the petitioner cannot retain or forfeit the earnest money deposited by the respondent by way of penalty; *State of Tripura v. Bhowmik & Co.*, AIR 2004 Gau 21.

Chapter I – Of the Communication, Acceptance and Revocation of Proposals

3. Communication, acceptance and revocation of proposals.

The communication of proposals, the acceptance of proposals, and the revocation of proposals 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.

Comments

Communication of acceptance

An offer is accepted when the acceptance is communicated. The communication must be made to the offer or and a communication of acceptance made to a third person creates no contract; *Felt house v. Bindely*, (1862) 6 LT 157.

Exposure of goods: offer or not

The Exposure of goods by a shopkeeper does not amount to an offer to sell. On picking the goods, it is an offer by the customer to buy, and sale is not effected until the buyer's offer price is

accepted by the shopkeeper; *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*, (1952) 2 QB 795.

Offer to the whole world

Though an offer may be made to the whole world, a contract can arise only by acceptance of the offer. Hence knowledge of the terms of the offer is essential for acceptance. Thus where a person sent his servant in search of his missing boy and subsequently offered a reward to any one who would find the boy, the servant, on finding the boy, could not claim the reward, as his search for the boy could not be regarded as a consideration for the promise of reward; *Lalman Shukul v. Gauri Dat*, (1913) 11 AQLJ 489.

Unaccepted offer creates no right or obligation

A mere making of an offer does not form part of the cause of action for damages for breach of contract which has resulted from the acceptance of the offer. Ordinarily it is the acceptance of the offer and intimation of that acceptance which results in a contract; *Bhagwan Das Goverdhan Das Kedia v. Girdhari Lal & Co.*, AIR 1966 SC 543.

4. Communication when complete

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

The communication of an acceptance is complete,—

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

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

The communication of a revocation is complete,—

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

Illustrations

- a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter.
- b) B accepts A's proposal by a letter sent by post. The communication of the acceptance is complete, as against A when the letter is posted; as against B, when the letter is received by A.
- c) A revokes his proposal by telegram. The revocation is complete as against A when the telegram is dispatched. It is complete as against B when B receives it.

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

COMMENTS

Communication of proposal and acceptance

The advertisement of the Corporation for tenders was an 'invitation to make an offer'. The tenders when submitted to the Corporation were 'offers' or 'proposals' in terms of section 4 of the Act and the 'communication' of 'proposal' or 'offers' was complete when received by the Corporation. In terms of section 4 of the Act, the 'acceptance' was not complete as it was never made, and never put into transmission. The revocation within the meaning of section 4 was complete as it was received and within the knowledge of the Corporation. The offers on tenders were revoked before it was accepted. The contract never saw the light of the day; *Shyam Biri Works Pvt. Ltd. v. U.P. Forest Corporation*, AIR 1990 All 205.

Where an offer is made by a method of instantaneous communication like telex, the contract is only complete when the acceptance is received by the offered, and the contract is made at the place where the acceptance is received; *Entores Ltd. v. Miles Far East Corporation*, (1955) 2 All ER 493; (1955) 2 QB 327; (1955) 3 WLR 48.

Contract by correspondence: Antecedents and subsequent negotiations

The communication of acceptance of the highest bid is necessary for completed contract; *Haridwar Singh v. Begum Sumbrui*, AIR 1972 SC 1942.

Dispensing with notice of acceptance

A notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so: there 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 mode 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; *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 QBD 256.

5. Revocation of Proposals and acceptance

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

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but no afterwards.

Illustrations

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

B accepts the proposal by a letter sent by post.

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

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

COMMENTS

Revocation

Where an offer gives the offered an option to accept within a fixed period, it may be withdrawn even before the expiry of that period unless there is some consideration for keeping it open; *Airfred Schonlank v. Muthurayna Chetty*, (1892) 2 Mad LJ 57.

6. Revocation how made

A proposal is revoked -

1. By the communication of notice of revocation by the proposer to the other party;
2. By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
3. By the failure of the acceptor to fulfill a condition precedent to acceptance; or
4. By the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.

7. Acceptance must be absolute

In order to convert a proposal into a promise the acceptance must -

- 1) Be absolute and unqualified.
- 2) Be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted; and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

COMMENTS

Acceptance must be unqualified and without condition

The cardinal principle in the light of section 7 of the Act is that the offer and acceptance of an offer must be absolute without giving any room of doubt. It is well settled that the offer and acceptance must be based or founded on three components—Certainty, commitment and communication. If any one of three components is lacking either in the offer or in the acceptance there cannot be a valid contract; *Kilburn Engineering Ltd. v. Oil and Natural Gas Corporation Ltd.*, AIR 2000 Bom 405.

When the acceptor puts in a new condition while accepting, the contract already signed by the proposer is not complete until the proposer accepted the condition; *Haridwar Singh v. Begum Sumbrui*, AIR 1972 SC 1942.

An acceptance with a variation is no acceptance; it is simply a counter proposal which must be accepted by the original promissory before a contract is made; Haji Mohd. Haji Jiva v. E. Spinner, (1900) 24 Bom 510.

No second acceptance

The rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependant on the acceptance of the person to whom it is made, is a mere nudum pactum. The person to whom, the offer has been made, cannot, by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to someone else; Dickinson v. Dodds, 1876 Ch. D. 463.

8. Acceptance by performing conditions, or receiving consideration.

Performance of the conditions of proposal, for the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Comments

Performance by act: Interference of acceptance

The defendant company advertised that they would pay pound 1,000 to any person who used their carbolic smoke ball for a certain time any yet contracted influenza. The plaintiff purchased the medicine, used it for the stated time but contracted the disease. It was held that the contract was accepted by being acted upon, that the defendant had not stipulated for any communication of acceptance and therefore the plaintiff was entitled to recover the amount; Carlill v. Carbolic Smoke Ball Co., (1893) 1 QBD 256.

9. Promise, express and implied

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

COMMENTS

Implied terms

A contract can be implied and it is very clear from section 9 of the Contract Act, but it is a fundamental principle of law that the court should not make a contract for the parties. A contract implied in fact requires meeting of minds. The court should refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of the term. However, when the stipulations are clear and in contemplation of the parties or which necessarily arise out of the contract between the parties, they will be implied; *State of Maharashtra v. Saifuddin Mujjaffarali Saifi*, AIR 1994 Bom 48.

Chapter II – Of contracts, violable, contracts and void agreements

10. What agreements are contracts

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

Nothing herein contained shall affect any law in force in ¹India, and not hereby expressly repealed, by which any contract is required to be made in writing ²or in the presence of witnesses, or any law relating to the registration of documents.

COMMENTS

Breach of statutory provision

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 month of February and March and the tender were accepted by the letter. 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. 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 Dy. General Manager to accept the jaggery delivered in pursuance of that order; *Union of India v. Maddala Thathaiah*, (1964) 3 SCR 774.

What agreements is Contract

If entering into a contract containing prescribed terms and conditions is a must under the statute then that contract becomes a statutory contract. If contract incorporates certain terms and conditions in it, which are statutory then the said contract to that extent is statutory; *Thermal Power Ltd. v. State of Madhya Pradesh*, AIR 2000 SC 1005.

In order to constitute a contract, both the parties must consent to the agreement; *Steel Authority of India Ltd. v. Salem Stainless Steel Suppliers*, AIR 1994 SC 1415.

A person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. The question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, and cannot arise in the case of an infant; *Mohoribibi v. Dharmodas Ghose*, (1903) 30 IA 114.

What agreements is not Contract

Agreement subject to ratification by others who are not parties to it is not a conclusive contract; *M.V. Shankar Bhat v. Claude Pinto (Deceased) by LRs*, (2003) 4 SCC 86.

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- 1. Subs. by Act 3 of 1951, sec. 3 and Sch., for “Part a States and Part C States”. Earlier the words “Part a States and Part C States” were substituted by the A.O. 1950, for the words “the Provinces”.**
 - 2. See e.g., sec. 25, the Copyright Act, 1957 (14 of 1957), section 19, the Carriers Act, 1865 (3 of 1865) sections 6 and 7; the Companies Act, 1956 (1 of 1956) sections 12, 30, 46 and 109.**

11. Who are competent to contract

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 sound mind and is not disqualified from contracting by any law to which he is subject.

Comments

Minor’s contract of service

A contract of marriage, entered into by a father for the benefit of his minor child is not void for want of consideration, unlike a contract of service by a minor which is a contract of service

entered into by a father on behalf of the minor which is not enforceable as it is void for want of consideration; *Raj Rani v. Prem Adib*, AIR 1949 Bom 215.

Minor's contract void

Where a mortgage was made by a minor and the money lender who had advanced money to the minor on the security of the mortgage sued the minor on the strength of the contract. It is held, having regard to sections 2, 10 and 11 of the Contract Act, that the Act makes it essential that the contracting parties should be competent to contract and that a minor's contract is void; *Mohoribibee v. Dharmodas Ghose*, (1903) ILR 30 Cal 539 (PC).

1. See the Indian Majority Act, 1875 (9 of 1875).

12. What is a sound mind for the purposes of contracting

A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

- a) A patient in a lunatic asylum, who is, at intervals, of sound mind, may contract during those intervals.
- b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

13. "Consent" defined -

Two or more person are said to consent when they agree upon the same thing in the same sense.

14. “Free consent” defined -

Consent is said to be free when it is not caused by -

- 1) Coercion, as defined in section 15, or
- 2) Undue influence, as defined in section 16, or
- 3) Fraud, as defined in section 17, or
- 4) Misrepresentation, as defined in section 18, or
- 5) Mistake, subject to the provisions of section 20, 21, and 22.

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

15. “Coercion” defined

“Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860) or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (45 of 1860).

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when or place where the act was done.

COMMENTS

An act forbidden by the Penal Code

The threat of suicide amounts to coercion within section 15; *Chikam Amiraju v. Chickam Seshamma*, (1912) 16 IC 344.

16. “Undue influence” defined

¹[16. ‘Undue influence’ defined.—

- 1) A contract is said to be induced by "under 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 generally of the foregoing principle, a person is deemed to be in a position to dominate the will of another -
 - a) Where he hold 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 be upon the person in a position to dominate the will of the other.

Nothing in the sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872)

Illustrations

- a) A having advanced money to his son, B, during his minority, upon B’s coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. An employs undue influence.
- b) A, a man enfeebled by disease or age, is induced, by B’s influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, B employees undue influence.
- c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

- d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

COMMENTS

Unconsiderable transaction

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; *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib*, AIR 1967 SC 878.

Undue influence

Merely because the parties were nearly related to each other no presumption of undue influence can arise; *Subhas Chandra Das Mushib v. Ganga Prasad Das Mushib*, AIR 1967 SC 878.

Undue influence and fraud

- i. Undue influence is said to be a subtle species of fraud whereby mastery is obtained over the mind of the victim, by insidious approaches and seductive artifices; *Mahboob Khan v. Hakim Abdul Rahim*, AIR 1964 Raj 250.
- ii. Where pardanashin and illiterate woman acting under full confidence of the defendant who projected a false impression of the contents of a documents, put this thumb impression on such documents, their comment is a vitiated one; *Kharbuja Kuer v. Jangbahadur Rai*, AIR 1963 SC 1203.

What to prove—Burden of proof

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; *Shrimati v. Sudhakar R. Bhatkar*, Air 1998 Bom 122.

17. “Fraud defined ”

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents,¹ with intent to deceive another party thereto his agent, or to induce him to enter into the contract;

- 1) The suggestion as a fact, of that which is not true, by one who does not believe it to be true;
- 2) The active concealment of a fact by one having knowledge or belief of the fact;
- 3) A promise made without any intention of performing it;
- 4) Any other act fitted to deceive;
- 5) Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak², or unless his silence, is, in itself, equivalent to speech.

Illustrations

- a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse’s unsoundness. This is not fraud in A.
- b) B is A’s daughter and has just come of age. Here the relation between the parties would make it A’s duty to tell B if the horse is unsound.
- c) B says to A—“If you do not deny it, I shall assume that the horse is sound”. A says nothing. Here, A’s silence is equivalent to speech.
- d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B’s willingness to proceed with the contract. A is not bound to inform B.

COMMENTS

Cases where there is duty to speak

It is the duty of the assured to put the insurer in possession of all material facts affecting the risk covered; *Mithoo Lal Nayak v. L.I.C. of India*, AIR 1962 SC 814.

Pleading and proof of fraud

The transaction designed to defeat the plaintiff creditors was fraudulent. Fraud was fully carried into effect in letter and spirit. In as much as the plaintiff himself was the preparatory of fraud, he should not be granted any discretionary relief. Once it is found that the parties are in pari delicto the court will not assist the party who enters into illegal transaction and makes that transaction the basis of his claim; *Sultan Ahmad v. Rashid Ahmad*, AIR 1990 All 47.

1. Cf. section 238, *infra*.

2. See section 143, *infra*.

18. “Misrepresentation” defined

“Misrepresentation” means and includes -

- 1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- 2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or anyone claiming under him; by misleading another to his prejudice, or to the prejudice of any one claiming under him;
- 3) Causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is subject of the agreement.

COMMENTS

A statement is said to be warranted by the information of the person making it when he receives the information from a trustworthy source. It should not be a mere hearsay; *Mohanlal v. Sri Gungaji Cotton Mills Co.*, (1900) 4 CWN 369.

19. Void ability of agreements without free consent

When consent to an agreement is caused by coercion, ¹fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. A party to contract, whose consent was caused by fraud or mis presentation, May, if he thinks fit, insists that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true.

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

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

Illustrations

- a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.
- b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.
- c) A fraudulently informs B that A's estate is free from in cumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and mortgage-debt redeemed.
- d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.
- e) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

COMMENTS

Scope

The defendant represented him self to be a partner of the firm by his conduct and through documents and got a loan of Rs. 60,000 from the plaintiff bank. The plaintiff bank gave loan to all the defendants believing them to be partners of the defendant. It was held that the defendant had represented himself to be a partner and therefore liable with other defendants; Oriental Bank of Commerce v. S.R. Kishore & Co., AIR 1992 Del 174.

1. The words “undue influence” rep. by Act 6 of 1899, sec. 3.

19-A. Power to set aside contract induced by undue influence -

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

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

Illustrations

- a) A’s son has forged B’s name to a promissory note. B under threat of prosecuting A’s son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.
 - b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond a side, ordering B to repay the Rs. 100 with such interest as may seem just.]
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1. Ins. by Act 6 of 1899, sec. 3.

20. Agreement void where both parties are under mistake as to matter of fact

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement the agreement is void.

Explanation.— An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

Illustrations

- a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.
- b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.
- c) A, being entitled to an estate for the life of B, agrees to sell it to C, B was dead at the time of agreement, but both parties were ignorant of the fact. The agreement is void.

COMMENTS

Mistake

There can be a mistake of identity only when a person bearing a particular identity exists within the knowledge of the plaintiff and the plaintiff intends to deal with him only; King's Norton Metal Co. v. Edridge, Merrett & Co., (1897) 14 TLR 98 (CA).

21. Effect of mistake as to law

A contract is not voidable because it was caused by a mistake as to any law in force in ¹India; but mistake as to a law not in force in India has the same effect as a mistake of fact.

²[***]

Illustration

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

³[***]

1. **The original words “British India” have successively been amended by the A.O. 1948 and the A.O. 1950 to read as above.**
2. **Paragraph 2 omitted by the A.O. 1950. Earlier paragraph 2 was inserted by the A.O. 1937.**
3. **The second Illustration rep. by Act 24 of 1917, sec. 3 and Sch. II**

22. Contract caused by mistake of one party as to matter of fact

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

23. What consideration and objects are lawful, and what not

The consideration or object of an agreement is lawful, unless -It is forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

- a) A agrees to sell his house to B for 10,000 rupees. Here, B’s promise to pay the sum of 10,000 rupees is the consideration for A’s promise to sell the house and A’s promise to sell the house is the consideration for B’s promise to pay the 10,000 rupees. These are lawful considerations.

- b) A promise to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.
- c) A promise, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.
- d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.
- e) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
- f) A promises to obtain for B an employment in the public service and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.
- g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.
- h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.
- i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter and would so defeat the object of the law.
- j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favor of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.
- k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code (45 of 1860).

COMMENTS

Applicability

The notification permitting refund of sales tax was contrary to the statute. The tax paid is not an amount spent by the appellant but realized on sale by it. The constitutional requirements of levy of tax being for the welfare of the society and not for a specific individual the agreement or promise made by the Government was in contravention of public purpose thus violative of public policy and void under section 23 of the Contract Act; *Amrit Bansapati Co Ltd. v. State of Punjab*, AIR 1992 SC 1076.

Illegal and void agreements

The distinction between illegal and void contracts is very thin but it is there. The law may either 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; *Nutan Kumar v. IInd Additional District Judge, Banda*, AIR 1994 All 298.

Object of agreement is valid thereof

The exemption clause containing that the carrier shall be under no liability for any damages to passengers, is valid and it legally excludes all liability for negligence and such clause cannot be held bad under section 23 of Act; *Indian Airlines v. Madhuri Chowdhuri*, AIR 1965 Cal 252.

Scope

If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void, is not prohibited by law it may be enforced as a collateral agreement. Where a person entering into an illegal contract promises expressly or by implication that the contract is blameless such a promise amount to collateral agreement upon which the other party if in fact innocent of turpitude may sue for damages; *Rajat Kumar Rath v. Government of India*, AIR 2000 Ori 32.

The appellation 'void' in relation to a juristic act, means without legal force, effect or consequence, not binding, invalid, null, worthless, cipher, useless and ineffectual etc.; *Nutan Kumar v. IInd Additional District Judge, Banda*, AIR 1994 All 298.

An agreement offending a statute or public policy or forbidden by law is not merely void but it is invalid from nativity. It cannot become valid even if the parties thereto agree to it; *Nutan Kumar v. IInd Additional District Judge, Banda*, AIR 1994 All 298.

While the term ‘object’ unlike the term ‘consideration’ has not been defined in section 2 of the Act, but has been held to mean as ‘purpose’ or ‘design’ of the contract. If the object is opposed to public policy or tends to defeat any provision of law, it becomes unlawful and thereby it is void under section 23 of the Act; *Nutan Kumar v. IInd Additional District Judge, Banda*, AIR 1994 All 298.

The term ‘law’ in section 23 of the Act must be understood in the sense of the term explained in the Article 13(3) of the Constitution; *Nutan Kumar v. IInd Additional District Judge, Banda*, AIR 1994 All 298.

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1. See sections 26, 27, 28 and 30, *infra*.

24. Agreements void, if consideration are objects unlawful in part

If any part of a single consideration for one or more objects, or any one or any part of any one of several consideration of a single object, is unlawful, the agreement is void.

Illustration

A promise to superintend, on behalf of B, a legal manufacturer of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A’s promise, and the consideration for B’s promise, being in part unlawful.

COMMENTS

General Rule

Non-compoundable offences, which are a matter of public concern, cannot be subject matter of private bargains and administration of criminal justice should not be allowed to pass from the hands of judges to private individuals. Where the offence is of public nature, no agreement can be valid that is founded on the consideration of stifling of a prosecution for it. The payment of 470 million US dollars by the Union Carbide Corporation to Union of India was held not to be stifling of prosecution and the payment not unlawful; *Union Carbide Corporation v. Union of India*, AIR 1992 SC 248.

25. Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law -

An agreement made without consideration is void, unless -

1. It is expressed in writing and registered under the law for the time being in force for the registration of¹ documents, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless.
2. It is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promissory, or something which the promissory was legally compellable to do; or unless.
3. It is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorized in that behalf, to pay wholly or in part debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract.

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

Explanation 2: An agreement to which the consent of the promissory is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promissory was freely given.

Illustrations

- a) A promise, for no consideration, to give to B Rs. 1,000. This is a void agreement.
- b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.
- c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.
- d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

- e) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.
- f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.
- g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

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

Comments

Natural love and affection as a consideration

In order to rely upon clause (1) of section 25, the existence of the factum of natural love and affection between parties standing in a near relation to each other is a condition precedent; *Rajlukhy Dabee v. Bhootnath Mookherjee*, (1900) 4 CWN 488.

Voluntary services

If the services are rendered voluntarily, without the desire of the promissory or otherwise than at his request and the promissory undertakes to recompense the person who has rendered his services for it. In such cases, the promise does not need a consideration to support it, and the case falls under section 25 of the Act; *Sindha Shri Ganpatsingji v. Abraham alias Vazir Mahomed Akuji*, (1895) 20 Bom 755.

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1. Subs. by Act 12 of 1891, sec. 2 and Sch. II, Pt. I, for "assurances".

26. Agreement in restraint of marriage, void-

Every agreement in restraint of the marriage of any person, other than a minor, is void.

COMMENTS

Agreement in restraint of marriage

An agreement between two co-widows that if any of them remarried, she should forfeit her right to her share in the deceased husband's property is not in restraint of marriage; A. Suryanarayan Murthi v. P. Krishna Murthy, AIR 1957 Ori 125.

27. Agreement in restraint of trade, void

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1: Saving of agreement not to carry on business of which good will is sold – One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business there in, provided that such limits appear to the court reasonable, regard being had to the nature of the business.

¹[***]

COMMENTS

Agreement in restraint of trade

The words “restrained from exercising a lawful profession, trade or business”, do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to same particular place; *Mahbub Chander v. Raj Coomar*, (1874) XIV Bengal Law Reports 76.

1. **Exceptions 2 and 3 rep. by Act 9 of 1932, sec. 73 and Sch. II.**

28. Agreements in restraint of legal proceedings, void -

¹[***]Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to the extent.

Exception 1: Saving of contract to refer to arbitration dispute that may arise. This section shall not render illegal contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subject shall be referred to arbitration and that only and amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

²[***]

Exception 2: Saving of contract to refer question that have already arisen – Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to reference to arbitration. ³

COMMENTS

Agreement restricting law of limitation

The clause in the agreement that the appellant would not have any right under the bond after the expiry of six months from the date of termination of the contract has been held not to be contrary to section 28 of the Act nor it imposed any restriction to file a suit within six months; Food Corporation of India v. New India Assurance Co. Ltd., AIR 1994 SC 1896.

Jurisdiction of the proper court

It has been held that it is not open to the parties by agreement to confer jurisdiction on any court which it did not otherwise possess under section 20 of Code of Civil Procedure; Patel Roadways v. Prasad Trading Company, AIR 1992 SC 1514.

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1. Subs. by Act 1 of 1997, sec. 2, for certain words (w.e.f. 8-1-1997).
 2. The second clause of Exception 1 rep. by Act 1 of 1877, sec. 2 and Sch.

3. Cf. the Arbitration Act, 1940 (10 of 1940) and the Companies Act, 1956 (1 of 1956), section 389.

29. Agreements void for uncertainty -

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations

- a) A agrees to sell B “a hundred tons of oil”. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
- b) A agrees to sell B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.
- c) A, who is a dealer in coconut-oil only, agrees to sell to B “one hundred tons of oil”. The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.
- d) A agrees to sell B “all the grain in my granary at Ramnagar”. There is no uncertainty here to make the agreement void.
- e) A agrees to sell to B “one thousand maunds of rice at a price to be fixed by C”. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given. The agreement is void.

30. Agreements by way of wager, void

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which may wager is made. Exception on favor of certain prizes for horse-racing: This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or

sum of money, of the value or amount of five hundred rupees or upwards, to be rewarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected: Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the (45 of 1860) apply.

COMMENTS

Scope

To treat an agreement by way of wager as void is that the law discourages people to enter into games of chance and make earning by trying their luck instead of spending their time, energy and labour for more fruitful and useful work for themselves, their family and the society; Subhash Kumar Manwani v. State of Madhya Pradesh, AIR 2000 MP 109.

Wagering Contract

A chit-fund does not come within the scope of wager; Narayana Ayyangar v. K.V. Ambalam, (1927) ILR 50 Mad 696 (FB).

Chapter III – Of contingent contracts

31. “Contingent contract” defined

A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

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

32. Enforcement of Contracts contingent on an event happening

Contingent contracts to do or not to do anything in an uncertain future event happen cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.

Illustrations

- a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
- b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
- c) A contract to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

COMMENTS

Applicability

The essential idea upon which doctrine of frustration is based is that of impossibility of performance of contract; *Satyabrata Ghose v. Mugneeram Bangur*, AIR 1954 SC 44.

33. Enforcement of contract contingent on an event not happening-

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

Illustration

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

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person-

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

Illustration

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

35. When contracts become void, which are contingent on happening of specified event within fixed time

Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

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

Illustrations

- a) A promise to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.
- b) A promise to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreements contingent on impossible event void

Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to agreement at the time when it is made.

Illustrations

- a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.
- b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

Chapter IV – Of the performance of contracts which must be performed

37. Obligations of parties to contract -

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

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

Illustrations

- a) A promises to deliver goods to B on a certain day on payment of Rs.1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.
- b) A promise to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B

COMMENTS

Assignment of Contract

A person cannot be subject to the obligation of a contract to which he is not a party and the logical consequence is that a stranger cannot acquire rights under a contract; Harnam Singh v. Purbi Devi, AIR 2000 HP 108.

Scope

If the agreement makes express provision for enhancement of rate of interest, held, bank need not put borrower on notice before charging higher rate on the basis of the agreement; *Syndicate Bank v. R. Veeranna*, (2003) 2 SCC 15.

It is well settled principle of law that an arbitration clause is assignable, if the main contract is assignable. An arbitration agreement will find not only the actual parties to it, but also an assignee of the contract containing it; *R. K. Associates v. V. Channappa*, AIR 1993 Kant 248.

38. Effect of refusal to accept offer of performance

Where a promissory has made an offer of performance to the promise, and the offer has not been accepted, the promissory is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions -

- 1) It must be unconditional;
- 2) It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is been made is able and willing there and then to do the whole of what he is bound by his promise to do;
- 3) If the offer is an offer to deliver anything to the promise, the promise must have a reasonable opportunity of seeing that the thing offered is the thing which the promissory is bound by his promise to deliver. An offer to one of several joint promises has the same legal consequences as an offer to all of them.

Illustration

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

Comments

Tender must be strict

Where the instructions have been issued to Bidders asking them to state against each work item unit rate in Indian Currency and in U.S. Dollar or Japanese Yen. Then the quoting of the unit rate 50 per cent. in Indian Rupee and 50 per cent. in U.S. Dollar will not be treated as clerical or Mechanical error and cannot be allowed to be corrected; West Bengal Electricity Board v. Patel Engg. Co. Ltd., AIR 2001 SC 683.

39. Effect of refusal of party to perform promise wholly

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

Illustrations

- a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.
- b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

40. Person by whom promises is to be performed -

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contain in it should be performed by the promissory himself, such promise must be performed by the promissory.

In other cases, the promissory or his representative may employ a competent person to perform it.

Illustrations

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

41. Effect of accepting performance from this person

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

42. Devolution of joint liabilities

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

43. Any one of joint promisor may be compelled to perform

When two or more persons make a joint promise, the promisee may, in the absence of express agreements to the contrary, compel any¹ one or more of such joint promisor to perform the whole promise.

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

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

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

Illustrations

- a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.
- b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.
- c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.
- d) A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

1. Subs. by Act 12 of 1891, sec. 2 and Sch. II Pt. I, for "one".

44. Effect of release of one joint promissory

Where two or more persons have made a joint promise, a release of one of such joint promissory by the promise does not discharge the other joint promissory, neither does it free the joint promissory so released from responsibility to the other joint promissory or joint promisors.¹

1. See section 138. *Infra*.

45. Devolution of joint rights

When a person has made a promise to two or more persons jointly, then unless contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any one of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.¹

Illustration

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life and after the death of C, with the representatives of B and C jointly.

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- 1. For an exception to section 45 in case of Government securities, see the Public Debt Act, 1944 (18 of 1944), section 8.**

46. Time for performance of promise, where no application is to be made and no time is specified

Where, by the contract, a promissory is to perform his promise without application by the promise, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation: The question “what is a reasonable time” is, in each particular case, a question of fact.

47. Time and place for performance of promise, where time is specified and no application to be made -

When a promise is to be performed on a certain day, and the promissory has undertaken to perform it without the application by the promise, the promissory may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

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

48. Application for performance on certain day to be at proper time and place -

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

Explanation: The question “what is proper time and place” is, in each particular case, a question of fact.

49. Place for the performance of promise, where no application to be made and no place fixed for performance -

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

Illustration

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

50. Performance in manner or at time prescribed or sanctioned by promise -

The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions

Illustrations

- a) *B* owes *A* 2,000 rupees. *A* desires *B* to pay the amount to *A*'s account with *C*, a banker. *B*, who also banks with *C*, orders the amount to be transferred from his account to *A*'s credit, and this is

done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

- b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.
- c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.
- d) A desires B, who owes him Rs.100, to send him a note for Rs.100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

COMMENTS

Manner and time of performance

If any agreement states that a particular act relating to the furtherance of a contract is to be done in a particular manner, it should be done in that manner and it is not open to the parties to chalk out his own manner of performing his part of contract; *Bishamber Nath Agarwal v. Kishan Chand*, AIR 1990 All 70.

51. Promissory not bound to perform, unless reciprocal promise ready and willing to perform-

When a contract consists of reciprocal promises to be simultaneously performed, no promissory need perform his promise unless the promise is ready and willing to perform his reciprocal promise.

Illustrations

- a) A and B contract that A shall deliver goods to B to be paid for by B on delivery. A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

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

- b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

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

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

52. Order of performance of reciprocal promises-

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

Illustrations

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

53. Liability of party preventing event on which contract is to take effect-

When a contract contains reciprocal promises and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation¹ from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

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

1. See section 73, *infra*.

54. Effect of default as to the promise which should be performed, in contract consisting or reciprocal promises-

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

Illustrations

- a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must take compensation to B for the loss which B sustains by the non-performance of the contract.
- b) A contract with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- c) A contract with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.
- d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

55. Effect of failure to perform a fixed time, in contract in which time is essential

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time and fails to do such thing at or before a specified time, and fails to do such thing at or before a specified time, the contract or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract.

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

Effect of acceptance of performance at time other than agreed upon: If, in case of a contract voidable on account of the promise's failure to perform his promise at the time agreed, the promise accepts performance of such promise at any time other than agree, the promise cannot claim compensation of any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of acceptance, he give notice to the promissory of his intention to do so.¹

COMMENTS

Time – whether essence of Contract

The parties may make time of the essence either expressly in terms which unmistakably provide that they intended to do so. Alternately, making of time as the essence of a contract may be inferred from the nature of the contract, the property or the surrounding circumstances; Swarnam Ramchandran v. Aravacode Chakungal Jayapalan, AIR 2000 Bom 410.

When the contract itself provides for extension of time, the same cannot be termed to be the essence of the contract and default, however, in such a case it does not make the contract voidable; Arosan Enterprises Ltd. v. Union of India, AIR 1999 SC 3804.

The deferred clause indicated that time was not the essence of the contract. But in the present case the defendants had kept quite for an unreasonably long time so the defendants cannot rely on this clause but the plaintiffs can seek the relief of possession prayed for; Y.A. Kader v. Muthulakshmi Ammal, AIR 1992 Mad 208.

In a contract for the sale of land or immovable property, it would normally be presumed that time was not of the essence of the contract; Gomathinayagam Pillai v. Palaniswami Nadar, AIR 1967 SC 868: (1967) 1 SCR 227.

1. Cf. sections 62 and 63, *infra*.

56. Agreement to do impossible act-

An agreement to do an act impossible in itself is void. Contract to do act afterwards becoming impossible or unlawful: A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promissory could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.¹

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

Illustrations

- a) A agrees with B to discover treasure by magic. The agreement is void.
- b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- c) A contract to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- d) A contract to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- e) A contract to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

COMMENTS

Contracting party must not be in default

In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility arising from the perishing of the person or thing shall excuse performance; Taylor v. Caldwell, 122 ER 30.

It is not permissible for the courts to travel outside the provisions of the section and import the principles of English law de hors the statutory provisions; *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44.

Impossibility may be in law or in fact

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; *Satyabrata Ghose v. Mugneeram Bangur*, AIR 1954 SC 44.

Scope and applicability

Section 56 lays a positive rule relating to frustration and does not leave the matter of frustration to the court to be determined. There can be no agreement on altered circumstances and it has also been held that if a consideration of the terms of the contract in the light of the circumstances when it was made shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly arises the contract ceases to bind at that point, not because the court in its discretion considers it just but on true construction it does not apply in that situation; *Shyam Biri Works Pvt. Ltd. v. U.P. Forest Corporation*, AIR 1990 SC 205.

1. See section 65, *infra*.

57. Reciprocal promise to do things legal, and also other things illegal

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

Illustration

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

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

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

58. Alternative promise, one branch being illegal-

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

Illustration

A and *B* agree that *A* shall pay *B* 1,000 rupees, for which *B* shall afterwards deliver to *A* either rice or smuggled opium.

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

59. Application of payment where debt to be discharged is indicated

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

Illustrations

- a) *A* owes *B*, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes *B* no other debt of that amount. On the first June, *A* pays to *B* 1,000 rupees. The payment is to be applied to the discharge of the promissory note.
- b) *A* owes to *B*, among other debts, the sum of 567 rupees. *B* writes to *A* and demands payment of this sum. *A* sends to *B* 567 rupees. This payment is to be applied to the discharge of the debt of which *B* had demanded payment.

COMMENTS

Scope of applicability

To several distinct debts payable by a person and not to the various heads of one debt. The principal and interest due on a single debt or decree passed on such debt carrying subsequent

interest cannot be held to several distinct debts. Accepting such an argument would amount to doing violence to the language employed in the section and the purpose sought to be achieved by it. Besides it would also be contradictory in terms; Industrial Credit and Development Syndicate now called I.C.D.S. Ltd. v. Smithaben H. Patel, AIR 1999 SC 1036.

The principle applies to several distinct debts and not to a single debt payable by installments; Munno Bibi v. Commissioner of Income-tax, AIR 1952 All 514.

60. Application of payment where debt to be discharged is not indicated-

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

61. Application of payment where neither party appropriates

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

62. Effect of innovation, rescission, and alteration of contract-

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

- a) A owes money to B under a contract. It is agreed between A, B and C, that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.
- b) A owes B 10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's), estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

- c) A owes B 1,000 rupees under a contract, B owes C 1,000 rupees, B orders A to credit C with 1,000 rupees in his books, but C does not assent to the agreement. B still owes C 1,000 rupees, and no new contract has been entered into.

COMMENTS

Alteration of Contracts

Person entering into agreement under section 8(1)(a) of Requisition and Acquisition of Immovable Property Act cannot later claim a legal right to obtain a court order directing reopening of the agreement, just because a subsequent award granted higher compensation for land similar to his own; *Dayal Singh v. Union of India*, (2003) 2 SCC 593.

If the parties to a Contract agree

The plaintiff Bank had agreed that the defendants could pay the amount of Rs.10,00,000 which would be convenient to both the parties subsequent to the filing of the suit. The parties have entered into a second agreement to supersede the liability and the entitlement formulated through the transaction and that under the circumstances the said subsequent agreement squarely comes within the ambit of section 62 of the Act; *Central Bank of India v. V. G. Naidu & Sons (Leather) Pvt. Ltd.*, AIR 1992 Mad 139.

Material alteration

A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed from its original state, or otherwise varies the effect of the instrument as originally expressed or reduces to certainty some provisions which were originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed. The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed. The last line in the schedule of property regarding delivery of possession was held to be inserted not on the date of execution of agreement but subsequent to it and have material alteration; *Janab M. H. M. Yakoob v. M. Krishnan*, AIR 1992 Mad 80.

Where an existing mortgage was replaced by a new agreement of mortgage, the new agreement being not enforceable for want of registration, the parties were still bound by the original mortgage; *Shanker Lal Damodhar v. Ambalal Ajaipal*, AIR 1946 Nag 260.

63. Promise may dispense with or remit performance of promise

Every promise may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,¹ or may accept instead of it any satisfaction which he thinks fit.

Illustrations

- a) A promise to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.
- b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.
- c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.²
- d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.
- e) A owes B 2,000 rupees, and is also indebted to another creditors. A makes an arrangement with his creditors, including B, to pay them a ³[composition] of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

COMMENTS

Becomes void – discovered to be void

Section 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, e.g. where one of the parties was a minor; *Mohori Bibee v. Dharmodas Ghose*, (1903) ILR 30 Cal 539 (PC).

Necessity for consideration

The plaintiff bank accepted the sum of Rs. 10, 00,000 from the defendants towards the full discharge of the suit claim according to second agreement. It was held that having received the said compromise amount, it is not open for the plaintiff to claim the overdue interest to the extent of Rs. 69,571.20 for which there has been no agreement and that under the circumstances

the claim, if any made by the plaintiff has been directly hit by section 63 of Contract Act; Central Bank of India v. V. G. Naidu & Sons (Leather) Pvt. Ltd., AIR 1992 Mad 139.

Waiver

A waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right; Jagad Bandhu Chatterjee v. Nilima Rani, (1969) 3 SCC 455: (1970) 2 SCR 925: (1971) 1 SCJ 38.

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1. **But See section 135, infra.**
 2. **See section 41, supra.**
 3. **Subs. by Act 12 of 1891, sec. 2 and Sch. II, Pt. I, for “compensation”.**

64. Consequence of rescission of voidable contract

When a person at whose option a contract is voidable rescinds it, the other party thereto needs to perform any promise therein contained in which he is the promissory. The party rescinding a voidable contract shall, if he have received any benefit there under from another party to such contract restore such benefit, so far as may be, to the person from whom it was received.¹

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1. **See section 75, infra.**

65. Obligation of person who has received advantage under void agreement, or contract that becomes void -

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

Illustrations

- a) A pays B 1,000 rupees, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.
- b) A contract with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.
- c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.
- d) A contract to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

Comments

Frustrated Contracts

Where under a contract of Insurance the insured gave a cheque to the insurer for payment of first premium amount, but the cheque was dishonored by the drawee-bank due to inadequacy of the funds in the account of the drawer, the insurer is not liable in such a situation to honour the claim of the insured. Even if the insurer has disbursed the amount covered by the policy to the insured before the cheque was returned dishonored insurer is entitled to get the money back; National Insurance Company Ltd. v. Seema Malhotra, AIR 2001 SC 1197.

66. Mode of communicating or revoking rescission of voidable contract-

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to some rules, as apply to the communication or revocation of the proposal. proposal.¹

1. See sections 3 and 5, supra.

67. Effect of neglect or promise to afford promissory reasonable facilities for performance-

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

Illustration

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

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

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

Chapter V – Of certain relations resembling those created by contract

68. Claim for necessaries supplied to person incapable of contracting, or on his account -

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

Illustrations

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

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1. **The property of a Government ward in Madhya Pradesh is not liable under this section; see the C.P. Court of Wards Act, 1899 (C.P. Act 24 of 1899), section 31(I).**

69. Reimbursement of person paying money due by another, in payment of which he is interested

A person, who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B to prevent the sale and the consequent annulment of his own lease pays the Government the sum due from A. A is bound to make good to B the amount so paid.

COMMENTS

Contribution and reimbursement

Where a person is jointly liable with other to pay, a payment by him of the other's share would not give him a right of recovery under this section; *Jagpatiraju v. Sadnusannama*, AIR 1916 Mad 980.

70. Obligation of person enjoying benefit of non-gratuitous act

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

71. Responsibility of finder of goods

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.¹

1. See sections 151 and 152, *infra*.

72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion-

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

1. A and B jointly owe 100 rupees to C, A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.
2. A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegal and excessive.

COMMENTS

Ingredients of unjust enrichment

Under this Section the principle of unjust enrichment cannot be extended to give a right to the State to recover or realize vend fee after the concerned statute for realization or recovery of vend fee has been struck down; M/s. Somaiya Organics (India) Ltd. V. State of Uttar Pradesh, AIR 2001 SC 1725.

Chapter VI – Of the consequences of breach of contract

73. Compensation of loss or damage caused by breach of contract

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

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

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

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

Illustrations

- a) A contract to sell and deliver 50 maunds of saltpeter to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpeter of like quality at the time when the saltpeter ought to have been delivered.
- b) A hires B's ship to go to Bombay, and there takes on board, on the first of January, a cargo, which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.
- c) A contract to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
- d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.
- e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

- f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.
- g) A contract to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.
- h) A contract to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.
- i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.
- j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.
- k) A contract with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery, at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the price of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

- l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensations to C for the breach of his contract. A must make compensation to B for the cost of rebuilding of the house, for the rent lost, and for the compensation made to C.
- m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.
- n) A contract to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.
- o) A contracts to deliver 50 maunds of saltpeter to B on the first of January, at a certain price, B, afterwards, before the first of January, contracts to sell the saltpeter to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.
- p) A contract to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by closing of the mill.
- q) A contract to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.
- r) A, a ship owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in

Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

COMMENTS

Award of damages

When a contract is broken, the party who suffers by such breach is entitled to receive compensation for any loss or damage caused to him from the party who has broken the contract; *K. Narayana Kurup v. Sankaranarayanan*, AIR 2000 Ker 296.

Breach of Contract of carriage

A corporation had placed the order on telephone. The entire transaction was oral and no attempt was made to produce any witness of the alleged buyer to support the contention that the market value of the goods was at the rate of Rs. 3,000 per metric ton. The material on record does not show that the price of goods has risen to Rs. 3,000. Therefore the damages as a result of non-delivery of the alleged goods, have not been proved by the plaintiff and he is not entitled to any damages; *Thakral and Sons v. Indian Petro Chemicals Corporation Ltd.*, AIR 1994 Del 226.

Damages for breach of contract

When there is a breach of contract, party to the contract cannot determine as to who has committed breach. Damages could be recovered from the person who has committed breach only after the same is determined. The conditions of contract would be considered as liquidated damages and could be recovered and no power has been conferred on the other contracting party to determine the damages; *P.V. Paily v. State of Kerala*, AIR 2000 Ker 268.

The party in breach must make compensation in respect of the direct consequences flowing from the breach and not in respect of loss or damage indirectly or remotely caused; *Pannalal Jankidas v. Mohanlal*, AIR 1951 SC 145: (1950) SCR 979.

Damages for breach of contract of service

A contract of service entered into by father on behalf of minor is void being without consideration; *Raj Rani v. Prem Adib*, AIR 1949 Bom 215.

Damages when become due

A seller who commits breach will be liable to compensate according to the prices at the place of sale and not at destination; *Murlidhar Chiranji Lal v. Harish Chandra Dwarkadas*, AIR 1962 SC 366: (1962) 1 SCR 653.

Limitation

The principle of awarding damages for a reasonable period or reasonable period of notice comes into play only when the contract of employment is not for a fixed period; *S.S. Shetty v. Bharat Nidhi Ltd.*, AIR 1958 SC 12: (1958) SCR 442.

Measure of damages – Breach of contract for sale of goods

Damages are to be awarded as compensation for any loss or damage arising naturally in the usual course of things from the breach of contract; *Karsandas H. Thacker v. Saran Engg. Co. Ltd.*, AIR 1965 SC 1981.

Natural and probable result of breach: Special damage

In cases of breach of contract the damages should be such as may fairly and reasonably be considered as arising naturally or the damages may be such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it. The damages, however cannot include compensation for any remote and indirect loss or damages sustained by reason of the breach; *Hadley v. Baxendale*, 9 Ex 742.

Taking advantage of benefit resulting from breach of contract

Where a vendee is in default and the vendor subsequently sells at a price higher than the market price on the date of delivery, the fact that by reason of the loss of the contract which the vendee had failed to perform, the vendor obtained the benefit of another contract which was of value to him did not entitle the vendee to the benefit of the later contract; *Jamal v. Moola Dawood Sons & Co.*, (1916) AC 175.

74. Compensation of breach of contract where penalty stipulated for

¹[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.— When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the ²[Central Government] or of any ³[State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

- a) A contract with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.
- b) A contract with B that, if A practices as a surgeon within Calcutta, he will pay B Rs. 5,000. A practices as a surgeon in Calcutta. B is entitled to such compensation; not exceeding Rs. 5,000 as the court considers reasonable.
- c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.
- d) ⁴[A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
- e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable consideration in case of breach.

- f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly installments, with a stipulation that, in default, of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.
- g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly installments of Rs. 40, with a stipulation that, in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.]

COMMENTS

Courts power to grant damages fined

Where the right to recover liquidated damages under section 74 is found to exist no question of ascertaining damages really arises; *Chunilal Mehta & Sons Ltd. v. Century Spinning & Mfg. Co. Ltd.*, AIR 1962 SC 1314.

Penalty and liquidated damages

A clause in a contract can be described as penal if the party who has to pay a certain amount of money fails to pay the amount within the time stipulated. In such a situation the other party will be at liberty to recover the entire sum with interest and costs. Such a clause would be penal in character. But if half payment is made within the time stipulated, the other party waves his right to the balance amount; *Prithvichand Ramchand Sablok v. S.Y. Shinde*, AIR 1993 SC 1934.

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1. **Subs. by Act 6 of 1899, sec. 4, for the first paragraph.**
 2. **Subs. by the A.O. 1937, for “Government of India”.**
 3. **Subs. by the A.O. 1950, for “Provincial Government”.**
 4. **Ins. by Act 6 of 1899, sec. 4(2).**

75. Party rightfully rescinding contract, entitled to compensation

A person who rightfully rescinds a contract is entitled to consideration for any damage which he has sustained through the non-fulfillment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contracts. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.

Chapter VII – Sale of Goods

Section 76 to 123 –

Repealed

Chapter VIII – Of indemnity and guarantee

124. “Contract of indemnity” defined

A contract by which one party promises to save the other from loss caused to him by the contract of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity”.

Illustration

A contract to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

COMMENTS

Indemnity and guarantee

Acknowledgement of debt by principal debtor binds the guarantor in all respects as if he had given express consent; *United Commercial Bank v. B. M. Mahadev Babu*, AIR 1992 Kant 294.

125. Right of indemnity-holder when sued -

The promise in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promissory-

- 1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- 2) All costs which he may be compelled to pay in any such suit, if in bringing or defending it, he did not contravene the orders of the promissory, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promissory authorized him to bring or defend the suit;
- 3) All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contract to the orders of the promissory, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity, or if the promissory authorized him to compromise the suit.

126. “Contract of guarantee”, “surety”, “principal debtor” and “creditor” -

A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”, the person in respect of whose default the guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.

COMMENTS

Bank guarantee

Once it becomes apparent that there was no chance to fulfill the conditions in the bank guarantee, invocation of the bank guarantee would not be premature or unjustified; *Daewoo Motors India Ltd. v. Union of India*, (2003) 4 SCC 690.

It is well settled that bank guarantee is an autonomous contract. It is in common parlance that the issuance of guarantee is what a guarantor creates to discharge liability when the principal debtor fails in his duty and guarantee is in the nature of collateral agreement to answer for the debt; *Syndicate Bank v. Vijay Kumar*, AIR 1992 SC 1066.

127. Consideration for guarantee

Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

- a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
- b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.
- c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

128. Surety's liability

The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantee to B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

COMMENTS

General

Contract of guarantee does not provide any contra-note pertaining to the liability of the surety so as to create an exception within the meaning of section 128; *Industrial Finance Corporation of India Ltd. v. Cannonore Spinning & Weaving Mills Ltd.*, (2002) 5 SCC 54.

Limitation

It is a settled law that the creditor would be entitled to adjust from the payment of a sum by a debtor towards the time barred debt from the guarantor's account. The appellant did not act in violation of any law when he cut the amount from the fixed deposit of the respondent i.e. the surety when the principal debtor failed to pay; Punjab National Bank v. Surendra Prasad Sinha, AIR 1992 SC 1815.

Scope

The clauses of the guarantees executed by the appellant in favor of PICUP clearly show that the liability of the guarantors was to remain unaffected by the failure of PICUP to enforce its mortgage and hypothecation against the assets of the company. There is nothing in the contracts which can in any way be construed as contrary to the joint and several liability created under section 128; Kailash Nath Agarwal v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd., (2003) 4 SCC 305.

The surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal debtor to the creditor, the guarantee is prima facie to be construed as being of part only of the debt. A continuing guarantee may even be for the fixed period. It is well settled that the guarantor cannot be made liable beyond the terms of the agreements; Aditya Naryan Chouresia v. Bank of India, AIR 2000 Pat 222.

Surety may be liable though the principals Contract is void

The Liability of the sureties is co-extensive with that of the principal debtor. Consequently creditor can proceed against the principal debtor or against the sureties, unless it is otherwise provided in the contract. The same should also be the principle with regard to the rights and liabilities between co-sureties as well. A co-surety cannot insist that the creditor should proceed either against the principal debtor or against other sureties before proceeding against him; Kerala State Financial Enterprises Ltd. v. C.J. Thampi, AIR 2000 Ker 36.

129. Continuing guarantee

A guarantee which extends to a series of transaction, is called, a “continuing guarantee”.

Illustrations

- a) A, in consideration that *B* will employ *C* in collecting the rents of *B*'s zamindari, promises *B* to be responsible, to the amount of 5,000 rupees, for the due collection and payment by *C* of those rents. This is a continuing guarantee.
- b) A guarantees payment to *B*, a tea-dealer, to the amount of £ 100, for any tea he may from time to time supply to *C*. *B* supplies *C* with tea of above the value of £ 100, and *C* pays *B* for it. Afterwards, *B* supplies *C* with tea of the value of £ 200. *C* fails to pay. The guarantee given by *A* was a continuing guarantee, and he is accordingly liable to *B* to the extent of £ 100.
- c) A guarantees payment to *B* of the price of five sacks of flour to be delivered by *B* to *C* and to be paid for in a month. *B* delivers five sacks to *C*. *C* pays for them. Afterwards *B* delivers four sacks to *C*, which *C* does not pay for. The guarantee given by *A* was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

130. Revocation of continuing guarantee

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

- a) A, in consideration of *B*'s discounting, at, *A*'s request, bills of exchange for *C*, guarantees to *B*, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. *B* discounts bills for *C* to the extent of 2,000 rupees. Afterwards, at the end of three months, *A* revokes the guarantee. This revocation discharges *A* from all liability to *B* for any subsequent discount. But *A* is liable to *B* for the 2,000 rupees, on default of *C*.
- b) A guarantee to *B*, to the extent of 10,000 rupees, that *C* shall pay all the bills that *B* shall draw upon him. *B* draws upon *C*, *C* accepts the bill. *A* gives notice of revocation. *C* dishonors the bill at maturity. *A* is liable upon his guarantee.

131. Revocation of continuing guarantee by surety' death -

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default -

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B is no answer to a suit by C against A upon the note.

133. Discharge of surety by variance in terms of contract-

Any variance made without the surety's consent, in the terms of the contract between the principal¹ [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

- a) A becomes surety to C for B's conduct as manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to over-draw, and the bank loses a sum of money.

A is discharged from his surety ship by the variance made without his consent, and is not liable to make good this loss.

- b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change

from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

- c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.
- d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then, existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.
- e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January; A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the first of March.

1. Ins. by Act 24 of 1917, sec. 2 and Sch. I.

134. Discharge of surety by release or discharge of principal debtor -

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

- a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his surety ship.
- b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary

for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

- c) A contract with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his surety ship.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

A contract between the creditor and the principal debtor, by which the creditor make a composition with, or promises to give time, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

136. Surety not discharged when agreement made with third person to give time to principal debtor

Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give to B. A is not discharged.

137. Creditor's forbearance to sue does not discharge surety

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his surety ship.

138. Release of one co-surety does not discharge other -

Where there are co-sureties, a release by the creditor of one of them does not discharge the others neither does set free the surety so released from his responsibility to the other sureties.¹

1. See section 44, supra.

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy -

If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

- a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.
 - b) C lends money to B on the security of a joint and several promissory note made in C's favor by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.
 - c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.
-
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to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

- c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

140. Rights of surety on payment or performance -

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Comments

A guarantor will get invested with all the rights which the creditor had only "upon payment or performance of all that he is liable for". A guarantor is liable for any payment or performance of any obligation only to the extent the principal debtor has defaulted; C.K. Aboobacker v. K.P. Ayishu, AIR 2000 Ker 29 (NOC).

141. Surety's right to benefit of creditor's securities -

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of surety ship entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety, the surety is discharged to the extent of the value of the security.

Illustrations

- a) C, advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C, cancels the mortgage. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

- b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.
- c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

Comments

Meaning of security

Creditor cannot be said to have lost or parted with a security, without consent of the surety, unless there has been some voluntary act by him; *Industrial Finance Corporation of India Ltd. v. Cannanore Spinning & Weaving Mills Ltd.*, (2002) 5 SCC 54.

142. Guarantee obtained by misrepresentation, invalid

Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

143. Guarantee obtained by concealment, invalid

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

- a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.
- b) A guarantee to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

144. Guarantee on contract that creditor shall not act on it until co-surety joins -

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has jointed in it as co-surety, the guarantee is not valid that other person does not join.

145. Implied promise to indemnify surety -

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

- a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.
- b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.
- c) A guarantee to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Comments

Surety's right

There is an implied promise by the principal debtor to indemnify the surety and on its basis the latter is entitled to recover from the former whatever sum the latter had rightfully paid under the contract of guarantee; C.K. Aboobacker v. K.P. Ayishu, AIR 2000 Ker 29 (NOC).

146. Co-sureties liable to contribute equally -

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contract, and whether with or without the knowledge of each other the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.¹

Illustrations

- a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.
- b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

1. See section 43, supra.

147. Liability of co-sureties bound in different sums -

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

- a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees,

conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

- b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.
- c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay the full penalty of his bond.

Chapter IX – Of bailment

148. 'Bailment', 'bailor' and 'bailee' defined.—

A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.

Explanation.— If a person is already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

COMMENTS

Bailment – general

One of the requirements of bailment is delivery of goods to the bailee. Delivery of possession to the bailee is sine qua non of bailment. In order to constitute a bailment change of possession is necessary; *Kavita Trehan v. Balsara Hygiene Products Ltd.*, AIR 1992 Del 103.

149. Delivery to bailee how made -

The delivery to be bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

150. Bailor's duty to disclose faults in goods bailed -

The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risk; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Illustrations

- a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.
- b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

151. Care to be taken by bailee -

¹**151. Care to be taken by bailee.**—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed.²

COMMENTS

Care required

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances; *Kavita Trehan v. Balsara Hygiene Products Ltd.*, AIR 1992 Del 103.

Railway Company as bailee

Under section 73 of The Railways Act, the responsibility of railway administration as a carrier and also as a bailee commences from the moment the goods are entrusted to the railway

administration for transit to be carried by railway and continues until the goods are unloaded at the destination point. When the responsibility under section 73 of the Railways Act terminates, the responsibility of the railway administration under section 77 of The Railway Act commences; Union of India v. Sattur Nataraja Traders, AIR 1992 Kant 301.

- 1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words “in the absence of any special contract” in section 152, see section 40(1) of that Act.**
- 2. As to railway contracts see the Indian Railways Act, 1890 (9 of 1890), section 72. [Ed. The Indian Railways Act, 1890 (9 of 1890) has been repealed by the Railways Act, 1989 (24 of 1989), sec. 200.] As to the liability of common carriers, see the Carriers Act, 1865 (3 of 1865), section 8.**

152. Bailee when not liable for loss, etc, of thing bailed -

¹**152. Bailee when not liable for loss, etc., of thing bailed.** The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

- 1. The responsibility of the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Madras Act 2 of 1905), in regard to goods has been declared to be that of a bailee under these sections, without the qualifying words “in the absence of any special contract” in section 152, see section 40(1) of that Act**

153. Termination of bailment by bailee’s act inconsistent with conditions -

A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

154. Liability of bailee making unauthorized use of goods bailed -

If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

- a) A lends a horse to *B* for his own riding only. *B* allows *C*, a member of his family, to ride the horse. *C* rides with care, but the horse accidentally falls and is injured. *B* is liable to make compensation to *A* for the injury done to the horse.

- b) A hires a horse in Calcutta from *B* expressly to march to Banaras. *A* rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. *A* is liable to make compensation to *B* for the injury to the horse.

155. Effect of mixture with bailor's consent, of his goods with bailee's -

If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. Effect of mixture, without bailor's consent, when the goods can be separated -

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to *B*. *B*, without *A*'s consent, mixes the 100 bales with other bales of his own, bearing a different mark; *A* is entitled to have his 100 bales returned, and *B* is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

157. Effect of mixture, without bailor's consent, when the goods cannot be separated -

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of Cape flour worth Rs. 45 to *B*. *B*, without *A*'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. *B* must compensate *A* for the loss of his flour.

158. Repayment, by bailor, of necessary expenses -

Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailors shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

159. Restoration of goods lent gratuitously

The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him losses exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefits so derived.

160. Return of goods bailed, on expiration of time or a accomplishment of purpose -

It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. Bailee's responsibility when goods are not duly returned -

¹**161. Bailee's responsibility when goods are not duly returned.**—If by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

- 1) **Section 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to goods in their possession see the Madras Port Trust Act, 1905 (Madras Act 2 of 1905).**
- 2) **As to Railway contracts, see the Indian Railways Act, 1890 (9 of 1890), section 72 [Ed. The Indian Railways Act, 1890 (9 of 1980) has been repealed by the Railways Act, 1989 (24 of 1989), sec. 200.]**

162. Termination of gratuitous bailment by death -

A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. Bailor entitled to increase or profit from goods bailed -

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of *B* to be taken care of. The cow has a calf. *B* is bound to deliver the calf as well as the cow to A.

164. Bailor's responsibility to bailee -

The bailor is responsible to the bailee for any loss which the bailee may sustain the reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions, respecting them.

165. Bailment by several joint owners -

If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary.

166. Bailee not responsible on redelivery to bailor without title -

If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.¹

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1. See the Indian Evidence Act, 1872 (1 of 1872), section 117.

167. Right of third person claiming goods bailed -

If a person, other than the bailor, claims goods bailed he may apply to the court to stop delivery of the goods to the bailor, and to decide the title to the goods.

168. Right to finder of goods may sue for specified reward offered -

The finder of goods has no right to use the owner for compensation for trouble and expense, voluntary incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receive such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he received it.

169. When finder of thing commonly on sale may sell it -

When thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it -

- 1) When the thing is in danger of perishing or of losing the greater part of its value, or
- 2) When the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

170. Bailee's particular lien -

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed he has in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

- a) A delivers a rough diamond to *B*, a jeweler, to be cut and polished, which is accordingly done. *B* is entitled to retain the stone till he is paid for the services he has rendered.
- b) A gives cloth to *B*, a tailor, to make into a coat. *B* promises *A* to deliver the coat as soon as it is finished, and to give a three months credit for the price. *B* is not entitled to retain the coat until he is paid.

171. General lien of bankers, factors, wharfinger, attorneys and policy brokers -

Bankers, factor, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other person have a right retain, as a security for which balance, goods, bailed to them, unless is an express contract to that effect.¹

COMMENTS

Banker's lien

In mercantile system the Bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customers in the ordinary course of banking business. The Bank has the liberty to adjust from the proceeds of the two FDR's towards the dues to the Bank and if there is any balance left that would belong to the depositor; *Syndicate Bank v. Vijay Kumar*, AIR 1992 SC 1066.

General and particular lien

Section 171 of the Act is clear and categorical that unless a contract to the contrary is established by the plaintiffs, the bank's right of lien will have to be accepted; *Smt. K.S. Nagalambika v. Corporation Bank*, AIR 2000 Kant 201.

Workman's lien for remuneration

The proposition that the bailee, who exercises a lien, is not entitled to charge rent for storage of goods can never apply to a case where the lien is exercised for non-payment of rent or storage charges; *Om Shankar Biyani v. Board of Trustees, Port of Calcutta*, (2002) 3 SCC 168.

-
- 1. As to lien of an agent, see section 221, infra. As to lien of a Railway Administration, see the Indian Railways Act, 1890 (9 of 1890), section 55. [Ed. The Indian Railways Act, 1890 (9 of 1890) has been repealed by the Railways Act, 1989 (24 of 1989) Sec. 200. Now see the Railways Act 1989 (24 of 1989, section 83.]**

172. "Pledge", "Pawn or", and "Pawnee" defined -

The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called "pawn or". The bailee is called "Pawnee".

173. Pawnee's right of retainer -

The Pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interests of the debt, and all necessary expenses incurred by him in respect to the possession or for the preservation of the goods pledged.

174. Pawnee not to retain for debt or promise other than for which goods pledged – presumption in case of subsequent advances -

The Pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise of other than the debtor promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the Pawnee.

175. Pawnee's right as to extraordinary expenses incurred -

The Pawnee is entitled to receive from the pawn or extraordinary expenses incurred by him for the preservation of the goods pledged.

176. Pawnee's right where pawn or makes default -

If the pawn or makes default in payment of the debt, or performance, at the stipulated time, or the promise, in respect of which the goods were pledged, the Pawnee may bring a suit against the pawn or upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawn or reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawn or is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the Pawnee shall pay over the surplus to the pawn or.

Scope

It is the discretion of the Pawnee to sell the goods in case the pawn or makes default but if the Pawnee does not exercise that discretion no blame can be put on the Pawnee and Pawnee has the right to bring a suit for recovery of the debt and retain the goods pledged as collateral security; *State Bank of India v. Smt. Neela Ashok Naik, AIR 2000 Bom 151.*

177. Defaulting pawn or's right to redeem -

If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledged is made, and the pawn or makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them;¹ but he must, on that case, pay, in addition, any expenses which have arisen from his default.

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1. **For limitation, see the Limitation Act, 1963 (36 of 1963), Schedule 1.**

178. Pledge by mercantile agent -

¹[**178. Pledge by mercantile agent.**—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the Pawnee acts in good faith and has not at the time of the pledge notice that the pawn or has not authority to pledge.

Explanation : In this section, the expression "mercantile agent" and "documents of title" shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930 (3 of 1930).

1. Sections 178 subs. by Act 4 of 1930, sec. 2, for original section 178.

178A. Pledge by person in possession under voidable contract -

¹[178A. Pledge by person in possession under voidable contract.—When the pawn or has obtained possession of the other goods pledged by him under a contract voidable under section 19 of section 19A, but the contract has not been rescinded at the time of the pledge, the Pawnee acquired a goods title to the goods, provided he acts in good faith and without notice of the pawn or's defect of title.

1. Sections 178A subs. by Act 4 of 1930, sec. 2, for original section 178.

179. Pledge where pawn or has only a limited interest -

Where person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

180. Suit by bailor or bailee against wrong-doer -

If a third person wrongfully deprives the bailee of the use of possession of goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment has been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

181. Appointment of relief or compensation obtained by such suit --

Whatever is obtained by way of relief of compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Chapter X – Agency, Appointment and Authority of Agents

182. "Agent" and "principal" defined -

An "agent" is a person employed to do any act for another, or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

Comments

Principle of agency

D.e.s.u. is not an insurance agent within the meanings of life Insurance Corporation Act, 1956 and the Life Insurance Corporation of India (Agents) Regulations, 1972 but D.E.S.U. is certainly an agent as defined in section 182 of the Act. When there is no insurance agent as defined in the Regulations and the Insurance Act, general principles of the law of agency as contained in the Contract Act are to be applied; *D.E.S.U. v. Basanti Devi*, AIR 2000 SC 43.

183. Who may employ agent -

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

COMMENTS

Scope

Since the defendant is weak, mentally infirm and cannot comprehend for herself, the power of attorney which authorized to act as agent of the defendant had been exhausted because of the defendant's incapacity; *Mahendra Pratap Singh v. Padam Kumari Devi*, AIR 1993 All 182.

184. Who may be an agent -

As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and sound mind can become an agent, so as to be responsible to the principal according to the provisions in that behalf herein contained.

185. Consideration not necessary.—

No consideration is necessary to create an agency.

186. Agent's authority may be expressed or implied.—

The authority of an agent may be expressed or implied.¹

1. **See, however, the Registration Act, 1908 (16 of 1908), section 33; See also the Code of Civil Procedure, 1908 (5 of 1908), Schedule I, Order III, rule 4.**

187. Definitions of express and implied -

An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampor, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by *B*, and he is in the habit of ordering goods from *C* in the name of *A* for the purposes of the shop, and of paying for them out of *A*'s funds with *A*'s knowledge. *B* has an implied authority from *A* to order goods from *C* in the name of *A* for the purposes of the shop.

188. Extent of agent's authority –

An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do so such act. An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

Illustrations

- a) *A* is employed by *B*, residing in London, to recover at Bombay a debt due to *B*. *A* may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

- b) A constitutes *B* his agent to carry on his business of a ship-builder. *B* may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

189. Agent's authority in an emergency -

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss and would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

- a) An agent for sale may have goods repaired if it be necessary.
- b) A consigns provisions to *B* at Calcutta, with directions to send them immediately to *C*, at Cuttack. *B* may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

190. When agent cannot delegate -

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature or agency, a sub-agent must, be employed.

191. "Sub-agent" defined -

A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Representation of principal by sub-agent properly appointed -

Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent: The agent is responsible to the principal for the acts of the sub-agent. Sub-agent's responsibility:

The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud, or willful wrong.

193. Agent's responsibility for sub-agent appointed without -

Authority Where an agent, without having authority to do so, has appointed a person to act as a sub-agent stands towards such person in the relation of a principal to an agent, and is responsible for his act both to the principal and to third person; the principal is not represented, by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

194. Relation between principal and person duly appointed by agent to act in business of agency -

When an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

- a) A directs *B*, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. *B* names *C*, an auctioneer, to conduct the sale. *C* is not a sub-agent, but is *A*'s agent for the conduct of the sale.
- b) A authorizes *B*, a merchant in Calcutta, to recover the moneys due to *A* from *C* & *Co.* *B* instructs *D*, a solicitor, to take legal proceedings against *C* & *Co.* for the recovery of the money. *D* is not a sub-agent, but is solicitor for *A*.

195. Agent's duty in naming such person -

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts of negligence of the agent so selected.

Illustrations

- a) A instructs *B*, a merchant, to buy a ship for him. *B* employs a ship-surveyor of good reputation to choose a ship for *A*. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. *B* is not, but the surveyor is, responsible to *A*.
- b) *A* consigns goods to *B*, a merchant, for sale. *B*, in due course, employs an auctioneer in good credit to sell the goods of *A*, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. *B* is not responsible to *A* for the proceeds.

196. Right of person as to acts done for him without his authority, effect of ratification -

Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

197. Ratification may be expressed or implied -

Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

- a) *A*, without authority, buys goods for *B*. Afterwards *B* sells them to *C* on his own account; *B*'s conduct implies a ratification of the purchase made for him by *A*.
- b) *A*, without *B*'s authority, lends *B*'s money to *C*. Afterwards *B* accepts interest on the money from *C*. *B*'s conduct implies a ratification of the loan.

198. Knowledge requisite for valid ratification -

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

199. Effect of ratifying unauthorized act forming part of a transaction -

A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorized act cannot injure third person -

An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

- a) A, not being authorized thereto by *B*, demands, on behalf of *B*, the delivery of a chattel, the property of *B*, from *C* who is in possession of it. This demand cannot be ratified by *B*, so as to make *C* liable for damages for his refusal to deliver.
- b) A holds a lease from *B*, terminable on three months' notice. *C*, an unauthorized person, gives notice of termination to *A*. The notice cannot be ratified by *B*, so as to be binding on *A*.

201. Termination of Agency -

An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

202. Termination of Agency, where agent has an interest in subject-matter -

Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

- a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
- b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

COMMENTS

Agent may enforce Contracts if personally interested

A power of attorney executed in favor of an agent recording or recognizing an interest of the Agent/Attorney in the property which is the subject-matter of the Agency, cannot be revoked or terminated, even if the instrument does not state specifically that it is irrevocable, as then it would be a power coupled with an interest but a power of attorney simplicitor which merely authorized an agent to do certain acts in the name of or on behalf of the executants at any time in spite of the instrument that power of attorney be revoked or cancelled by the executant at any time in spite of the instrument stating that the Power of Attorney is irrevocable; Corporation Bank, Bangalore v. Lalitha H. Holla, AIR 1994 Kant 133.

203. When principal may revoke agent's authority -

The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

204. Revocation where authority has been partly exercised -

The principal cannot revoke the authority given to his agent after the authority has been partly exercised; so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

- a) A authorizes *B* to buy 1,000 bales of cotton on account of *A* and to pay for it out of *A*'s moneys remaining in *B*'s hands. *B* buys 1,000 bales of cotton in his own name, so as to make him self personally liable for the price. *A* cannot revoke *B*'s authority so far as regards payment for the cotton.

- b) *A* authorizes *B* to buy 1,000 bales of cotton on account of *A*, and to pay for it out of *A*'s money remaining in *B*'s hands. *B* buys 1,000 bales of cotton in *A*'s name, and so as not to render himself personally liable for the price. *A* can revoke *B*'s authority to pay for the cotton.

205. Compensation for revocation by principal, or renunciation by agent -

Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206. Notice of revocation or renunciation -

Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and Renunciation may be expressed or implied -

Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers *B* to let *A*'s house. Afterwards *A* lets it himself. This is an implied revocation of *B*'s authority.

208. When termination of agent's authority takes effect as to agent, and as to third persons -

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

- a) *A* directs *B* to sell goods for him, and agrees to give *B* five per cent. Commission on the price fetched by the goods. *A* afterwards by letter, revokes *B*'s authority. *B* after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on *A*, and *B* is entitled to five rupees as his commission.
- b) *A*, at Madras, by letter directs *B* to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter revokes his authority to sell, and directs *B* to send the cotton to Madras. *B* after receiving the second letter enters into a contract with *C*, who knows of the first letter, but not of the second for the sale to him of the cotton. *C* pays *B* the money, with which *B* absconds. *C*'s payment is good as against *A*.
- c) *A* directs *B*, his agent, to pay certain money to *C*. *A* dies, and *D* takes out probate to his will. *B*, after *A*'s death, but before hearing of it, pays the money to *C*. The payment is good as against *D*, the executor.

209. Agent's duty on termination of agency by principal's death or insanity -

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

210. Termination of Sub-agent's authority -

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

211. Agent's duty in conducting principal's business -

An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

- a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, on its to make such investments. A must make good to B the interest usually obtained by such investments.
- b) B, a broker in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

212. Skill and Diligence required from agent -

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations

- a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest, from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e.g., by variation of rate of exchange—but not further.

- b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B at the time of such sale is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.
- c) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.
- d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time of ship arrived, but not any profit he might have made by the subsequent rise.

COMMENTS

General

The defendant/respondent had grossly misconduct himself firstly when he communicated to the appellant that the goods had been purchased at the rate of Rs. 36 per pound when they had not been and further stating that these goods would be dispatched as soon as the transporters strike was over. The defendant later on informed the appellant that the goods could not be purchased as their delivery was dependant on yet another party. The defendant had misinformed his principal and his misconduct squarely comes within section 212 of Contract Act; and the defendant must bear the brunt to pay the damages; Jayabharathi Corporation v. SV P.N. SN Rajasekara Nadar, AIR 1992 SC 596.

213. Agent's accounts -

An agent is bound to render proper accounts to his principal on demand.

214. Agent's duty of communicate with principal -

It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. Right to principal when agent deals, on his own account, in business of agency without principal's consent -

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

- a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
- b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

216. Principal's right to benefit gained by agent dealing on his own account in business of agency

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If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

217. Agent's right of retainer out of sums received on principal's account -

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

218. Agent's duty to pay sums received for principal -

Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

219. When agent's remuneration becomes due -

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

220. Agent not entitled to remuneration for business misconduct -

An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconduct.

Illustrations

- a) A employs *B* to recover 1,00,000 rupees from *C*, and to lay it out on good security, *B* recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby *A* loses 2,000 rupees. *B* is entitled to remuneration for recovering the 1, 00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to *B*.
- b) A employs *B* to recover 1,000 rupees from *C*. Through *B*'s misconduct the money is not recovered. *B* is entitled to no remuneration for his services, and must make good the loss.

221. Agent's lien on principal property -

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

COMMENTS

General

The lien of an agent extends only to the retention of the property till his dues are paid. At common law a legal lien merely confers on the holder of the articles in respect of which it was claimed, a passive right to detain the articles until the debt is paid. Such a lien cannot be enforced by sale of the goods; *Kavita Trehan v. Balsara Hygiene Products Ltd.*, AIR 1992 Del 103.

222. Agent to be indemnified against consequences of lawful acts -

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

- a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.
- b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

223. Agent to be indemnified against consequences of acts done in good faith -

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons

Illustrations

- a) *A*, a decree-holder and entitled to execution of *B*'s goods requires the officer of the Court to seize certain goods, representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.
- b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had no right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C*, and for *B*'s own expenses.

224. Non-Liability of employer of agent to do a Criminal Act -

Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

- a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.
- b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

1. See section 24, supra.

225. Compensation to agent for injury caused by principal's neglect -

The principal must make compensation to his agent in respect of injury¹ caused to such agent by the principal's neglect or want of skill.

Illustration

A employs *B* as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and *B* is in consequence hurt. *A* must make compensation to *B*.

1. Cf. the Indian Fatal Accidents Act, 1855 (13 of 1855).

226. Enforcement and Consequences of agent's contracts -

Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

- a) *A* buys goods from *B*, knowing that he is an agent for their sale, but not knowing who is the principal. *B*'s principal is the person entitled to claim from *A* the price of the goods, and *A* cannot, in a suit by the principal, set-off against that claim a debt due to himself from *B*.
- b) *A*, being *B*'s agent, with authority to receive money on his behalf, receives from *C* a sum of money due to *B*. *C* is discharged of his obligation to pay the sum in question to *B*.

227. Principal how far bound, when agent exceeds authority -

When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo, authorizes *B* to procure an insurance for 4,000 rupees on the ship. *B* procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. *A* is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

228. Principal not bound when excess of agent's authority is not separable -

Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A, authorizes *B* to buy 500 sheep for him. *B* buys 500 sheep and 200 lambs for one sum of 6,000 rupees. *A* may repudiate the whole transaction.

229. Consequences of notice given to agent -

Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations

- a) *A* is employed by *B* to buy from *C* certain goods, of which *C* is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, *A* learns that the goods really belonged to *D*, but *B* is ignorant of that fact. *B* is not entitled to set-off a debt owing to him from *C* against the price of the goods.

- b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal -

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

PRESUMPTION OF CONTRACT TO THE CONTRARY. –

Such a contract shall be presumed to exist in the following cases:-

- 1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- 2) Where the agent does not disclose the name of his principal; and
- 3) Where the principal, though disclosed, cannot be sued.

Comments

When agent can be sued

Before the agent can be sued it must be pleaded and shown that the principal is undisclosed and the contract, the breach of which is sued on was entered into by the agent as having contracted personally. Where the contract is entered into by agent contracting on behalf of a foreign principal who is named and disclosed, the agent can not be sued personally nor made personally liable; *Midland Overseas v. "CMBT Tana"*, AIR 1999 Bom 401.

231. Rights of Parties to a contract made by agent not disclosed -

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been the principal. If the principal discloses him self before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who the principal in the contract was, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Performance of contract with agent supposed to be principal -

Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to *B*, sells 1,000 rupees worth of rice to *B*. *A* is acting as agent for *C* in the transaction, but *B* has no knowledge or reasonable ground of suspicion that such is the case. *C* cannot compel *B* to take the rice without allowing him to set-off *A*'s debt.

233. Right of person dealing with agent personally liable -

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustrations

A enters into a contract with *B* to sell him 100 bales of cotton, and afterwards discovers that *B* was acting as agent for *C*. *A* may sue either *B* or *C*, or both, for the price of the cotton.

234. Consequence of Inducing agent or principal to act on belief that principal or agent will be held exclusively liable --

When a person who has made a contract with an agent induces the agent to act upon the belief that the Principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. Liability of pretended agent -

A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

236. Person falsely contracting as agent not entitled to performance -

A person, with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

237. Liability of principal inducing belief that agent's unauthorized acts were authorized -

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such act and obligations were within the scope of the agent's authority.

Illustrations

- a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.
- b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

238. Effect, on agreement, of misrepresentation or fraud by agent -

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed, by the principals; but misrepresentations made, or frauds, committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

- a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

- b) A, the captain of *B*'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between *B* and the pretended consignor.

Chapter XI – Of Partnership

239-266 of Partnership

[Rep. by the Indian Partnership Act, 1932 (9 OF 1932), SEC. 73 and Sch. II].

Sch. I .THE SCHEDULE Enactments repealed –

[Repealed by the Repealing and Amending Act, 1914 (10 of 1914) sec. 3 and Sch. II.