*-Dr. Ajay Nathani*

**Precedents on the Indian Contract Act**

**Section 2.-Consideration.-Executed and executory consideration.-Distinction between the two classes of contracts containing two different types of considerations.** An executed consideration consists of an act for a promise. It is the act which forms the consideration. . . . . No contract is formed unless and until the act is performed, e.g., the payment for a railway ticket, but the act stipulated for exhausts the consideration, so that any subsequent promise, without further consideration, is merely a *nudum pactum.* . . . . In an executed consideration the liability is outstanding on one side only; it is a present as opposed to a future consideration. In an executory consideration the liability is outstanding on both sides. It is in fact a promise for a promise; one promise is bought by the other . . . . . The contract is concluded as soon as the promises are exchanged. In mercantile contracts this is by far the most common variety. In other words, a contract becomes binding on the exchange of valid promises, one being the consideration for the other. It is clear, therefore, that there is nothing to prevent one of the parties from carrying out his promise at once, i.e., performing his part of the contract; whereas the other party who provides the consideration for the act of or detriment to the first may not carry out his part of the bargain simultaneously with the first party. *Union of India v. M/s. Chaman Lal Loona and Co.,* AIR 1957 SC 652: 1957 SCJ 719: 1957 SCR 1039

**Section 2(b).-Concluded contract.-Determination of.-Proposal sent by letter.-As soon as an order was placed and accepted, a contract came into existence.-Each separate order and its acceptance constituted a different contract.** *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram and others,* AIR 1954 SC 236: 1954 SCA 373: 1954 SCJ 315: 1954 SCR 817

**Sections 2(b) and 7.-Acceptance of offer.-Implied acceptance.-Agreement to sell property.-Filing of suit of specific performance does not convey acceptance of the offer where the offer itself has been withdrawn before institution of suit.** The plaint was not an acceptance of the offer, nor was it intended to be an acceptance. It is not usual to accept a business offer by a plaint; nor is it usual to communicate an acceptance by serving a copy of the plaint through the medium of the Court. We shall be straining the language of Sections 2(b), 3 and 7 of the Contract Act if we were to hold that the plaint was an acceptacne and that the service of a copy of the plaint along with the writ of summons was a communication of the acceptance. A plaint in a suit for specific performance should allege a concluded contract, see the Code of Civil Procedure 1st Schedule Appendix A, Form No. 48. The offer as well as the acceptance should precede the institution of the suit. However, the precise point does not arise in this case. O.S. No. 46 of 1957 was not a suit for specific performance of the contract. Before the present suit for specific performance of the contract was instituted, the offer had been withdrawn. *Visweswaradas Gokuldas v. B.K. Narayan Singh and another,* AIR 1969 SC 1157: 1969 (3) SCR 581: 1969(3) SCR 581: 1969(1) SCC 547

**Section 2(c).-Promisee.-The person to whom the promise is conveyed is the promisee.** The creditor's representative, whether directly in conversation with her or by an open declaration in her presence, made a promise to the plaintiff that the house and the ring would be given to her. That she did become the promisee under this contract is clearly proved not only by the oral evidence but from the recital in the first letter in which it was clearly stipulated that she would pay the costs of the conveyance. It was in the status of a promisee that the conveyance had to be executed in her name. This construction of the agreement is fully supported by the conduct of the promisors immediately after the contract had been made. *Messrs. Gorakhram Sadhuram v. Laxmibai wife of Inderlal Nandlal,* AIR 1953 SC 443

**Section 2(d).-Consideration.-Meaning of.** `Consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to promisee or by the transeror to the transferee. Similarly, when the word `consideration' is qualified by the word `adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and

necessities of the case. *Ku. Sonia Bhatia v. State of U.P. and others,* AIR 1981 SC 1274: 1981(2) SCC 585: 1981(3) SCR 239: 1981(1) Scale 58: 1981 All LJ 467

**Section 2(d).-Invalid consideration.-Permissibility.-Transfer of property to concubine.-Motive of past co-habitation is not consideration for transfer.-The transaction is not invalid.** Venkatacharyulu and the appellant were parties to an illicit intercourse. The two agreed to cohabit. Pursuant to the agreement each rendered services to the other. Her services were given in exchange for his promise under which she obtained similar services. In lieu of her services, he promised to give his services only and not his properties. Having once operated as the consideration for his earlier promise, her past services could not be treated under Section 2(d) of the Indian Contract Act as a subsisting consi- deration for his subsequent promise to transfer the properties to her. The past cohabitation was the motive and not the consideration for the transfers.*Dwarampudi Nagaratnamba v. Kunuku Ramayya and another,* AIR 1968 SC 253: 1967 (2) Andh LT 420: 1968 (1) Andh WR (SC) 110: 1968 (1) Mad LJ (SC) 110: 1968(1) SCR 43

**Section 2(d).-Scope of.-Enforcement of contract by third party.-Permissibility.** A person not a party to a contract cannot subject to certain well recognised exceptions, enforce the terms of the contract; the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.The purchaser's contract to pay off a mortgage debt could not be enforced by the mortgagee who was not a party to the contract. It must therefore be taken as well settled that except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement, no right may be enforced by a person who is not a party to the contract. *M.C. Chacko v. The State Bank of Travancore,* AIR 1970 SC 504: 1970 Ker LR 175: 1970 (1) SCJ 347: 1970 (1) SCR 658: 1969(2) SCC 343

**Section 2(h).-Contract.-Bilateral transaction between two or more parties.-Contract has to pass through several stages, i.e. proposal, negotiations, consideration and acceptance of proposal.-Agreement when reduced into writing and formally executed is called a 'contract' and enforceable in law.**

"Contract" is a bilateral transaction between two or more parties. Every contract has to pass through several stages beginning with the stage of negotiations during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposals. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affix their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of contract, as set out in Section 2(h) provides that "an agreement enforceable by law is a contract". *Tarsem Singh vs. Sukhminder Singh,* AIR 1998 SC 1400 : 1998(2) BLJR 819 : 1998(2) Mad LW 303 : 1998(2) Raj LW 183 : 1998(3) SCC 471

**Section 3, 4, 7 & 10.-Binding Contract.-Draft agreement.-Correspondence exchanged between parties shows that no enforceable agreement came into existence.-Even fax message also shows that both parties were negotiating.-Terms of letter of credit and performance guarantee not accepted by parties.-Inference that there was no binding contract between parties.-Clause relating to arbitration had no existence in law.**

The entire correspondence on the record shows that no concluded bargain had been reached between the parties as the terns of the standby letter of credit and performance guarantee were not accepted by the respective parties. In the absence of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between them and no concluded enforceable and binding agreement came into existence between them. Apart from the correspondence the fax messages exchanged between the parties, shows that the parties were only negotiating and had not arrived at any agreement. There is a vast difference between negotiating a

bargain and entering into a binding contract. After negotiation of bargain in the present case, the stage never reached when the negotiations swere completed giving rise to a binding contact. Thus the clause 53 of the Charter Party relating to Arbitration had no existence in the eye of law because no concluded and binding contract ever came into existence between the parties. *Rickmers Verwaltung Gimb H.V. Indian Oil Corporation Ltd.,* AIR 1999 SC 504 : 1999(1) Mad LJ 62 : 1998(76) DLT 587 : 1999(121) Pun LR 842 : 1999(1) SCC 1 : 1999(1) Rec Civ R 379 : 1998(4) Cur CC 101 : 1999(4) Civ LJ 326

**Sections 4, 2, and 3.-Place of contract.-Determination of.-Proposal and acceptance over telephone.-Application of analogy of contract by post.-The place where acceptance is received, a part of cause of action accrued and the suit for breach of damages is maintainable at such place.** When by agreement, course of conduct, or usage of trade, acceptance by post or telegram is authorised, the bargain is struck and the contract is complete when the acceptance is put into a course of transmission by the offeree by posting a letter or dispatching a telegram. In the case of a telephonic conversion, in a sense the parties are in the presence of each other; each party is able to hear the voice of the other. There is instantaneous communication of speech intimating offer and acceptance, rejection or counter-offer. Intervention of an electrical impulse which results in the instantaneous communication of messages from a distance does not alter the nature of the conversion so as to make it analogous to that of an offer and acceptance through post or by telegraph.If regard be had to the essential nature of conversation by telephone, it would be reasonable to hold that the parties being in a sense in the presence of each other, and negotiations are concluded by instantaneous communication of speech, communication of acceptance is a necessary part of the formation of contract, and the exception to the rule imposed on grounds of commercial expediency is inapplicable. *Bhagwandas Goverdhandas Kedia v. M/s. Girdharlal Parshottamdas and Co., and others,* AIR 1966 SC 543: 1966(1) SCWR 351: 1966(1) SCR 656

**Section 7.-Conditional acceptance.-Failure to communicate acceptance of offer.-No concluded contract came into existence.** What the Minister did was not to confirm the acceptance made by the Divisional Forest Officer, but to accept the offer made by the appellant in his communication dated October 26, 1970, that he would take the coup for the reserved price of Rs. 95,000/-. There was, therefore, no confirmation of the acceptance of the bid to take the coup in settlement for the amount of Rs. 92,001/-. If the offer that was accepted was the offer contained in the communication of the appellant dated October 26, 1970, we do not think that there was any communication of the acceptance of that offer to the appellant. The telegram sent to the Conservator of Forest, Hazaribagh, by the Government on November 28, 1970, cannot be considered as a communication of the acceptance of that offer to the appellant. The acceptance of the offer was not even put in the course of transmission to the appellant; and so even assuming that an acceptance need not come to the knowledge of the offerer, the appellant cannot contend that there was a concluded contract on the basis of his offer contained in his communication dated October 26, 1970, as the acceptance of that offer was not put in the course of transmission. Quite apart from that, the appellant himself revoked the offer made by him on October 26, 1970, by his letter dated November 3, 1970, in which he stated that the coup may be settled upon him at the highest bid made by him in the auction. We are, therefore, of the opinion that there was no concluded contract between the appellant and the Government. *Haridwar Singh v. Bagun Sumbrui and others,* AIR 1972 SC 1242: 1973(3) SCC 889: 1972(3) SCR 629

**Sections 7 and 8.-Acceptance of proposal.-Implied acceptance.-Proposal of insurance.-Receipt and retention of premium is not acceptance to under right the policy of insurance.** Though in certain human relationships silence to a proposal might convey acceptance but in the case of insurance proposal, silence does not denote consent and no binding contract arises until the person to whom an offer is made says or does something to signify his acceptance. Mere delay in giving an answer cannot be construed as an acceptance, as, *prima facie*, acceptance must be communicated to

the offeror. The general rule is that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. Whether the final acceptance is that of the assured or insurers, however, depends simply on the way in which negotiations for an insurance have progressed. The mere receipt and retention of premium until after the death of the applicant or the mere preparation of the policy document is not acceptance. Acceptance must be signified by some act or acts agreed on by the parties or from which the law raises a presumption of acceptance. *Life Insurance Corporation of India v. Raja Vasireddy Komalavalli Kamba and others,* AIR 1984 SC 1014: 1984(2) SCC 719: 1984(3) SCR 350: 1984(1) Scale 561: 1984 Rajdhani LR 357

**Sections 7, 8 and 10.-Acceptance of contract.-Tender bid.-Failure to deposit the amount required to be deposited on the spot of auction.-No concluded contract came into existence.** *State of Madhya Pradesh and another v. Firm Gobardhan Dass Kailash Nath,* AIR 1973 SC 1164: 1973 (1) SCC 668

**Section 10.-Arbitration Agreement.-Validity of.-Contract not executed in accordance with the local law.-The contract not executed on the form prescribed under the bye-laws.-The contract is void and not binding on the party.** *M/s. Khimji Poonja & Co. v. Shri Baldeo Das C. Parikh,* AIR 1950 SC 7: 52 Bom. LR 515: 1950 SCJ 311: 1950 SCR 64

**Section 10.-Award of Contract.-Directions by court.-Permissibility.-Breach of contract by the Government.-Award of contract to another person, the Court cannot cancel the contract granted to another person.** When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14, because the choice of the person to fulfil a particular contract must be left to the Government. Similarly, a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Article 19(1)(g). The main reason which weighed with the learned Judicial Commissioner in setting aside the lease in favour of the appellant was the submission made on behalf of the State that it was prepared without accepting the correctness of the contentions of respondent No. 1 to set aside the lease if the court so desired. This circumstance in our opinion, was hardly sufficient to warrant the setting aside of the lease in favour of the appellant. The person who was primarily affected by the setting aside of the lease was the appellant to whom the lease had been granted. In the absence of any concurrence of the appellant, the fact that the Government was prepared if the court so desired, to set aside the lease could hardly provide valid basis for the setting aside of the lease. *Purxotoma Ramanata Quenim v. Makan Kalyan Tandel,* AIR 1974 SC 651: 1974(2) SCC 169: 1974(3) SCR 64

**Section 10.-Black listing of contractor.-Procedure.-Compliance of principles of natural justice.-Necessity of.-The order passed without granting an opportunity of hearing is liable to be quashed.** Black-listing has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of black-listing indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair-play require that the person concerned should be given an opportunity ot represent his case before he is put on the black-list. *Joseph Vilangandan v. The Executive Engineer (P.W.D.) Ernakulam and others,* AIR 1978 SC 930: 1978(3) SCC 36: 1978(3) SCR 514

**Section 10.-Compliance of terms of contract.-Procedure.-Enhancement of rates in accordance with rise in market rate.-Denial to revise rates on the basis of extraneous considerations is not permissible.** Turning to the plain language of the special condition 51 we find that in case of annual contracts, after said months from their commencement there has to be a provision for revision, which means increase or decrease, according to the rise or fall in the market rates. The appellant could not

be deprived of his right to claim the enhanced rates merely because the respondent chose to consult the Controller of Military Accounts who does not figure in special condition No. 51; nor can be appellant be made to suffer by reason of the respondent's omission to enlighten the Court by precise evidence clearly showing as to which Officer other than B.R.I.A.S.C. is the sanctioning authority and for what reasons that officer declined to accept the recommendation of the reviewing Tribunal. *Sheikh Abdual Sattar v. Union of India,* AIR 1970 SC 479: 1970 SCD 131: 1970(3) SCC 845

**Section 10.-Concluded contract.-Acceptance of tender.-No order placed for supply of any definite quantity of goods after acceptance of tender.-No concluded contract came into existence.** *Union of India v. Maddala Thathaiah,* AIR 1966 SC 1724: 1964(3) SCR 779

**Section 10.-Concluded contract.-Determination of.-Contract claim to have come into existence on the basis of bought note and sold note.-Contradiction between the notes.-Contradiction occurring on account of the *bona fide* omission which was satisfactorily explained.-Judgement of court below holding sold note to be genuine document, affirmed.** *Fort Gloster Industries Ltd. v. Sethia Mercantile (P) Ltd.,* AIR 1971 SC 2289: 1972(4) SCC 252

**Section 10.-Concluded contract.-Determination of terms.-Sale transaction through buyer and seller notes.-Discrepancies between the notes.-Parties not *ad idem*.-No concluded contract can be said to have come into existence.** *Fort Gloster Industries Ltd. v. Sethia Mercantile Private Ltd.,* AIR 1968 SC 1308: 1968 (2) SCJ 874: 1968(3) SCR 450

**Section 10.-Illegal Contract.-Effect of.-Arbitration Clause contained in an illegal contract is also invalid alongwith the contract itself.** *Jaikishan Dass Mull v. Luchhiminarain Kanoria & Co.,* AIR 1974 SC 1579: 1974(2) SCC 521

**Section 10.-Invitation to tender offer.-Grant of contract.-Discrimination by Government.-Award of contract to a person not eligible in terms of conditions inviting the offer.-The contract is illegal and unconstitutional.** Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of larges including award of jobs contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discreminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which is itself was not irrational, unreasonable or discriminatory. Once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to a ward the contract to the 4th respondent who did not satisfy the condition of eligibility prescribed by the standard or norm. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action. *Ramana Dayaram Shetty, The International Airport Authority of India and others,* AIR 1979 SC 1628: 1979(3) SCC 489: 1979(3) SCR 1014

**Section 10.-Standard form of contract.-Interpretation of.-Interpretation favourable to the party who was made to sign the contract prepared by the other.-No ambiguity existing in the words used in standard form of contract.-Rule of contra proferentem has no application.** *The Central*

*Bank of India, Ltd., Amritsar v. The Hartford Fire Insurance Co. Ltd.,* AIR 1965 SC 1288: 1965(1) SCJ 498

**Section 10.-Tender bid.-Eligibility .-Work experience.-Failure to submit the documents proving the requisite work experience of the tenderer, alongwith the tender paper .-The requisite papers cannot be entertained subsequently.-Denial of bid.-Award of bid to other persons who was qualified.-The procedure adopted for processing the bids is not illegal.** In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. *M/s. G.J. Fernandez v. State of Karnataka and others,* AIR 1990 SC 958: 1990(2) SCC 488: 1990(1) SCR 229: 1990(1) Scale 117: 1990(1) JT 134

**Section 10.-Written contract.-Intention of parties.-Determination of .-The court has to primarily gather the intention of the parties from the terms and conditions agreed upon the parties.** *State of Gujarat (Commissioner of Sales Tax, Ahmedabad) v. M/s. Variety Body Builders,* AIR 1976 SC 2108: 1976(3) SCC 500: 1976 Supp. SCR 131

**Section 10.-Bailee's lien.-Non-clearance of goods.-Customs authorities cannot compel carrier not to charge demurrage charges from the time of detention of goods.-Contract between importer and carrier of goods in whose favour Bill of Lading has been consigned is governed by contract between parties.-Power conferred on carrier/shipping Corporation to retain goods until dues are paid.-Importer not entitled to remove goods from premises unless customs clearance is given.-Contract between parties cannot be altered because of orders issued by customs authorities.-Customs authorities bound to pay demurrage where detention of goods is held illegal.** *Shipping Corporation of India Ltd. etc. vs. C.L. Jain Woolen Mills and others,* AIR 2001 SC 1806 : 2001(4) SCC 675 : 2001(4) JT 507

**Sections 10 and 7.-Formal agreement.-Necessity of.-Determination of existence of concluded contract between the parties.-Effect of non- execution of formal written agreement.-Considerations for.** A mere reference to a future formal contract will not prevent a binding a bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The evidence adduced on behalf of respondent No. 1 does not show that the drawing up of a written agreement was a pre-requisite to the coming into effect of the oral agreement. It is therefore not possible to accept the contention of the appellant that the oral agreement as ineffective in law because there is no execution of any formal written document. As regards the other point, it is true that there is no specific agreement with regard to the mode of payment but, this does not necessarily make the agreement ineffective. The mere omission to settle the mode of payment does not affect the completeness of the contract because the vital terms of the contract like the price and area of the

land and the time for completion of the sale were all fixed. *Kollipara Sriramulu v. T. Aswatha Narayana,* AIR 1968 SC 1028: 1968 (3) SCR 387

**Section 13, 14.-Free consent.-Parties to agreement under mistake of fact.-Mistake has to be mutual.-Parties to agreement to sell not ad-idem with respect to unit of measurement of land.-Seller intended to sell land in terms of 'Kanals', whereas purchaser intending to purchase in 'bighas'.-Mutual mistake with regard to area of land whereby price of land was to be calculated.-Agreement held void.**

In the northern part of the country, the land is measured in some States either in terms of "bighas" or in terms of "kanals". Both convey different impressions regarding area of the land. The finding of the Lower Appellate Court is to the effect that the parties were not ad-idem with respect to the unit of measurement. While the defendant intended to sell in terms of "kanals" , the plaintiff intended to purchased it in terms of "bighas". Therefore, the dispute was not with regard to the unit of measurement only. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement for sale, or to put it differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties were suffering, did not relate to a matter essential to the agreement cannot be accepted. *Tarsem Singh vs. Sukhminder Singh,* AIR 1998 SC 1400 : 1998(2) BLJR 819 : 1998(2) Mad LW 303 : 1998(2) Raj LW 183 : 1998(3) SCC 471

**Section 15.-Coercion.-Proof of.-Allegation of nomination of successor under coercion.-Presence of Police at the time of succession, disproves the allegation of coercion.** *Amar Prakash and others v. Parkasha Nand and others,* AIR 1979 SC 845: 1979(3) SCC 221: 1979(2) SCR 1012: 81 Pun LR 486

**Sections 15 and 16.-Coercion and undue influence.-Pleading of.-Full particulars of fraud, undue influence and coercion not stated.-The Court is not ought to take notice of the allegations stated without such particulars.** *Bishundeo Narain and another v. Seogeni Rai and others,* AIR 1951 SC 280

**Section 16.-Undue influence.-Scope of application.** The doctrine of undue influence under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English common law. The first sub-section of Section 16 lays down the principle in general terms. By sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. *Ladli Parshad Jaiswal v. The Karnal Distillery Co., Ltd. Karnal and others,* AIR 1963 SC 1279: 1963(2) Andh LT 228: 1964(1) SCR 270**Section 16.-Undue influence.-Proof of.-Considerations for.-Determination of undue influence.-Close relationship between the parties does not raise presumption of undue influence.** Under Section 16(1) of the Indian Contract Act a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. This shows that the court trying a case of undue influence must consider two things to

start with, namely, (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor and (2) has the donee used that position to obtain an unfair advantage over the donor? The three stages for consideration of a case of undue influence. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substituted the second stage has been reached.- namely, the issue whether the contract has been included by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. It must also be noted that merely because the parties were nearly related to each other no presumption of undue influence can arise. *Subhas Chandra Das Mushib v. Ganga Prosad Das Mushib and others,* AIR 1967 SC 878: 1967(1) SCR 331

**Section 16(3).-Undue influence.-Burden of proof.-Allegation of execution of gift deed under undue influence of husband.-The parties standing in a position of active confidence.-The burden of rebutting the presumption is on the person denying undue influence.** Trial court has found that the husband of the appellant was in a position of active confidence towards her at the time of the gift deed and that he was in a position to dominate her will and the transaction of gift was on the face of it unconscionable. Section 16(3) of the Indian Contract Act says that where a person who is in a position to dominate the will of another enters win to a transaction with him which appears, on the face of it or on the evidence adduced, to be unconscion- able, the burden of proving that such transaction was not induced by undue influence, shall lie upon the person in a position to dominate the will of another. *Ningawwa, v. Byrappa Shiddappa Hireknrabar and others,* AIR 1968 SC 956: 1968(1) SCWR 872

**Section 17.-Application of.-Suit on the basis of non-gratutious act.-The provision is applicable on Government as well as a Corporation.** This Court pointed out that the real basis of the liability under Section 70 is the fact that the person for whom the work has been done, has accepted the work and has received the benefit thereunder, and that what Section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Government. *Pannalal v. Dy. Commissioner, Bhandara,* AIR 1973 SC 1174: 1973 Mah LJ 528: 1973 MPLJ 632

**Section 17.-Compensation for gracious act.-Scope of.-Amount which may be claimed as compensation under the provision is not something as damages for breach of contract.-The provision only prevent unjust enrichment and is applicable with the Government sale.** A request is thus not an element of Section 70 at all though the existence of an invalid request may not make Section 70 inapplicable. An invalid request is in law no request at all and so the conduct of the parties has to be judged on the basis that there was no subsisting contract between them at the material time. What Section 70 provides is that compensation has to be paid in respect of the goods delivered or the work done. The alternative to the compensation thus provides is the restoration of the thing so delivered or done. In the present case there has been no dispute about the amount of compensation but normally a claim for compensation made under Section 70 may not mean the same thing as a claim for damages for breach of contract if a contract was subsisting between the parties. If, what is done in pursuance of the contracts is for the benefit of the Government and for their use and enjoyment and is otherwise legitimate and proper Section 70 would step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contracts had not been made. What Section 70 prevents is unjust enrichment and it applies as much to individuals as to corporations and Government. Therefore, we do not think it would be possible to accept the very broad argument that the State Government is out side the purview of Section 70. *State of West Bengal v. M/s. B.K. Mondal and Sons,* AIR 1962 SC 779: 1962 Supp. (1) SCR 876

**Section 17.-Fraud.-Concealment of material fact.-Decree obtained by fraud.-Duty of litigant to come to the Court with true case and to prove it with true evidence.-Withholding of vital**

**documents in order to gain advantage over the other parties.-The decree obtained by fraud is a nullity.** "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court.-has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings. The short questions before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation. A litigant, who approached the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of paying fraud on the court as well as on the opposite party. It was only at the hearing of the application for final decree that the appellants came to know about the release deed and, as such, they challenged the application on the ground that non-disclosure on the part of Jagannath that he was left with no right in the property in dispute, vitiated the proceedings and, as such, the preliminary decree obtained by Jagannath by playing fraud on the court was a nullity. *S.P. Chengalvaraya Naidu (dead) by LRs. v. Jagannath (dead) by LRs. and others,* AIR 1994 SC 853: 1994(1) SCC 1: 1993 (4) Scale 277: 1993(6) JT 331: 1994(1) Guj. LH 81: 1994(1) Orissa LR 201

**Section 17.-Fraud.-Misrepresentation.-Effect on execution of document.** The legal position will be different if, there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With referent to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. *Ningawwa, v. Byrappa Shiddappa Hireknrabar and others,* AIR 1968 SC 956: 1968(1) SCWR 872: 1968(2) SCR 797

**Section 17.-Fraud.-Pleading of.-Full particulars of fraud, undue influence and coercion not stated.-The Court is not ought to take notice of the allegations stated without such particulars.** *Bishundeo Narain and another v. Seogeni Rai and others,* AIR 1951 SC 280

**Section 17.-Fraud.-Proof of.-The person alleging fraud found to be in a position to discover the fraud by due diligence.-Acquiescence.-Effect of.** Where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It was neither a case of *suggestio falsi,* or *suppressio veri.* The appellant never wrote to the University authorities that he had attended the prescribed number of lectures. There was ample time and opportunity for the University authorities to have found out the defect. In these circumstances, therefore, if the University authorities acquiesced in the infirmities which the admission form contained and allowed the appellant to appear in Part I Examination in April 1972, then by force of the University Statute the University had no power to withdraw the candidature of the appellant. *Shri Krishan v. The Kurukshetra University, Kurukshetra,* AIR 1976 SC 376: 1976(1) SCC 311: 1976(2) SCR 722

**Section 17.-Fraud.-Proof of.-Strange circumstances are not sufficient.-Strange circumstances cannot give rise to inference of fraud.-Fraud must be proved beyond doubt.** *Union of India v. M/s.*

*Chaturbhai M. Patel Co.,* AIR 1976 SC 712: 1976(1) SCC 747: 1976(2) SCR 902

**Section 17.-Unjust enrichment.-Refund of tax paid under mistake.-The refund of tax allowed to the condition that the amount shall be refunded to end consumers upon whom the liability of tax was passed on.** *Ayurveda Pharmacy and another v. State of Tamil Nadu,* AIR 1989 SC 1230: 1989(2) SCC 285: 1989(2) SCR 37: 1989(1) Scale 624: 1989(1) JT 539

**Sections 17 and 23.-Fraudulent terms.-Avoidance of creditor.-Rules of voluntary Provident Fund Trust providing that in case of insolvency of subscriber, the property standing to his credit will vest in the Trust and not the Official Receiver.-Such clause if allowed would be fraud perpetrated on insolvency law and therefore is not valid or binding.***Muktilal Agarwala v. Trustees of the Provident Fund of the Tin Plate Co. of India Ltd. and others,* AIR 1956 SC 336: 1956 All LJ 383: 1956(1) MLJ: 1956 SCR 100

**Sections 17 and 126.-Suppression of material fact.-contract of insurance.-Non-disclosure of ailment of diabetes, by the assured.-Testimony of Doctors produced, unable to prove that the patient they examined was the same person as assured.-Burden of proof not discharged.-Claim for insurance rightly allowed.***Life Insurance Corporation of India v. Smt. G.M. Channabasemma,* AIR 1991 SC 392: 1991 SCC 357: 1990(2) Scale 1191: 1991(5) JT 73

**Section 17(2).-Fraud.-Concealment of material fact.-Auction sale of property.-Court not informed about the highest price offered for the property.-Order granting permission rightly set aside.-Trusts Act, 1882.-Sections 15 and 11.-Care required for dealing in property.** *Gowrishankar and another v. Joshi Amba Shankar Family Trust and others,* AIR 1996 SC 2202: 1996(3) SCC 310: 1996(2) Scale 454: 1996(2) JT 560: 1996 Rajdhani LR 179

**Section 17(5).-Fraud by agent.-Effect of.-It unravels all contracts and such act is void.-Transfer of property by power of attorney holder to his own wife, fraudulently.-The transfer is void.-Original owner is entitled to declaration of title of the property in his favour.** *Smt. Bhatori v. Smt. Ram Piari,* AIR 1996 SC 2754: 1996(11) SCC 655: 1996(5) Scale 752: 1996(7) JT 210: 1997 Civ. CR (SC) 116

**Section 20.-Mistake of fact.-Parties to agreement under mistake of fact.-Mistake has to be mutual.-Parties to agreement to sell not ad-idem with respect to unit of measurement of land.-Seller intended to sell land in terms of 'Kanals', whereas purchaser intending to purchase in 'bighas'.-Mutual mistake with regard to area of land whereby price of land was to be calculated.-Agreement held void.**

In the northern part of the country, the land is measured in some States either in terms of “bighas” or in terms of “kanals”. Both convey different impressions regarding area of the land. The finding of the Lower Appellate Court is to the effect that the parties were not ad-idem with respect to the unit of measurement. While the defendant intended to sell in terms of “kanals” , the plaintiff intended to purchased it in terms of “bighas”. Therefore, the dispute was not with regard to the unit of measurement only. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement for sale, or to put it differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the “mistake” with which the parties were suffering, did not relate to a matter essential to the agreement cannot be accepted. *Tarsem Singh vs. Sukhminder Singh,* AIR 1998 SC 1400 : 1998(2) BLJR 819 : 1998(2) Mad LW 303 : 1998(2) Raj LW 183 : 1998(3) SCC 471

**Section 20 & 74.-Void agreement.-Parties to agreement under mistake of fact.-Mistake has to be mutual.-Parties to agreement to sell not ad-idem with respect to unit of measurement of land.-Seller intended to sell land in terms of 'Kanals', whereas purchaser intending to purchase**

**in 'bighas'.-Mutual mistake with regard to area of land whereby price of land was to be calculated.-Agreement held void.**

In the northern part of the country, the land is measured in some States either in terms of "bighas" or in terms of "kanals". Both convey different impressions regarding area of the land. The finding of the Lower Appellate Court is to the effect that the parties were not ad-idem with respect to the unit of measurement. While the defendant intended to sell in terms of "kanals" , the plaintiff intended to purchased it in terms of "bighas". Therefore, the dispute was not with regard to the unit of measurement only. Since these units relate to the area of the land, it was really a dispute with regard to the area of the land which was the subject-matter of agreement for sale, or to put it differently, how much area of the land was agreed to be sold, was in dispute between the parties and it was with regard to the area of the land between the parties and it was with regard to the area of the land that the parties were suffering from a mutual mistake. The area of the land was as much essential to the agreement as the price which, incidentally, was to be calculated on the basis of the area. The contention of the learned counsel that the "mistake" with which the parties were suffering, did not relate to a matter essential to the agreement cannot be accepted. *Tarsem Singh vs. Sukhminder Singh,* AIR 1998 SC 1400 : 1998(2) BLJR 819 : 1998(2) Mad LW 303 : 1998(2) Raj LW 183 : 1998(3) SCC 471

**Section 21.-Mistake of law.-Effect of.-Contract entered into by the parties under a mistake of law on the part of both the parties.-The contract is not voidable.** *Dhanyalakshmi Rice Mills etc. v. The Commissioner of Civil Supplies and another,* AIR 1976 SC 2243: 1976(4) SCC 723: 1976(3) SCR 387

**Section 21.-Mistake of law.-Changein legal position.-Subsequent pronouncement of law by Privy Council.-The contract is voidable and not void.** The plaintiff no doubt believed in that representation and entered into the contract on that understanding. As a result of the decision of the Privy Council, however, the Bihar Govern- ment became incapable of making out the title which it asserted it had at the time of the contract. But its title was not wholly gone; it was restricted only by reason of the lease which had still several years to run. In these circumstances, it might have been open to the plaintiff to repudiate the contract if they so liked, but the defendant No. 1 could not certainly pleaded that the contract was void on the ground of mistake and refuse to perform that part of the agreement which it was possible for it to perform.The mistake, if any, was with regard to the effect of the law of registration upon the validity of the assignment deed. At the most, such mistake would be a mistake of law and under Section 21 of the Indian Contract Act the contract would not be void on that ground. *Kalyanpur Lime Works Ltd. v. State of Bihar and another,* AIR 1954 SC 165: 1954 SCJ 99: 1954 SCR 958: 1954(1) Mad LJ

**Section 23.-Agreement to stifle prosecution.-Validity of.-Prohibition sought to be imposed on criminal prosecution.-Such agreement is barred by the provision.** With regard to non-compoundable offences, however, the position is clear that no court of law can allow a private party to take the administration of law in its own hands and settle the question as to whether a particular offence has been committed or not, for itself. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stiffing criminal prosecutions are sustained, the basic purpose of criminal law would be defeated; such agreements may enable the guilty persons to escape punish- ment and in some others they may conceivably impose an unconscionable burden on an innocent party under the coercive process of a threat of the criminal prosecution. In substance, where an agreement of this kind is made, it really means that the complainant chooses to decide the fate of the complaint which he has filed in a criminal court and that is clearly opposed to public policy. *Ouseph Poulo and another v. The Catholic Union Bank Ltd. and others,* AIR 1965 SC 166: 1964 Ker LT 398: 1964(7) SCR 745:

**Section 23.-Agreement to stifle prosecution.-Proof of.-It must be proved that the consideration for the agreement was to stifle prosecution and it was not a mere motive thereof.**The main

point to remember is that the party challenging the validity of the impugned transaction must show that it was based upon an agreement to stifle prosecution. If it is shown that there was an agreement between the parties that a certain consideration should proceed from the accused person to the complainant in return for the promise of the complainant to discontinue the criminal proceedings that clearly is a transaction which is opposed to public policy. Where the validity of an agreement is impeached on the ground that it is opposed to public policy under Section 23 of the Act, the party setting up the plea must be called upon to prove that plea by clear and satisfactory evidence. Reliance on a mere sequence of events may tend to obliterate the real difference between the motive for the agreement and the consideration for it. *Ouseph Poulo and another v. The Catholic Union Bank Ltd. and others,* AIR 1965 SC 166: 1964 Ker LT 398: 1964(7) SCR 745

**Section 23.-Contract opposed to public policy.-Refund of sales-tax realised in accordance with law.-Such tax realised on sales made by the company.-An agreement between the State and the Company for refund of such tax would be invalid *ultra vires* and opposed to public policy.** *Amrit Banaspati Co. Ltd. and another v. State of Punjab and another,* AIR 1992 SC 1075: 1992(2) SCC 411: 1992(1) Scale 540: 1992(2) JT 217

**Section 23.-Contracting out litigation.-Permissibility.-Contract between the parties whereby private persons undertaking to withdraw the prosecution of criminal cases initiated against the other parties.-Such consideration for contract is opposed to public policy and therefore the contract is invalid.** Agreements made by parties for stifling prosecution are not enforced by courts on the ground that the consideration for such agreements is opposed to public policy. If a person sets the machinery of the Criminal Law into, action on the allegation that the opponent has committed a non-compoundable offence and by the use of this coercive criminal progress he compels the opponent to enter into an agreement, that agreement would be treated as invalid for the reason that its consideration is opposed to public policy. Under the Indian Law, offences are divided into three categories, some are compoundable between the parties, some are compoundable. In the present case, it is common ground that amongst the offences charged by respondent No. 1 against the appellant and others were included non-compoundable offences, and so, we are dealing with a case where, according to the appellant, a criminal process was issued in respect of non-compoundable offences and the withdrawal of the criminal proceedings was a consideration for the agreement of reference to which the appellant has put his signature. Whether or not the appellant proves his case, we will consider later, but the true legal position on this point is not in doubt. If it is shown that the consideration for the arbitration agreement was the withdrawal and the non-prosecution of the criminal complaint, then the provisions of Section 23 of the Contract Act would be attracted. The principle underlying this provision is obvious. Once the machinery of the Criminal Law is set into motion on the allegation that a non-compoundable offence has been committed, it is for the criminal courts and criminal courts alone to deal with that allegation and to decide whether the offence alleged has in fact been committed or not. The decision of this question cannot either directly or indirectly be taken out of the hands of criminal courts and dealt with by private individuals. When as a consideration for not proceeding with a criminal complaint, an agreement is made, in substance it really means that the complainant has taken upon himself to deal with his complaint and on the bargaining counter he has used his non-prosecution of the complaint as a consideration for the agreement which his opponent has been induced or coerced to enter into. It must be held that the arbitration agreement executed by the parties is invalid under Section 23 of the Indian Contract Act, because its consideration was opposed to public policy. *V. Narasimharaju v. V. Gurumurthy Raju and others,* AIR 1963 SC 107: 1962 All LJ 1075: 1963(1) Andh LT 181: 1962 BLJR 977: 1963(3) SCR 687

**Section 23.-Frustration of contract.-Violation of ceiling law.-Purchaser likely to be in possession of land in excess of ceiling limit.-Specific performance of agreement to sell cannot be refused.** *Jambu Rao Satappa Kocheri v. Neminath Appayya Hanamannayar,* AIR 1968 SC 1358: 1969(1) SCJ 279: 1968(3) SCR 706

**Section 23.-Illegal contract.-Place of contract.-Effect of.-The object of contract prohibited in the State where one of the parties were situated.-Contract is illegal.** The mere fact that the contracts between the plaintiff and the defendants were entered into at Kurnool in the State of Andhra Pradesh would also not make any difference in principle if the objects of contracts which were to be carried out at Bombay were of such a kind as to be hit by Section 23 of the Act. The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "*Qui facit per alium facit per se*" (What one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only. *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons,* AIR 1975 SC 1223: 1975(2) SCC 208: 1975(3) SCR 1

**Section 23.-Immorality.-Scope of.-Agreement of bribery is clearly covered by the provision.** *Gulabchand v. Kudilal and others,* AIR 1966 SC 1734: 1966 All WR (HC) 765(2): 1966 Jab LJ 1121: 1966(3) SCR 623

**Section 23.-Oppose to public policy.-Meaning of.-The expression is incapable of being given any precise definition.-The Court must act in consonance with public conscience and the principles of Fundamental Rights and Directive Principles.** The Contract Act does not define the expression `public policy' or `opposed to public policy'. From the very nature of things, the expressions `public policy', `opposed to public policy', or `contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circum- stances and have at times not even flinched from inventing a new head of public policy. The principles governing publlic policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamable to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution. *Central Inland Water Transport Corporation Ltd. and another v. Brojo Nath Ganguly and another,* AIR 1986 SC 1571: 1986(3) SCC 156: 1986(2) SCR 278: 1986(1) Scale 799

**Section 23.-Public policy.-Doctrine of.** The doctrine of public policy may be summarized thus: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them

to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the inter-est of stability of society not to make any attempt to discover new heads in these days. *Gherulal Parakh v. Mahadeodas Maiya and others,* AIR 1959 SC 781: (1959) 2 Andh WR (SC) 81: (1959) 2 Mad LJ (SC) 81: 1959 Supp (2) SCR 406

**Section 23.-Undue influence.-Burden of proof.-Execution of sale deed by an old, illiterate and tribal woman who was also blind, in favour of a relative without any evidence of consideration.-The relative in a position to influence the executant upon whom she was dependent.-The burden of proving absence of undue influence passed on to the purchaser on account of such circumstance.** From the certified copy thereof it was evident that no consideration passed at the time of the sale. Nobody from the registration office was examined to explain the sale. No evidence was led by the respondent to discharge the onus that the sale deed was executed under no undue influence, even though the vendor was old, blind, illiterate and tribal woman totally at the mercy of the respondent, with whom she was living till her death. The parties were so situated that Bhana-respondent was in a position to dominate the will of Putlibai and was in a position to obtain any unfair advantage over her. It is also in evidence that Putlibai was dependent on the respondent. *Mst. Sethani v. Bhana,* AIR 1993 SC 956: 1992(2) JT 427: 1993 Supp (4) SCC 639: 1992(2) Chand.LR 569

**Section 23.-Void agreement.-Effect of.-A clause of the agreement found to be opposed to public policy.-If the clause found to be void, the agreement as a whole is void.-The court cannot substitute new agreement in place of the void agreement.** Under this part of the agreement, the Agent is entitled to recover from his client, in ca se the latter succeeds in litigation, whatever sum might be allowed to him on proper taxation. This is the agreement between the parties. The latter part undoubtedly embodies a contingent promise, the performance of which is made to depend upon the happening of an uncertain event; but as the event has happened in the present case, the obligation has ripened into an absolute one. The Taxing Officer seems to be under an impression that the latter part of the agreement is not enforceable because it is not a `bona fide' arrangement and is calculated to aid gambling in litigation. If the agreement was to relieve the client of his costs in the event of the litigation not being successful, the law of Maintenance might have some bearing on such agreement. The question of Champerty again could arise if the Solicitor is to be paid out of the proceeds of the litigation. Obviously, nothing like that has happened here. But assuming that the agreement is void and unenforceable for some reason or other, even then, the whole of it has got to be disregarded and the party and party costs are to be taxed, as if no such agreement existed. The Court is not competent to substitute a new contract for the parties and the first part of the agreement cannot be taken to be the whole contract ignoring the second part altogether. *The Firm of N. Peddanna Ogeti Balayya and others v. Katta V. Srinivasayya Setti Sons,* AIR 1954 SC 26: 1953 SCJ 608

**Section 23.-Void contract.-Forbidden contract.-Agreement for entering into forward contracts, prohibited under the law.-Contract is illegal.** 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 in itself prohibited within the meaning of Section 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, the Courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by Section 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a "void contract". A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or "*mala in se*". *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty &*

*Sons,* AIR 1975 SC 1223: 1975(2) SCC 208: 1975(3) SCR 1

**Section 23.-Void contract.-Prohibition on transfer of land.-Land allotted to weaker sections of society in accordance with the scheme under Article 39(b) of the Constitution.-Transfer is void and transferee not entitled to claim any title arising out of transfer of such land.** *Papaiah v. State of Karnataka and others,* AIR 1997 SC 2676: 1996(10) SCC 533: 1996(9) JT 292

**Section 23.-Wagering contract.-Public policy.-Partnership agreement between the parties to enter into business of wager.-The contract of wager though legally not enforceable, there is no law prohibiting the same.-In the absence of any such prohibition and the fact that it is being tolerated by the society for centuries.-Any prohibition by the judiciary on the grounds of public policy is not permissible.** The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. Even after the contracts of wager were declared to be void in England, collateal contracts were enforced till the passing of the Gaming Act of 1989, and in India, except in the State of Bombay, they have been enforced even after the passing of the Act 21 of 1848, which was substituted by Section 30 of the Contract Act. The moral prohibitions in Hindu Law texts against gambling were not only not legally enforced but were allowed to fall into desuetude. In practice, though gambling is controlled in specific matters, it has not been declared illegal and there is no law declaring wagering illegal. Indeed, some of the gambling practices are a perennial source of income to the State. In the circumstances it is not possible to hold that there is any definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. Even if it is permissible for Courts to evolve a new head of public policy under extraordinary circumstances giving rise to incontestable harm to the society, we cannot say that wager is one of such instances of exceptional gravity, for it has been recognized for centuries and has been tolerated by the public and the State alike. If it has any such tendency, it is for the legislature to make a law prohibiting such contracts and declaring them illegal and not for this Court to resort to judicial legislation. *Gherulal Parakh v. Mahadeodas Maiya and others,* AIR 1959 SC 781: (1959) 2 Andh WR (SC) 81: (1959) 2 Mad LJ (SC) 81: 1959 Supp (2) SCR 406

**Sections 23 and 24.-Enforcement of illegal agreement.-Exceptions.** The principle that the Cours will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud is expressed in the maxim in *pari delicto potiorest conditio defendentis.* There are exceptional cases in which a man will be relieved of the consequences of an illegal contract into which he has entered.-cases to which the maxim does not apply. They fall into three classes: (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recovery money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in *pari delicto* with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim. Where the parties are not in pari delicto, the less guilty party may be able to recover money paid, or property transferred, under the contract. This possibility may arise in three situations.First, the contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one. Secondly, the plaintiff must have been induced to enter into the contract by fraud or strong pressure. Thirdly, there is some authority for the view that a person who is under a fiduciary duty to the plaintiff will not be allowed to retain property, or to refuse to account for moneys received, or the ground that the property or the moneys have come into his hands as the proceeds of an illegal transaction. *Sita Ram v. Radha Bai and others,* AIR 1968 SC 534: 1968 (2) SCJ 231: 1968(1) SCR 805

**Sections 23 and 24.-Stifling of prosecution.-Contract for compensation for damage caused by negligence of the Management of the company involved in manufacturing of hazardous and dangerous substances.-Quashing of criminal prosecution on the request of the Union of India.-The arrangement in the nature of purported withdrawal of prosecution.-The agreement is not hit by doctrine of stifling of prosecution.** We think that the main settlement does not suffer from

this vice. The pain of nullity does not attach to it flowing from any alleged unlawfulness of consideration. We shall set out our reasons presently. The essence of the doctrine of stifling of prosecution is that no private person should be allowed to take the admini-, stration of criminal justice out of the hands of the Judges and place it in his own hands. In this sense, a private party is not taking administration of law in its own hands in this case. It is the Union of India, as the *Dominus Litis*, that consented to the quashing of the proceedings. We have said earlier that what was purported to be done was not a compounding of the offence. Though, upon review, we have set aside that part of the order, the consequences of the alleged unlawfulness of consideration must be decided as at the time of the transaction. The arrangement which purported to terminate the criminal cases was one of a purported withdrawal not forbidden by any law but one which was clearly enabled. Whether valid grounds to permit such withdrawal existed or not is another matter. *Union Carbide Corporation, etc. v. Union of India etc.,* AIR 1992 SC 248: 1991(4) SCC 584: 1991 Supp. (1) SCR 251: 1991(2) Scale 675: 1991(6) JT 8

**Section 23.-Void contract.-Agreement that employee would not claim higher salary on being promoted by stop-gap arrangement.-Agreement is opposed to public policy and not valid.**

*Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma and others*, AIR 1998 SC 2909 : 1998(3) Andh LT 30 : 1998(3) Raj LW 326 : 1998(5) SCC 87 : 1998(4) All Mah LR 362 : 1998(3) Scale 388 : 1998(2) SLR 735

**Section 23.-Works Contract.-Concept of variation clause.-Variation of quantum of work common feature of works contract.-Plus minus variation upto 25 per cent by authority.-To be computed as a whole on average variation pooled together.**

The concept of variation of the quantum of work is no doubt a common feature of works contracts. This is because in contracts relating to major works, the estimates of work at the time the tenders are invited can be approximate. But, it was also realised that the power of the employer to very the terms relating to the quantum of work cannot be unlimited. Even under the general law of contracts, once the contract is entered into, any clause giving absolute power to one party to override or modify the terms of the contract at his sweet will or to cancel the contract.-even if the opposite party is not in breach.-will amount to interfering with the integrity of the contract. There is thus good reason as to why, in modern works contract, a limitation upto 20 per cent (now 25 per cent) has been put on this power of alternation, both plus and minus. The additions and decreases in work are, therefore, both independent for the purpose of finding out the 25 per cent variation and have to be pooled together.

*National Fertilisers vs. Puran Chand Nangia,* AIR 2001 SC 53 : 2000(8) SCC 343 : 2000(S1) JT 591 : 2000(3) Arbi LR 461

**Sections 23 and 28.-Jurisdiction of court.-Contract limiting jurisdiction.-More than one Court having the jurisdiction.-Contract limiting the jurisdiction to one of the courts is not opposed to public policy and is valid.** Section 28 of the Contract Act, 1872 provides that 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 tribunal, or which limits the time within which he may thus enforce his rights, is void to that extent. This is subject to exceptions, namely, (1) contract to refer to arbitration and to abide by its award, (2) as a matter of commercial law and practice to submit disputes on or in respect of the contract to agreed proper jurisdiction and not other jurisdictions though proper. Under Section 23 of the Contract Act the consideration or object of an agreement is lawful, unless it is opposed to public policy. Every agreement of which the object or consideration is unlawful is void. Hence there can be no doubt that an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy. Ex dolo malo non oritur actio. If therfore it is found in this case that Clause 11 has absolutely ousted the jurisdiction of the Court it would be against public policy. However, such will be the result only if it can be shown that the jurisdiction to whcih the parties have agreed to submit had noting to do with the contract. If on the other hand it is found that the jurisdiction agreed would also be a proper

jurisdiction in the matter of the contract it could not be said that it ousted the jurisdiction of the Court. *A.B.C. Laminart Pvt. Ltd. and another v. A.P. Agencies, Salem,* AIR 1989 SC 1239: 1989(2) SCC 163: 1989(2) SCR 1: 1989(1) Scale 633: 1989(2) JT 38: 1989(2) APLJ (SC) 15

**Sections 23 and 28.-Jurisdiction of court.-Contract vesting the jurisdiction in Court where a part of the cause of action arose.-The jurisdiction not vested in a Court totally lacking the same.-Contract is a valid and are not opposed to public policy.** *M/s. Angile Insulations v. M/s. Davy Ashmore India Ltd. and another,* AIR 1995 SC 1766: 1995(4) SCC 153: 1995(3) Scale 203: 1995(5) JT 179: 1995(3) Pun LR (SC) 275

**Sections 23 and 30.-Wagering contract.-Permissibility.-Partnership agreement between the parties to enter into business of wager.-The wager though void and unenforceable, it is not forbidden by law.** Though a wager is void and unenforceable, it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under Section 23 of the Contract Act; and (6) partnership being an agreement within the meaning of Section 23 of the Indian Contract Act, it is not unlawful, though its object is to carry on wagering transactions. We, therefore, hold that in the present case the partnership is not unlawful within the meaning of Section 23(a) of the Contract Act. *Gherulal Parakh v. Mahadeodas Maiya and others,* AIR 1959 SC 781: (1959) 2 Andh WR (SC) 81: (1959) 2 Mad LJ (SC) 81: 1959 Supp (2) SCR 406

**Sections 23 and 73.-Contract for future delivery of goods.-Prohibition by law.-Effect of.-Suit for damages on account of the breach of contract is not maintainable.** *Koteswar Vittal Kamath v. K. Rangappa Baliga and Co.,* AIR 1969 SC 504: 1969(3) SCR 40: 1969(1) SCR 255

**Sections 23 and 222.-Contract for illegal act.-Contract for forwarding trading prohibited by law.-Contract is enforceable irrespective of the status of the party agreeing to it, whether as an Agent or the Principal.** The question whether the parties through whom the plaintiff actually alleged carrying out of the contract set up between the plaintiff and the defendants could themselves be regarded as principals or agents of the plaintiff will become quite immaterial if the objects of the contracts are found to be tainted with the kind of illegality which is struck by Section 23 of the Contract Act. *Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons,* AIR 1975 SC 1223: 1975(2) SCC 208: 1975(3) SCR 1

**Section 24.-Contract.-Clause giving absolute power to one party to cancel contract.-Does not amount to interfering with integrity of contract.-Contract cannot be held to be void.**

Under general law of contracts any clause giving absolute power to one party to cancel the contract does not amount to interfering with the integrity of the contract. The acceptance of the argument regarding invalidity of the contract on the ground that it gives absolute power to the parties to terminate the agreement would also amount to interfering with the rights of the parties to freely enter into the contracts. A contract cannot be held to be void only on this ground. Such a broad proposition of law that a term in a contract giving absolute right to the parties to cancel the contract, is itself enough to void it, cannot be accepted. *Her Highness Maharani Shantidevi P. Gaikwad vs. Savjibhai Haribhai Patel and others,* AIR 2001 SC 1462 : 2001(5) SCC 101 : 2001(4) JT 43

**Sections 25 and 29.-Void contract.-Consideration for sale.-Necessity of.-Sale deed executed as a sham document without any intention to be acted upon and without any consideration, out of dissatisfaction for the son.-Sale deed continue to be in possession of vendor.-Sale deed is invalid.** *Sadasivam v. K. Doraisamy,* AIR 1996 SC 1724: 1996(8) SCC 624: 1996(2) Scale 89: 1996(2) JT 400: 1996(1) Land LR 551

**Section 26.-Frustration of contract.-Application of Doctrine.-Self induced frustration.-Event of frustration arose from the act or omission of a party.-Such party is not entitled to invoke doctrine of frustration.** *Boothalinga Agencies v. V.T.C. Poriaswami Nadar,* AIR 1969 SC 110: 1969 (2) Andh WR (SC) 15: 1969 (2) Mad LJ (SC) 15: 1969(1) SCR 65

**Section 27.-Restraint on trade.-Reasonable restraint.-Burden of proof.** A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with

that object. In such a case the general principle of freedom of trade must be applied with due regard to the principle of freedom of trade must be applied with due regard to the principle that public policy requires for men of full age and understanding the utmost freedom of contract and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficently carried on and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors. Where an agreement is challenged on the ground of its being a restraint of trade the onus is upon the party supporting the contract to show that the restraint is reasonably necessary to protect his interests. Once, this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is upon the party attacking the contract. *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co., Ltd.,* AIR 1967 SC 1098: 69 Bom LR 535: 1967 MPLJ 454: 1967 Mah LJ 606: 1967(2) SCR 378

**Section 27.-Restraint on trade.-Reasonableness of restriction.-Rele-vance of.-Test of reasonableness is not applicable in India.-Agreement in restraint of trade operating only till the agreement is in force.-Doctrine of restraint of trade has no application.** Except in cases where the contract is wholly one sided, normally the doctrine of restraint of trade is not attracted in cases where the restriction is to operate during the period the contract is subsisting and it applies in respect of a restriction which operates after the termination of the contract.*M/s. Gujarat Bottling Co, Ltd. and others v. Coca Cola Company and others,* AIR 1995 SC 2372: 1995(5) SCC 545: 1995(4) Scale 635: 1995(6) JT 3: 1995(2) Arb. LR 249

**Section 27.-Service bond.-Restrained on trade.-Permissibility .-The agreement stipulating that the employee after leaving the company not entitled to join any firm of the competitor.-The clause has application only in case of voluntary leaving and not when the services of employee are terminated by the employer.** *Superintendence Company of India (P.) Ltd. v. Krishan Murgai,* AIR 1980 SC 1717: 1981(2) SCC 246: 1980(3) SCR 1278: 1980 BLJR 417

**Section 28.-Agreement in restraint of legal proceedings.-Condition in insurance policy providing that liability of insurer for loss or damage shall cease after expiration of 12 months from happening of loss or damage.-The condition does not bar filing of suit for damages after expiry of this period.-Validity of condition, affirmed.** An agreement which in effect seeks to curtail the period of limitation and prescribes a shorter period than the prescribed by law would void as offending Section 28 of the Contract Act. That is because such an agreement would seek to restrict the party from enforcing his right in Court after the period prescribed under the agreement expires even though the period prescribed by law for the enforcement of his right has yet not expired. But there could be agreements which do not seek to curtail the time for enforcement of the right but which provides for the forfeiture or waiver of the right itself if no action is commenced within the period stipulated by the agreement. Such a clause in the agreement would not fall within the mischief of Section 28 of the Contract Act. To put it differently, curtailment of the period of limitation is not permissible in view of Section 28 but extinction of the right itself unless exercised within a specified time is permissible and can be enforced. If the policy of insurance provides that if a claim is made and rejected and no action is commenced within the time stated in the policy, the benefits flowing from the policy shall stand extinguished and any subsequent action would be time-barred. Such a clause would fall outside the scope of Section 28 of the Contract Act. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the insurance company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause, therefore, has the effect of extinguishing the right itself and consequently the liability also. *National Insurance Co. Ltd. v. Sujir Ganesh Nayak & Co. and another,* AIR 1997 SC 2049: 1997(4) SCC 366: 1997(3) Scale 228: 1997(4) JT 179: 1997 Civ. CR (SC) 685: 1997(2) Ker. LT 54

**Section 28.-Bar to claim.-Permissibility.-The clause of contract providing that the claim made**

**after the expiry of three months shall not be entertained.-Omission to initiate legal proceedings within three months, bar the suit.-The clause is not illegal.** *The Vulcan Insurance Co. Ltd. v. Maharaj Singh and another,* AIR 1976 SC 287: 1976(1) SCC 943: 1976(2) SCR 62

**Section 28.-Fidelity guarantee.-Validity of.-Fidelity insurance guar-antee refused to be honoured by insurance company after lapse of six months as per the terms of contract providing that claimant shall have no right after such period.-The cause of auction arose on refusal by the insurance company to honour.-Suit for claim held to be within limitation.**What was agreed was that the appellant would not have any right under this bond after the expiry of six months from the date of the termination of the contract. This cannot be construed as curtailing the normal period of limitation provided for filing of the suit. If it is construed so it may run the risk of being violative of Section 28 of the Contract Act. It only puts embargo on the right of the appellant to make its claim known not later than six months from the date of termination of contract. Since the period is provided under the agreement the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the miller to enable it either to pay or to persuade the miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the corporation shall be precluded from filing suit after expiry of six months. It can utmost be constured as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the agreement was required to pay the amount. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. What is envisaged by the `restriction' is that the Corporation, if wants to exercise or enforce the rights given to it under the Fidelity Insurance Guarantee Bond, it could present before the Insurance Company, the claim for its loss under the contract entered into with the Rice Miller even up to the period of six months from the date of termination of the contract and not beyond. None of the clauses nor the restriction in the bond, to which we have adverted, require that a suit or legal proceeding should be instituted by the Corporation for enforcing its right under the bond against the Insurance Company within a period of six months from the date of termination of the contract. Therefore, the restriction adverted to in the clauses of the bond, envisages the need for the Corporation to lodge a claim based on the bond, before the Insurance Company within a period of six months from the date of termination of the contract as becomes clear from the express language of the clause in which that restriction is imposed and the express language of the clauses which have preceded it. In fact the period of limitation for filing a suit or instituting a legal proceeding by the Corporation for recovery of the claim made against the Insurance Company could also be regarded as commencing from the date when the Insurance Company expressly refuses to honour the claim or from a date when its conduct amounts to refusal to honour the claim, in that, such default could also give rise to the cause of action for the institution of the suit or legal proceeding by the Corporation against the Insurance Company. Hence, it would not be correct to say that suits filed by the Corporation out to which the present appeals adverted to, in that, they were not filed within six months envisaged in that restriction. *The Food Corporation of India v. The New India Assurance Co. Ltd. and others,* AIR 1994 SC 1889: 1994(3) SCC 324: 1994(1) JT 703: 1994(53) DLT 843

**Section 28.-Jurisdiction of Court.-Limitation on.-Ouster of jurisdiction.-Permissibility.** So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proepr jurisdiction under the law their agreement to the extent they agreed

not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy. *A.B.C. Laminart Pvt. Ltd. and another v. A.P. Agencies, Salem,* AIR 1989 SC 1239: 1989(2) SCC 163: 1989(2) SCR 1: 1989(1) Scale 633: 1989(2) JT 38: 1989(2) APLJ (SC) 15

**Section 28, Exception 1.-Scope.-Right of parties to refer their dispute to arbitration.-Arbitrators are situate in foreign country not enough to nullify arbitration agreement.-Plea of excluding remedy available opposed to public policy cannot be raised before Supreme Court for first time.**

The parties are only required to have their disputes adjudicated by having the same referred to arbitration. Merely because the arbitrators are situated in a foreign country cannot by itself be enough to nullify the arbitration agreement when the parties have with their eyes open willingly entered into the agreement. The instant case is clearly covered by Exception 1 to Section 28. Moreover, in this case the parties have willingly initiated the arbitration proceedings on the disputes having arisen between them. They have appointed arbitrators, participated in the arbitration proceedings and sufferedan award. The plea that the parties between whom the dispute arose are both Indian parties and the contract which had the effect of compelling them to resort to arbitration by foreign arbitrators and thereby impliedly excluding the remedy available to them under the ordinary law of India should be held to be opposed to public policy was not raised either before or during arbitration proceedings, nor before the single Judge of the High Court in the objections filed before him, nor in the Letters Patent Appeal filed before the Division Bench. Such a plea would not be available to be raised by the appellant before the Supreme Court for the first time. *Atlas Export Industries vs. Kotak & Company,* AIR 1999 SC 3286 : 1999(4) Rec Civ R 136 : 1999(8) ADSC 87 : 1999(3) Arbi LR 305 : 1999(7) SCC 61 : 2000 CLC 175

**Section 29.-Uncertain contract.-Agreement to sell.-Reference to proposed sale of other properties to make arrangement for payment under the contract in question will not render the contract uncertain.** *Smt. Sobbat Dei v. Devi Phal and others,* AIR 1971 SC 2192: 1972(3) SCC 495

**Section 30.-Wagering contract.-Determination of.-Terms of contract must indicate the intention of parties to accept difference of price without insisting upon performance of contract.** To constitute a wagering contract there must be roof that the contract was entered into upon terms that the performacne of the contract should not be demanded, but only the different in prices should be paid. There should be common intention between the parties to the wager that they should not demand delivery of the goods but should take only the difference is prices on the happening of an event. *Gherulal Parakh v. Mahadeodas Maiya and others,* AIR 1959 SC 781: (1959) 2 Andh WR (SC) 81: (1959) 2 Mad LJ (SC) 81: 1959 Supp (2) SCR 406

**Section 30.-Wagering contract.-Speculation on future.-Effect of.-Necessity of mutual intention of wagering.** If we substitute "goods", in respect of which forward contracts are made, for "securities", we get the exact nature of the transactions set up by the plaintiff in each case. They are nothing short of contracts for speculation in rise and fall of prices of goods purchases only nationally without any intention to actually deliver them to the purchasers. In such a transaction, a purchaser is not at all expected to make a demand for actual delivery of goods obstensibly sold. There could be no agreement in the nature of a wager between the principal and the agent whatever may have been intentions of the principal. It was held that, in a wagering contract, there the gain of one party would be the loss of the other on the happening of the uncertain event which is the subject-matter of a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.*Firm of Pratapchand Nopaji v. Firm of Kotrike Venkata Setty & Sons,* AIR 1975 SC 1223: 1975(2) SCC 208: 1975(3) SCR 1

**Section 31.-Contingent contract.-Registration of.-Compromise decree stipulating creation of**

**an under-lease in one of the contingencies.-No certainty about execution of the lease.-The contingent agreement forming the compromise decree is excepted from registration.***Mangan Lal Deoshi v. Mohammad Moinul Huque and others,* AIR 1951 SC 11: 1951 ALJ SC 121: 64 MLW 350: 1951 SCJ 9: 1950 SCR 833

**Section 31.-Contingent contract.-Life Insurance.-Contract of insurance is in the nature of contingent contract.** *Chandulal Harjivandas v. Commissioner of Income-tax, Gujarat,* AIR 1967 SC 816: 1967(1) SCJ 292: 1967(1) SCR 921

**Sections 31 and 55.-Conditional contract.-Agreement to Sell.-Necessity to obtain prior permission for sale.-The agreement is subject to the implied condition to obtain sanction of the appropriate authority.** *Nathulal v. Phoolchand,* AIR 1970 SC 546: 1970 All LJ 742: 1970 Mah LJ 674: 1970 MPLJ 612: 1970(2) SCR 854: 1969(3) SCC 120

**Section 32.-Contingent contract.-Agreement for supply of goods.-Goods manufactured by third person.-No term of contract contemplating the event of non-supply of goods.-The contract cannot be said to be contingent to the act of supply by the third party.** The agreement does not seem to us to convey the meaning that the delivery of the goods was made contingent on their being supplied to the respondent-firm by the Victoria Mills. We find it difficult to hold that the parties ever contemplated the possibility of the goods not being supplied at all. The words "prepared by the Mill" are only a description of the goods to be supplied, and the expressions "as soon as they are prepared" and "as soon as they are supplied to us by the said Mill" simply indicate the process of delivery. *Ganga Saran v. Firm Ram Charan Ram Gopal,* AIR 1952 SC 9: 1951 SCJ 799: 1952 SCR 36**Section 32.-Contingent contract.-Determination of.-Purchase of goods to be used by a Company to be floated.-The company not floated by the promoter.-Contract cannot be said to be contingent to the formation of the company.-Contract is enforceable against promoter.** *Bashir Ahmad and others v. Government of Andhra Pradesh,* AIR 1970 SC 1089: 1960 SCD 976

**Section 35.-Time if essence of contract.-Determination of.-Agreement to sell.-Time is not always essence of contract, unless the contract itself stipulates a date for its performance.** *D.S. Thimmappa v. Siddaramakka,* AIR 1996 SC 1960: 1996(8) SCC 365: 1996(3) Scale 704: 1996(4) JT 324: 1996 Civ. CR (SC) 511: 1996(2) Mad LW 465

**Section 37, 62 and 60.-Termination of contract.-Agreement for supply of high tension electricity.-Minimum charges to be paid by consumer.-Initial contract for three years and thereafter to continue from year to year.-After three years, contract could be determined on giving 12 months previous notice in writing.-In case of disconnection, consumer not applying for reconnection, date of disconnection would be deemed to be date of notice for determination of contract.-Notice by consumer after expiry of three years for disconnection.-His liability to pay minimum charges would extend to 12 months from date of disconnection.**
*Bihar State Electricity Board and another vs. UMI Special Steel Ltd.,* AIR 2001 SC 161 : 2000(8) SCC 560 : 2000(S3) JT 68

**Section 38.-Repudiation of Contract.-Determination of.-Sale of property with agreement to re-convey offer of re-purchase.-Necessity of formal tender of amount.-The question of paying capacity of purchaser or actual tender is not relevant.-The real question is to determine if other party unequivocally has refused to carry out his part of contract.** *International Contractors Ltd. v. Prasanta Kumar Sur (deceased) and others,* AIR 1962 SC 77: 1961(3) SCR 702.

**Section 40.-Liability under contract.-Enforcement against third party.-Permissibility.-Suit for recovery of price of goods supplied to lessee of the Mill.-Enforcement debt against lessor is not permissible.**The defendants, *viz.,* the appellant and respondent No. 3 were lessees from Purneshwari Rice Mill. The lessors were not a party to the agreement with the State upon which the State filed the suit. The lessors were not the purchasing and milling agents. There is no pleading making Purneshwari Rice Mill liable in respect of supply of rice. It would be strange to hold that the lessors were liable for the business of the lessees. The lease between the Purneshwari Rice Mill and the

defendants shows that the business to be carried on by the lessees is that of the lessees and the lessor is not engaged in that business. Therefore, the decree against Purneshwari Rice Mill is unjustified and set aside. *Nand Kishore Prasad v. State of Bihar,* AIR 1974 SC 1988: 1973(2) SCC 770

**Section 43.-Effect on subrogation of mortgage.-The provision not directly dealing with mortgages.-It cannot affect the provisions of Transfer of Property Act, 1882 applicable on mortgages.** When parties enter into a mortgage they know, or must be taken to know, that the law of mortgage provides for this very question of contribution. It confers rights on the mortgagor who redeems and directs that in the absence of a contract to the contrary, he shall be reimbursed in a particular way out of particular properties. The parties are at liberty to vary these rights and liabilities by special contract to the contrary but if they do not do so. I can see no reason why these provisions should be abrogated in favour of a section in the Contract Act which does not deal with mortgages. Slightly to vary the language of the Judicial Committee it is the terms and nature of the transaction viewed in the light of the law of mortgage in India which exclude the personal liability and therefore Section 43, except where there is a contract to the contrary. *Kedar Lal Seal and another v. Hari Lal Seal,* AIR 1952 SC 47: 1952 SCJ 37: 1952 SCR 179

**Section 43.-Joint Lessee.-Liability of.-Lease in favour of Lessee is jointly the clear stipulation about share.-Each Lessee in respect of interest as well as liability to pay rent.-Jointly and severally liable to pay the rent.** *Rama Shankar Singh and another v. Mst. Shyamlata Devi and others,* AIR 1970 SC 716: 1970 BLJR 556: 1968 Pat LJR (SC) 118 A (2): 1969(2) SCR 360

**Section 45.-Joint promisee.-Rights of.-Refusal by joint promisee to join in the suit.-The benefit of suit shall ensure to the benefit of such joint promisee as well.** Where two parties contract with a third party, a suit by one of the joint promisee, making the other as co-defendant, is maintainable even if the plaintiff does not prove that the other joint promisee has refused to join him as a co-plaintiff. *Jahar Roy (dead) by L.R's. and another v. Premji Bhimji Mansata and another,* AIR 1977 SC 2439: 1977(4) SCC 562: 1978(1) SCR 770

**Section 46.-Reasonable period of time.-Determination of.-Absence of stipulation in the contract about period during which it was required to be performed.-Analogy of reasonableness of time cannot be invoked in specific performance.** The parties when they entered into the contract, knew the prevailing circumstances and must have borne in mind the possibility that something like what actually happened may happen and, therefore, did not specify the time within which the land had to be developed. In other words, the parties intended to exclude from the computation of reasonable time such time as was taken up in procuring the necessary martial which was not easy to obtain and such as may be taken up if the land were requisitioned by Government. Thus, in our view it cannot be said that because of the requisitioning orders which had the effect of making the entry by or on behalf of the company on the period of requitioning the contract stood discharged. *Mugneeram Bangur and Co. (P.) Ltd. v. Gurbachan Singh,* AIR 1965 SC 1523: 1965(2) Andh WR (SC) 158: 1965(2) SCR 630

**Section 50(a).-Consideration.-Proof of.-Purchase of shares of a company.-Payment not made in cash but credited by transfer entry.-The transaction is valid.** *Narayandas Shreeram Somani v. Sangli Bank Ltd.,* AIR 1966 SC 170: 68 Bom LR 45: 1965(3) SCR 777

**Section 50(d).-Completion of communication.-Dispatch by post.-The sender having no absolute right to reclaim the post.-The payment sent by post amount to discharge of contract which would relate to the date of receipt of the cheques and not its encashment.** It is left entirely to the authorities to decide whether a letter once posted should be returned to the sender. This very narrow and qualified right can hardly be regarded as bringing about a position so different from that prevailing in England as to make the English decisions wholly inapplicable. There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee. It is to be remembered that there

are four modes in which a contract may be discharged, namely (1) by agreement, (2) by performance, (3) by being excused by law from performing it and (4) by breach. In this case Clause 15 of the contract provides how the payment of the price is to be made. In short the contract itself, by that clause, prescribes the manner and the time for performance by the Government of its part of the contract and as the Government made the payments in the prescribed manner, *i.e.,* by cheques, it fulfilled its engagement and such payment would under Section 50 of the Indian Contract Act, operate as a discharge of the contract. In one view of the matter there was, in the circumstances of this case, an implied agreement under which the cheques were accepted unconditionally as payment and on another view, even if the cheques were taken conditionally, the cheques not having been dishonoured but having been cashed, the payment related back to the dates of the receipt of the cheques and in law the dates of payments were the dates of the delivery of the cheques. *Commissioner of Income Tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd., Ogale Wadi,* AIR 1954 SC 429: 56 Bom LR 1196: 1955 SCA 181: 1954 SCJ 522: 1955(1) SCR 185

**Section 51, 52, 54 and 65.-Contract of insurance.-Cheque issued by insured for payment towards first premium.-Dishonoured by drawee bank due to insufficient funds.-Such a contract consists of reciprocal promise.-Where insured failed to pay the premium promised, he cannot claim performance from the insurer.** *National Insurance Company Limited vs. Seema Malhotra,* AIR 2001 SC 1197 : 2001(3) SCC 151 : 2001(3) JT 58 : 2001(1) KLT 822

**Sections 53 and 62.-Discharge of contract.-Default in performance.-Effect of.** The respondents accepted from their debtors, the appellants, a cheque drawn by a third party on the Tripura Modern Bank and endorsed by the appellants. The respondents through their collecting agents, the Calcutta Commercial Bank, presented the cheque for collection to the Tripura Modern Bank, and instead of obtaining cash payment, received a draft drawn by the Sibsagar Branch of the Tripura Modern Bank on its Head Office. Having accepted this draft in course of collection of the cheque, the respondents *vis-a-vis* the appellants were in no better position than they would have been, if they had accepted the draft from the appellants directly as conditional payment of the cheque. In the circumstances, the respondents owned a duty to the appellants to present the draft for payment within a reasonable time. The failure of the respondents and their agents to cash the draft within a reasonable time altered the position of the appellants for the worse, and caused prejudice to them. In the circumstances, the respondents must be regarded as having kept the draft in absolute payment of the cheque. The cheque must be treated as duly paid and consequently, the original debt stood discharged. *Ramlal Onkarmal Firm and another v. Mohanlal Jogani Rice and Atta Mills,* AIR 1965 SC 1679: 1965(1) SCWR 928: 1965(3) SCR 103

**Sections 53 and 62.-Termination of contract.-Automatic cancellation.-Non-compliance of terms of contract of sale of property.-Non-payment of instalments of consideration.-The agreement to sell stood cancelled automatically and no notice for cancellation of contract is required.** Under clause 5 of the agreement the question of giving notice arises only if the vendor wanted to forfeit the instalments paid by the purchaser. Not even one instalment having been paid the question of forfeiture does not arise and no notice was necessary for cancelling agreement. It stood automatically cancelled. It was sought to be argued before us that once the agreement stood cancelled the appellants stood restored to their original position as tenants and the suit could not be filed without giving notice under the Transfer of Property Act. We are of opinion that when the agreement dated 7-6-1959 was entered into the old relationship of landlord and tenant came to an end. The rights and liabilities of the parties have to be worked out on the basis of that agreement. This is obvious from the fact that there was no provision for payment of any rent till the whole purchase money was paid or even for the balance of the purchase money that may be due after one or more instalments were paid. There was no provision even for payment of interest in respect of the whole of the purchase money or any of the instalments. Therefore, when the agreement stood cancelled the plaintiff was automatically entitled to possession under the terms of the agreement.

*Arjunlal Bhatt Mall Gothani v. Girish Chandra Dutta,* AIR 1973 SC 2256: 1973(2) SCC

**Sections 53 and 62.-Termination of contract.-Removal of all District Government Counsels in the State en bloc by the State Government.-Non compliance of procedure laid down in Legal Rememberancer's Manual .-The engagement of Government counsel is not purely contractual but has public element.-Order of termination set aside.** We are unable to accept the argument that the appointment of District Government Counsel by the State Government is only a professional engagement like that between a private client and his lawyer, or that it is purely contractual with no public element attaching to it, which may be terminated at any time at the sweet will of the Government excluding judicial review. The non-assigning of reasons or the non-communication thereof may be based on public policy, but termination of an appointment without the existence of any cogent reason in furtherance of the object for which the power is given would be arbitrary and, therefore, against public policy. Clause 3 of para 7.06 must, therefore, be understood to mean that the appointment of a District Government Counsel is not to be equated with appointment to a post under the Government in the strict sense, which does not necessarily mean that it results in denuding the office of its public character, and that the appointment may be terminated even during currency of the term by only communicating the decision of termination without communicating the reasons which led to the termination. It does not mean that the appointment is at the sweet will of the Government which can be terminated at any time, even without the existence of any cogent reason during the subsistence of the term. Even apart from the premise that the office of `post' of D.G.Cs. has a public element which alone is sufficient to attract the power of judicial review for testing validity of the impugned circular on the anvil of Art. 14, we are also clearly of the view that this power is available even without that element on the premise that after the initial appointment, the matter is purely contractual. Applicability of Art. 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, can it be said that the State can thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more? We have no hesitation in saying that the personality of the State, requiring regulation of its conduct in all spheres by requirements of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirements of Art. 14 and contractual obligations are alien concepts, which cannot co-exist. *Kumari Shrilekha Vidyarthi etc. v. State of UP and others,* AIR 1991 SC 537: 1991(1) SCC 212: 1990 Supp (1) SCR 625: 1990(2) Scale 561: 1990(4) JT 211

**Sections 53 and 62.-Termination of contract.-Stipulation of prior notice.-Failure to serve written notice prior to termination of contract would render termination in breach of contract.** *Bombay Housing Board v. M/s. Karbhase Naik and Co., Sholapur,* AIR 1975 SC 763: 1975(1) SCC 828: 1975(3) SCR 407

**Section 54.-Breach of contract.-Fundamental breach.-Breach of policy of insurance.-Commercial vehicle carrying nine persons instead of six persons permitted in terms of policy.-Breach is not fundamental in nature to have contributed to the accident Insurer is liable for damages.** *B.V. Nagaraju v. M/s. Oriental Insurance Co. Ltd., Divisional Office, Hassan,* AIR 1996 SC 2054: 1996(4) SCC 647: 1996(4) Scale 640: 1996(6) JT 32: 1996 Civ. CR (SC) 759: 1996(3) All WC 1313

**Section 54.-Agreement to sell.-Property in Cantonment Area.-Vendee undertaking to obtain permission to purchase property in cantonment area.-Conditional permission granted by CEO that purchaser would give certificate not to represent against resumption.-Condition imposed could not prohibit purchaser to challenge resumption in future.-Nature of condition imposed cannot sustain.-Conditional permission granted cannot sustain.**

The Vendee was aware of the legal position with regard to resumption in respect of the property in the cantonment area. Knowing the legal position of the properties situated in the cantonment area, the Vendee had entered into an agreement to sell. It was the Vendee who had undertaken to obtain the permission for the purchase of the property from the MEO. In such circumstances the permission granted by CEO with condition that the purchaser gives a certificate to the effect that he has no intention to represent against the resumption proceedings when decided by the competent authority, cannot be said to be unusual having regard to the situation of the property in the cantonment area, entitling the purchaser-Vendee to repudiate and agreement and claim refund of earnest money paid. The condition could not be given a narrow and literal meaning so as to mean that the purchaser was prohibited from challenging any future resumption, even if the resumption proceedings were contrary to the provisions of the Cantonment Act and the rules regarding resumption. To construe the condition as above and hold that the permission was in fact no permission at all, was improper. *Rameshwar Swarup (dead) by LRs vs. Saroj Tyagi (Smt.) and others,* AIR 1998 SC 3389 : 1998(4) Rec Civ R 384 : 1998(7) SCC 456 : 1998 All LJ 2579

**Section 55.-Stipulation of time.-Necessity of compliance.-Option to seek renewal of lease.--Failure of Lessee to seek renewal within the stipulated time.-Lessee is not entitled to renewal.** At common law stipulations as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain. The reason is that a renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose. We may add that where no time is fixed for the purpose, an application of renewal for the lease may be made within a reasonable time before the expiry of the term. *Caltex (India) Ltd. v. Bhagwan Devi Marodia,* AIR 1969 SC 405: 1969 (1) SCJ 783: 1969 (1) SCWR 639: 1969(2) SCR 238

**Section 55.-Time if essence of contract.-Determination of.** The words are: "This contract is subject to import license, and therefore the shipment date is not guaranteed". Remembering, as we must, that in commercial contracts, time is ordinarily of the essence of the contract and giving the word "therefore" its natural, grammatical meaning, we must hold that what the parties intended we that to the extent that delay in shipment stands in the way of keeping to the shipment date October/November, 1950, this shipment date was not guaranteed; but with this exception shipment October/November 1950, was guaranteed. it has been strenuously contended by the learned Attorney- General, that the parties were mentioning only one of the many reasons which might cause delay in shipment and the conjunction "therefore" was used only to show the connection between one of the many reasons.-by way of illustration and a general agreement that the shipment date was not guaranteed. The provisions in the first paragraph give the seller a right to give notice to the buyer of non-shipment and give the buyer an option on such notice either to cancel the portion not shipped or to grant extention of time at allowances mentioned in the second paragraph. Unless time was of the essence of the contract and shipment time was guaranteed there would be no need for making such provisions for an option for extension of time, or for these allowances. *M/s. China Cotton Exporters v. Beharilal Ramcharan Cotton Mills Ltd.,* AIR 1961 SC 1295: 63 Bom LR 962: 1961(3) SCR 845

**Section 55.-Time if essence of contract.-Determination.-Considerations for.-Specification of time in the contract itself for performance of the same is not sufficient to draw inference that time was essence of contract.** Fixation of the period within which the contract is to be performed does not make the stipulation as to time of the essence of the contract. It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable; it

may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence.*Gomathinayagam Pillai and others v. Palaniswami Nadar,* AIR 1967 SC 868: 1967 (1) SCR 227: 1967 (2) SCWR 147

**Section 55.-Time if essence of contract.-Determination of.-Contract for sale of immovable property.-Stipulation that balance payment shall be paid within 10 days only from the date of agreement to sell.-The time held to be essence of contract.** The word `only' has been used twice over: (1) to qualify the amount of Rs. 98,000/-, and(2) to qualify the period of 10 days. Therefore, having qualified the amount there was no further need to qualify the same unless it be the intention of the parties to make time as the essence of the contract. Therefore, we conclude that though as a general proposition of law time is not the essence of the contract in the case of a sale of immovable property yet the parties intended to make time as the essence under clause (1) of the suit agreement. *Smt. Chand Rani (dead) by LRs. v. Smt. Kamal Rani (dead) by LRs.,* AIR 1993 SC 1742: 1993(1) SCC 519: 1992(3) Scale 544: 1993(1) JT 74: 1993(49) DLT 257

**Section 55.-Time if essence of contract.-Determination of.-Stipulation of time in agreement per se is not sufficient.-Normal presumption is that in a contract of sale of land, time is not of essence.** The language used in the agreement is not such as to indicate in unmistakeable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract. *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another,* AIR 1977 SC 1005: 1977(2) SCC 539: 1977(2) SCR 877

**Section 55.-Time if essence of contract.-Sale of immovable property.-There is no presumption that time is essence of contract.** In the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are: 1. from the express terms of the contract; 2. from the nature of the property; and 3. from the surrounding circumstances, for example:, the object of making the contract. *Smt. Chand Rani (dead) by LRs., v. Smt. Kamal Rani (dead) by LRs.,* AIR 1993 SC 1742: 1993(1) SCC 519: 1992(3) Scale 544: 1993(1) JT 74: 1993(49) DLT 257

**Section 55.-Contract.-Time essence of contract.-Contract providing all reciprocal and mutual obligations.-Terms of contract cannot be strictly adhered to.**

The contract in the instant case itself provides reciprocal obligations and in the event of non-fulfilment of some such obligations and which have a direct bearing on to them.-Strict adherence of the time schedule or question of continuing with the notion of the time being the essence of the contract would not arise. the obligations are mutual and the terms of the agreement are inter-dependent on each other. *Arosan Enterprises Ltd. vs. Union of India and another,* AIR 1999 SC 3804 : 1999(8) DLT 825 : 1999(3) Arbi LR 310 : 2000(1) Cur CC 37

**Section 55.-Performance of contract.-Time essence of contract.-No question of any presumption of presumed extension or presumed acceptance of renewed date where parties not adhering to original terms.-Court cannot fix a date for performance of contract.-Courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given go- by to the original terms of the contract.**

In the event the time is the essence of the contract question of there being any presumption or

presumed extension or presumed acceptance of a renewed date would not arise. The extension if there be any, should and ought to be categorical in nature rather than being vague or in the anvil of presumptions. In the event of the parties knowingly give a go-by to the stipulation as regards the time, the same may have two several effects : (a) parties name a future specific date for delivery and (b) parties may also agree to the abandonment of the contract. As regards (a) above, there must be a specific date within which delivery has to be effect and in the event there is no such specific date available in the course of conduct of the parties, then and in that event, the Courts are not left with any other conclusion but a finding that the parties themselves by their conduct have given a go-by to the original term of the contract as regards the time being the essence of the contract. Courts cannot possibly fix a date on its own for performance of the contract. *Arosan Enterprises Ltd. vs. Union of India and another,* AIR 1999 SC 3804 : 1999(8) DLT 825 : 1999(3) Arbi LR 310 : 2000(1) Cur CC 37

**Section 55.-Re-conveyance of immovable property.-Time is the essence of contract relating to contract of re-conveyance.-Amount not paid within stipulated time.-Option in favour of plaintiff deemed to have lapsed.**

For renewal and options to repurchase where, in regard to immovable property, as a matter of law time becomes essence of the contract. Therefore in regard to contracts of reconveyance relating to immovable property, the principle laid down in *A.H. Mama vs. Flora Sassoon,* AIR 1928 PC 208, that time is not normally essence of the contract in contract relating to immovable property.-does not apply. It is fact, so observed in *Caltex (India) Ltd.* case (AIR 1969 SC 405). In view of the abovesaid decision of this Court relating to contract of reconveyance, and inasmuch as the amount was not paid within the stipulated time, the said option in favour of the plaintiff must be deemed to have "lapsed". For the aforesaid reasons, the appeal fails and is dismissed.# *Bismillah Begum (Smt.) (dead) by LRs vs. Rahmatullah Khan (dead) by LRs.,* AIR 1998 SC 970 : 1998(1) Andh LT 24 : 1998(1) Mad LW 825 : 1998(2) SCC 226

**Sections 55 and 39.-Time if essence of contract.-Effect of.-Stipulation in the contract that time would be essence of contract and stipulation of compensation for delay in execution of contract.-Rescission of contract by the other party after the amount of compensation exceeded the amount of security deposit.-Rescission of contract affirmed.** The time was of the essence of the contract only in the sense that if the plaintiff completed it within the original period of one year, he would not be liable to pay any compensation but that in case he overstepped the said time-limit he would have to compensate the defendants for every day of the delay in completing the work and that the right to rescission would accrue to the defendant No. 2 only when the compensation due exceeded the amount of the security deposit or the plaintiff abandoned the work. Till the time the contract was rescinded therefore, it was fully in force and the rescission was consequently well- founded. *State of Maharashtra and another v. Digambar Balwant Kulkarni,* AIR 1979 SC 1339: 1979(2) SCC 217: 1979(3) SCR 188: 1979 BBCJ (SC) 57

**Sections 55, 48 and 73.-Time essence of contract.-Determination of.-Contract relating to immovable property.-Performance within reasonable time.-Necessity of.** Although in the case of a sale of immovable property time is not of the essence of the contract. It has to be ascertained whether under the terms of the contract, when the parties named a specific time within completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. It observed that the specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immoveable property, it would normally be presumed that the time was not of the essence of the contract. But even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions of the contract so warrant. These can be inferred, (1) from the express terms of the

contract; (2) from the nature of the property; and (3) from the surrounding circumstances. for example, the object of making the contract may make it clear that the agreement requires to be performed within a reasonable time. *M/s. P.R. Deb and Associates v. Sunanda Roy,* AIR 1996 SC 1504: 1996(4) SCC 423: 1996(2) Scale 551: 1996(2) JT 654: 1996(2) Raj LW 67

**Sections 55 and 73.-Works contract.-Claim for extra payment.-Increase in period stipulated for contract.-No condition imposed denying the claim for increased rates on account of extended period.-Claim for extra payment rightly allowed.** *Hyderabad Municipal Corporation v. M. Krishnaswami Mudaliar and another,* AIR 1985 SC 607: 1985(2) SCC 9: 1985(1) Scale 212: 1985 Srinagar LJ 25

**Sections 55 and 74.-Earnest money.-Meaning of.-Principle for forfeiture.**The following principles emerge regarding "earnest": (1) It must be given at the moment at which the contract is concluded. (2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out. (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser. (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest. Forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty." *Shree Hanuman Cotton Mills and another v. Tata Air Craft Ltd.,* AIR 1970 SC 1986: 1970 (2) SCJ 420: 1970(3) SCR 127: 1969(3) SCC 522

**Sections 55 and 74.-Time if essence of contract.-Determination of.-Necessity to gather intention from the parties.-Stipulation in the contract about the time being essence of contract, is not conclusive by itself as the parties may waive the condition by their conduct.** It cannot be disputed that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract.Even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of contract. *M/s. Hind Construction Contractors by its sole proprietor Bhikamchand Mulchand Jain (Dead) by L.Rs. v. State of Maharashtra,* AIR 1979 SC 720: 1979(2) SCC 70: 1979(2) SCR 1147: 1979(2) APLJ (SC) 1

**Section 56.-Frustration of contract.-Application on concluded contract.-Permissibility.-Agreement to sell.-The transaction of transfer of property already complete.-The provision has no application.** By Section 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. That section however does not enact and cannot be read as enacting that the provisions of the Contract Act are to be read into the Transfer of Property Act. There is a clear distinction between a completed conveyance and an executory contract, and events which discharge a contract do not invalidate a concluded transfer. By its express terms Section 56 of the Contract Act does not apply to cases in which there is a completed transfer. The second paragraph of Section 56 which is the only paragraph material to cases of this nature has a limited application to covenants under a lease. A covenant under a lease to do an act which after the contract is made becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. But on that account the transfer of property resulting from the lease

granted by the lessor to the lessee is not declared void. *Raja Dhruv Dev Chand v. Raja Harmohinder Singh and another,* AIR 1968 SC 1024: 1968 Cur LJ 738: 1968(3) SCR 339

**Section 56.-Frustration of contract .-Application on lease.-Doctrine of frustration has no application where the contract was not an agreement to convey the lease but conveyance of lease.** *H.V. Rajan v. C.N. Gopal and others,* AIR 1975 SC 261: 1975(4) SCC 302

**Section 56.-Frustration of contract.-Agreement for sale of property.-Denial of permission to sell under local land laws.-Sale become impracticable.-In the absence of any term of condition in the agreement to the contrary, the contract become void on account supervening event.** *Govind Prasad Chaturvedi v. Hari Dutt Shastri and another,* AIR 1977 SC 1005: 1977(2) SCC 539: 1977(2) SCR 877

**Section 56.-Frustration of contract.-Contract for supply of goods .-Failure on the part of manufacturer to manufacture.-No evidence led to prove that order was placed with the manufacturer but he failed to supply the same.-The contract in question cannot be held to have become impossible.** It seems to us that the plea of the respondents must fail on their own admissions. The defendant has stated in his evidence that he had not sold the 61 bales of cloth to any other person at the time he received the telegraphic notice of 20-11-1941 (Exhibit 1). On his own admission, therefore, he was in a position to supply 61 bales of the contracted goods at the time when the breach of the agreement is alleged to have happened. That being so, we are unable to hold that the performance of the contract had become impossible. It was for the defendants to show that an order for the manufacture of the contracted goods was placed with the Mills ad yet the Mills failed to supply the goods. No such evidence has however been offered by the defendants. The High Court has surmised that it might not have been possible to supply the goods within the period mentioned in the agreement, but there is no material to support that statement. In these circumstances, this is obviously not a case in which the doctrine of frustration of contract can be invoked. *Ganga Saran v. Firm Ram Charan Ram Gopal,* AIR 1952 SC 9: 1951 SCJ 799: 1952 SCR 36

**Section 56.-Frustration of contract.-Doctrine of.-Supervening impossibility.-Scope of doctrine.-The provisions of the Act are comprehensive and the English law de hors these provisions is not applicable.** The essential idea upon which the doctrine, is based is that of impossibility of performance of the contract, in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. It would be incorrect to say that Section 56 of the Contract Act applies only to cases of physical impossibility and that where this section is not applicable, recourse can be had to the principles of English law on the subject of frustration. It must be held also, that, to the extent that the indian Contract Act deals with a particular subject, it is exhaustive upon the same and it is not permissible to import the principles. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court, which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. *Satyabrata Ghose v. Mugneeram Bangur & Co. and another,* AIR 1954 SC 44: 73 Cal LJ 336: 1954 SCJ 638: 1954 SCR 310: 1954(1) Mad LJ 41

**Section 56.-Frustration of contract.-Impossible.-Meaning of.-The term does not convey the sense of physical or literal impossibility but impracticability of the Act.** This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The

performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do. *Satyabrata Ghose v. Mugneeram Bangur and Co. and another,* AIR 1954 SC 44: 73 Cal LJ 336: 1954 SCJ 638: 1954 SCR 310: 1954(1) Mad LJ 41

**Section 56.-Frustration of contract.-Injunction of court prohibiting performance.-The contract stood frustrated.** *M/s. Shanti Vijay & Co., etc. etc. v. Princess Fatima Fouzia and others,* AIR 1980 SC 17: 1979(4) SCC 602: 1980(1) SCR 459

**Section 56.-Frustration of contract.-Non-performance of contract.-Ban imposed on export of commodity.-enforcement of indemnity clause against the exporters is not permissible.** *The Union of India and others v. M/s. C. Damani & Co. and others,* AIR 1980 SC 1149: 1980 Sup. SCC 707

**Section 56.-Frustration of contract.-Prohibition on future transaction.-Settlement of outstanding contract not barred.-The provision has no application.** Fresh contracts were contracts by payment of differences was not prohibited, nor was delivery of gur in pursuance of the contract and acceptance thereof at the due date by the Company prohibited. The difficulty arising by the Government orders in transporting the goods needed to meet the contract was not an impossibility contemplated by Section 56 of the Contract Act leading to frustration of the contracts. *Seth Mohan Lal and another v. Grain Chambers Ltd., Muzaffarnagar and others,* AIR 1968 SC 772: 1968 (1) SCWR 281: 1968(2) SCR 252

**Section 56.-Frustration of contract.-Scope of.-The event must affect the basis of contract to render its performance impossible or its performance impracticable or useless.** Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. The impossibility contemplated by Section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be of such a character that it strikes at the root of the contract. *Sushila Devi and another v. Hari Singh and others,* AIR 1971 SC 1756: 971 J & K LR 241: 1971(2) SCC 288: 1971 Supp. SCR 671

**Section 56.-Agreement for High Tension Supply.-Right to demand minimum guaranteed charges.-Depend on corresponding duty to supply energy.-Consumer not liable to pay minimum charges when contracted supply falls short of 40 per cent of contract load.**

Where as per terms of agreement between the consumer and State Electricity Board an obligation has been cast on the consumer to pay minimum tariff of 40 per cent of the contract load whenever the contracted supply falls short of 40 per cent of contract load then Board shall be entitled to charge only for reduced energy actually supplied. Even going by the tariff notification which prescribes also a minimum entitling the Board to collect it, it merely casts liability on the consumer to 'guarantee a minimum monthly consumption equivalent to 40 per cent load factor of the contract demand". Consequently, for the consumer to honour his/its commitment so undertaken to give a minimum consumption there should essentially be corresponding supply by the Board at least to that extent, without which the consumption of the agreed minimum is rendered impossible by thereby lapse of Board. The minimum guarantee, thus, appears to be not in terms of merely the energy to be consumed. The right of the Board to demand the minimum guaranteed charges, by the very terms of the language in the contracts well as the one used in the tariff notification is made enforceable depending upon a corresponding duty, impliedly undertaken to supply electrical energy to that extent, and not otherwise. *Raymond Ltd. and another vs. M.P. Electricity Board and others etc.*, AIR 2001 SC 238 : 2001(1) SCC 534 : 2000(S3) JT 39

**Sections 56 and 32.-Frustration of contract.-Intervening illegality.-Time not found to be**

**essence of contract.-The contract is not discharged merely because its performance is rendered unlawful for a limited period time.** If time is of the essence of the contract or if time for performance is set out in the contract it may be that the contract would stand discharged even though its performance may have been rendered unlawful for an indeterminate time provided unlawfulness attached to the performance of the contract at the time when the contract ought to have been performed. Thus, where the performance of a contract had been rendered unlawful by reason of some subsequent event the contract would stand discharged but such discharge will take place not necessarily from the date on which the further performance was rendered unlawful, unless further performance was rendered unlawful for all time. If the performance of the contract is rendered unlawful either for a determinate period of time or for an indeterminate period of time the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. *Mugneeram Bangur and Co. (P.) Ltd. v. Gurbachan Singh,* AIR 1965 SC 1523: 1965(2) Andh WR (SC) 158: 1965(2) SCR 630

**Sections 56 and 73.-Frustration of contract.-Change in circumstances by itself is not sufficient to construe frustration of Contract.** A contract is not frustrated merely because the circumstances in which the contract was made, are altered. The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had, as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an uncontemplated turn of events since the date of the contract. *M/s. Alopi Parshad and Sons, Ltd. v. Union of India,* AIR 1960 SC 588: (1960) 2 Andh WR (SC) 46: (1960) 2 Mad LJ SC 46: (1960) 2 SCR 793

**Section 62.-Alteration in contract.-Material alterations.-Determination of.-Subsequent addition in the contract declaring that the property is clear from any defect or encumbrance.-Liability of vendors to sell property with clear title only.-The alteration does not affect the rights and liabilities of the parties and therefore is not a material alteration.** Ordinarily when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all the circumstances before executing the sale deed. The alteration, if any, cannot therefore be regarded as material. Since the defendants were liable to clear the encumbrances, if any, subsisting on the land before executing the sale deed, assuming that the covenant was incorporated after the execution of the deed, it cannot be regarded as a material alteration on that account, for, it does not alter the rights or liabilities of the parties or the legal effects of the instrument. *Kalianna Gounder v. Palani Gounder and another,* AIR 1970 SC 1942: 1970 (2) Mad LJ (SC) 19: 1970(2) SCR 455: 1970(1) SCC 56

**Section 62.-Novation of contract.-Effect on arbitration clause.-The arbitration clause contained in earlier contract is not applicable on subsequent contract.** The following principles relevant to the present case emerge from the aforesaid discussion : (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation, it perishes with the contract; (3) the contract may be *non est* in the sence that it never came legally into existence or it was void *ab initio*; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existene, the arbitration caluse also cannot operate, for along with the original contract, it is also void, in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, frustration, the question of

repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes. *The Union of India v. Oishorilal Gupta and Bros.,* AIR 1959 SC 1362: 1960 SCJ 1101: 1960 (1) SCR 493

**Section 62.-Novation of contract.-Purpose of agreements.-Original agreement followed by subsequent agreement to meet the statutory requirement i.e. registration under Trade and Merchandise Marks Act, 1958.-Nature and scope of both the agreements.-Subsequent agreement does not supersede previous agreement.** *M/s. Gujarat Bottling Co. Ltd. and others v. Coca Cola Company and others,* AIR 1995 SC 2372: 1995(5) SCC 545: 1995(4) Scale 635: 1995(6) JT 3: 1995(2) Arb. LR 249

**Section 62.-Novation.-Suit based on contract.-Plea regarding novation of contract.-Neither any issue framed by trial Court nor by evidence led.-Such a plea cannot be raised for first time in second appeal.**

Novation under Section 62 of the Contract Act requires a clear plea, issue and evidence. such a question cannot be raised or accepted under Section 100 C.P.C. for the first time in Second Appeal. There was no such issue in the Courts below and the defendant's evidence was contrary to such a theory. *Babu Ram alias Durga Prasad vs. Indra Pal Singh (dead) by LRs,* AIR 1998 SC 3021 : 1998(2) Guj LH 686 : 1998(3) Cur CC 145 : 1998(6) SCC 358 : 1998(5) Andh LT 13

**Section 62.-Novation of contract.-Terms of old and new contract inconsistent and cannot stand together.-Old contract deemed to be rescinded.-Subsequent contract cannot be said to be in substitution of earlier contract.**

One of the essential requirements of novation as contemplated by Section 62 is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be substitution of the earlier contract. *Lata Construction and others vs. Dr. Rameshchandra Ramniklal Shah and another,* AIR 2000 SC 380 : 2000(1) Land LR 300 : 2000(3) Civ LJ 439 : 2000(2) Bom CR 145 : 2000(124) Pun LR 460 : 2000(1) SCC 586 : 1999(37) Arbi LR 460 : 2000(1) Mad LW 416

**Sections 62 and 73.-Repudiation of contract.-Change in circumstances.-Auction of forest coupes.-Declaration of forest as reserved forest subsequently.-The repudiation of contract is permissible.-Auction purchaser is not entitled to damages.***M/s. Rajendra Kumar & Co. and another v. Smt. Vijaya Rani,* AIR 1981 SC 2010: 1981(4) SCC 289: 1982(1) SCR 894: 1981(3) Scale 1591

**Section 63.-Remission of promise.-Partial remission.-Permissibility.-Decision to recover an amount less than the amount of debt due.-Effect of.** The Government had decided to recover only 40% and no more. The Government decision would amount to remitting a part of the debt due by the appellants. Under Section 63 of the Contract Act, a promisee can remit a promise in part. It is not necessary under the Contract Act that such remission should be supported by consideration. If the decision of the Government as we think, then the Government amounts to remitting a part of the debt, as we think, then the Government cannot seek to recover more than 40%. Admittedly more than 40% of the total liability has already been paid to the Government. Therefore nothing remains due by the appellants. *M/s. Hari Chand Madan Gopal and Co. and others v. State of Punjab,* AIR 1973 SC 381: 1973(1) SCWR 262: 1973(1) SCC 204: 1973(2) SCR 582

**Sections 63 and 29.-Performance of contract.-Extension of time.-The promisee cannot extend the time unilaterally without the consent of the other party.-The question of consent is a**

**question of fact to be determined in each case on the basis of facts and circumstances.-Extension of time pleaded on the basis of a communication found to be vague and uncertain is void and not enforceable.**Every promisee, as the section provides, may extend time for the performance of the contract. It would not be open to the promisee by his unilateral act to extend the time for performance of his own accord for his own benefit. It is true that the agreement to extend time need not necessarily be reduced to writing. It may be proved by oral evidence. In some cases it may be proved by evidence of conduct. Forbearance on the part of the buyer to make a demand for the delivery of goods on the due date as fixed in the original contract may conceivably be relevant on the question of the intention of the buyer to accept the seller's proposal to extend time. It would be difficult to lay down any hard and fast rule about the requirements of proof of such an agreement. It would naturally be a question of fact in each case to be determined in the light of evidence adduced by the parties. The respondent in its letter asking for extension of time were so vague and uncertain that it is not possible to ascertain defnitely the period for which the time for the performance of the contract was really intended to be extended. In such a case, the agreement for extension must be held to be vague and uncertain and as such void under Section 29, Contract Act. *Keshavlal Lallubhai Patel and others v. Lalbhai Trikum-lal Mills Ltd.,* AIR 1958 SC 512: 60 Bom LR 948: 1958 SCJ 866: 1959 SCR 213

**Sections 63 and 41.-Discharge of promise.-Part performance.-Acceptance of a part of amount of payment in full satisfaction of claim .-Acceptance of money amounts to acceptance of discharge of whole the claim.-Subsequent suit for claim of balance amount is not permissible.** It seems to us that this case is completely covered by Section 63 and illustration (c) thereof. The appellants having accepted payment in full satisfaction of their claim are not now entitled to sue the respondent for the balance. The words of Section 41 of the Contract Act leave no room for doubt and when the appellants have accepted performance of the promise from a third person, they cannot afterwards enforce it against the promisor, namely, the respondent. The position in the present case is that the appellant's must have known that they could receive the second instalment and retain the first instal- ment by accepting the condition on which the sum of Rs. 20 lacs was offered to them, namely, that they must record a full satisfaction of their claim. They accepted the money on the condition on which it was offered and it is not now open to them to say, either in fact or in law, that they accepted the money but not the condition. *Lala Kapurchand Godha and others v. Mir Nawab Himayata-likhan Azamjah,* AIR 1963 SC 250: 1963(2) MLJ (SC) 94: 1963(2) SCR 168

**Section 64.-Forfeiture of earnest money.-No evidence of misrepresentation.-Admitted breach of contract.-Invocation of provision not permissible.** *Shree Hanuman Cotton Mills and another v. Tata Air Craft Ltd.,* AIR 1970 SC 1986: 1970 (2) SCJ 420: 1970(3) SCR 127: 1969(3) SCC 522

**Section 65.-Compensation for void contract.-Computation of.-Contract for lease of Mine found to be void.-The quantum of compensation to the State for the benefit availed by the grantee has to be ascertained on the basis of the amount of proportionate royalty payable to the grantor and not on the basis of the profits earned by the grantee.** *State of Rajasthan v. Associated Stone Industries (Kotah) Ltd.,* AIR 1985 SC 466: 1985(1) SCC 575: 1985(1) Scale 1159

**Section 65.-Void contract.-Violation of statute.-Effect of knowledge of illegality, on enforcement of agreement.** The Section 65 makes a distinction between an agreement and a contract. According to Section 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and it, therefore, not a contract. It means that it was void. It may be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was,

therefore, a contract, becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case of the contract becoming void due to subsequent happenings. Therefore, Section 65 of the Contract Act did not apply. A peron who, however, gives money for an unlawful purpose knowing it too be so, or in such circumstances that knowledge of illegality or unlawfulness can as a finding of fact be imputed to him, the agreement under which the payment is made cannot on his part be said to be discovered to be void. The criticism that if the aforesaid view is right then a person who has paid money or transfereed property to another for illegal purpose can recover it back from the transferee under this section even if the illegal purpose is carried into execution, notwithstanding the fact that both the transferor and transferee are in *pari delicto*, in our view, overlooks the fact that the courts do not assist a person who comes with unclean hands. In such cases, the defendant possesses an advantage over the plaintiffs.-in *pari delicto potior est conditio defendentio. Kuju Collieries Ltd. v. Jharkhand Mines Ltd. and others,* AIR 1974 SC 1892: 1974(2) SCC 533: 1975(1) SCR 703

**Section 65.-Breach of contract.-Interest.-On refund of consideration amount.-No provision to pay interest in contract.-Interest, however, can be awarded on equitable grounds.-Breach by development authority of contract to allot developed plots.-Interest at 12 per cent awarded found justified.**

Interest on equitable grounds can be awarded in appropriate cases. In *Sovintorg (India) Ltd.'s case* (AIR 1999 SC 2963) the rate of 15 per cent per annum was considered adequate to serve the ends of justice. The Court was apparently influenced by the fact that the claimant had to suffer winding-up proceedings under the Companies Act and the defendant must be to share part of the blame. However, in the cases before us, the parties have not tendered any evidence enabling formation of opinion on the rate of interest which can be considered ideal to be adopted. The rate of interest awarded in equity should neither be too high nor too low. In our opinion awarding interest at the rate of 12 per cent per annum would be just and proper and meet the ends of justice in the cases under consideration. The provision contained in the brochure issued by the Development Authority that it shall not be liable to pay any interest in the event of an occasion arising for return of the amount should be held to be applicable only to such cases in which the claimant is itself responsible for creating circumstances providing occasion for the refund. In the case under appeal the fault has been found with the Authority. The Authority does not therefore have any justification for resisting refund of the claimant's amount with interest. *Ghaziabad Development Authority vs. Union of India and another*, AIR 2000 SC 2003 : 2000(4) Cir LJ 377 : 2000(6) SCC 113 : 2000(3) All Mah LR 639 : 2000(3) Arbi LR 170 : 20001(1) Mad LW 86 : 2000 All LJ 1456

**Sections 69 and 73.-Unjust enrichment.-Miscalculation of interest.-Commercial transaction between two parties in which one of the parties who was maintaining account of interest, miscalculated the same.-Such party is under obligation to re-pay excess amount realised by it.***Thomas Abraham v. The National Tyre and Rubber Co. of India Ltd.,* AIR 1974 SC 602: 1973(3) SCC 458

**Section 70.-Absence of pleadings.-Effect of.-Claim for mesne profit is not maintainable without proper pleadings in this regard.** *Devi Sahai Palliwal v. Union of India and another,* AIR 1977 SC 2082: 1976(4) SCC 763

**Section 70.-Compensation for goods.-Determination of.-A person without enforceable contract, non-gratuitously supplying goods to another is entitled to demand delivery of goods or compensation thereof.-Normally the market price of the goods shall be the compensation.** *Pilloo Dhunji Shaw Sidhwa v. Municipal Corporation of the City of Poona,* AIR 1970 SC 1201: 1970 (1)

SCC 213: 1970(3) SCR 415

**Section 70.-Compensation for non-gratuitous act.-Necessity of oral agreement.-A party to contract rendering services in addition to the services contracted in agreement.-Such party is entitled to compensation without any necessity to prove oral agreement in this regard.** If a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him. Evidently, the respondent made additional constructions to the building and they were not done gratuitously. Even if he failed to prove an express agreement in that behalf, the court may still award him compensation under Section 70 of the Contract Act. By awarding a decree for compensation under the Statute and not under the oral contract pleaded, there was in the circumstances of this case no substantial departure from the claim made by the respondent. *V.R. Subramanyam v. B. Thayappa and others,* AIR 1966 SC 1034: 1961 Ker LT (SC) 37: 1961 Mad WN 794

**Section 70.-Effect on specific performance.** In a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution. *Mulamchand v. State of Madhya Pradesh,* AIR 1968 SC 1218: 1968 All LJ 745: 1968 BLJR 774: 1968 MPLJ 815: 1968(3) SCR 214

**Section 70.-Implied contract.-Determination of.-Contract of sale of goods.-Nature of contract.** It it true that no express contract, as understood in law, was pleaded in the plaint. But what was clearly pleaded was supply of goods by the plaintiff on its own account; acceptance of them by the defendants as such; part payment to the plaintiff and the balance remaining due to it. The case pleaded, therefore, was, as it is called in law, an implied contract brought about by the conduct of the parties, namely, the supply of the goods by the plaintiff. The plaintiff was entitled for the recovery of the balance. It was thus a pleading of direct contract of sale between the plaintiff and the defendants brought about by their conduct. A conduct of sale means an agreement to sell or sale. *Haji Mohammed Ishaq Wd. S.K. Mohammed and others v. Mohamed Iqbal and Mohamed Ali and Co.,* AIR 1978 SC 798: 1978(2) SCC 493: 1978(3) SCR 571

**Section 70.-Non-gracious act.-Liability of beneficiary.-Claim made by the person so acting against the third person.-Permissibility.-In the absence of privity of contract between the parties, the beneficiary is not liable to pay compensation to third party.** *Aries Advertising Bureau v. C.T. Devaraj (dead) by LRs,* AIR 1995 SC 2251: 1995(3) SCC 250: 1995(2) Scale 103: 1995(2) JT 576

**Section 70.-Non-gracious act.-Right to compensation.** If money is deposited and goods are supplied or if services are rendered in terms of the void contract, the provisions of Section 70 of the Indian Contract Act may be applicable. In other words if the conditions imposed by Section 70 of the Indian Contract Act are satisfied that the provisions of that section can be invoked by the aggrieved party to be void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. *Mulamchand v. State of Madhya Pradesh,* AIR 1968 SC 1218: 1968 All LJ 745: 1968 BLJR 774: 1968

MPLJ 815: 1968(3) SCR 214

**Section 70.-Unjust enrichment.-Absence of formal contract.-Benefit derived from the transaction.-The beneficiary is liable to pay for the cost of supplies received by it or the person deriving the benefit through it.** There is no reason for us to hold, in view of this statement that the steel supplied by the plaintiff company to G. Brothers was not being held by the latter on behalf of the Government of India and if that be so, the Government must be held to have reaped full benefit of the delivery to G. Brothers and it is immaterial how the steel supplied to the latter was dealt with later on. *Union of India v. M/s. J.K. Gas Plant,* AIR 1980 SC 1330: 1980(3) SCC 469: 1980(3) SCR 893

**Section 70.-Unjust enrichment.-Cause of action.-Determination of.-Considerations for.** The three ingredients to support the cause of action under Section 70 of the Indian Contract Act are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously." Third, the person to whom the goods are delivered "enjoys the benefit thereof." It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered. In view of the fact that there was acceptance of the goods no question of restoration arises. Counsel for respondent argued that restoration under Section 70 of the Indian Contract Act meant that the defendant would have to restore the goods to the plaintiff by delivering the same to the plaintiff. This contention of the plaintiff respondent is utterly unsound. As long as there is intimation by the defendant to the plaintiff that the plaintiff can take back the goods the defendant evinces intention of restoration. In the present case no question of restoration arises because of the acceptance of the goods.*Union of India v. Sita Ram Jaiswal,* AIR 1977 SC 329: 1976(4) SCC 505: 1977(1) SCR 979

**Section 70.-Unjust enrichment.-Change in policy.-The person benefiting from change in policy of Government is not liable to part with the benefit to another person who was indirectly instrumental in the benefit.**The certificate which the appellant surrendered to the respondent resulted in the appointment of the appellant as the sole distributor for schluter engines. The issue of blanket licence by the Government to the respondent was because of change in import trade policy. The respondent of its own applied for the blanket licence. The grant of the blanket licence was not any act done by the appellant. The respondent did not receive the blanket licence as a benefit from the appellant.*Srinivas & Company v. Inden Biselers,* AIR 1971 SC 2224: 1971(3) SCC 721

**Section 70.-Unjust enrichment.-Pleading of.-Necessity of.** Section 70 of the Contract Act enables the person who actually supplies goods or renders some services, not intending to do so gratuitously, to claim compensation from the person who enjoys the benefit of the supply made or services rendered. It is a liability which arises on equitable grounds even though express agreement or a contract may not be proved. So long as the claim is there, this Court is not precluded from applying Section 70 of the Contract Act for the first time even on appeal by special leave. We, however, think that the conditions for the applicability of this Section must at least be set out in the pleadings and proved. *M/s. Hansraj Gupta & Co. v. Union of India,* AIR 1973 SC 2724: 1973(2) SCC 637: 1973 SCWR 509

**Section 70.-Unjust enrichment.-Reduction in price fixed by Government.-The consumer who paid excess price are entitled to refund to the same.** *The Newabganj Sugar Mills Co. Ltd. and others v. The Union of India and others,* AIR 1976 SC 1152: 1976(1) SCC 120: 1976(1) SCR 803

**Section 70.-Limitation.-Refund of tax.-Provision for levy of water charges struck down on ground that Corporation was incompetent to frame rules but on ground that rules framed were inarticulate and not clear.-Payment of water charges made by petitioner to be treated as having been made by mistake.-Payments made under mistake could be claimed within reasonable time.-Reasonable period is period of limitation prescribed for filing suit for recovery**

**of amount.**

In ascertaining what is reasonable time for claiming refund, the Courts have often taken note of the period of limitation prescribed under the general law of Limitation for filing of suits for recovery of amount due to them. In the present case also that standard adopted by the High Court is the same in ascertaining whether there has been laches on the part of the appellant in seeking relief in due time or not. The finding clearly recorded is that long after the charges had been paid and law had been declared by the Court, the writ petition has been filed and, therefore, such a refund should not be allowed. We do not think such a view taken by the High Court calls for interference under Article 136 of the Constitution. *Municipal Corporation of Greater Bombay vs. Bombay Tyres International Ltd. and others,* AIR 1998 SC 1629 : 1998(4) SCC 100 : 1998(2) Rec Civ R 121 : 1998(2) Scale 493

**Section 70.-Unjust enrichment.-Water charges recovered without authority of law.-Relevant rules struck down by Division Bench of High Court.-Decision upheld by Supreme Court in AIR 1988 SC 1009.-Rules not invalidated on ground that Corporation was incompetent to frame rules but on account of clear provision not having been framed.-Where burden had been passed on to consumers to pay water charges, allowing refund would be inequitable.**

The High Court having allowed the petitions has directed the refund of the amounts with certain rates of interest and if those amounts have already been refunded to the parties concerned, we do not think it appropriate to allow the appellants to recover such amounts again but if, however, such amounts have not been refunded and are retained by the Corporation, such amount shall not be refunded. We are making this order being conscious of the fact that the rule had been struck down not on the ground that it was incompetent to frame such Rule but on account of clear provisions not having been framed. Further, we are not sure in the absence of investigation as to whether the respondents had included in their price structure the amounts paid to the Corporation pursuant to the demand raised under the invalidated rules and whether the burden had been passed on to the consumers, in which event it will be wholly inequitable to allow respondents to claim such amounts back from the Corporation. *Municipal Corporation of Greater Bombay vs. Bombay Tyres International Ltd. and others,* AIR 1998 SC 1629 : 1998(4) SCC 100 : 1998(2) Rec Civ R 121 : 1998(2) Scale 493

**Section 70, 72.-Agreement to sell.-First defendant negotiated for sale of property on strength of authority of second defendant.-Sale consideration amount paid by plaintiff to both defendants.-Suit for recovery of amount.-First defendant denying privity of contract between him and plaintiff.-Sale consideration paid to defendants not gratuitous amount.-Doctrine of undue enrichment squarely applicable.-Plaintiff entitled to restitution.**

After the first defendant admitted having received Rupees one lakh from the plaintiff he could not retain that money on the spacious plea that there was no privity of contract between him and the plaintiff. Amount of Rupees one lakh had been given to him by the plaintiff as he wanted to purchase ground floor of his property. The agreement to sell for the purpose was entered into through the second defendant whom the first defendant had authorised to enter into any such agreement on his behalf. The plaintiff could not have paid to the first defendant Rupees one lakh but for the agreement to sell in respect of ground floor of his property. It is only on the basis of this agreement which is entered into by the second defendant on the strength of Ext. P-1 that the plaintiff paid Rupees one lakh each to the first and second defendants. If we accept the pleadings of the first defendant then the amount of Rupees one lakh had been given by the plaintiff under some mistake. In any case, it was not a payment gratuitously made. Doctrine of undue enrichment would squarely apply in the present case and the plaintiff would be entitled to restitution. *K.S. Satyanarayana vs. V.R. Narayana Rao,* AIR 1999 SC 2544 : 1999(3) Land LR 404 : 1999(3) Pun LR 297 : 1999(3) Rec Civ R 621 : 1999(5) Andh LD 7 : 1999(6) SCC 104 : 1999(37) All LR 93

**Sections 70 and 73.-Breach of contract.-Damages for.-Actual damage.-Contract for manufacturing of biscuit from the flour supplied by the Government.-Failure to return the containers in which the flour was supplied in terms of agreement.-Decision of Court below**

**directing adjustment of determined value of containers from the security deposit with the Government, affirmed.** *M/s. Modi Sugar Mills Ltd. v. Union of India,* AIR 1984 SC 1248: 1984 Supp SCC 338: 1984(1) Scale 519

**Section 71.-Implied bailment.-Despatch of consignment from Pakistan to India by Railway.-Indian Railway is the Bailee of the goods even if there is no treaty or express contract between two Railways and therefore, shall be subject to limitations of Bailee.** *Union of India v. Amar Singh,* AIR 1960 SC 233: 1960 SCJ 543: 1960 2 SCR 75

**Section 72.-Application of.-Payment to third party.-Onward payment to another party.-Claim for refund of money to such third party is not permissible.** There is no doubt that Section 72 of the Contract Act provides that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. That section in our opinion will only apply when we are dealing with a case of two persons one paying the money and the other receiving the money on behalf of the person paying it. In such a case if the payment is made by mistake the person receiving the money must return it. But Section 72 in our opinion has no application to a case where money is paid by a person to a bank with instructions that it should be deposited in the account of a third person who is a constituent of the bank, the money becomes the money of the constituent, and it is not open to the bank in such circumstances to reverse the entry of credit made in the account of the constituent and in effect pay back the money to the person who had deposited it, even though it might have been deposited by mistake.*Jammu and Kashmir Bank Ltd. v. Attar-Ul-Nisa,* AIR 1967 SC 540: 1967 All LJ 287: 1967 BLJR 285: 1967(1) SCWR 1035: 1967(1) SCR 792

**Section 72.-Excess payment of rent.-Payment not made under any mistake.-Provision has no application.** *Union of India v. Jal Rustomji Modi and another,* AIR 1970 SC 1490: 1970 (3) SCC 368

**Section 72.-Mistake.-Meaning of.-The expression include mistake of fact as well as mistake of law.** The section in terms does not make any distinction between a mistake of law or a mistake of fact. The term "mistake" has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. There is no warrant for ascribing any limited meaning to the word `mistake' as has been used therein and it is wide enough to cover not only a mistake of fact but also a mistake of law. There is no conflict between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Indian Contract Act on the other and the true principle enuniciated is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same.*The Sales Tax Officer, Banaras and others v. Kanhaiya Lal Makund Lal Saraf,* AIR 1959 SC 135: (1959) Mad LJ (SC) 35: 1959 SCR 1350

**Section 72.-Refund of Tax.-Illegal recovery of tax.-Suit for refund is maintainable.** *Ballabhdas Mathuradas Lakhani and others v. Municipal Committee, Malkapur,* AIR 1970 SC 1002: 1970 Mah LJ 561: 1970(2) SCC 267

**Section 72.-Unjust enrichment.-Mistake of parties.-Where both the parties entered into a contract under a mistake of law, the money paid under the contract cannot be said to have been paid under the mistake of law.** Section 72 of the Contract Act states that a person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it. The mistake is material only as far as it leads to the payment being made without consideration. This Court has said that the true principle is that if one party under a mistake of law pays to another money which is not due by contract or otherwise that is to be repaid. When there is a clear and unambiguous position of law which entitles a party to the relief claimed by him equitable considerations are not imported. A contract entered into under a mistake of law of both parties falls under Section 21 of the Contract and not Section 72. If a mistake of law had led to the formation of a contract, Section 21 enacts that that contract is not for that reason voidable. If money is paid under

that contract, it cannot be said that the money was paid under mistake of law; it was paid because it was due under a valid contract, if it had not been paid payment could have been enforced. *Dhanyalakshmi Rice Mills etc. v. The Commissioner of Civil Supplies and another,* AIR 1976 SC 2243: 1976(4) SCC 723: 1976(3) SCR 387

**Section 72.-Unjust enrichment.-Principle of.-Payment of tax by mistake.-Such recovery on the part of State may amount to unjust enrichment entitling its refund.** The principle of unjust enrichment requires: first, that the defendant has been `enriched' by the receipt of a `benefit'; secondly, that this enrichment is `at the expense of the plaintiff'; and thirdly, that the retention of the enrichment be unjust. This justifies restitution. Enrichment may take the form of direct advantage to the recipient's wealth such as by the receipt of money or indirect one for instance where inevitable expense has been saved. There is no doubt that the instant suit is for refund of money paid by mistake and refusal to refund may result in injust enrichment depending on the facts and circumstances of the case. *Mahabir Kishore and others v. State of Madhya Pradesh,* AIR 1990 SC 313: 1990 Supp. SCC 688: 1990 Jab LJ 1: 1989 Supp. (2) SCR 177: 1989(2) Scale 1134: 1989(4) JT 407

**Section 72.-Unjust enrichment.-Refund of tax paid under mistake.-Limitation commences from the time of discovery of mistake.-In a case based on the decision of the Court declaring a levy of tax void, the limitation can commence from the date of judgement declaring the levy void.** *State of Rajasthan and others v. Novelty Stores, etc.,* AIR 1995 SC 1132

**Section 72.-Unjust enrichment.-Refund of tax paid under mistake.-The octroi duty passed to customer.-Refund would amount to unjust enrichment of the dealer.-Refund of duty not permissible.** *State of Rajasthan and others v. Novelty Stores, etc.,* AIR 1995 SC 1132

**Section 72.-Unjust enrichment.-Refund of duty.-Payment of tax under mistake.-No proof that duty was passed on to purchasers.-No question of unjust enrichment.-Refund of duty allowed.** There is no evidence that any of the articles sold by the Company is subject to any price control by the Government or that the Company had charged any octroi separately in the bills. Invoices and the other documents of sale to the outside purchasers produced before us do not also show that any octroi was separately charged and collected by the Company. It may be mentioned that in the rejoinder filed by the appellant in the writ petition they have specifically denied that they "have recovered the amount paid by them by way of octroi duty from the dealers in turn have recovered the octroi duty from the customers." In view of this the question of unjust enrichment does not arise. *Tata Engineering and Locomotive Company Limited and another v. The Municipal Corporation of the City of Thane and others,* AIR 1992 SC 645: 1993 Supp (1) SCC 361: 1991(2) Scale 1111: 1991(6) JT 322

**Section 72.-Unjust enrichment.-Refund of levy without authority.-Pending adjudication, direction given by Court to keep the amount so refunded separately in an interest earning bank account.-The question of unjust enrichment never raised in the proceedings.-Subsequent denial of refund on the ground of unjust enrichment not called for.-Direction given for refund of amount.** *State of Orissa and others v. Mahanandi Coalfields Ltd. and others, etc.,* AIR 1996 SC 3339: 1996(8) SCC 621: 1996(4) Scale 229: 1996(9) JT 83: 1996(2) Bank. Case 332

**Section 72.-Unjust enrichment.-Remedy of.-Payment to government claimed to have been made under mistake.-The proper remedy is by way of suit and not by way of writ petition.** The remedy under Article 226 is not appropriate in the present cases for these reasons as well. First, several petitioners have joined. Each petitioner has individual and independent cause of action. A suit by such a combination of plaintiffs would be open to misjoinder. Second, there are triable issues like limitation, estoppel and questions of fact in ascertaining the expenses incurred by the Government for administrative surcharges of the scheme and allocating the expenses with regard to quality as well as quantity of rice covered by the permits. *Dhanyalakshmi Rice Mills etc. v. The Commissioner of Civil Supplies and another,* AIR 1976 SC 2243: 1976(4) SCC 723: 1976(3) SCR 387

**Section 72.-Unjust enrichment.-Tax paid under mistake of law.-The claim for refund is covered**

**by the provision and the tax collected is liable to be refunded.** *Nagar Mahapalika, Kanpur and another v. M/s. Sri Ram Mahadeo Prasad,* AIR 1991 SC 274: 1991 Supp. (2) SCC 279: 1990 All. LJ 912

**Section 72.-Contract for supply of gas.-Supplier's proposal for renewal on enhanced price.-Challenge to escalation in price.-Interim direction to supply gas at old rates.-Escalation in price by ONGC finally found valid by Court.-Purchaser liable to pay difference in price and interest for delayed payment on principle of restitution.**

Agreement for supply of natural gas were entered into between ONGC and different industries. The agreement stipulated the price, mode of payment and also the interest payable in case of delay in payment. After the expiry of the term of these agreement, ONGC the supplier proposed that the contract should be renewed but at the enhanced price. The purchaser thereon challenged the increase in the price of gas as fixed. By an interim order the Court directed the supplier to supply gas at the old rate. The escalation in price made by ONGC was finally found to be valid by Court. ONGC the seller thereupon demanded from the purchasers the different in price and also interest for delayed payment at the rate stipulated in the agreement. The claim made for interest was disputed by the purchasers. Held, ONGC was entitled to claim interest from the purchasers for the delayed payment of the principal amount. *O.N.G.C. and another vs. Association of Natural Gas Consuming Industries,* AIR 2001 SC 2796 : 2001(6) SCC 627 : 2001(6) JT 156

**Section 72.-Unjust enrichment.-Recovery of vend fee on industrial alcohol.-Principle cannot be extended to give right to State to recover or realise vend fee after statute has been struck down.**

In *Mafatlal Industries Ltd. vs. Union of India,* (1997) 5 SCC 536 the principle of unjust enrichment was involved as refund was claimed even though the amount of excise duty paid had already been recovered. This principle resulted in the Court declining to order refund. The principle of unjust enrichment does not apply in the present case, in view of the direction given in second *Synthetics and Chemical's case*, AIR 1990 S.C. 1927, that no refund be given. This is in line with the principle of unjust enrichment. But that principle cannot be extended to give a right to the state to recover or realise vend fee after the statute has been struck down and it has been categorically stated that "the respondent States are restrained from enforcing the said levy and further...." The contention of the respondent in the teeth of the aforesaid direction cannot, therefore, be accepted. *Somaiya Organics (India) Ltd. vs. State of Uttar Pradesh,* AIR 2001 SC 1723 : 2001(5) SCC 519 : 2001(130) ELT 3

**Section 72.-Unjust enrichment.-Refund of import duty not legally payable.-Question whether refund could have been ordered.-When burden of duty was passed on to third parties.-Is a prime question for consideration.**

Where a claim for refund of any duty or tax paid arises for consideration of the authorities, apart from the merits of the claim and even if on merits it is found to be a justified claim, the principle of unjust enrichment has to be kept in view before directing the refund. While upholding the plea of the respondent that the disputed import duty paid by it was not legally payable, still the question survives for consideration as to whether refund could have been ordered to it if the burden of duty was passed on to the third parties. If it is found that the burden was already passed on to the third parties then on the principle of unjust enrichment the refund application will have to be dismissed. *Union of India and another vs. Raj Industries and another,* AIR 2000 SC 3500 : 2000(2) Cur Cir R 223 : 2000(1) SCC 707 : 2000(2) SCC 172

**Section 73.-Breach of contract.-Damages.-Assessment of.-Necessity of.-Auction of mining lease.-Breach of bidder.-Recovery proceedings initiated without assessing the loss suffered by the State is not proper.-It cannot be assumed that the loss suffered by the State would be equal to amount of the rent paid by the lessee under the Bid.** *Masum Hussain v. State of Madhya Pradesh and others,* AIR 1981 SC 1680: 1981(4) SCC 155: 1981(3) Scale 1153

**Section 73.-Breach of contract.-Damages.-Computation of.-Measurement of damages to**

**compensate for the loss caused to the party must be based on the direct consequences of breach as known to the party.** The appellant, on the breach of contract by the respondent, was entitled, under Section 73 of the Contract Act, to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Under Section 73 of the Contract Act, such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Illustration (k) to Section 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties. *Karsandas H. Thacker, v. M/s. The Saran Engineering Co. Ltd.,* AIR 1965 SC 1981: 1965 BLJR 280

**Section 73.-Breach of contract.-Damages.-Computation of.-Market price of goods to be supplied under the contract as on the date of proposed delivery, held to be the basis on which the damages should be quantified.** *Union of India v. M/s. Jolly Steel Industries (P) Ltd. and others,* AIR 1980 SC 1346: 1980 Supp. SCC 436

**Section 73.-Breach of contract.-Damages.-Considerations for.-Necessity to prove wrongful cancellation of contract.** In order to succeed in its claim to damages the plaintiff must establish that the cancellation of the agreement before the expiry of the period fixed was wrongful. *M/s. G.L. Kilikar v. The State of Kerala and another,* AIR 1971 SC 1196: 1971(3) SCC 751

**Section 73.-Breach of contract.-Damages.-Considerations for.-Default in supply of commodity.-Computation of damages on the basis of the last price prevailing in the market on the date in question is not illegal or unreasonable.** *M.N. Gangappa v. A.N. Setty & Co.,* AIR 1972 SC 696

**Section 73.-Breach of Contract.-Damages.-Consideration for.** The two principles on which damages in such cases are calculated are well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it sufficient any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things. *M/s. Muridhar Chiranjilal v. M/s. Harishchandra Dwarka-das and another,* AIR 1962 SC 366: 1961(2) Ker LJ 90: 1962(1) SCR 653

**Section 73.-Breach of contract.-Damages.-Expected profits.-Breach of works contract.-Denial of opportunity to complete the contract.-The Contractor is entitled to claim damages or loss of profits.** Where in a works contract, the party entrusting the work commits breach of the contract the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. *M/s. A.T. Brij Paul Singh and Bros. v. State of Gujarat,* AIR 1984 SC 1703: 1984(4) SCC

59: 1984(2) Scale 56

**Section 73.-Breach of contract.-Damages.-Measure of.-Loss of goods in fire while in possession of carrier.-The contract price is not measure of damages.-The damages should be awarded on the basis of market price at the time of damage.** *The Union of India v. The West Punjab Factories, Ltd.,* AIR 1966 SC 395: 1966(2) Andh LT 269: 1966(1) SCR 580

**Section 73.-Breach of contract.-Damages.-Mitigation of loss.-Necessity of.-The principle of mitigation of loss does not give any right to defaulting party but is a factor to be borne in mind by the court while awarding damages.** *M. Lachia Setty and Sons Ltd. v. The Coffee Board, Bangalore,* AIR 1981 SC 162: 1980(4) SCC 626: 1981(1) SCR 884

**Section 73.-Breach of contract.-Non-fulfilment of terms of contract.-Defect in quality of goods.-Termination of contract justified.-Claim for damages dis-allowed.** *M/s. Madhya Pradesh Industries Ltd. v. M/s. Rai Bahadur Shriram Durga Prasad Ltd.,* AIR 1971 SC 1983: 1971 Mah LJ 952: 1971 MPLJ 1002: 1972 (3) SCC 180

**Section 73.-Damages for occupation.-Delay in loading the goods.-Delay occurred on account of failure on the part of plaintiff to provide sufficient lighting for the purpose.-Plaintiff is not entitled to demurrage.** *Timblo Irmaos Ltd., Margao v. Jorge Anibal Matos Sequeira and another,* AIR 1977 SC 734: 1977(3) SCC 474: 1977(2) SCR 451

**Section 73.-Damages for termination of contract.-Considerations for.-The scope of damages is limited to the express terms of the contract in this regard.-A party is not liable for damages arising out of termination of contract on account of remote consequences.** Government expressly stipulated, and the contractor expressly agreed, that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affair. But having contracted he cannot go back on his agreement simply because it does not suit him to abide by it. This is not to say that Government is absolved from all liability, but all it can he held responsible for is for damages occasioned by the breach of its contract to remove the pucca bricks which it had undertaken to remove. The contractor had a duty under Section 73 of the Contract Act to minimise the loss, accordingly he would have had the right to remove the bricks himself and stack them elsewhere and claim compensation for the loss so occasioned. Alternatively, he could have sold the bricks in the market and claimed the difference in price, but ordinarily he could not have claimed compensation for damage done to the katcha bricks unless he could have shown that kind of damage, ordinarily too remote, was expressly contemplated by the parties when the contract was made: Section 73 of the Contract Act. *Thawardas Pherumal and another v. Union of India,* AIR 1955 SC 468: 57 Pun LR 369: 1955 SCJ 445: 1955(2) SCR 48

**Section 73.-Damages.-Scope of.-The amount of damages can only be the difference of price and not the actual damage suffered by the claimant.** It is, however, clear that in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be the difference between the price which he paid and the price which he would have received if he had resold them in the market forthwith after the purchase provided, of course, that there was a fair market then. *Messrs. Trojan & Co. v. R.M.N.N. Nagappa Chettiar,* AIR 1953 SC 235: 1953 SCJ 345: 1953 SCR 789

**Section 73.-Interest on damages.-Permissibility.-Interest is allowed by the Court in equity in cases where money is obtained or retained by fraud.-Even an agent is liable to pay interest for the money earned by him by fraud, bribe and secret profits out of the agency.** *Messrs. Trojan & Co. v. R.M.N.N. Nagappa Chettiar,* AIR 1955 SC 235: 1953 SCJ 345: 1953 SCR 789

**Section 73.-Quantum meruit.-Application of.-Stipulation of damages in the contract itself.-Effect of.** The principle of quantum meruit is rooted in English law under which there were certain procedural advantages in framing an action for compensation for work done. In order to avail of the remedy under quantum meruit, the original contract must have been discharged by the Defendant in

such a way as to entitle the Plaintiff to regard himself as discharged from any further performance and he must have elected to do so. The remedy it may be noticed in however, not available to the party who breaks the contract even though he may have partially performed part of his obligation. This remedy by way of quantum meruit is restitutory that is it is a recompense for the value of the work done by the Plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this regard it is different to a claim for damages which is a compensatory remedy aimed at placing the injured party, as near as may be in the position which he would have been in, had the other party performed the contract. Where work is done under a contract pursuant to the terms thereof no amount can be claimed by way of quantum meruit. *Puran Lal Sah v. The State of U.P.,* AIR 1971 SC 712: 1971(1) SCC 424: 1971(3) SCR 469

**Section 73.-Breach of contract.-Claim in lieu of.-Amount of compensation fixed in agreement.-Can be claimed under the agreement.-Defaulting party cannot make lesser payment that provided in agreement without assigning any reason.**

The suit was for specific performance or in the alternative for a sum of Rs. 40,000/- as compensation. The sum of Rs. 40,000/- was claimed as the suit agreement *inter alia* provided as follows:

"Due to any reason, if I don't get Sale Deed executed then purchaser can get it done through Court of law or he can claim double the advance amount paid to me."

No reasons have been given by the trial Court as to why this term of the suit agreement should not be given effect to. No reasons have been given as to why compensation of only Rs. 8,800/- was awarded when what was to be returned, if Appellant could not get Sale Deed executed, was double the amount. Trial Court has held that the 1st Respondent was ready and willing to perform the whole of the Agreement. Trial Court has noted that the Appellant could not perform the Agreement in its entirely inasmuch as she could not deliver possession. As 1st Respondent had elected not to accept performance in part the trial Court held that the Agreement could not be specifically enforced. However in such an event trial Court should have directed payment of Rupees 40,000/- as provided in the Agreement. We accordingly vary the decree granted by the trial Court to the extant that the Appellant shall repay Rs. 20,000/- with interest thereon at 12% p.a. from 30th June, 1981 till payment and also pay another sum of Rupees 20,000/- with interest thereon at 12% p.a. from date of decree till payment. *Surjit Kaur vs. Naurata Singh and another,* AIR 2000 SC 2927 : 2000(7) SCC 379 : 2000(6) Andh LD 78 : 2000(10) JT 520 : 2000(4) Cur CC 30 : 2000(41) All LR 310

**Section 73.-Breach of contract.-Damages, liquidated or unliquidated.-Mental agony.-Not covered under ordinary commercial contract.-Unreasonable delay by Development Authority in completing scheme for allotment of plots and development work and handing over possession.-Order awarding damages for mental agony to allottees set aside.**

The ordinary heads of damages allowable in contracts for sale of land are settled. A vendor who breaks the contract by failing to convey the land to the purchaser is liable to damages for the purchaser's loss of bargain by paying the market value of the property at the fixed time for completion less the contract price. The purchaser may claim the loss of profit he intended to make from a particular use of the land if the vendor had actual or imputed knowledge thereof. For delay in performance the normal nature of damages is the value of the use of the land for the period of delay viz., usually the rental value. Damages for anguish and vexation caused by breach of contract cannot be awarded in an ordinary commercial contract. Damages for mental anguish granted to the persons who had subscribed to the scheme for allotment of developed plots floated by development authority and who had approached different forum complaining of failure or unreasonable delay in accomplishing the scheme was improper. *Ghaziabad Development Authority vs. Union of India and another*, AIR 2000 SC 2003 : 2000(4) Cir LJ 377 : 2000(6) SCC 113 : 2000(3) All Mah LR 639 : 2000(3) Arbi LR 170 : 20001(1) Mad LW 86 : 2000 All LJ 1456

**Section 73.-Damages.-Illegal recission of contract.-Claim made by contractor for recovery of**

**amount as damages based on expected profits out of contract.-Specific finding of trial court that defendants by rescinding agreement committed breach of contract.-Erring defendant legally bound to compensate plaintiff.**

In the instant case the trial court had granted only 10 per cent of the contract price, which was reasonable and permissible, particularly when the High Court had concurred with the finding of the Trial court regarding breach of contract by specifically holding that "we therefore see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract". It follows therefore as and when the contract of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. *Dwarka Das vs. State of Madhya Pradesh and another,* AIR 1999 SC 1031 : 1999(2) Mad LJ 49 : 1999(1) Orissa LR 388 : 1999(3) Raj LW 379 : 1999(1) SCC 500 : 1999(121) Pun LR 820 : 1999(1) Cur CC 116

**Sections 73 and 55.-Breach of contract.-Delay in payment.-Failure to make payment within the period stipulated in the contract.-It amounts to breach of contract entitling other party to rescind the contract.** *Mahabir Prasad Rungta v. Durga Datta,* AIR 1961 SC 990: 1961 (1) Andh WR (SC) 142: 1962(3) SCR 639

**Sections 73 and 222.-Quantum meruit.-Application of.-Remuneration of agent.-The agent cannot claim remuneration on terms different than those stipulated in the contract.** The claim made by the Agents was not for indemnity for consequences of acts lawfully done by them on behalf of the Government of India; it was a claim for charges incurred by them in excess of those stipulated. Such a claim was not a claim for indemnity, but a claim for enhancement of the rate of the agreed consideration. It is difficult to appreciate the argument advanced by Mr. Chatterjee that the Agents were entitled to claim remuneration at rates substantially different from the terms stipulated, on the basis of quantum merit. Compensation quantum meruit is awarded for work done or services rendered, when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract, compensation quantum meruit cannot be awarded where the contract provides for the consideration payable in that behalf. Quantum meruit is but reasonable compensation awarded on implication of a contract to renumerate, and an express stipulation governing the relations between the parties under a contract, cannot be displaced by assuming that the stipulation is not reasonable. *M/s. Alopi Parshad and Sons, Ltd. v. Union of India,* AIR 1960 SC 588: (1960) 2 Andh WR (SC) 46: (1960) 2 Mad LJ (SC) 46: (1960) 2 SCR 793

**Section 73(c).-Damages.-Computation of.-Refusal to accept delivery of goods in terms of the contract.-The seller reselling the goods.-Entitlement to claim damages.-Scope of.** The respondent is entitled to claim as damages the difference between the contract price and the market price on the date of the breach. Where no time is fixed under the contract of sale for acceptance of the goods, the measure of damages is *prima facie* the difference between the contract price and the market price on the date of the refusal by the buyer to accept the goods, see Illustration (c) to Section 73 of the Indian Contract Act. *P.S.N.S. Ambalavana Chettiar and Co. Ltd. and another v. Express Newspapers Ltd. Bombay,* AIR 1968 SC 741: 1968 (2) Andh WR (SC) 34: 1968 (2) Mad LJ (SC) 34: 1968(2) SCR 239

**Section 74.-Breach of contract.-Damages.-Stipulation of penalty in contract.-Effect of.** In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. *Fateh*

*Chand v. Balkrishan Dass,* AIR 1963 SC 1405: 1964(1) Andh WR (SC) 60: 1964(1) MLJ (SC) 60: 1964(1) SCR 515

**Section 74.-Damages.-Stipulation in contract.-Effect of.-Provision for forfeiture of deposit made as security for due performance of contract.-Where forfeiture amounts to penalty, the provision is applicable.** Forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty.It is ture that in every case of breach of contract the person aggrieved by the breach is not required to prove acutal loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation araising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him. *Maula Bux v. Union of India,* AIR 1970 SC 1955: 1970 All LJ 783: 1970 BLJR 885: 1970(1) SCR 928: 1969(2) SCC 554

**Section 74.-Forfeiture of performance deposit.-Failure to prove loss.-Forfeiture of deposit is invalid.**Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty. The amount deposited by way of security for guaranteeing the due performance of the contract cannot be regarded as earnest money. It is important that the breach of contract caused no loss to the appellants. The stipulate quantity of rum was subsequently supplied to the appellants by the respondents themselves at the same rate. The appellants, in fact, made no attempt to establish that they had suffered any loss or damage on account of the breach committed by the respondents. *Union of India v. Rampur Distillery & Chemical Co. Ltd.,* AIR 1973 SC 1098: 1973(1) SCC 648

**Section 74.-Forfeiture of security deposit.-Abandonment of work.-Contractor not completing the works contract.-Rescission of contract.-Damages claimed from contractor for breach of contract.-Forfeiture of security deposit in terms of contract, affirmed.** *State of Gujarat v. Dahyabhai Zaverbhai,* AIR 1997 SC 2701: 1997(9) SCC 34: 1997(3) JT 513: 1997(2) Scale 568: 1997(1) Arb. LR 626

**Section 74.-Liquidated damages.-Damages stipulated in the contract.-The party is entitled to claim such amount of liquidated damages only and not unascertained amount of damages under general law.** Now, when parties name a sum of money to be paid as liquidated a sum of money to be paid as liquidated damages they must be deemed to exclude the right to claim an unascertained sum of money as damages. The right to claim liquidated damages is enforceable under Section 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they, at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable at the date of the breach.*Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.,* AIR 1962 SC 1314: 1962(1) Lab LJ 656: 1962 Supp. (3) SCR 549

**Section 74.-Liquidated damages.-Distinction with English Law.** The section is clearly an attempt

to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. *Fateh Chand v. Balkishan Dass,* AIR 1963 SC 1405: 1964(1) Andh WR (SC) 60: 1964(1) MLJ (SC) 60: 1964(1) SCR 515

**Section 74.-Liquidated damages.-Earnest Money.-forfeiture of.-Principles and considerations for.-Discussed.** The principles regarding the `earnest':(1) It must be given at the moment at which the contract is concluded. (2) It represents a guarantee that the contract will be fulfilled or, in other words, `earnest' is given to bind the contract. (3) It is part of the purchase price when the transaction is carried out. (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser. (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest. The earnes money which was deposited was not 10 per cent of premium as required by the amended Nazul Rules, but was a fixed sum of Rs. 5 lakhs in C.A. No. 931/85 mentioned in the offer of 1-10-90, the earnest money which had become liable to be forfeited was a sum of Rs. 5 lakhs, and not 10 per cent of the total premium. *Delhi Development Authority v. Grihsthapana Co-operative Group Housing Society Ltd.,* AIR 1995 SC 1312: 1995 Supp (1) SCC 751: 1995(1) Scale 807: 1995(2) JT 530

**Section 74.-Liquidated damages.-No prior adjudication.-Effect of.-Claim if permissible.** A calim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not, eo instanitt incu any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has it the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. *Union of India v. Raman Iron Foundry,* AIR 1974 SC 1265: 1974(2) SCC 231: 1974(3) SCR 556

**Section 74.-Liquidated damages.-Penalty clause.-Determination of.-Distinction between penalty and concession.-If defendant gets some benefit by complying the clause, it cannot be said to be penal in nature.**If the defendant is required to suffer the consequence for his failure to abide by the terms by a stipulated date such a consequence would be penal in nature but on the other hand if the defendant gets some benefit by complying with the requirement by the stipulated date such a clause granting benefit can never be treated as penal in character. *Prithvichand Ramchand Sablok v. S.Y. Shinde,* AIR 1993 SC 1929: 1993(3) SCC 271: 1993(3) SCR 729: 1993(3) JT 348: 1993(3) Bom. CR 435

**Section 74.-Liquidated damages.-Stipulation in contract.-Nature of stipulation if by way of penalty.-Determination of.** The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the Court against the background of various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accuring from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is conteded to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promisor so

as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty. Where a contract provides for payment of money in instalments and contains also a stipulation that on default being committed in praying any of the instalments the whole sum shall become payable at once, the true test for determining whether the said condition is in the nature of a penalty is to find out whether the amounts referred to in the agreement were *debitum in praesenti* although *solvendum in futureo* or whether they were to become due to the promise only on the respective dates when the instalments were payable. If on a proper construction of a contract it is found that the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in the payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal: if, on the other hand, on a proper consideration of the terms of the contract the court comes to the conclusion that the debt itself arises or becomes due and payable by the debtor only on the respective dates fixed for the instalments the stipulation that on default being made in the payment of any instalment the whole of the balance should become due and payable would be in the nature of a penalty. *K.P. Subbarama Sastri and others v. K.S. Raghavan and others,* AIR 1987 SC 1257: 1987(2) SCC 424: 1987(2) SCR 767: 1987(1) Scale 680: 1987(2) J.T. 53: 1987(1) Ker.L.T. 53

**Sections 74 and 73.-Breach of contract.-Damages.-Forfeiture of security deposit.-Such forfeiture though found to be in the nature of penalty, it cannot relieve the hardship, in view of the exception to the provision.** *Union of India v. K.H. Rao,* AIR 1976 SC 626: 1977 (1) SCC 583

**Section 76.-Frustration of contract.-Concluded transaction.-Application on Deed of conveyance.- Permissibility.** Section 56 applies only to contract. Once a valid lease comes into existence the agreement to lease disappears and its place is taken by the lease. It becomes a completed conveyance under which the lessee gets an interest in the property. There is a clear distinction between a completed conveyance and an executory contract. Events which discharge a contract do not invalidate a concluded transfer. The contract between the parties provided that the lease deed should be registered within 15 days from the date of acceptance of the tender. For one reason or the other, the contemplated lease deed was neither executed nor registered. Therefore we have before us only an agreement to lease and not a lease. Such an agreement comes within the scope of Section 56 of the Contract Act. *Sushila Devi and another v. Hari Singh and others,* AIR 1971 SC 1756: 1971 J & K LR 241: 1971(2) SCC 288: 1971 Supp. SCR 671

**Section 123.-Indemnity.-Breach of contract.-Sale of property by the father as legal guardian of son with agreement to indemnify the loss.-The purchaser is entitled to indemnification only if he is dispossessed .-His entitlement is limited to the loss sustained in defending their possession.** In a case of this description the Indemnity Bond becomes enforceable only if the vendee is dispossessed from the properties in dispute. A breach of the covenant can only occur on the disturbance of the vendee's possession and so long as the vendee remains in possession he suffers no loss and no suit can be brought for damages either on the basis of the Indemnity Bond or for the breach of a covenant of the warranty of title. It has also been found that P.We. 1 did not take possession at any time and plaintiffs have been cultivating and enjoying the whole village all along and at no time were the plaintiffs dispossessed of the property. The only loss sustained by the plaintiff was a sum of Rs. 736 paid at the Court sale and a sum of Rs. 500 spent for the defence of O.S. No. 640 of 1923 which the plaintiffs had to incur for protecting the continuance of their possession over the disputed share of land. *V. M. Rv. Ramaswami Chettiar and another v. R. Muthukrishna Aiyar and others,* AIR 1967 SC 359: 1966(2) Andh WR (SC) 85: 1966(2) Mad LJ (SC) 85: 1966(3) SCR 608

**Sections 123 and 124.-Bank guarantee.-Nature of contract.-It is a contract independent of the underlying contract between the parties in respect of the terms of which the bank guarantee is obtained by a party from the bank.** *State of Maharashtra and another v. M/s. National*

*Construction Company, Bombay and another,* AIR 1996 SC 2367: 1996(1) SCC 735: 1996(1) Scale 176: 1996(1) JT 156: 1996(2) RLW 27

**Section 124.-Bank guarantee.-Nature of transaction.-Discharge of guarantee.-The Court should refrain from probing into nature of transaction between the Bank and the customer after the discharge.** The Bank guarantees are on different level and they must be allowed to be honoured free from interference by the Courts and a bank which gives a guarantee must honour the same according to its terms and it is only in exceptional cases that the Court will interfere with the machinery of irrevocable obligations assumed by the banks. A fortiori the same principle applies in respect of Bank guarantees which are discharged. When once the bank guarantee is discharged the obligation of the Bank ends and there is no question of going behind such discharged Bank guarantee. The courts should refrain from probing into the nature of the transactions between the Bank and the customer which led to the furnishing of the Bank guarantee. *Syndicate Bank v. Vijay Kumar and others,* AIR 1992 SC 1066: 1992(2) SCC 330: 1992(1) Scale 534: 1992(2) JT 136: 1992(2) APLJ 15

**Section 124.-Fidelity guarantee.-Distinction with contingency guarantee.** `Fidelity' according to dictionary means faithfulness, loyalty. In insurance terminology it is understood as assurance to indemnify against loss consequent upon the dishonesty or default. Usually the assured and the person whose fidelity is assured stand to each other in relation of employer and employee. As the use of the word `fidelity' indicates, `it is a policy intended to protect the assured against the contingency of breach of fidelity on part of a person in whom confidence has been placed. It is a contract whereby, for a consideration, one agrees to indemnify another against loss arising from the want of honesty, integrity or fidelity of an employee or other person holding a position of trust.Fidelity Guarantee is thus different from contingency guarantee. The insurance udner it is for honesty, against negligence or for being faithful and loyal. The protection afforded is different than normal insurance policies. Its consequences and enforcement are also not the same. The employer or the principal has first to be satisfied about the breach. No action can be taken on suspicion. In contingency insurance the cause of action arises immediately whereas in Fidelity Guarantee it has to be ascertained and verified. And on being satisfied the company must necessarily be informed of it to enable the principal to seek its remedy in the court of law.*The Food Corporation of India v. The New India Assurance Co. Ltd. and others,* AIR 1994 SC 1889: 1994(3) SCC 324: 1994(1) JT 703: 1994(53) DLT 843

**Sections 124 and 126.-Bank guarantee.-Stay of encashment.-Considerations for.-Breach of contract.-Bank guarantee given for due performance of contract.-Obligation under the bank guarantee is absolute and no distinction can be drawn on the basis of the nature of the bank guarantee.-In the absence of irretrievable injustice or fraud, interference with encashment of bank guarantee is not permissible.** In case of an unconditional bank guarantee the nature of obligation of the bank is absolute and not dependent upon any dispute or proceeding between the party at whose instance the bank guarantee is given and the beneficiary. The High Court thus failed to appreciate the real object and nature of a bank guarantee. The distinction which the High Court has drawn between a guarantee for the due performance of a works contract and a guarantee given towards security deposit for that contract is also unwarranted. The said distinction appears to be the result of the same fallacy committed by the High Court of not appreciating the distinction between the primary contract between the parties and a bank guarantee and also the real object of a bank guarantee and the nature of bank's obligation thereunder. Whether the bank guarantee is towards security deposit or mobilisation advance or working funds or for due performance of the contract is the same is unconditional and if there is a stipulations in the bank guarantee that the bank should pay on demand without a demu and that beneficiery shall be the sole judge not only on the question of breach of contract but also with respect to the amount of loss or damages, the obligation of the bank would remain the same and that obligation has to be discharged in the manner provided in the bank guarantee. *Hindustan Steel Works Construction Ltd. v. Tarapore and Co. and another,* AIR 1996

SC 2268: 1996(5) SCC 34: 1996(5) Scale 186: 1996(6) JT 295: 1996(2) APLJ 53

**Sections 124 and 126.-Contract of indemnity.-Distinction with contract of guarantee.-Obligation of surety.** A promise to be primarily and independently liable for another person's conduct may amount to a contract of indemnity. A contract of guarantee requires concurrence of three persons.-the principal debtor, the surety and the creditor.-the surety undertaking an obligation at the request express or implied of the principal debtor. The obligation of the surety depends substantially on the principal debtor's default; under a contract of indemnity liability arises from loss caused to the promisee by the conduct of the promisor himself or by the conduct of another person. *Punjab National Bank Ltd. v. Sri Bikram Cotton Mills Ltd. and another,* AIR 1970 SC 1973: 1970 (2) SCJ 101: 1970(2) SCR 462: 1970(1) SCC 60

**Sections 124 and 126.-Letter of credit.-Obligation to honour the guarantee.-Payment of goods supplied.-Inferior quality of goods.-Supply made on the basis of conditional letter of credit.-Quality not conforming to terms of agreement or letter of credit.-Bank is under no obligation to honour the letter of credit.** When the parties have admitted that the goods supplied were not of the specification and the standard required under the letters of credit vis-a-vis the appellant and the first defendant, the obligation to honour the letters of credit having been conditional one, the appellant is absolved of its liability to honour the letters of credit and pay over the value of the goods supplied. *State Bank of India and others v. Manganese Ore (India) Ltd. and another,* AIR 1997 SC 254: 1997(3) SCC 150: 1997(1) Scale 544: 1997(2) JT 171: 1997(2) Mad. LW 679

**Sections 125 and 126.-Bank guarantee.-Encashment of.-Restraint by Court.-Permissibility.** Commitments of banks must be allowed to be honoured free from interference by the Courts. Otherwise, trust in international commerce would be irreparably damaged. The appellant took the risk of unconditional wording of the letters of indemnity executed by its bankers, the Allahabad Bank. There is really no equity in favour of the appellant. The Shipping Company on the faith and assurance of the letters of indemnity which were duly countersigned by the appellant, gave delivery of the goods without production of the original shipping documents. The appellants have sold the goods and realised the proceeds amounting to the huge sum of Rs. 17,50,000 and have not paid a farthing to respondent No. 1, the sellers, and have instead brought the instant suit claiming that the goods supplied were of inferior quality and not the goods contracted for. The High Court has rightly held that the mark 5202 pertained not to the quality or the grade but to the shipping mark. We are satisfied that the appellant has no *prima facie* case. The balance of convienience also lies in not granting the injuction prayed for i.e. in allowing the banking transaction to go forward. The appellant would also not be put to any irreparable loss if no injunction is granted. *Centax (India) Ltd. v. Vinmar Impex Inc. and others,* AIR 1986 SC 1924: 1986(4) SCC 136: 1986(2) Scale 254: 1986 JT 175

**Section 126.-Bank guarantee.-Restraint on encashment.-Considerations for.-No *prima facie* case of established fraud and irretrievable injury.-The ultimate decree passed by Indian Court could be executed against the defendant.-Stay of encashment of bank guarantee not called for.** In the present case the plaintiff has not repudiated the contract. In fact it is working with the power plant and, therefore, the breach of condition has been treated by the plaintiff as a breach of warranty and in view of Section 12(3) of the Sale of Goods Act, the breach of warranty gives a right to claim for damages but not to a right to reject the goods and treat the contract as repudiated. Even the prayer in the plaint is for diminution of the price of the power plant and the relief is based on Section 59 of the Sale of Goods Act. In law relating to bank gurantees, a party seeking injunction from encashing of bank guarantee by the suppliers has to show *prima facie* case of established fraud and an irretrievable injury. Irretrievable injury is of the nature as noticed in the case of *Itek Corporation* (566 Federal Supplement 1210) (supra). Here there is no such problem. Once the plaintiff is able to establish fraud against the suppliers of suppliers-cum-lenders and obtains any decree for damages or diminution in price, there is no problem for affecting recoveries in a friendly country where the bankers and the suppliers are located. Nothing has been pointed out to show that the decree passed

by the Indian courts could not be executable in Sweden. *Svenka Handelsbanken v. M/s. Indian Charge Chrome and others,* AIR 1994 SC 626: 1994(1) SCC 502: 1993(4) Scale 124: 1993(6) JT 189: 1994(1) RRR 272: 1994(1) Andh. LT 37

**Section 126.-Bank guarantee.-Restraint on encashment.-No specific pleading of fraud.-Bald averment in the application seeking injunction is of no consequence without pleading of established fraud.-Temporary injunction against encashment of bank guarantee, should not be granted.** *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and another,* AIR 1997 SC 2477: 1997(6) SCC 450: 1997(5) JT 417: 1997(2) Arb. LR 350: 1997(4) Scale 103

**Section 126.-Bank guarantee.-Invocation of.-The bank undertaking to pay unconditionally the maximum sum stipulated as demanded by the beneficiary on account of any damage or loss suffered by it due to non-fulfilment of any terms and conditions of the agreement.-Encashment cannot be refused on the ground that amount sought to be encased was less than the maximum.***Fenner (India) Ltd. v. Punjab and Sind Bank,* AIR 1997 SC 3450: 1997(7) SCC 89: 1997(6) JT 410: 1997(5) Scale 12

**Section 126.-Liability of Guarantor.-Scope of.-Liability is subject to the terms of contract and therefore it cannot be enforced beyond the terms of contract.** In case of ambiguity when all other rules of construction fall, the Courts interpret the guarantee *contra proferentem* that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement. *State of Maharashtra v. Dr. M.N. Kaul,* AIR 1967 SC 1634: 1967 MPLJ 937: 1967 Mah LJ 998

**Section 126.-Surety.-Determination of status.-Transaction containing in more than one document.- The status of surety must be determined with reference to all the documents to arrive at conclusion whether he was a Surety or a Co-obligent.** *S. Chattanatha Karayalar v. The Central Bank of India Ltd.,* AIR 1965 SC 1856: 1965(2) SCWR 788: 1965(3) SCR 318

**Section 126.-Bank guarantee.-Enforcement of.-Works contract.-Bank guarantee has to be read in conjunction with terms of contract.-Failure to furnish extended terms of bank guarantee.-State not obliged to file suit for a specific performance requiring contractor to furnish guarantee.-Proper course for State was to terminate contract on ground of breach of terms thereof and make claim for damages.**

The contractor was obliged under the terms of the contract to furnish to the State security in the sum of Rs. 2,87,800/- for due performance of its obligations. By reason of Clause 5.3 of the contract, the contractor could in lieu of a cash deposit, furnish a bank guarantee. It was, under the terms of that clause, open to the Chief Engineer of the State to direct extension of the period of the bank guarantee. The State could, therefore, require the contractor to furnish the security deposit in cash or by way of the bank guarantee that would cover the period of the contract. The question is what was its remedy against the contractor when the contractor failed to furnish the security deposit in cash or, in lieu thereof, by a bank guarantee. The State could not have filed a suit requiring the contractor to do these things for it would have been tantamount to asking for a decree of specific performance, a decree which would have been incapable of enforcement if the contractor was unable or unwilling to pay out the money or put a bank in funds to provide a bank guarantee. When the contractor declined to extend the terms of the bank guarantee, the proper course for the State was to terminate the contract on the ground of breach of the terms thereof, make a claim for damages and recover on the bank guarantee, if necessary by filing a suit. *Makharia Brothers vs. State of Nagaland and others,* AIR 1999 SC 3466 : 1999(2) Bank LJ 526 : 1998(4) Civ LJ 863

**Section 126.-Bank guarantee.-Injunction restraining encashment of bank guarantee.-Buyer cannot obtain injunction against banker on ground of breach of contract by seller.**

It is settled that Courts ought not to grant injunction to restrain encashment of Bank guarantees or Letters of Credit. Two exceptions have been mentioned, (i) fraud, and (ii) irretrievable damage. If the

plaintiff is *prima facie* able to establish that the case comes within these two exceptions, temporary injunction under Order 39, Rule 1 C.P.C. can be issued. The contract of the Bank guarantee or the Letter of Credit is independent of the main contract between the seller and the buyer. This is also clear from Articles of the UCP. In case of an irrevocable Bank guarantee or Letter of Credit the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller. The Bank is to honour the demand for encashment if the seller *prima facie* complies with the terms of the Bank guarantee or Letter of Credit, namely, if the seller produces the documents enumerated in the Bank guarantee or Letter of Credit. *Federal Bank Ltd. vs. V.M. Jog Engineering Ltd. and others,* AIR 2000 SC 3166 : 2000(4) Rec Civ R 718 : 2000(4) Cur CC 120 : 2000(6) Scale 654

**Section 126.-Bank guarantee.-Invocation of.-Competent authority.-Contract of guarantee between bank and employer.-Independent of main contract between employer and contractor.-Bank guarantee furnished by Chief Engineer instead of by Executive Engineer.-Word "Chief Engineer" not includes 'Executive Engineer'.-Invocation of guarantee wholly wrong.-Bank under no obligation to pay amount covered by performance guarantee.**

Bank guarantee constitutes a separate, distinct and independent contract. This contract is between the Bank and the employer-State. It is independent of the main contract between the contractor and the employer-State. Since the Bank guarantee was furnished to the Chief Engineer and there is no definition of "Chief Engineer" in the Bank guarantee nor is it provided therein that "Chief Engineer" would also include Executive Engineer, the Bank guarantee could be invoked by none except the Chief Engineer. The invocation was thus wholly wrong and the Bank was under no obligation to pay the amount covered by the "performance guarantee" to the Executive Engineer. Contention that Executive Engineer who has invoked the guarantee would be covered not only by the definition of "employer" but also by the definition "Engineer in-charge" or "Engineer" as set out in the general conditions of contract appended to agreement between contractor and State cannot be countenanced. *Hindustan Construction Co. Ltd. vs. State of Bihar and others,* AIR 1999 SC 3710 : 2000(1) Land LR 72 : 2000(1) Mad LW 13 : 1999(8) SCC 436 : 1999(3) Arbi LR 510 : 1999(3) Pat LJR 181

**Section 126.-Bank guarantee.-Invocation of.-Grant of injunction restraining bank to invoke.-Bank guarantee being an independent contract, both parties bound by its terms.-Invocation has to be as per terms of the bank guarantee.**

What is important, in matter of grant of injunction restraining invocation of bank guarantee is that the Bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the Bank guarantee are, therefore, extremely material. Since the Bank guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, would have to be in accordance with the terms of the Bank guarantee, or else, the invocation itself would be bad. *Hindustan Construction Co. Ltd. vs. State of Bihar and others,* AIR 1999 SC 3710 : 2000(1) Land LR 72 : 2000(1) Mad LW 13 : 1999(8) SCC 436 : 1999(3) Arbi LR 510 : 1999(3) Pat LJR 181

**Section 126.-Documentary credits.-Binding nature.-Relevance of Uniform Customs and Practices (UCP) for Documentary Credits formulated by International Chamber of Commerce.**

The Uniform Customs and Practices for Documentary Credits (UCP) has been formulated by the International Chamber of Commerce. The UCP provides that general provisions and definitions and the Articles following are to apply to all documentary credit and binding upon all parties thereto unless otherwise expressly agreed. The UCP states that it shall be deemed incorporated into each documentary credit if there are words in the credit indicating that such credit was issued subject to Uniform Customs and Practices of Documentary Credits. In the absence of incorporation, the UCP will not apply but it can be taken into account as part of mercantile customs and practices and most

of it is also treated as part of common law, barring a few differences. If an express term in the contract contradicts of UCP terms, the contract prevails. *Federal Bank Ltd. vs. V.M. Jog Engineering Ltd. and others,* AIR 2000 SC 3166 : 2000(4) Rec Civ R 718 : 2000(4) Cur CC 120 : 2000(6) Scale 654

**Section 126.-Fraud Bank Guarantees/Letter of Credit.-Injunction restraining encashment of.-Bank has to prove knowledge of fraud.**

Denning M.R. stated in *Edward and Owen Engineering Ltd. vs. Barclays Bank International Ltd.* 1978 QB 159, that 'the only exception is where there is a clear fraud of which the bank had notice'. Browne, L.J. said in the same case: "but it is certainly not enough to allege fraud, it must be established and in such circumstances, I should say, very clearly established". In *Bolvinter Oil S.A. vs. Chase Manhattan Bank* (1984) 1 All ER 351 at p. 352, it was said where it is proved that the Bank knows that any demand for payment already made or which may thereafter be made, will clearly be fraudulent. But the evidence must be clear, both as to the fact of fraud and as to the Bank's knowledge. It would certainly not be sufficient that this rests upon the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time "before the injunction is vacated". Thus not only must "fraud" be clearly proved but so far as the Bank is concerned, it must prove that it had knowledge of the fraud. *Federal Bank Ltd. vs. V.M. Jog Engineering Ltd. and others,* AIR 2000 SC 3166 : 2000(4) Rec Civ R 718 : 2000(4) Cur CC 120 : 2000(6) Scale 654

**Section 126.-Insurance Policy.-Interpretation of terms.-Expression 'amount due and payable'.-Liberal and wider meaning cannot be given because one of parties to contract a public authority.**

In our opinion, there is also no force in the argument of the defendant that a liberal and wider meaning should be given to the expression "amount due and payable" because one of the parties to the agreement is a public authority. This view of ours, is also supported by a decision of this Court in the case of *Smt. Shashi Gupta vs. LIC,* AIR 1995 SC 1367, wherein it is held that while interpreting the terms of the insurance policies if two views are possible, Courts will not accept the one which favours the policy-holders. *Life Insurance of India vs. Raj Kumar Rajgarhia and another,* AIR 1999 SC 2346 : 1999(3) Civ LJ 859 : 1999(3) SCC 465 : 1999(2) Col LT 56 : 1999(3) Raj LW 455.

**Section 126.-Life Insurance Policy.-Automatic non-forfeiture clause.-Assured taking loan against policy.-Nature of loan an advance against security of policy.-Non-payment of premium by insured.-Specific period for repayment neither contained in insurance policy nor in loan bond.-Insurer authorised to recover principal amount either while settling amount due or by invoking its right under clause 4 of loan bond.-Clause 4 not invoked by insurer.-Effect.-Loan amount became repayable only by calculating surrender value of policy on date of default.**

Neither the insurance policy nor the loan bond specifically fixed a period of repayment of the loan in question. Clause 4 of the loan bond specifies that the repayment of the principal amount of loan shall be made when called upon to make repayment at the said office of the said advance with all interest which may be due thereon on being given 3 months notice to that effect. Since the loan in question is in the nature of an advance on the security of the policy, under the terms of the policy as well as the loan bond, the company was only authorised to recover the principal amount of loan either while settling the amount due under the policy or if it so desires, by invoking its right under Clause 4 of the loan bond. In the instance case, since the company had not invoked its right under Clause 4 of the loan bond, it must be construed that the loan amount became payable only when the insurance company's obligation to pay the assured amount had occurred which in the instant case, was on the death of the assured. As per Clause 4 of loan bond the borrower was to be given three months time to discharge the loan if the Company wanted the loan to be discharged. This clause being in the nature of an agreement between the parties until such notice period is given to the plaintiffs, it cannot be said that the principal amount of loan had become due and payable. Therefore, the words "all moneys due" found in the automatic non-forfeiture clause will have to be construed to mean such amounts

which have become not only due also payable under the terms of the agreement. If so construed, the principal amount of loan had not become due and payable on the date the policy was said to have lapsed and the company was not entitled to deduct the same from the surrender value. The claim made by plaintiff could not have been rejected. *Life Insurance of India vs. Raj Kumar Rajgarhia and another,* AIR 1999 SC 2346 : 1999(3) Civ LJ 859 : 1999(3) SCC 465 : 1999(2) Col LT 56 : 1999(3) Raj LW 455.

**Section 126.-Money payable under contract of insurance.-Contract containing specific provision for exercise of option.-Option can be exercised only after occurrence of accident and not earlier.**

When the contract of insurance contains a specific provision for the exercise of an option by the insurer without any reference to the insured and with regard to which the insured had no say whatever, they amount such option is exercised, the contract becomes only as one providing for replacement of the subject matter of insurance from the inception thereof. In that event, it cannot be considered to be a contract for payable of money at any time. Consequently, when the contract is one for replacement of subject matter of insurer from its inception, there could be no money payable under the contract to the insured at any time because of the legal effect of the option exercised by the Insurer. Hence Section 41(2) of Income-tax Act would have no application to such a case. It is incorrect to say that the money became payable on the occurrence of the accident and the exercise of the option thereafter by the insurer would not alter the nature of the contract. The contract itself gives the right to the insurer to exercise the option and the legal effect of such exercise is to make the contract one for reinstatement only from the inception. It is analogous to the 'doctrine of relation back'. Such exercise of option could only be after the occurrence of the accident and not at any time earlier. Consequently the expression 'money payable' in Section 41(2) will not apply in such a case. *Commissioner of Income-tax, Madras vs. Kasturi and Sons Ltd.* AIR 1999 SC 1275 : 1999(237) ITR 24 : 1999(149) Taxation 554 : 1999(103) Taxman 342 : 1999(3) SCC 346 : 1999 Tax LR 425

**Sections 126 and 127.-Bank guarantee.-Stay of encashment.-The guarantee worded in absolute terms.-Bank undertaking to pay without any demur or pendency of any legal proceedings.-Stay of encashment of bank guarantee permissible only on the grounds of fraud and irretrievable injury.-Termination of contract disputed between the parties is no fraud in encashment.-Stay refused.** *U.P. State Sugar Corporation v. M/s. Sumac International Ltd.,* AIR 1997 SC 1644: 1997(1) SCC 568: 1996(8) Scale 676: 1996(10) JT 709: 1997 All. LJ 638

**Section 128.-Surety.-Scope of liability.--Postponement of liability till the remedy against Principal Debtor existed.-Permissibility.-Directions to this effect must be on the basis of reasons.-In the instant case such directions held to be not required for the ends of justice.** *The Bank of Bihar Ltd. v. Dr. Damodar Prasad and another,* AIR 1969 SC 297: 1969 All LJ 475: 1969(1) SCR 620

**Sections 128 and 134.-Surety.-Liability of.-Bank guarantee.-Encashment of.-Liquidation of company at whose instance the bank guarantee was issued.-It does not affect the right of beneficiary to encash the bank guarantee.** The fact that the Company in liquidation i.e. the principal debator has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act 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, but a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability. *Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam and another,* AIR 1982 SC 1497: 1982(3) SCC 358: 1983(1) SCR 561: 1982(2) Scale 875

**Section 133.-Instrument of guarantee.-Alteration.-Effect of.-Alteration made for the benefit of guarantor.-Nature of alteration if substantial.-Effect of.** The appellant agreed to stand surety for an overdraft allowed by the respondent Bank to the principal debtor, Shankaran. The Bank required a guarantee in the form which was handed over to the principal debtor, Shankaran. Shankaran got it filled by the appellant for a sum of Rupees 25,000/-. The Bank did not accept the guarantee up to that limit but wanted the figure to be corrected, *i.e.*, by insertion of Rs. 20,000/-. The document was thereupon handed back to the principal debtor who, it is stated, altered the document. At that stage the principal debtor was acting for and on behalf of the appellant because if was at his instance that the appellant was standing surety and the appellant handed over the deed of guarantee to the principal debtor for the purposes of being given to the Bank, the respondent. In these circumstances the avoidance of contract by material alteration is inapplicable because the document was not altered while in possession of the promisee or its agent but was altered by the principal debtor who was at the time acting as the agent of the guarantor, the appellant. If the alteration was without the appellant's consent, it could not have been authorised by him; if it had been, consent would be implied. There is further neither evidence, nor pleading nor finding of any such authority. The altered document is not binding on the appellant for the alteration had not been made to carry out the intention of the parties. If the alteration is ignored, then the document creates no liability in the appellant, for the Bank refused to accept a guarantee on the terms contained in the document before it was altered. Further, the contract sued upon is different from the contract which might have been made by the document as it stood before the alteration. The unaltered document cannot establish the contract sued upon.*M.S. Anirudhan v. Thomco's Bank, Ltd.,* AIR 1963 SC 746: 1963 Ker LJ 407: 1963 Supp. (1) SCR 63

**Section 135.-Hypothecation of goods.-Time granted to make up deficiency of goods.-It does not discharge the surety from its liability.** It is manifest that the act of giving time to the borrowers to make up the quality of the goods found to be short on weighment by the Bank cannot be considered to be a "promise to give time" to the borrowers as contemplated by Section 135 of the Indian Contract Act. In this connection reference should be made to Clause 9 of Ex. P-1 which provides that the borrowers shall be responsible for the quantity and quality of goods pledged and also for the correctness of the statements and returns furnished to the bank from time to time. It is stated in Ex. P-1 that the borrowers have declared and agreed that the goods pledged with the Bank have not been actually weighted or valued in order to verify the quantity and quality of the goods pledged. It is in the light of these clauses of the agreement that the act of giving time to the principal debtor has to be considered. The act of the Bank in giving time to the principal debtor to make up the quantity of the goods pledged is not tantamount to the giving of time to the principal debtor for making the payment of the money within the meaning of Section 135 of the Indian Contract Act. What really constitutes giving of time is the extension of the period at which, by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. *Amrit Lal Goverdhan Lalan v. State Bank of Travancore and others,* AIR 1968 SC 1432: 1969 Ker LJ 45: 1968(3) SCR 724

**Section 140.-Surety.-Right of.-Execution of decree against surety.-Considerations for.** The solvency of the principal is not a sufficient ground for restraining execution of the decree against the surety. It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down. *The Bank of Bihar Ltd. v. Dr. Damodar Prasad and another,* AIR 1969 SC 297: 1969 All LJ 475: 1969(1) SCR 620

**Section 141.-Surety.-Liability of.-Under Indian law the surety's right to securities held by creditor is limited to the securities held on the date of his becoming surety.-This is in contrast to English law where under a surety is entitled to benefit of securities given after the date of becoming of surety.-In regard to discharge of surety on the loss of security by the creditor, the Indian law is same as English law and discharges the surety from liability.** *Amrit Lal Goverdhan Lalan v. State Bank of Travancore and others,* AIR 1968 SC 1432: 1969 Ker LJ 45: 1968(3) SCR 724

**Section 141.-Surety.-Loss of Security.-Effect of.-Surety is discharged to the extent of value of loss of security.** The State had a charge over the goods sold as well as the right to remain in possession till payment of the instalments. When the goods were removed by Jagatram that security was lost and to the extent of the value of the security lost the surety stood discharged. In the present case the State has not produced the accounts furnsihed under Rule 16 by the contractor relating to the quantity of goods removed by Jagatram. We must in the circumstances hold that the entire quantity contracted to be sold to Jagatram had been removed, and the surety is, because the State has parted with the security which it held, discharged from liability to pay the amount payable under the terms of the contract. *State of Madhya Pradesh v. Kaluram,* AIR 1967 SC 1105: 1967 All LJ 327: 1967 BLJR 313: 1967 Jab LJ 55: 1967 Mah LJ 497: 1967(1) SCR 266

**Sections 141 and 139.-Surety.-Scope of liability.-Loss of goods pledged.-The surety stood discharged from its liability to the extent of the loss of goods.** The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion Section 141 of the Act will be indubitably attracted. Section 141 comprehends a situation where the debtor has offered more than one security, one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by Section 41.*The State Bank of Saurashtra v. Chitranjan Rangnath Raja and another,* AIR 1980 SC 1528: 1980(4) SCC 516: 1980(3) SCR 915

**Sections 148 and 155.-Bailment.-Implied bailment.-Insurance of Motor Vehicle.-Damage to vehicle in accident.-Liability of insurer for repair of vehicle.-Insurer took the custody of vehicle and handed over to repairer where it was destroyed in fire.-The Insurer was the bailee liable to make good the loss.** The Insurer wanted the repairer to repair the car and recover the charges from the Insurer. The custody of the repairer would be that of a sub-bailee because the Insurer was the bailee as pointed out earlier from the time of accident. Since the accident, the Insured dealt with vehicle strictly as provided under the contract of insurance and that necessitated taking the car to the nearest repairer for and on behalf of the Insurer. The Insurer became the bailee and the repairer may have been initially pointed out by the bail or but with whom the Insurer entered into negotiation, arrived at a contract and agreed to get the car repaired in discharge of an obligation under the contract of insurance. Therefore, for this additional reason the custody of the repairer is that of a sub-bailee. The obligation to get the car repaired was of the insurer. It had a right to take the car into its custody. It did formally take the car into the custody when it expected the repairer to whom the custody was given as the one acceptable to them and entered into negotiations about the repair charges and finally agreed to pay the repair charges to the repairer. Unquestion- ably, the Insurer would be the bailee and the repairer would be the sub-bailee. Plaintiff has led some evidence in this behalf as to the careless manner in which the car was kept in the workshop where inflammable material was kept. Without doubt the burden being on the bailee and the sub-bailee and the same having not been discharged, the learned trial Judge was perfectly justified in accepting the evidence of the plaintiff and in recording the finding that bailee and the sub-bailee had not taken

such care of the car as was expected of a prudent man in respect of his own goods of the same quality and value. Therefore, the bailee is liable for the loss suffered by the plaintiff the bailor.*N.R. Srinivasa Iyer v. New India Assurance Co. Ltd., Madras,* AIR 1983 SC 899: 1983(3) SCC 458: 1983(3) SCR 479: 1983(2) Scale 44: 1983 BBCJ (SC) 114

**Sections 148 and 182.-Bailment or Agency.-Banker interested with collection of bills.-Duty of bank.-The bank take charge of instrument as bailee and not as agent.-Failure to collect the payment for the bills deposited or to return the instrument.-The bank is liable absolutely even if no negligence on its part is proved.** Banks take charge of goods, articles, securities as bailee and not as trustee or agent. Bailment is the delivery or transfer of possession of a chattel (or other item of personal property) with a specific mandate whcih requires the identical *res* either to be returened to the bailor or to be dealt with in a particular way by the bailee as per directions of the bailor. One important distinguishing feature between agency and bailment is that the bailee does not represent the bailor. He merely exercises, with the leave of the bailor (under contract or otherwise), certain powers of the bailor in respect of his property. Secondly, the bailee has no power to make contracts on the bailor's behalf; nor can he make the bailor liable, simply as bailor, for any acts he does. The banker bailee gratuitous or for reward is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. In fact a paid bailee must use the greatest possible care and is expected to employ all precautions in respect of the goods deposited with him. If the property is not delivered to the true owner, the banker cannot avoid his liability in conversion. The Bank could not avoid the liability to return to goods as agreed upon or to pay an equivalent amount to the plaintiff. Even if we assume that the goods were delivered to a wrong person, the Bank has to own the res- ponsibility to pay the plaintiff. The liability of banker to customer in such a case is absolute even if no negligence is proved. *UCO Bank v. Hem Chandra Sarkar,* AIR 1990 SC 1329: 1990(2) SCR 709: 1990(1) Scale 784: 1990(3) JT 369: 1990(3) SCC 389

**Section 171.-Banker's lien.-Attachment of deposit with Bank.-Liability of Judgment Debtor towards the bank.-The bank has liberty to adjust the liability from on the amount of deposit and the remaining amount if any can only be attached in discharge of decree.** If a deposit is payable at a future date or after the lapse of a specified time it is still liable to attachment. What is attached is the money in the deposit account. The banker as a garnished, when an attachment notice is served, has to appear before the Court and obtain suitable directions for safeguarding its interest. This also becomes clear from the perusal of Order 21, Rule 46(a) of the Civil Procedure Code. The court, in such a situation has to take into account the banker's lien over the securities or deposits regarding which garnishee notice is issued. Merely because the two FDRs were also furnished as security for the issuance of the Bank guarantee, the general lien thus created cannot come to an end when the Bank guarantee is discharged. The words `Lien to BG 11/80' do not make any difference. The Bank in the instance case has the liberty to adjust from the proceeds of the two FDRs towards the dues to the Bank and if there is any balance left that will only be the amount which would belong to the depositor namely the judgment-debtor in this case and only such amount, if any, can be attached in discharge of a decree. *Syndicate Bank v. Vijay Kumar and others,* AIR 1992 SC 1066: 1992(2) SCC 330: 1992(1) Scale 534: 1992(2) JT 136: 1992(2) APLJ 15

**Section 171.-Lien over pledged goods.-Banker's lien.-Damage to pledged goods indemnify by insurer.-Right of Banker to adjust the amount received from insurer.-The amount must be given credit in the Cash Credit Account.** The goods were of the firm. They were not the goods of the partners. The goods were not offered as security for the individual debt of the partners. The goods were pledged against cash credit facility of the firm. Therefore, when the amount on account of the destruction of the pledged goods of the firm was recovered from the insurer, it must be given credit only in the cash credit account and to that extent the liability in the cash credit account would be reduced. *Gurbax Rai and others v. Punjab National Bank, New Delhi,* AIR 1984 SC 1012: 1984(3) SCC

96: 1984(1) Scale 512

**Section 171.-Attorney's lien.-Advocate entrusted case files by client.-He has no lien on them for unpaid fee.-Case files cannot be equated with goods.**

An Advocate has no lien on the files entrusted to him be the client. Files containing copies of the records, perhaps some original documents also cannot be equated with the "goods" referred to in Section 171. The Advocate keeping the files cannot amount to "goods bailed". The "bailment" is defined in Section 148 of the Contract Act, as the delivery of goods by one person to another for some purpose, upon a contract that they shall be returned or otherwise disposed of according to the directions of the person delivering them, when the purpose is accomplished. In the case of litigation papers in the hands of the Advocate, there is neither delivery of goods nor any contract that they shall be returned or otherwise disposed of. That apart, the word "goods" mentioned in Section 171 is to be understood in the sense in which that word is defined in the Sale of Goods Act, it must be remembered that Chapter VII of the Contract Act, comprising Section 76 to 123, had been wholly replaced by the Sale of Goods Act, 1930. The word "goods" is defined in Section 2(17) of the Sale of Goods Act. Thus understood "goods" to fall within the purview of Section 171 of the Contract Act should have marketability and the person to whom it is bailed should be in a position to dispose it of in consideration of money. In other words the goods referred to in Section 171 of the Contract Act are saleable goods. There is no scope for converting the case files into money, nor can they be sold to any third party. *R.D. Saxena vs. Balaram Prasad Sharma,* AIR 2000 SC 2912 : 2000(87) DLT 83 : 2000(1) Mah LJ 23 : 2000(7) SCC 264 : 2000(5) Andh LD 86 : 2000(4) Civ LJ 898 : 2000(41) All LR 1

**Section 172.-Pledge.-Shares and securities pledged with bank.-Right shares subscribed by bank by pledging stock.-Bank entitled to keep pledged shares whether these accretions formed part of pledge or not.-Question of return of shares does not arise.** *Standard Chartered Bank and another vs. Custodian and another,* AIR 2000 SC 1488 : 2000(3) Com LJ 193 : 2000(1) Banks Cas 127 : 2000(6) SCC 427 : 2000 LC 1131

**Section 172.-Pledgee.-Liability.-Bank pledgee of goods.-Godown where goods were stacked did not belong to defendant pledger.-Ejectment order obtained by landlord against defendant and its partners.-Defendants along with bank obtained injunction order restraining landlord from removing goods and using godown.-Suit for damages by landlord maintainable.-Bank cannot absolve itself of malice arising in case.**

In justifying claim for damages apart from Section 95, CPC, a distinction has to be drawn between acts done without judicial sanction and the acts done under judicial sanction improperly obtained. Proof of malice is not necessary when the property to a stranger, not a party to the suit, is taken in execution but if the plaintiff bringing a suit for malicious legal process is a party to a suit proof of malice is necessary. The plaintiff must prove special damage. The claim of a person for damages for wrongful attachment of property can fall under two heads.-(1) trespass and (2) malicious legal process. Where property belonging to person, not a party to the suit, is wrongly attached, the action is really one grounded on trespass. But where the act of attachment complained of was done under judicial sanction, though at the instance of a party, the remedy is an action for malicious legal process. In the case of malicious legal process of Court, the plaintiff has to prove absence of probable and reasonable cause. In cases of trespass the plaintiff has only to prove the trespass and it is for the defendant to prove a good cause or excuse. In the former case plaintiff has to prove malice on the part of the defendant while in the latter case it is not necessary.

In the background in which the injunction was obtained and the manner in which the defendants prevented the plaintiffs from utilising their premises, it is clear that the same had been obtained on insufficient and improbable grounds. The intention of the parties is very clear that it is only to deprive the defendants of the possession of the premises that such an order was obtained. The bank was pledgee of the goods and could not claim an independent right in respect of the said premises. The suit premises was not in their possession either under licence or by way of lease. They should

not only have ascertained whether the goods belong to the pledgor but also should have known as to whether the premises where the goods were kept belonged to them at the time they obtained the pledge. In those circumstances, even the Bank cannot absolve itself of malice arising in the case. *Bank of India vs. Lakshimani Dass,* AIR 2000 SC 1172 : 2000(2) Mad LJ 185 : 2000(2) Cur CC 18 : 2000(102) Com Cas 350 : 2000(2) Mah LR 121 : 2000(3) SCC 640 : 2000(3) Andh LD 64 : 2000(2) All CJ 881

**Sections 172 and 148.-Pledgee in possession.-Distinction with agent in possession.-Specific agreement providing that the agent shall be in possession of goods and would be liable to dispose of the same in accordance with the directions of principal.-The goods disposed of without protest of claim of pledge.-The status of the agent is not that of pledgee of goods.** *Ram Prasad v. The State of Madhya Pradesh and another,* AIR 1970 SC 1818: 1970 All LJ 1022: 1970 BLJR 1078: 1970 Mah LJ 696: 1969(3) SCC 24

**Sections 172 to 176.-Rights of Pledgee.-Recovery of debts.-Where the possession of goods remain with the Pledgee, he cannot retain the possession of the goods and seek recovery of debt by sale.** Under Section 172 a pledge is a bailment of the goods as security for payment of a debt or performance of a promise. Section 173 entitles a pawnee to retain the goods pleaded as security for payment of a debt and under Section 175 he is entitled to receive from the pawner any extra-ordinary expenses he incurs for the preservation of the goods pledged with him. Section 176 deals with the rights of a pawnee and provides that in case of default by the pawner the pawnee has (1) the right to sue upon the debt and to retain the goods as collateral security, and (2) to sell the goods after reasonable notice of the intended sale to the pawner. Once the pawnee by virtue of his right under Section 176 sells the goods the right of the pawner to redeem them is of course extinguished. But as aforesaid the pawnee is bound to apply the sale proceeds towards satisfaction of the debt and pay the surplus, if any, to the pawner. So long, however, the sale does not take place the pawner is entitled to redeem the goods on payment of the debt. It follows, therefore, that where a pawnee files a suit for recovery of debt, though he is entitled to retain the goods he is bound to return them on payment of the debt. The right to sue on the debt assumes that he is in a position to redeliver the goods on payment of the debt and, therefore, if he has put himself in a position where he is not able to redeliver the goods he cannot obtain a decree. *Lallan Prasad v. Rahmat Ali and another,* AIR 1967 SC 1322: 1967(2) SCR 233

**Section 176.-Rights of pawnee.-Prior lien of property.-Pawnee cannot be deprived of his right, by Government by seizure of property.**The pawnee has special property and a lien which is not of ordinary nature on the goods and so long as his claim is not satisfied no other creditor of the pawnor has any right to take away the goods or its price. After the goods had been seized by the Government it was bound to pay the amount due to the plaintiff and the balance could have been made available to satisfy the claim of other creditors of the pawnor. But by a mere act of lawful seizure the Government could not deprive the plaintiff of the amount which was secured by the pledge of goods to it. As the act of the Government resulted in deprivation of the amount to which the plaintiff was entitled it was bound to reimburse the plaintiff for such amount which the plaintiff in ordinary course would have realized by sale of the goods pledged with it on the pawnor making a default in payment of debt. *The Bank of Bihar v. The State of Bihar and others,* AIR 1971 SC 1210: 1971(2) SCJ 661: 1972(3) SCC 196: 1971 Supp. SCR 299

**Section 180.-Pledgee.-Right of.-Entitlement to take action in tort.-Loss of goods on account of the injury caused by third person.-Pledgee is entitled to pursue the same remedy as the owner of the goods would be entitled against third person.** A careful scrutiny of Section 178 of the Contract Act and the other relevant provisions thereof indicates that the section assumes the power of an owner to pledge goods by transferring documents of title thereto and extends the power even to a mercantile agent. A pledge is delivery of goods as security for payment of a debt. If a railway receipt is a document of title to the goods covered by it, transfer of the said document for consideration

effects a constructive delivery of the goods. *Morvi Mercantile Bank Ltd. v. Union of India,* AIR 1965 SC 1954: 68 Bom LR 61: 1965(3) SCR 254

**Section 182.-Agent.-Distinction from servant.-An agent though works under the authority of principal but is not under direct control and supervision of principal.-An agent is not a servant but a servant is generally an agent.** An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent the extent of the agency depending upon the duties or position of the servant. *Lakshminarayan Ram Gopal and Son, Ltd. v. Government of Hyderabad, through the Commissioner, Excess Profits Tax,* AIR 1954 SC 364: 1954 SCA 1027: 1954 SCJ 595: 1955(1) SCR 393

**Section 182.-Agent.-Post Office.-Cheque sent by post at the request of the addressee.-The Post Office is the agent of the addressee.-The transaction is complete by handing over the cheques to the Post Office.** *Commissioner of Income Tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd., Ogale Wadi,* AIR 1954 SC 429: 56 Bom LR 1196: 1955 SCA 181: 1954 SCJ 522: 1955(1) SCR 185

**Section 182.-*Del Credre* Agent.-Distinction with principle.-The so called Agent paying price of goods and purchasing goods for re-sale.-On appreciation of circumstances held that no agency came into existence.** It is important to notice that the contract in the opening portion specifically makes a mention of the fact that the defendants were buying the goods for resale, and in the paragraph containing the terms of the contract it is reiterated that the goods were intended for re-sale in the United Kingdom. On the face of it, therefore, the contract is clearly not one of agency for sale but it reads as an agreement of sale. If the defendants were intended to be constituted as the agents for sale the terms of the contract would have been entirely different. Another important feature in this case is that there is a definite price fixed in the contract for the plaintiff's goods. According to the plaintiff the rates fixed in the contract were the ones at which the goods were sold to London purchaser and not a different rate and the defendants were agents who were obtaining for him only the price at which the goods were sold at London. It is true that the defendants admit that before fixing the price as between themselves and the plaintiff they used to ascertain the London price by cable. It is also true that the plaintiff was debited in the Statement of account with the expenses of the cable. Even so, if the defendants were simply acting as agents for the sale there was no need at all to fix the price in the contract as between them and the plaintiff. It was contended for the plaintiff that according to the contracts the prices fixed are c.i.f. less 2-1/2 per cent and discount of 2-1/2 per cent was the commission for the defendants as agents. There is no use of the word "commission" in the contracts and we see no reason to hold that 2-1/2 per cent should be taken as commission and not as a margin of profit. The important point is that if the contract was one of agency there was no need to mention the price at all as between the plaintiff and the defendants. It may be that in most cases the prices which the defendants obtained from the London purchasers were the same as the prices stipulated in the contracts with the plaintiff but the fact remains that they obtained 2-1/2 per cent discount on the sale price, that is to say, they purchased the goods from the plaintiff 2-1/2 per cent less and sold them to their London purchasers at the full price, so that 2-1/2 per fent was their margin of profit. It is possible that sometimes they sold the goods to the London purchasers at a higher price in which case they would be entitled to the difference in prices as a profit in addition to the 2-1/2 per cent which they got from the plaintiff. *Gordon Woodroffe and*

*Co. (Madras) Ltd., v. Shaik M.A. Majid and Co.*. AIR 1967 SC 181: 1967(2) Andh LT 289: 1967(2) Mad LJ (SC) 66: 1966 Supp. SCR 1

**Section 182.-Agent.-Salary Savings Scheme of LIC.-Deduction of premium by employer from employees salary.-Deductions made transferred to LIC.-Employer's implied authority to collect premium.-Employer would be an agent of LIC.-General principles of 'agent' contained in Contract Act would be applicable.**

In the present case we are not concerned with the insurance agent. It is not the case of the LIC that DESU could be permitted as an insurance agent within the meaning of Insurance Act and the Regulations. DESU is not procuring or soliciting any business for the LIC. DESU is certainly not an insurance agent within the meaning of the Insurance Act and the Regulations but DESU is certainly an agent as defined in Section 182 of the Contract Act. Mode of collection of premium has been indicated in the scheme itself and the employer has been assigned the role of collecting premium and remitting the same to LIC. As far as employee as such is concerned, the employer will be the agent of the LIC. It is a matter of common knowledge that Insurance Companies employ agents. When there is no insurance agent as defined in Regulations and the Insurance Act, general principles of law of agency as contained in the Contract Act are to be applied. *Delhi Electricity Supply Undertaking vs. Basanti Devi and another,* AIR 2000 SC 43 : 2000(1) Guj LH 244 : 1999(4) Com LJ 415 : 2000 (17) Mad LW 868 : 1999(8) SCC 229 : 2000(1) Raj LW 9 : 1999 (8) ADSC 454

**Sections 182, 183, 186 and 188.-Agent.-Joint agent.-Permissibility.-Several principals can jointly appoint one agent.** The relation between the donor of the power and the donee of the power is one of principal and agent and the expression `agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person called the agent has authority to act on behalf of another called the principal and consents so to act. The relationship has its genesis in a contract. If agency is the outcome of a contract between the principal and the agent, in order to show that three principals jointly constituting an agent by a deed called `Power of Attorney's was impermissible, provisions of Contract Act or the general law of contract should have been shown as having been violated by such a contract. Nothing of the kind was pointed out to us. *Syed Abdul Khader v. Bami Reddy and others,* AIR 1979 SC 553: 1979(2) SCC 601: 1979(2) SCR 424

**Section 187.-Compromise between communities.-The compromise entered through prominent persons belonging to each community but no indication that they represented the community.-It cannot bar the members of communities from exercising their rights.** *Shaikh Piru Bux (dead) and others v. Kalandi Pati and others,* AIR 1970 SC 1885: 35 Cut LT 671: 11 Orissa JD 16: 1969(2) SCR 563

**Section 188.-Estate agent.-Distinction with other agents.-Scope of authority of estate agent.-Ordinarily the authority of estate agent is different from stock agent.-Contrary to stock agent, the estate agent does not have authority to finalise the deal on behalf of the principal unless specified otherwise in the terms of contract.** A house or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal which does not pass by a short instrument as stocks and shares do but has to be transferred after investigation of title as to which various special stipulations, which might be of particular concern to the owner, may have to be inserted in a concluded contract relating to such property. The parties, therefore do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. That is why it has been held, both in England and here, that authority given to a broker to negotiate a sale and find a purchaser, without furnishing him with all the terms, means "to find a man willing to become a purchaser and not to find him and make him a purchaser."*Abdulla Ahmed v. Kissen Animendra Mitter,* AIR 1950 SC 15: 1950 SCJ 153: 1950 SCR 30

**Sections 188 and 219.-Authority of agent.-Scope of.-Right to receive remuneration.-The sale**

**negotiated by the agent and secured buyers.-Failure by principal to complete the contract on account of his own reasons.-The agent is entitled to remuneration.** *Abdulla Ahmed v. Animendra Kissen Mitter,* AIR 1950 SC 15: 1950 SCJ 153: 1950 SCR 30

**Section 194.-Implied Agency.-Despatch of consignment from Pakistan Railway to India by Indian Railway.-Implied agency came into existence between Forwarding Railways and Receiving Railways.** The aforesaid facts clearly indicate that the respondent appointed the Receiving Railway as his agent to carry his goods on the railway to a place in India with whom Pakistan had no treaty arrangement in the matter of through booked traffic. In that situation the authority in the agent must necessarily be implied to appoint the Forwarding Railway to act for the consignor during that part of the journey of the goods by the Indian Railway; and, if so, by force of the said section, the Forwaeding Railway would be an agent of the consignor. *Union of India v. Amar Singh,* AIR 1960 SC 233: 1960 SCJ 543: 1960 2 SCR 75

**Sections 201, 208 and 221.-Agency.-Revocation of.-The agent provided accommodation by the principal for carrying on business.-The agent is bound to vacate the premises to enable the principal to carry on his business.** Even otherwise, under law revocation of agency by the principal immediately terminates the agent's actual authority to act for the principle unless the agents authority is coupled with an interest as envisaged under Section 202 of the Indian Contract Act. When agency is revoked, the agent could claim compensation if his case falls under Section 205 or could exercise a lien on the principal's property under Section 221. The agent's lien on principal's property recognised under Section 221 could be exercised only when there is no agreement inconsistent with the lien. In the present case the terms of the agreement by which the respondent was appointed as agent, expressly authorises the company to occupy the godown upon revocation of agency. Secondly, the lien in any event, in our opinion, cannot be utilised or taken advantage of to interfere with principal's business activities. *Southern Roadways Ltd., Madurai v. S.M. Krishnan,* AIR 1990 SC 673: 1989(4) SCC 603: 1989 Supp (1) SCR 410: 1989(2) Scale 811: 1989(4) J.T. 89

**Section 202.-Irrevocable Power of Attorney.-Assignment of Decree.-Scope of power of assignee/attorney.-The Attorney executed on account of the liability of loans taken from the Bank.-The Power of Attorney is irrevocable.** It is clear that the amount under the decree was specifically earmarked for discharge of the debts due to the Bank. It was constituted as a special fund for the said purpose. The power to realize that fund was made over to the Bank with the further authority to set off the amount realized towards the debts due to it. In other words, the power of attorney is an engagement to pay out of the particular fund the debt due to the Bank and hence the same constitutes an equitable assignment of the amount due under the decree or so much of that amount as is necessary for discharging the debts due to it. *Seth Loon Karan Sethiya v. Ivan E. John and others,* AIR 1969 SC 73: 1968 (2) SCJ 851: 1969(1) SCR 122

**Sections 211, 212 and 220.-Damages for negligence.-Liability of agent.-Scope of.-The liability of agent is limited to damaged directly arising from negligence or misconduct and not remotely caused by such conduct or neglect.** In case of the agent's negligence he is liable to make good the damage directly arising from his neglect but not indirectly or remotely caused by such neglect or misconduct. The question, therefore, is whether in the present case the claim of the resps. based on the neglect or misconduct can be stated to be a direct consequence of such neglect or misconduct or is only indirectly or remotely caused by such neglect. *Pannalal Jankidas, a firm v. Mohanlal and another,* AIR 1951 SC 144: 53 Bom LR: 1951(1) MLJ 314: 1951 SCJ 149: 1950 SCR 979

**Section 212.-Misconduct of agent.-Liability for damages.-Failure to communicate non-purchase after making the principal to believe that he had actually purchased the goods.-The agent is liable for damages.** The defendant-respondent grossly misconducted himself in first communicating to the appellant that goods had been purchased for him at the rate of Rs. 36/- per pound when they had not been and further in another communication to have told him that those goods would be

dispatched the moment the strike of transporters was over. His turning around at the later stage to say that in fact the goods could not be purchased by him at all as their delivery was dependent on a third party and which third party was dependent on yet another party for delivery of goods appears to us an afterthought. For such neglect and misconduct of the agent misinforming his principal, his conduct squarely comes within the wide terms of Section 212 of the Indian Contract Act, and he therefore must bear the brunt to pay damages. *Jayabharathi Corporation v. SV. P.N. Rajesekara Nadar,* AIR 1992 SC 596: 1993 Supp (2) SCC 401: 1992(1) APLJ 53

**Sections 215 and 216.-Agent.-Liability to pay interest.-Interest is allowed by the Court in equity in cases where money is obtained or retained by fraud.-Even an agent is liable to pay interest for the money earned by him by fraud, bribe and secret profits out of the agency.***Messrs. Trojan & Co. v. R.M.N.N. Nagappa Chettiar,* AIR 1955 SC 235: 1953 SCJ 345: 1953 SCR 789

**Section 219 and 221.-Agent.-Right to sue for accounts.-Scope of.-It is a right arising under special circumstances and it is not a statutory right.** Section 213 of the Indian Contract Act specially provides that an agent is bound to render proper accounts to his principal on demand. The principal's right to sue an agent for rendition of accounts is, therefore, recognised by the statute. But the question is whether an agent can sue the principal for accounts. There is no such provision in the Indian Contract Act. In our opinion, the statute is not exhaustive and the right of the agent to sue the principal for accounts is an equitable right arising under special circumstances and is not a statutory right. *Narandas Morardas Gajiwala and others v. S.P.A.M. Papammal and another,* AIR 1967 SC 333: 1967(2) Andh WR (SC) 32: 1967(2) Mad LJ (SC) 32: 1966 Supp. SCR 38

**Section 221.-Improvement by Agent.-Consent of principal.-Determination of.-A person coming into possession of land under Power of Attorney.-The attorney spending for improvement of the land without the consent of the owner is not entitled to recover the same from the owner.** *Shankar Gopinath Apte v. Gangabai Hariharrao Patwardhan,* AIR 1976 SC 2506: 1976(4) SCC 112: 1977(1) SCR 411

**Section 222.-Indemnity to agent.-Claim of.-Permissibility.-Loss in illegal business suffered by the agent on behalf of principal.-Suit seeking indemnification of the loss is not barred as the transaction was not carried out at the place where such transaction was prohibited.-The right to indemnity is not hit by the prohibition on the transaction in the nature of wagering.** *Kishan Lal and another v. Bhanwar Lal,* AIR 1954 SC 500: 1955 SCA 592: 1954 SCJ 542: 1955(1) SCR 439

**Section 230.-Contract through agent.-Terms of agent.-Terms of contract.-Determination.-Variation in sale note and purchase note.-No binding contract came into existence between the parties.** *Radhakrishna Sivadutta Rai and others v. Tayeballi Dawoodbhai,* AIR 1962 SC 538: 1962 Supp (1) SCR 81

**Section 230.-Liability of agent.-Contract entered on behalf of the Government found to be void for want of compliance of Article 299(1).-The contract cannot be enforced against Agent even if the Principal cannot be sued.** *The State of U.P. and another v. Murari Lal and Brothers Ltd.,* AIR 1971 SC 2210: 1971(2) SCC 449: 1972(1) SCR 1

**Section 230.-Complaint against contractor for rendering deficient services before Consumer Protection Forum.-Complainant Entitled to seek protection under Section 230 of Contract Act.** The Contract Act applies to all, litigants before the Commission under the Consumer Protection Act included. Whether in proceedings before the Commission or otherwise, an agent is entitled to invoke the provisions of Section 230 of the Contract Act and in, if the facts found support him, his defence based thereon cannot be brushed away. The District Consumer Disputes Redressal Forum, Madras, before whom the respondent had instituted the claim, had found in favour of the appellant, both on the basis of Section 230 of the Contract Act as also on the issue of limitation. The State Consumer Disputes Redressal Commission, Madras, in appeal, upheld the decision of the District Forum based on Section 230 of the Contract Act and, therefore, found it unnecessary to consider the aspect of

limitation. The National Forum, as aforesaid, took the contrary view on the applicability of Section 230 of the Contract Act on the mistaken basis referred to above as also by reliance on third clause of the presumptions to the contrary in Section 230, that is to say that an agent is bound by a contract entered into by his principal who, though disclosed, cannot be sued. That the principal here is some company in Taiwan situated far outside the jurisdiction of the consumer Courts in India" does not mean that it could be inferred, for it had not been so found by the District or State Commissions, that it could not be sued. The judgment and order of the National Commission is erroneous. It must be set aside and the order of the State Commission restored. *Marine Container Services South Pvt. Ltd. vs. GoGo Garments,* AIR 1999 SC 80 : 1998(2) Mad LJ 65 : 1998 BRLJ 128 : 1998(3) SCC 247 : 1999(1) Raj LW 3 : 1998(33) All LR 590

***