

Agency

DEFINITION OF "AGENT"

Representative capacity, hallmark of agency

"Agent" is defined in Section 182 of the Act in the following words:

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

The emphasis is on the power of the agent to represent his principal in dealings with third persons. But the above definition is wide enough to embrace a servant pure and simple, even a casual employee, a man who is engaged by me in the street to black my boots; but it cannot for a moment be contended that they are all to be placed in the same category.¹ Thus what distinguishes an agent from a person appointed to do an act, is the agent's representative capacity coupled with a power to affect the legal relations of the principal with third persons.

"The essence of the matter is that the principal authorised the agent to represent or act for him in bringing the principal into contractual relation with a third person."²

The concept of "agency" has been thus explained by RAMASWAMI J of the Madras High Court in *Krishna v Ganapathi*:³

"In legal phraseology, every person who acts for another is not an agent. A domestic servant renders to his master a personal service; a person may till another's field or tend his flocks or work in his shop or factory or mine or may be employed upon his roads or ways; one may act for another in aiding in the performance of his legal or contractual obligations of third persons.... In none of these capacities he is an agent and he is not acting for another in dealings with third persons. It is only when he acts as a representative of the other in business negotiations, that is to say, in the creation, modification or termination of contractual obligations, between that other and third persons, that he is an agent.... Representative character and derivative authority may briefly be said to be the distinguishing feature of an agent."⁴

1. VIVIAN BOSE J in *Kalyanji v Tirkaram*, AIR 1938 Nag 255.
2. *Mahesh Chandra Basu v Radha Kishore Bhattacharjee*, (1908) 12 Cal WN 28, 32. A person performing ministerial acts is not an agent. *Mohan Lal Jain v Swami Man Singh*, (1962) 1 SCR 702; AIR 1962 SC 73. For the position of post office, see *I.T.C. v Palney & Co*, AIR 1959 SC 1070; *I.T.C. v P.M. Rathod & Co*, (1960) 1 SCR 401; AIR 1959 SC 1394; *Shri Jagdish Mills Ltd v C.I.T.*, (1960) 1 SCR 236; AIR 1959 SC 1160; *Malwa United Mills Ltd v C.I.T.*, (1966) 2 SCR 651; AIR 1966 SC 1466; *C.I.T. v Ogale Glass Works*, (1955) 1 SCR 185; AIR 1954 SC 429.
3. AIR 1955 Mad 648.
4. AIR 1955 Mad 648, 651. Post Office is agent of the sender, *I.T.C. v P.M. Rathod & Co*, (1960) 1 SCR 401; AIR 1959 SC 1394; buyers from manufacturers for export purposes, only

The same appears from an observation of the Supreme Court⁵ to the effect that "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".

Test of Determining Existence of Agency Relationship

The test of determining the existence of agency relationship has been explained by DHAWAN J of the Allahabad High Court in the following words:⁶

"Agency depends on true nature of relationship."⁷ The American jurisprudence refers to a case in which it was held that the use of the words 'agency agreement' and 'agent' by the parties in a contract does not necessarily establish a relationship of agency in the legal sense.⁸ The law in India is the same. It has been held in several decisions that the fact that the parties have called their relationship an agency is not conclusive, if the incidence of this relationship, as disclosed by evidence does not justify a finding of agency, and that the court must examine the true nature of the relationship and the functions and responsibilities of the alleged agent.⁹

Applying this test to the facts of the case before him the learned Judge held that when the Assam Government placed its quota of a commodity at the hands of a dealer for resale to consumers, he was not an agent of the Government even if he was described as such in the agreement.¹⁰ Similarly "a person does not become an agent merely because he gives advice in matters of business".¹¹ A "procurement agent" has been held to be not an agent, as he is only a person directed to do an act on a commission and not to represent another.¹²

channel allowed by the State for export, not agents. *State of Mysore v Mysore Spg & Mfg Co*, AIR 1958 SC 1002. *State of Maharashtra v Deepak*, (1996) 2 Bom CR 468. An agent cannot challenge the authority of the principal from whom he derived his appointment. An agent appointed to collect toll tax on a bridge was not allowed to say that the Government should not recover anything from him because the cost of the bridge had already been recovered.

5. *Syed Abdul Khader v Rami Reddy*, (1979) 2 SCC 601; AIR 1979 SC 553, 557. *State of Bihar v Dakhulal Das*, (1962) AP 140; *Babulal Swarupchand Shah v S.S. (F.D.) Merchants' Assn Ltd*, AIR 1960 Bom 548, formal agreement not necessary; *Lakshmi Ginning & Oil Mills v Amrit Banaspati Co Ltd*, AIR 1962 Punj 56. An agency can arise without any formal contract. *Govind Prasad v Board of Revenue*, AIR 1965 SC 66.
6. *Loon Karan v John & Co*, AIR 1967 All 308, 310-11; *Purshottamdas v Gulab Khan*, (1963) AP 407, all the circumstances to be examined, and not merely labels used by the parties.
7. Quoting from HALSBURY'S LAWS OF ENGLAND, 3rd edn, Vol 1, p 146.
8. AMERICAN JURISPRUDENCE, 2nd Edn, Vol 3, p 431. The case is *McCarty v King County Medical Service Corpn*, 26 Wash 2d 660: 175, P 2d 653.
9. Following cases are cited: *Banaras Bank v Ram Prasad*, AIR 1930 All 573; *Phoolchand v Agarwal B.M. Co*, AIR 1938 Lah 814; *Suryaprakasarya v Matheson's Coffee Works*, (1913) 14 Mad LJ 249. See further *Gaya Sugar Mills Ltd v Nand Kishore Bajoria*, AIR 1955 SC 441; *Kuchwar Lime & Stone Co v Dehri Rohtas Light Rly Co Ltd*, (1969) 1 SCR 359; AIR 1969 SC 193.
10. *Loon Karan v John & Co*, AIR 1967 All 308; *State of AP v J. Rice Mills*, AIR 1959 AP 352. Where, on the other hand, the miller was given the authority for hulling paddy and distributing the same according to Government but also for accountability, he was held to be an agent. *A.Z. Mohammed Farooq v State Government*, 1984 Ker LT 346 FB.
11. *Mahesh Chandra Basu v Radha Kishore Bhattacharjee*, (1908) 12 Cal WN 28, see at p 32.
12. *State of Madras v Jaya Lakshmi Rice Mills*, ILR 1958 AP 671, 678-79. The Supreme Court has held that an independent 'buyer' is not an 'agent', even if so described in the contract. *Gordon Woodruffe & Co v Shaik M.A. Majid & Co*, AIR 1967 SC 181; see also *Khedut*

A person who was described under the Madras Foodgrains Procurement Order, 1947, as a "wholesale dealer" has been held to be an agent. He was to purchase and sell at price fixed by the State and he was also responsible for safety. Thus, he was a channel through which the State was operating and became an agent of the State.¹³ Similarly, where a person was authorised by the Government of India to procure rice in Nepal, to have it milled at a specified mill in Bihar and to dispatch it to different States as directed, he was held to be an agent of the State.¹⁴ Coal dispatched by a colliery under colliery control order has been held to constitute the colliery into an agency for the consignee making the latter liable for freight and demurrage.¹⁵

Agency in Hire-Purchase Transactions

To know whether a person occupies the position of an agent or not, the law has to go by his functions. The law has to see the substance of the transaction and not the parties' terminology.¹⁶ The relevance of the expressions used in an agreement

Sahakari Ginning & Pressing Society v State of Gujarat, (1971) 3 SCC 480: (1972) 1 SCR 714: AIR 1972 SC 1786. The court relied upon *Balthazer & Son v E.M. Abowath*, AIR 1919 PC 166. See further on the position of procurement agent, *Ireland v Livingston*, (1871) LR 5 HL 395; Hill, 31 Mod LR 623.

13. *G. Alluraiah v State of AP*, AIR 1963 AP 394. For another example of a running State agency, see *Hari Chand Madan Gopal v State of Punjab*, (1973) 1 SCC 204: AIR 1973 SC 381. See also *Liberty Sales Services v Jakki Mull & Sons*, (1997) AIHC 2368 Delhi, handing over of shop on exclusive possession basis for business, the sub-lettee to be responsible for all expenses like payment of staff, telephone, electricity, etc. agency, not tenancy. *Happy Home Builders P Ltd v Delite Enterprises*, (1995) AIHC 1320, a legal counsel is not agent. A counsel appointed by the managing director of a company to negotiate the sale of the company's property was held not to be in a position to act as an agent of the company and in that capacity to rescind a contract and to forfeit the earnest money of the contractor and appropriate it towards his claims against the company. *Vijay Traders v Bajaj Auto Ltd*, (1995) 6 SCC 566, appointment of a distributor for Bajaj vehicles, the distributor had to pay the price of the vehicles ordered by him, delivery was to be given on payment of price and he had to bear damage to vehicles in transit. The relationship was held to be that of principal to principal buyer and seller and not that of principal and agent. Section 206 which prescribes a notice for terminating an agency would not be applicable.
14. *Government of India v Jamanadhar Rungta*, (1960) AP 19. Sellers who collect Sales Tax do not become agents for tax collection: *State Tax Commr v Sada Sukh Vyapar Mandal*, (1959) 10 STC 57 All; *Babu Lal v State of UP*, AIR 1966 All 204.
15. *Kuchwal Lime & Stone Co v Dehri Kohtas Light Rly Co Ltd*, AIR 1969 SC 193. Official receiver is not the insolvent's agent, *Ramgopal Naicker v M. Ayyar*, AIR 1957 Mad 1. A carrier who forwards goods to another carrier does not do so as an agent, *Sukul Bros v H.K. Kavarana*, AIR 1958 Cal 730. A person who purchases goods to supply them to his constituents, it depends, whether he is an agent. See *Pannalal Babulal v S.T. Commrs*, AIR 1956 Ass 710; *Satyanarayana v State of Madras*, AIR 1957 AP 474. See generally the opinion of the Supreme Court in this matter in *State of Mysore v Mysore Spinning and Weaving Co Ltd*, AIR 1958 SC 1002; *Ganesh Export and Import Co v Mahadeo*, AIR 1950 Cal 188, the use of the word "commission" for price does not convert the vendor and purchaser into principal and agent; *State of Madras v Jayalakshmi Rice Mills*, AIR 1959 AP 352, payment for work by way of commission, not exhaustive of the matter; *Fruit and Veg. Merchants' Union v Delhi Improvement Trust*, AIR 1957 SC 344: 1957 SCR 1, a trust constituted to hold and manage an estate, held, agency. *Ghosi Ram Agarwal v State*, AIR 1967 Cal 568, fair-price shop is not agency, but ownership, held not liable for movement of goods to some other place; *S.N. Barich v State of WB*, AIR 1963 Cal 79; an independent buyer is not an agent, *Varsha Engg P Ltd v Vijay Traders, Baroda*, AIR 1983 Guj 166.
16. *Superintendent of Stamps, Bom v Breul & Co*, (1944) 46 Bom LR 686; AIR 1944 Bom 225; *Shri Tirumala Venkateshwara Timber v Commr Tax Officer*, AIR 1968 SC 784: (1968) 2

has often been considered in connection with hire-purchase transactions. A transaction of this kind generally involves three parties, the dealer, who provides the goods; the financier, who provides money to the dealer and the hirer, who takes the goods and pays hire-purchase instalments to the financier. What happens in real substance is that the dealer hands over goods as directed by the financier. Lest the dealer be regarded as an agent of the financier a hire-purchase agreement often expressly declares that the dealer is not an agent. The Hire Purchase Act, 1972 regards the dealer as an agent of the financier for some purposes, one of them is that if any representations are made by the dealer to promote the sale of the product, he would be deemed to be an agent of the financier. But whether he is a general agent of the finance company remains an open question. The Court of Appeal has witnessed two views being expressed. In one of them it was stated that the dealer is a party to the hire-purchase transaction in his own right and not as a representative of any other party, though for many purposes he is an intermediary between the two others.¹⁷

The other view considered the dealer as an agent of the finance company for many purposes of law.¹⁸ The House of Lords has expressed (obiter) the opinion that the questions of the liability of the finance company for acts or defaults of dealers can be resolved only in reference to the general mercantile structure within which they arise or, if one prefers the expression, to mercantile reality. The reality of the situation is that customers often do not know about the finance company. They come only to the counter of the dealer, who does everything. "If this is so, a general responsibility of the finance company for the acts, receipts and omissions of the dealer in relation to the proposed transaction of hire-purchase ought to flow from this general structure of relationship and expectation."¹⁹

Co-agents and Co-principals

Where the authority given to co-agents is joint, it would be necessary for them to act jointly and only then their principal would be bound. Where the authority is joint and several any one of them would be competent to act for the principal.²⁰ An agent who represents more than one principals in one and the same transactions, should account for to all of them jointly, for an account given to one may not absolve him from his liability.²¹

SCR 476; *Murlidhar v Kishori Lal*, AIR 1960 Raj 296, description as *pucca adatia* not exhaustive.

17. *Mercantile Credit Co v Hamblin*, (1965) 2 QB 242, 269; (1964) 2 All ER 592, 600-601.

18. *Financings Ltd v Stimson*, (1962) 3 All ER 386; (1962) 1 WLR 1184.

19. *Branwhite v Worcester Works Finance*, (1969) 1 AC 552; (1968) 3 All ER 104. See *Northgran Finance Ltd v Ashley*, (1963) 1 QB 476 where it was recognised that he can be an agent for some purposes of the relation, e.g., to accept offers on the terms of the company's proposal forms. See G.H. Treital, *THE LAW OF CONTRACT*, 532 (5th edn, 1979).

20. *Brown v Andrew*, (1849) 18 LJ QB 153; *Liverpool Household Stores, Re*, (1890) 59 LJ Ch 616; *Guthrie v Armstrong*, (1820) 5 and Ald 628.

21. *Raghar Dayal v Piare Lal*, AIR 1933 Lah 93.

ESSENTIALS OF AGENCY

Principal should be competent to contract

An agency being a contract of employment to bring the principal into legal relations with a third party, the first requisite is that the principal should be competent to contract:²²

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

It follows that a minor cannot appoint an agent. The appointment of an agent involves a contract, and a minor's agreement is void. Emphasising this principle, DENNING L.J. observed in *Shephard v Cartwright*:²³

"An infant cannot appoint an agent to act for him neither by means of a power of attorney, nor by any other means. If he purports to appoint an agent, not only is the appointment itself void, but everything done by the agent on behalf of the infant is also void and incapable of ratification."

Explaining the reason for the infant's incapacity, his Lordship said:

"An infant has not sufficient discretion to choose an agent to act for him. He is all too likely to choose a wrong man; and so the law declares him to be incapable of choosing an agent at all."

But in situations where a minor is capable of binding himself by contract he may appoint an agent to contract on his behalf. "Whatever a person can do personally he can do through an agent."²⁴ The following article in Bowstead on AGENCY²⁵ emphasises the same principle:

"An infant or a lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract."²⁶

Further, "there is nothing in the Act which prohibits the guardian of a minor from appointing an agent for him".²⁷

Where a principal who had executed a power of attorney became old, weak, mentally infirm and not in a position to think independently, it was held that the power of attorney had become worthless; that the engagement of a lawyer under it

22. The base of an agency is an agreement, *Garnac Grain Co Inc v Faure and Fairclough Ltd*, 1968 AC 1130; noted, Fridman, 84 LQR 224.

23. (1953) Ch 728, 755.

24. Powell, THE LAW OF AGENCY, (1952) p 242, citing STIRLING, L.J. in *Beaven v Webb*, (1901) 2 Ch 59, 77.

25. 11th edn, p 14. See also *Kusa Parida v Baishnab*, AIR 1966 Ori 60.

26. See Webb, *The Capacity of an Infant to Appoint an Agent*, (1955) 18 Mod LR 461, and a note a by R.E.M. on *Shephard v Cartwright*, 69 LQR 446 (1953).

27. *Madanlal Dhariwal v Bherulal*, AIR 1965 Mys 272. Only natural guardian can deal with the property of a minor for the benefit of his estate. Dealings by a *de facto* guardian without the permission of the court are void. See *Gurmel Singh v Ujagar Singh*, (1991-1) 99 Punj LR 571. No specific enforcement of such a contract was allowed. The court cited: *Abdul Haq v Mohd Yehia Khan*, AIR 1924 Pat 84; *Babu Rameshwar Prasad Sahi v Anandi Devi*, AIR 1956 Pat 53; *R.M. Ramanathan Chettiar v P.S.L. Ramanathan Chettiar*, AIR 1960 Mad 207; *Gujoba Tulsiram v Nilkanth*, AIR 1958 Bom 202; *Bholanath v Balbhadra Pd*, AIR 1964 All 522; *Narpat Raj v Babulal*, AIR 1964 Raj 92.

came to an end, the principal being unable to give instructions because of mental infirmity and that the holder of the power was no longer competent to give evidence on behalf of the principal.²⁸

The principle that every person has the right to appoint an agent for any purpose does not apply where the act to be performed is personal in character or when it is annexed to a public office or to an office involving any fiduciary obligation.²⁹

Agent need not be competent

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

The agent need not be competent to contract. Section 184 lays down very clearly that "as between the principal and third persons any person may become an agent". Ordinarily, an agent incurs no personal liability while contracting for his principal and, therefore, it is not necessary that he should be competent to contract.³⁰ Thus a person may contract through a minor agent, but the minor will not be responsible to his principal.³¹ "In the days when married women lacked contractual capacity they could nonetheless act as agents."³² A company may act as an agent beyond its capacity (*ultra vires*).³³

Consideration for appointment not necessary

185. Consideration not necessary.—No consideration is necessary to create an agency.

Lastly, Section 185 provides that no consideration is necessary to create an agency. Generally an agent is remunerated by way of commission for services rendered, but no consideration is immediately necessary at the time of appointment.

Agent and Servant

An agent occupies a position which is in many respects similar to that occupied by a servant, bailee or trustee. The distinction between an "agent" and a "servant" has been underlined by the Supreme Court in *Lakshminarayan Ram Gopal & Sons v Hyderabad Government*.³⁴ BHAGWATI J adopted the distinction as it is stated in

28. *Mahendra Pratap Singh v Padam Kumari Devi*, AIR 1993 All 143.

29. *Agency T.C. Mathai v District & Sessions Judge*, (1999) 3 SCC 614; AIR 1999 SC 1385; (1999) Cri LJ 2092.

30. *Mohomedally v Schiller*, (1889) 13 Bom 470, no liability of a foreign commission agent. *De Souza, Re*, AIR 1932 All 374, minor son acting for his father, notice to son effective.

31. *Foreman v Great Western Rly Co.*, (1878) 38 LT 851.

32. Treitel, *THE LAW OF CONTRACT*, 534 (5th edn, 1979) citing *Stevenson v Hardie*, (1773) 2 Wm. Bl 872.

33. *Bell Houses Ltd v City Wall Properties*, (1966) 2 WLR 1323; (1966) 2 All ER 674. Commission for financial advice allegedly beyond the company's powers.

34. AIR 1954 SC 364; (1955) 1 SCR 393. See also *Indo Union Assn Ltd v T. Srinivasan*, AIR 1946 Mad 530; *Chandi Pd Singh v State of UP*, (1955) 2 SCR 1035, 1041; AIR 1956 SC 149; *Ram Pd v C.I.T.*, (1972) 2 SCC 696; AIR 1973 SC 637.

Powell's LAW OF AGENCY³⁵ and HALSBURY'S LAWS OF ENGLAND.³⁶ The main points of distinction which have been emphasised are as follows—

- (1) An agent has the authority to act on behalf of his principal and to create contractual relations between the principal and a third party. This kind of power is not generally enjoyed by a servant.
- (2) "A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."³⁷ "A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work. But an agent, though bound to exercise his authority in accordance with all lawful instructions . . . is not subject in its exercise to the direct control of supervision of the principal."³⁸
- (3) The mode of remuneration is generally different. A servant is paid by way of salary or wages, an agent receives commission on the basis of work done.³⁹
- (4) A master is liable for a wrongful act of his servant if it is committed in the course of the servant's employment. A principal is liable for his agent's wrong done within the "scope of authority".
- (5) A servant usually serves only one master, but an agent may work for several principals at the same time.⁴⁰

The managing director of a company is an employee of the company, but in the matter of the company's relation with third parties he occupies the position of an agent.⁴¹ Similarly, the secretary of a company is its servant, but in respect of the matters that come under his domain, he becomes an agent in his dealings with third persons.⁴² "Professional advisers, such as stockbrokers and architects often act as agents for their clients. Other professional persons are engaged simply to produce a specified result: for example, to prepare a report or to paint a picture. Such persons have no power to act on behalf of their clients;...."⁴³

The court is not bound by the terminology of the parties, but by the substance of the relation. Where an agent was described and treated as a servant, but the nature of the dealings showed that he was in essence an agent, it was held that he having

35. (1952) at pp. 19-20.

36. Hailsham Edition, Vol 22, p 113, para 192. See also Haffcutt, AGENCY (2nd edn) 11 and Professor Cecil A. Wright, 15 Can Bar Rev 287.

37. *Per* BRAMWELL B in *R. v Walker*, (1858) LJM C 207, 208: 31 LT (OS) 137.

38. *Supra* f.n. 25. See also *Qamar Shaffi v Commr, E.P.T.*, (1960) 3 SCR 546, 551: AIR 1960 SC 1269.

39. But see *Performing Right Society Ltd v Mitchell & Booker Ltd*, (1924) 1 KB 762.

40. *Khedut Sahakari Ginning & Pressing Society v State of Gujarat*, (1971) 3 SCC 480, 484: (1972) 1 SCR 714: AIR 1972 SC 1786. For distinction between agency and sale see *Gordon Woodroffe & Co v Shaik M.A. Majid & Co*, AIR 1967 SC 181, 183.

41. *Hely Hutchinson v Brayhead Ltd*, (1967) 3 All ER 98; *Kothandaraman v C.I.T.*, AIR 1967 Mad 143; *Qamar Shaffi Tyabji v Commr E.P.T.*, AIR 1960 SC 1269.

42. *Panorma Devp v Fidelis Furnishing Fabrics*, (1971) 1 WLR 440: (1971) 3 All ER 16 CA; *Chandi Pd Singh v State of UP*, AIR 1956 SC 149: (1955) 2 SCR 1049.

43. See G.H. Treital, THE LAW OF CONTRACT, 532 (5th edn, 1979) citing *Leicestershire C.C. v Michael Faraday*, (1941) 2 KB 205, valuers not agents, nor bound to surrender valuation documents prepared for the purpose of report; *Armstrong v Jackson*, (1917) 2 KB 822; *Fraser v B.N. Furman*, (1967) 1 WLR 898, 910, stockbrokers not agents.

invested his personal money and resources in the working of the agency, the same could not be summarily terminated. It required some reasonable notice.⁴⁴

Agent and Bailee

An agent differs from a bailee in certain respects. Firstly, the relationship of bailor and bailee subsists only so long as the bailee holds some goods belonging to the bailor, but this is not necessary for the subsistence of agency relationship. Sometimes an agent may be in possession of his principal's property and to that extent he may also be a bailee. And sometimes an ordinary bailee may become an agent when he is authorised to dispose of the bailor's property according to his directions.

Secondly, an agent is a representative with a power to contract on behalf of his principal. A bailee does not have that power. The Supreme Court accepted these points of distinction in a case in which a banker had assumed the responsibility of receiving the goods on behalf of an account-holder and to release them in favour of his customers against payment. The banker was held thereby not to have become an agent. He remained only a bailee.⁴⁵

Agent and Buyer

A selling agency has to be distinguished from a transaction resulting in an out and out sale. The legal position of an independent buyer is enormously different from that of an agent. An illustration is to be found in the decision of the Supreme Court in *Gordon Woodroffe & Co v Shaikh M.A. Majid & Co.*⁴⁶ The court pointed out that even an agent can become a purchaser when he pays the price to the principal and discloses to him that fact. The opening words of the contract in question were that the defendants were buying the goods for resale in the United Kingdom. If it were not an outright sale, but only an agency, it would not have been necessary to provide for the price, for the time of delivery and for the fact that sales tax was to be borne by the defendants.

Kinds of agent

Agents are of several kinds. The word "agent" is used to describe various types of activity. For instance, Lord HERSCHELL observed in *Kennedy v De Trafford*:⁴⁷

"No word is more commonly and constantly abused than the word 'agent'. A person may be spoken of as an agent and no doubt in popular sense of the word he may properly be said to be an agent, although when it is attempted to suggest that he is an agent under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading."

"The description 'agent' is often employed in business in a complimentary and not in a legal sense."⁴⁸ Thus one hears of 'dress agency; private inquiry

44. *Popular Shoe Mart v Srinivasa Rao*, AIR 1990 (NOC) 87 (AP).

45. *United Commercial Bank v Hem Chandra Sarkar*, (1990) 3 SCC 389, 396. In the subsequent case of *Vijaya Bank v United Corpn*, AIR 1990 Ker 209, the pledgee bank being bailee, and not an agent, was allowed to recover compensation from the godown-keeper for damage to the goods.

46. AIR 1967 SC 181.

47. (1897) AC 180, 188.

48. HALSBURY'S LAWS OF ENGLAND, (2nd edn) 1, para 194(g).

agent; secret agent⁴⁹, and the word is also used in reference to mechanical agents, such as washing or cleansing agent. The types of agent that are known to the business world are, however, fewer. Only those may be briefly described here.

Factor

"The word 'factor' in India as in England, means an agent entrusted with the possession of goods for the purpose of selling them."⁵⁰ "He is a mercantile agent whose ordinary course of business is to dispose of goods, of which he is entrusted with the possession or control by his principal."⁵¹

Broker

A "broker" is also a kind of mercantile agent.⁵² He is appointed to negotiate and make contracts for the sale or purchase of property on behalf of his principal, but is not given possession of the goods.

Del Credere Agent

A "*del credere agent*" is another type of mercantile agent. In ordinary cases the only function of an agent is to effect a contract between his principal and a third party. The agent then drops out.⁵³ He can neither sue on the contract, nor he is held liable for the failure of the third party to perform.⁵⁴ But where an agent undertakes, on the payment of some extra commission, to be liable to the principal for the failure of the third party to perform the contract, he is called *del credere agent* and his extra commission for the guarantee is known *del credere commission*. The position of such agent was explained in *Couturier v Hastie*:⁵⁵

The defendants acting as *del credere agents* sold the plaintiff's goods which were supposed to be on a voyage but which unknown to the parties had already been sold by the captain owing to damage by heat. The buyer repudiated the contract and, therefore, the agents were sued for the buyer's failure to perform.

The question was "whether the defendants are responsible by reason of their charging a *del credere commission*, though they have not guaranteed by writing".⁵⁶ The court said that they were. "A higher reward is paid in consideration of their taking greater care in sales to their customers and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them." Keeping this in view, the court held that a *del credere agency* is not a contract of guarantee, even if it may terminate in a liability to pay

49. Powell, THE LAW OF AGENCY, (1952) p 27, f.n. 3.

50. See STUART CJ in *E.H. Parakh v King Emperor*, AIR 1926 Oudh 202.

51. BOWSTEAD ON AGENCY, (11th edn, 1951) 2, citing *Baring v Corrie*, (1818) 2 B&A 137; *Stevens v Biller*, (1883) 25 Ch D 31: 53 LJ Ch 249 (CA).

52. See *Commercial Enterprisers v Madan Mohan Singh*, AIR 1951 Hyd 47 and *William Son Magor & Co v Keshoram Agarwalla*, ILR 1956 Ass 268.

53. See PAL J in *Sukumari Gupta v Dharendra Nath*, AIR 1941 Cal 648, 655.

54. See Section 230.

55. (1852) 8 Exch 40, reversed *sub-nom* in *Hastie v Couturier*, (1953) 9 Exch 102, affirmed, (1856) 5 HL Cas 673. A *dubash* is an agent of this kind, namely, a guarantor plus an agent. *Periyamianna v Banians & Co*, AIR 1926 Mad 544.

56. See PARKE B at p 55. It has been seen before that under the Statute of Frauds a guarantee is not enforceable unless it is in writing.

the debt of another, because the agent has a personal interest in the transaction and, therefore, a writing is not necessary.⁵⁷

The nature of liability incurred by a *del credere* agent has been explained by the Allahabad High Court in the following words:⁵⁸

"A *del credere* agent incurs only a secondary liability towards the principal. His legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals to the extent of any default by reason of any insolvency or something equivalent. His liability does not go to the extent of making him responsible to the principal where there can be no profit by reason of any stringency in the market."

A *del credere* agent is, however, not liable to the buyer for any default on the part of his principal.⁵⁹ Nor is he liable for any disputes between the principal and the buyer relating to the contract or the sum due.⁶⁰ The extent of his involvement as a guarantor was thus explained by BUCKLEY LJ:⁶¹

"The liability of the *del credere* agent is contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in the event of the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which as between the seller and the buyer is an ascertained sum."

CREATION OF AGENCY

In the words of DESAI J of the Supreme Court:⁶² "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."

The relationship of principal and agent may be created in any of the following ways:

- (1) by express appointment;
- (2) by the conduct or situation of the parties;
- (3) by necessity of the case; or
- (4) by subsequent ratification of an unauthorised act.⁶³

Express appointment

Any person who is competent to contract and who is of sound mind may appoint an agent. The appointment may be expressed in writing or it may be oral.⁶⁴

57. See also *Sutton & Co v Grey*, (1894) 1 QB 285.

58. *Champa Ram v Tulsi Ram*, (1927) 26 All LJ 81, per SEN J at p 82.

59. *Shaw v Woodcock*, (1872) 7 B & C 73: 31 RR 158.

60. *Churchill & Sim v Goddard*, (1937) 1 KB 92. See also Chorley: *Del Credere*, (1929) 55 LQR 221.

61. *Thomas Gabriel & Sons v Churchill & Sons*, (1914) 3 KB 1272 Ch. On the same point, *Rushalme & Bolton v S.G. Read & Co*, (1955) 1 WLR 146.

62. *Syed Abdul Khader v Rami Reddy*, (1979) 2 SCC 601: AIR 1979 SC 553, 557.

63. See a statement of these modes of constituting an agency in *Sukumari Gupta v Dhirendra Nath*, AIR 1941 Cal 643, 655.

64. *Delhasse ex. p.*, (1878) 7 Ch D 511.

"In English law no man can become the agent of another except by the will of that other person. His will may be manifested by writing or orally or simply by placing another in a situation in which, according to the ordinary rule or law, or perhaps it would be more correct to say, according to the ordinary usage of mankind, that other is understood to represent and act for the person who has so placed him; but in every case, it is only by the will of the employer that an agency may be created."⁶⁵

"In Indian law the definition given in Section 182 seems to be somewhat wider in this respect.... The definition does not limit the employment to one by the principal only.... It will include an employment by any authority authorised by law to make the employment." Thus, where an agent was appointed under the provisions of a statute for the protection of the interests of quarrelling co-owners and of third persons, the Calcutta High Court held that the agent so appointed would come within the definition, though he would not have the same "well-known and settled incidents" attached to him as arise in the case of contractual agency.⁶⁶ Similarly, loan incurred by an agent appointed under the terms of a statute was held binding on the proprietors.⁶⁷

In England also, "the law may attribute an agent to a person: for example, when a company is first formed, its original directors are its agents by operation of law.... A statute may empower the court to appoint a person to act on behalf of another and so enable the court to create the relation of principal and agent. Thus a person appointed by the court to manage the affairs of a mental patient has been held to be the patient's agent".⁶⁸

Where the appointment is made by a deed, it is called a "power of attorney". In a case before the Supreme Court⁶⁹ a power of attorney, by which a person was appointed as a caretaker of certain agricultural lands, was signed by the three owners of the lands and one of the arguments was that the appointment was ineffective because how could three persons become the principals of one agent and that too by a single power of attorney. Overruling the objection, DESAI J said:

"The relationship of agency 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' something which was impermissible, provisions of the Contract Act or the general law of contract should have been shown as having been violated

65. See PAL J. (*supra*), citing from *Pole v Leask*, (1860) 54 ER 481; (1863) 8 LT 645 (HL), 648. See also *Samuel v Wetherby*, (1908) 1 KB 184; 77 LJ (KB) 69; 98 LT 169; 24 TLR 160.

66. The appointment was under the provisions of Bengal Tenancy Act (8 of 1885). *Commissioner-cum-Secretary, Deptt of Animal Husbandry v K. Rinsing*, AIR 1998 Sikkim 7, letter of appointment under a statute stated that the appointment has been made with the approval of the Government. It was held that the plaintiff need not give any further proof of his appointment.

67. *Sukumari Gupta v Dharendra Nath*, AIR 1941 Cal 643. For another example of statutory agency, see *Fruits and Vegetable Merchants' Union v Delhi Improvement Trust*, 1957 SCR 1.

68. G.H. Treital, THE LAW OF CONTRACT, 530 (5th edn, 1979), citing *Plumpton v Burkinshaw*, (1908) 2 KB 572.

69. *Syed Abdul Khader v Rami Reddy*, (1979) 2 SCC 601; AIR 1979 SC 553, 557. See also *Timblo Irmaos Ltd v Jorge Anibal*, (1977) 3 SCC 474, which is on interpretation of power of attorney.

by such a contract. Nothing of the kind was pointed out to us. On the contrary, in HALSBURY'S LAWS OF ENGLAND,⁷⁰ the following proposition has been stated: 'Co-principals may jointly appoint an agent to act for them and in such case become jointly liable to him and may jointly sue him.' "

The three principals who signed the power of attorney had no joint property. Even so the power was regarded to be valid and applicable to their respective agricultural lands.⁷¹

An oral appointment is also valid even though the contract which the agent is authorised to make has to be in writing.⁷²

Under the Salary Saving Scheme adopted by the Life Insurance Corporation of India the employer, when authorised by the LIC to collect premium amount from the salary of an employee and forward it to the LIC, becomes an agent of the LIC for that purpose. Where such an employer failed in forwarding the amount to the LIC and consequently the policy was in the state of lapse at the time of the employee's death, the National Commission under the Consumer Protection Act, 1986 directed the employer to pay the amount due under the policy. The Supreme Court did not approve this decision and directed the LIC to make payment under the policy. The employer was directed to pay Rs 25,000 as the costs of the proceedings.⁷³ The court referred to its own earlier decision in *Harshad J Shah v LIC of India*.⁷⁴ The Supreme Court cited the following passage from HALSBURY'S LAWS OF ENGLAND:⁷⁵

"Under the law governing contracts of insurance the premium may be paid by the assured to the insurers or to an insurance agent acting on behalf of the insurers and if the agent has the authority to receive it the payment binds the insurers. The authority need not be an express authority; it may be implied from the circumstances."

Implied agencies

Implied agencies arise from the conduct, situation or relationship of parties. Whenever a person places another in a situation in which that other is understood to represent or to act for him, he becomes an implied agent.⁷⁶ Thus, where a woman allowed her son to drive a car for her, she paying all the expenses of maintenance

70. Vol 1, 4th edn, para 726.

71. A person performing the ministerial act of signing letters on behalf of the military secretary of an ex-Ruler, held, not an agent. *Mohanlal Jain v Sawai Man Singhji*, (1962) 1 SCR 702: AIR 1962 SC 73. Post office becomes an agent when the agreement between parties is that cheques may be sent by post. *I.T.C. v Patney & Co*, 1959 Supp 2 SCR 868: AIR 1959 SC 1070; *Indore Malwa United Mills Ltd v C.I.T.*, (1966) 2 SCR 651: AIR 1966 SC 1466. Important members of a community are not its agents. *Shaikh Peru Bux v Kalandi Pati Rao*, (1969) 2 SCR 563: AIR 1970 SC 1885. There can be no agency for illegal acts. *A. Thangal Kunju Musaliar v M.A. Patti*, (1955) 2 SCR 1196: AIR 1956 SC 246.

72. *Heard v Pilley*, (1869) LR 4 Ch 548.

73. *Delhi Electric Supply Undertaking v Basanti Devi*, AIR 2000 SC 43: (1999) 8 SCC 229: (1999) 98 Comp Cas 695: (1999) 3 CPJ 15.

74. (1997) 5 SCC 64: (1997) AIR SCW 2395: AIR 1997 SC 2459. In this case the court was concerned with an insurance agent appointed under Section 42 of the Insurance Act and his appointment under the LIC Regulations for the purpose of soliciting or procuring life insurance business for the LIC and the Regulations and the conditions of his service did not authorise him to collect premium on behalf of LIC.

75. 254 (Vol 25, Para 460).

76. See Lord CRANWORTH in *Pole v Leask*, (1863) 8 LT 645, 648 (HL).

and operation, it was held that the son was an implied agent of the mother and when he made a collision injuring his wife, the wife could sue the mother for the fault of her agent.⁷⁷ A permission granted to a person to ferry a car from one place to another makes him an agent for that limited purpose so as to create liability for consequences of negligent driving.⁷⁸ The borrower of a car would not occupy that position.⁷⁹ Unauthorised pretensions do not have that effect.⁸⁰ An employer allowed to collect premiums from his employees and forward the collection to the organisation, became the implied agent of the latter though described explicitly in the scheme as the agent of the employees.⁸¹

Estoppel

One of the well-known illustrations of implied agency is agency by holding out or estoppel. The principle of holding out has been thus stated in an American case:

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's work."⁸²

An early illustration is *Pickering v Busk*:⁸³

A purchaser of hemp allowed it to remain in the custody of the broker through whom he had bought it. The broker's ordinary business was to buy and sell hemp. He sold the hemp and received the price.

The Court held that the sale and receipt of money were binding on the principal. Lord ELLENBOROUGH explained the principle thus: "If a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. He may bind the principal within the limits of authority with which he has been apparently clothed by the principal; and there could be no safety in commercial transactions if he could not."

A recent illustration is a decision of the Orissa High Court.⁸⁴

A landlord appointed a *tahsildar* to manage his agricultural lands. He let out the lands to tenants on certain terms.

An authority of this kind was not given to him and, therefore, the question was whether the tenancy agreements would bind the landlord. It was held that the

77. *Smith v Mose*, (1940) 1 KB 424. For an example of an implied agency in addition to being a paid servant, see *J. Ayyadurai v J.S. Baliah Nadar*, (1988) 25 Reports 78 Mad.

78. *Ornrod v Crasville Motor Services Ltd*, (1953) 1 WLR 1120; *Vandyke v Fender*, (1970) 2 QB 292.

79. *Hewitt v Bonvin*, (1940) 1 KB 188; *Morgans v Launchbury*, 1973 AC 127.

80. *Kennedy v De Trafford*, 1897 AC 180, 188.

81. *Delhi Electric Supply Undertaking v Basanti Devi*, (1999) 8 SCC 229; (1999) 98 Comp Cas 695; (1999) 3 CPJ 15.

82. IRVINE C. in *Johnson v Milwankee*, (1895) 46 Neb 480; 64 NW Rep 1100; borrowed from John S. Ewart, *Estoppel—Principal and Agent*, 16 Harv LR 186, 187-88.

83. (1812) KB 15; 13 RR 364.

84. *Kashinath Das v Nisakar Rout*, AIR 1962 Ori 164. See also *Gaya Sugar Mills Ltd v Nana Kishore Bijoria*, AIR 1955 SC 441.

landlord had, by making the *tahsildar* incharge of the lands, created an appearance of authority which, according to the prevailing usages, included the right to let.

Husband and wife

A wife living with her husband has the implied authority of the husband to buy articles of household necessity. In the striking words of Hornby:

“As long as people continue to live in houses, the wife will normally do the household shopping, and the husband will pay the bills.... The law of principal and agent will always cut deeply into the law of husband and wife.”⁸⁵

A wife's implied authority to bind her husband by her credit purchases is, however, subject to some important limitations. In the first place, it is necessary that the husband and wife should be living together. If the wife is living apart from the husband without his fault and if she has been left unprovided for, she may become an agent of necessity of her husband to pledge his credit to the extent to which a reasonable maintenance makes it necessary, but she will not be an implied agent.⁸⁶

Secondly, they must be living together in a domestic establishment of their own. “The mere fact of marriage does not make the wife an agent in law of her husband”; nor the fact of living together is sufficient. There must be a domestic establishment of which the wife is the incharge. If there is a domestic establishment of which a person is acting as the manager, the presumption of agency will arise even if that person is not the wife. This well-known principle was established in *Debenham v Mellon*:⁸⁷

The defendant was the manager of a hotel, where his wife acted as the manageress. They lived together in the same hotel, but had no domestic establishment of their own. The wife incurred with a tradesman a debt for clothes, payment for which was demanded from the husband.

But he was held not liable, the court saying that the mere fact of cohabitation did not give rise to presumption of agency, unless it was in a domestic establishment.

If these conditions are fulfilled it is immaterial whether the tradesman did or did not know that the buyer was a married woman.⁸⁸

Thirdly, the wife can run her husband into debt only for necessaries. “The domestic arrangement of the family being usually left to the control of the wife, her authority extends to all those matters which fall within her department, as, for example, the supply of provisions for the house, clothing for herself and things of that sort.”⁸⁹ The word “necessaries” is no doubt not free from ambiguity. But it has been held to include articles suited to the style in which the husband chooses to live, because “the husband conducting himself in the manner of a wealthy man no doubt expects his wife to conduct herself in the manner of a wealthy man's wife”.⁹⁰ But

85. THE PRINCIPLES OF AGENCY, (1952), p 32.

86. A wife who went away to live apart from the husband because of his bringing second wife into the home was held to be not justifiably living apart. *Nathubhai v Jhaver*, (1876) 1 Bom 121. A woman purchasing in her own right does not purchase as a representative, the husband not liable. *Kanhayalal v Indarchandji*, AIR 1947 Nag 48.

87. (1880) AC 24.

88. *Pacquir Ltd v Beauclerk*, (1906) AC 148.

89. *Phillipson v Hayter*, (1870) 6 CP 38.

90. *Robert Simpson Co Ltd v Rugglas*, borrowed from 8 Can BR 722.

the wife cannot embark upon the purchase of things beyond the station in which they live.⁹¹ Thus where the goods supplied to a wife included a gold pen and pencil, a sealskin cigar case, a sealskin tobacco pouch, a glove and a handkerchief, the husband was held not liable.⁹²

Lastly, the husband will not be liable if he makes a reasonable allowance to his wife for her needs. Thus, for example, in *Girdhari Lal v Crawford*⁹³ the Allahabad High Court held that the husband will not be liable even if the fact of allowance is not known to the seller.

The husband can negate liability by proving⁹⁴—

- (1) that he expressly warned the tradesman not to supply goods on credit;⁹⁵
- (2) that the wife was already supplied with sufficiency of the articles in question;
- (3) that the wife was supplied with sufficient means for the purpose of buying the articles without pledging the husband's credit.

Further, the (English) Matrimonial Proceedings and Property Act, 1970, which restricts the implied agency of wife, provides in Section 4(1) that: "Any rule of law and equity conferring on a wife authority, as agent of necessity to her husband, to pledge his credit or to borrow money on his credit is hereby abolished."

Husband not Implied Agent of Wife

A husband has no original, inherent or implied power to act as an agent for his wife. His authority can arise from an appointment as agent, expressly or impliedly, or by ratification by his wife of acts done by him on her behalf. Accordingly, a wife was held not liable on a contract made by her husband in her name and without her authority when she disaffirmed the contract within reasonable time after getting to know of it.⁹⁶ A husband has no implied authority to sell his wife's property.⁹⁷

Agencies of necessity

The reason for the agency of necessity has been thus stated by Story:⁹⁸

"Although the powers of the agents are, ordinarily, limited to particular acts; yet . . . extraordinary emergencies may arise, in which a person, who is an agent, may, from the necessities of the case, be justified in assuming extraordinary powers; and... his acts fairly done, under such circumstances, will be binding upon his principal."

Originated with Marine Adventures

The principal of agency of necessity was first applied to cases of marine adventures. Unforeseen emergencies may arise in the course of a marine adventure which may threaten the goods and the master of the ship is not able to communicate with the

91. *Seymore v Kingscote*, (1922) 38 TLR 586.

92. *Phillipson v Hayter*, (1870) 6 CP 38.

93. (1885) 9 All 147.

94. *Miss Gray Ltd v Earl Cathcart*, (1922) 38 TLR 562, 565.

95. *Morel Bros & Co v Earl of Westmoreland*, (1903) 1 KB 64 CA.

96. *K. Kasulu v Commission, Endowments Deptt*, 1986 Andh LT 44.

97. *Jawaharlal Dalma & Co v Chinta Chittemma*, (1989) Andh LT 335.

98. ON AGENCY, 9th edn, Section 141 as cited by MCCARDIE J in *Prager v Blastpiel Stamp & Heacock Ltd*, (1924) 1 KB 566, 571. The learned Judge states at pp. 568-571 the general principles of the agency of necessity.

principal. In such circumstances the master gets the power and it is also his duty to sell the goods in order to save their value.¹ The sale will bind the cargo owner. Initially it was supposed "that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of the master of a ship or the acceptor of the bill of exchange for the honour of the drawer".² But in subsequent cases the same principle was applied to carriers by land.³ Thus, in *Sims & Co v Midland Rly Co*:⁴

A quantity of butter was consigned with the defendant railway company. It was delayed in transit owing to a strike. The goods being perishable the company sold them.

The sale was held binding on the owner. The company's action was justified by the necessities of the case and it was also not practicable to get instructions from the owner.

Similarly, in *Great Northern Railway Co v Swafeld*:⁵

A horse, having been consigned with the defendant-company, was not received by anyone at the destination. The company had no arrangement of its own to keep animals and, therefore, placed the horse with a livery stable-keeper.

The company's action was held to be reasonably necessary in the circumstances and, therefore, the company was allowed to recover the charges of the stable-keeper.

And then became Principle of General Application

"Thus the basic principle is a broad and useful one. It lies at the root of various classes of cases of which the carrier decisions are merely an illustration."⁶ The reason for this wide rule as to agency of necessity was thus stated by MCCARDIE J in *Prager v Blastpiel Stamp & Heacock Ltd*:⁷

"The object of common law is to solve difficulties and adjust relations in social and commercial life. It must meet, so far as possible, sets of facts abnormal as well as usual. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law."⁸

1. See the numerous cases set out in the Carver's CARRIAGE BY SEA.

2. See *Hawtayne v Bourne*, (1841) 7 M&W 595 per PARK B. See also Lord ESHER in *Gwilliam v Twist*, (1895) 2 QB 84, 87 and EYRE J in *Nicholson v Chapman*, (1793) 2 HB 1 254.

3. *Great Northern Railway Co v Swafeld*, (1874) LR 9 Ex 132.

4. (1913) 4 KB 103.

5. (1874) LR Ex 132.

6. See MCCARDIE J in *Prager v Blastpiel Stamp & Heacock Ltd*, (1924) 1 KB 570.

7. *Ibid.*

8. The learned Judge cited following cases as illustrations of the wide general principle: *Gwilliam v Twist*, (1895) 2 QB 84; *Harris v Fiat Motors*, (1970) Times LR 504; *Beard v London General Omnibus Co*, (1900) 2 QB 530 and *Bank of New South Wales v Owston*, (1879) 4 App Cas 270, 290-91. See also *Sach v Milkos*, (1948) 2 KB 23, Lord GODDARD CJ at p 35.

Pre-existing Agency not Necessary

It was also supposed at one time that agency of necessity is confined to cases in which there is subsisting relationship of principal and agent and the agent, in some emergency, exercises an authority which is not expressly provided in the contract. For example, SCRUTTON L.J. observed in *Jebara v Ottaman*⁹ that "the agency of necessity develops from an original and subsisting agency and only applies itself to unforeseen events not provided for in the original contract". According to him the principle would not apply "when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals". Two cases have been usually cited in support of this proposition, namely, where the finder of a dog spent money on feeding it,¹⁰ and a person spent money on rescuing logs from a river¹¹ and neither of them could claim a lien on the goods for his trouble and expense. BOWEN L.J. observed in one of the cases on the subject that "liabilities are not to be forced upon people behind their backs, any more than you can confer a benefit upon a man against his will".¹² The case where help is volunteered by a pure stranger are covered in Roman law by the doctrine of *Negotiorum Gestio*.¹³ Referring to this doctrine it is observed in ANSON'S LAW OF CONTRACT:¹⁴

"Our law does not recognise the *negotiorum gestor* of Roman law—the man who voluntarily spends his own money upon the necessary protection of the property of another."

This may be the general principle of English law. But exceptions have been admitted. A person who carries on salvage at sea is entitled to his compensation from the person whose property has been salvaged.¹⁵ Similarly, where a bill of exchange has been dishonoured either by non-acceptance or by non-payment, any person may honour it by acceptance or payment for protecting the honour of the drawer and may subsequently recover from such person. But it has been pointed out by Lord GODDARD CJ in *Sachs v Milkos*¹⁶ "that the court should be slow to increase the classes of those who can be looked upon as agents of necessity in selling or disposing of other people's goods without the authority of the owners".

"In the United States it is fairly clear law that a finder of lost goods is entitled to recover from the owner his necessary and reasonable expenses incurred in the successful recovery and preservation of the goods."¹⁷ In India a finder has no right of action, but he is entitled to lien unless his lawful charges are paid. He has also a limited right of sale.¹⁸

9. (1927) 2 KB 254, 257, reversed sub nom. *Ottoman v Jebara*, (1928) AC 269.

10. *Binstead v Buck*, (1776) 2 Wm B1 117: 96 ER 660.

11. *Nicholson v Chapman*, (1793) 2 Hy B1 254: 3 RR 374.

12. *Falcke v Scottish Imperial Ins Co*, (1886) 34 Ch D 234.

13. For meaning of this phrase see Walter B. Williston, *Agency of Necessity*, (1944) 22 Can BR 492.

14. (1964) 22nd edn by Guest, p 535.

15. *The Five Steel Barges*, (1890) 15 PD 142.

16. (1948) 2 KB 23, 36.

17. Williston, *Agency of Necessity*, (1944) 22 Can BR 492, 504 and the authorities cited there.

18. Section 177.

Relief of Injured Persons

Another occasion for a person to act as an agent of necessity arises when an injured person is in urgent need of medical attendance. Any person acting on his behalf may call the services of a doctor; or any doctor may volunteer his services. The person benefited is bound to pay the charges of the service. Williston in his article on *Agency of Necessity*¹⁹ cites the following cases as an illustration of the principle:

In *Matheson v Smiley*²⁰ the Manitoba Court of Appeal held that a surgeon was entitled to recover from the deceased man's estate reasonable remuneration for his services when he had, without request, given aid to a man who had attempted suicide.

Conditions for Application of the Principle

The conditions which enable a person to act as an agent of necessity of another have been stated by MCCARDIE J in *Prager v Blastpiel Stamp & Heacock Ltd.*²¹

INABILITY TO COMMUNICATE WITH PRINCIPAL.—“In the first place, it is of course clear that agency of necessity does not arise if the agent can communicate with his principal. The basis of this requirement is that if the principal's directions can be obtained the agent should ask it before acting.”²² A well-known illustration is *Gwilliam v Twist*²³.

While the defendants' omnibus was being driven by their servant, a policeman, thinking that the driver was drunk, ordered him to discontinue driving, the omnibus being then only a quarter of a mile from the defendants' yard. The driver and the conductor then authorised a person who happened to be standing by to drive the omnibus home. That person through his negligence injured the plaintiff.

The plaintiff's action against the owners failed, because the defendants might have been easily communicated with and, therefore, there was no necessity for their servants to employ another person.

ACT SHOULD BE REASONABLY NECESSARY.—“In the next place, it is essential for the agent to prove that the sale was necessary. What does this mean?”²⁴ LINDLEY L.J. observed in a case that “by necessary is meant reasonably necessary and in considering what is reasonably necessary every material circumstances must be taken into account, e.g. danger, distance, accommodation, expense, time and so forth”.²⁵ *Sachs v Milkos*²⁶ is an illustration explaining absence of necessity:

The defendant allowed the plaintiff to store certain furniture in his house free of charge. Thereafter they lost touch with each other. Some three years later the defendant needed the space taken up by the furniture and wrote two

19. (1944) 22 Can BR 492, 506.

20. (1932) 2 DLR 781.

21. (1924) 1 KB 566, 571-72.

22. The learned Judge considered this as “established by all the decisions”, and *cites* Carver on CARRIAGE BY SEA, Articles 295, 299; Scrutton on CHARTER PARTIES, 11th Edn, Article 98 and *Springer v Great Western Rly Co*, (1921) 1 KB 257.

23. (1895) 2 QB 84.

24. MCCARDIE J in *Prager case*, (1924) 1 KB 571. The learned Judge cites a number of cases in which the term has been explained.

25. *Phelps James & Co v Hill*, (1891) 1 QB 605, 610-11.

26. (1948) 2 KB 23.

letters to the plaintiff at an address supplied by his bank, but received no reply. His attempt to reach the plaintiff by telephone also failed. He then sold the furniture. Six years later the plaintiff claimed the furniture.

It was held that those facts gave rise to no agency of necessity since they exhibited nothing in the nature of an emergency compelling the defendant to sell the furniture. As to the question of damages the court pointed out that if the plaintiff received the letters, he would be entitled to recover only the actual sale proceeds of the furniture. But that if he did not receive the letters, he would be entitled to compensation for the increased value of furniture between the date of sale and his discovery of it.

A year later the same court faced another problem of the same kind in *Munro v Willmott*²⁷.

The plaintiff left her car in the defendant's yard without payment. The storage was intended to be for a short time, but the car remained there for several years. It became an obstacle owing to the conversion of the yard into a garage. After unsuccessful efforts to communicate with the plaintiff the car was repaired and sold.

The court held that the facts showed no emergency which would have entitled the defendant to sell as an agent of necessity.

Another interesting decision is *Prager v Blastpiel Stamp & Heacock Ltd.*²⁸

During the First World War the defendant purchased for the plaintiffs, as their agents, fur skins to be despatched to Romania. Owing to the occupation of Romania by German forces it became impossible for the defendants to send the skins or any communication to the plaintiffs. In the last year of the war, the defendants sold the skins.

When peace returned the plaintiffs claimed their goods. The defendants sought to justify their action under the principle of agency of necessity. But the court held that there was no necessity to sell the goods. They had been purchased by the plaintiff in time of war in the hope of receiving them when peace arrived. The goods being dressed furs were not likely to deteriorate if care was used.²⁹

BOA FIDE IN THE INTEREST OF PARTY CONCERNED.—“In the third place, an alleged agent of necessity must satisfy the court that he was acting *bona fide* in the interest of the parties concerned.³⁰ In *Tronson v Dent*,³¹ the Privy Council plainly indicated that *bona fides* was essential in addition to actual necessity.”³²

27. (1949) 1 KB 295.

28. (1924) 1 KB 566.

29. See MCCARDIE J's judgment at p 573.

30. The learned Judge cites here the opinion of COLTMAN J in *Ewbahk v Nitting*, (1849) 7 CB 797, 804, *ibid.*, at p 512.

31. (1853) 8 Moo PC 419, 452.

32. See also LINDLEY LJ in *Phelps & Co v Hills*, (1891) 1 QB 205, 611-12; Carver's CARRIAGE BY SEA, 6th edn, Articles 298, 299; SCRUTTON ON CHARTER PARTIES, 11th edn, Article 97.

Relations of Principal and Agent

DUTIES OF AGENT

Mutual rights and duties of principal and agent may be wholly provided for in their contract. But the following duties of general nature are imposed by law upon every agent, unless they are modified or excluded by special contract.

1. Duty to execute mandate

The first and the foremost duty of every agent is to carry out the mandate of his principal. He should perform the work which he has been appointed to do. Any failure in this respect would make the agent absolutely liable for the principal's loss. Thus it has been held in a number of cases that:

"The rule of equity is, that if an order is sent by a principal to a factor to make an insurance, and he charges his principal, as if it was made, if he never in fact made that insurance, he is considered as the insurer himself."¹

In such cases the agent is held liable to the principal for the amount which would have been recovered if the goods had been insured.² Thus, for example, in *Pannalal Jankidas v Mohanlal*:³

A commission agent purchased goods for his principal and stored them in a godown pending their despatch. The agent was under instruction to insure them. He actually charged the premium for insurance, but failed to insure the goods. The goods were lost in an explosion in the Bombay harbour.

The agent was held liable to compensate the principal for his loss minus the amount received under the Bombay Explosion (Compensation) Ordinance, 1944, under which the Government paid compensation up to fifty per cent in respect of the uninsured merchandise lost in the explosion.⁴

2. Duty to Follow Instructions or Customs [S. 211]

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

1. Lord Chancellor in *Tichel v Short*, (1750) 2 Ves Sen 239: 28 ER 159. Adopted by the Supreme Court in *Pannalal Jankidas v Mohanlal*, AIR 1951 SC 144, 146.

2. See *Smith v Lascelles*, (1788) 2 TR 187: 1 RR 457 cited by the Supreme Court, *ibid*.

3. AIR 1951 SC 144.

4. See also Illustration (d) to Section 212. See also *Savoy Solvent Oil Extraction Ltd v Indian Bank*, (1996) 2 Andh WR 184, failure of the person under duty to ensure, liability.

Illustrations

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

Section 211 provides that an agent is bound to conduct the business of his principal according to the directions given by the principal and to keep himself within the confines of his authority. For example, an estate agent cannot make a binding contract on behalf of his principal with a third party.⁵ In the absence of directions, the agent has to follow the custom which prevails in businesses of the same kind and at the place where the agent conducts such businesses. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.⁶ Thus, for example, in *Lilley v Doubleday*:⁷

An agent was instructed to warehouse his principal's goods at a particular place. He placed a part of them at a different warehouse which was equally safe. But the goods were destroyed without negligence.

The agent was held liable for the loss. Any disobedience of, or departure from, the instructions makes the agent absolutely liable for the loss.⁸

Where a principal had given instructions of ambiguous nature which were capable of two meanings, he was not permitted to argue as against the agent that he should have read the instruction in the other sense than what he actually did.⁹

In the absence of instructions, business customs must be followed. Where, for example, the customs of a particular trade require that goods should not be sold on credit or in return for a negotiable instrument, the agent should not do so. If he does so, he would be liable to the principal for any loss resulting from the transaction.¹⁰ In reference to a broker the importance of acting according to customs was highlighted in the following words:¹¹

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5. *John v Philip*, (1987) 2 Ker LT 50.
6. Section 212. See the judgement of KANIA CJ in *Pannalal Jankidas v Mohanlal*, AIR 1951 SC 144, 147.
7. (1881) 7 QBD 510. "Where the act which an agent is employed to perform is one which by law is void (such as the making of a wagering contract), the principal cannot recover damages for the failure to perform it." CHITTY ON CONTRACTS, 51, para 2095 (24th edn, 1977). Citing *Cohen v Kiotel*, (1899) 22 QBD 680; *Cheshire & Co v Vaughan & Co*, (1920) 3 KB 240.
8. See further *Bostock v Jardine*, (1865) 159 ER 707, an agent authorised to buy cotton, bought for the principal and divers others in one large-scale contract so that the principal had no particular contract to enforce, held bound to refund principal's money; *Pannure ex p*, (1883) 24 Ch D 367, purchasing shares of companies other than those directed.
9. *Ireland v Livingston*, (1872) 27 LT 79. Where the directors of a company were instructed to purchase a business as it then stood, they were held not liable when the business turned out to be insolvent. It was an imprudent instruction on the part of the principal. *Overrend Curney v Gibb*, (1872) LR 5 HL 480.
10. *Ferrer v Robbins*, (1835) 2 CM & R 152.
11. *Soloman v Broker*, (1862) 2 F&F 726: 121 RR 828, the broker sold goods at an inadequate price whereas he was under a duty to sell at a value in accordance with the customs of the

“Brokers employed to sell goods are bound to do so in the usual way, and if it is usual to send the seller an estimate of value in order that he may be enabled to fix a reserve price, they ought to do so; and whether it is so or not they are bound for their own guidance to make a careful estimate of the value; and if they sell, even by public auction at a price much below their fair value, then not having made such an estimate, will be evidence of negligence, and if a loss is caused thereby, they will be liable.”

Where a booking agent did not prepare the airway bill with proper skill and diligence inasmuch as the relevant boxes relating to the items as to ‘cash on delivery’ and collection of charges by the carrier were left blank by him, he being in breach of duty, he was not allowed to recover his expenses in arranging consignment of the goods.¹²

Akin to this is the duty to maintain the business secrets of the principal. A bank is under a similar duty of secrecy so far as the customer’s dealings with him are concerned and would be liable in damages if any loss is caused to the customer by leakage of secret information. Certain currency notes were deposited with a bank for demonetisation. The bank informed the Income Tax Authorities and the customer thereby lost the utilisation of that money. Even so the customer’s action against the bank failed. The bank was under a higher national duty which superseded the duty to the customer.¹³

An agent is also under a duty to maintain confidence, secrecy and non-disclosure of any sensitive information about the affairs of his principal. A banker may be liable if the state of his customer’s account is leaked, except where the disclosure is under compulsion of law, e.g., duty to obey an order under Bankers’ Books Evidence Act, or under higher duty owed to State or public institutions which supersedes lower duty or under any statement in a formal claim or with customer’s permission.¹⁴

3. Duty of reasonable care and skill [S. 212]

Section 212 lays down the standard of care and skill required of an agent.

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

particular trade, held liable for the principal’s loss. *Paul Beier v Chotalal Joverdas*, (1904) 30 Bom 1, customs of the place of business.

12. *Sinclair Freight and Chartering Consultants P Ltd v Fiel Traders*, AIR 1987 Cal 201. For another case of failure of agent to follow instructions see *Forsikringsaktierselskapet Vosta v Butcher*, (1986) 2 All ER 488 QBD.

13. *Shankarlal v State Bank of India*, AIR 1987 Cal 29.

14. *Ibid.*

Illustrations

- (a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with the orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.
- (b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.
- (c) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.
- (d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Thus every agent is bound to carry on the business of agency with reasonable skill and care.¹⁵ For example,¹⁶ a bank was instructed by the plaintiff to collect a certain amount on his behalf and to remit it to him. There was no specific instruction as to the manner of remittance. The bank sent the amount by draft placed in a letter sent by ordinary post. The bank was held negligent in sending the amount like that.

The standard of care and skill which an agent has to bestow depends upon the nature of his profession.¹⁷ An agent, having authority to sell on credit, must take care to ascertain the solvency of his buyer. An insurance broker must see that usual clauses for the protection of the principal are inserted in the policy. An estate agent should know the land laws and also must take care to ascertain the solvency of the tenant.¹⁸ If an agent is retained for assisting his principal for lending money on a mortgage, he must make reasonable inquiry about the value of the property.¹⁹ A stockbroker should know the regulations of the stock exchange. An agent should command enough legal knowledge to sufficiently and adequately safeguard the interests of the principal in the course of the agency.²⁰ He may become answerable for the incompetence of the labour employed by him.²¹

15. Duties and liabilities are the same whether the agent is working for consideration or without it. *Agnew v Indian Carrying Co*, (1865) 2 Mad HC Cases 449.

16. *Bank of Bihar v Tata Scob Dealers*, AIR 1960 Cal 475. If he satisfies the required standard, he is not liable for the principal's loss, if any, and it would be no cause of action that the loss could have been avoided if the agent had acted differently. *Raja Ram v Abdul Rashim*, (1915) 31 IC 450; *Lagunas Niterate Co v Lagunas Syndicate*, (1899) 2 Ch 392.

17. Every person who acts as a skilled agent is duty-bound to exercise reasonable skill and knowledge in the performance of his duty. *Panduranga v Jairamdas Panduranga*, AIR 1925 Nag 166; *Lee v Walker*, (1872) LR 7 CP 121.

18. *Heys v Tindal*, (1861) 1 B&S 296.

19. *Baxter v Gapp. & Co Ltd*, (1939) 2 KB 27.

20. *Park v Hammond*, (1816) 128 ER 1127. He has to assure the proper legal formalities of a contract. *Neilson v James*, 9 QBD 546 (1882).

21. *Nagendra Nath v Nagendra Bala*, AIR 1929 Cal 988.

If the principal suffers any loss owing to the agent's want of care or skill, the agent must compensate the principal for such loss. Section 212 limits the agent's liability to "direct consequences".²² It provides that the agent must "make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct". If, for example, an agent fails to send the principal's money in time, he may be liable for the money and the loss of interest, but not if the principal becomes insolvent by that reason.²³ An example of direct loss is to be seen in the facts of *Keppel v Wheeler*.²⁴ An agent was appointed to sell a house. He received an offer which he promptly communicated to his principal. The latter accepted it provisionally "subject to contract". Subsequently the agent received a higher offer which he failed to pass on to the principal. This resulted in final acceptance of the first offer in ignorance of the second. The agent was held liable to make good the principal's loss in terms of the difference in the two prices.

The meaning of the expression "direct consequences" has been explained by the Supreme Court in *Pannalal Jankidas v Mohanlal*:²⁵

An agent, having been instructed to insure certain goods, failed to do so. The goods were lost in an explosion at the docks. Even if the agent had taken out a fire insurance policy in the usual form it would not have covered a loss of this kind, as fire due to explosion would have been an excepted peril. But the Bombay Government passed an ordinance under which it undertook to pay half loss in cases of uninsured goods. Thus the principal got only half of what he would have got if the goods had been insured.

The agent contended that as the passing of the Ordinance could not have been anticipated, the loss was too remote. But, it was held by a majority, that the loss was the direct result of the agent's negligence.²⁶ Their Lordships, following English decisions,²⁷ felt that the intervention of the Government Ordinance did not break the chain of causation. KANIA CJ said: "Once misconduct is admitted or proved the fact that the Ordinance did not exist and could not have been in the contemplation of the parties is irrelevant for deciding the question of liability."

In cases of difficulty the agent's duty is to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions, if the principal can be communicated with by reasonable care, before taking any steps in facing the difficulty or emergency.²⁸

214. Agent's duty to communicate with principal.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence

22. *Narayanan Deo v Hanumantha*, AIR 1950 Ori 241.

23. Illustration (a) to Section 212.

24. (1927) 1 KB 577.

25. (1950) 1 SCR 979.

26. *Per* KANIA CJ and DAS J (PATANJALI SASTRI J dissenting).

27. The following English decisions bearing on the question were considered: *Polemis and Furness Withy & Co, Re*, (1921) 3 KB 560; *Liesbosch S.S. v Edison*, (1933) AC 449.

28. For example, in selling shares otherwise than as directed. *Budhulal v Shrikisan*, AIR 1961 MP 57, 61; *Pani Bai v Shiv Kanwar*, AIR 1981 Raj 184.

of communicating with his principal, and in seeking to obtain his instructions.

Where the agent informed his principal that purchases have been effected on his behalf and subsequently confirmed it by reporting that the goods would be despatched as soon as transport strike was over whereas he had done nothing in the matter, it was held by the Supreme Court that such a neglect and misconduct of the agent misinforming the principal was squarely within the wide terms of Section 212. "He must bear the brunt to pay damages," the court said.²⁹

4. Duty to avoid conflict of interest

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

Illustrations

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

216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

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

An agent occupies fiduciary position and, therefore, it is his duty not to do anything which would bring his personal interest and his duty to the principal in conflict with each other. This conflict invariably arises when the agent is personally

29. *Jayabharathi Corpn v S.V.P.N.S.N. Rajesekara Nadar*, 1993 Supp (1) SCC 401; AIR 1992 SC 596.

interested in the principal's transaction, for example, where he himself buys the property he is appointed to sell or delivers his own goods when he is instructed to buy on behalf of the principal. A stockbroker was employed to buy some shares for his principal. He submitted to his principal for signature certain papers which showed that the purchase was being effected in the market. But, in fact, the agent was transferring his own shares to the principal. The principal was allowed to claim rescission.³⁰ A well-known illustration is the case of *De Busche v Alt*.³¹

The plaintiff consigned a ship to a company in China for sale "at £90,000 payable in cash". With the consent of the plaintiff the company appointed the defendant, a Japanese agent, to sell the ship. The defendant attempted to sell the ship, but having failed to find a customer, bought the ship himself and without disclosing this, remitted the above sum through the company to the plaintiff. Soon thereafter a war broke out and ships were again in great demand. A Japanese prince bought it from the defendant at £1,60,000. The plaintiff sued the defendant to recover the profit made on resale.

He was held bound to account for the profit. There would have been nothing wrong if the agent had bought the ship after disclosing the fact to his principal. The agent might have been honest in this particular case. But if his contention was accepted, many an agent would make secret profits by feigning inability to sell.³²

The principle is incorporated in Section 215, which provides that if an agent deals on his own account in the business of agency, without first obtaining the consent of his principal and acquainting him with full facts, the principal may repudiate the transaction if he can show that—

- (a) a material fact has been dishonestly concealed from him, or
- (b) the dealing of the agent has been disadvantageous to him.³³

The first illustration to the section says that if the agent has secretly bought the principal's property for himself, the principal may repudiate the transaction if he can show that the agent has concealed any material fact or that the sale has been disadvantageous to him. Where, for example, the agent discovers a mine on the principal's estate and without disclosing this fact buys the estate for himself, the principal may repudiate the transaction. The mere fact of the agent buying the principal's property brings his interest in conflict with his duty to the principal and,

30. *Armstrong v Jackson*, (1917) 2 KB 822. WILLIES J observed in *Mollett v Robinson*, (1870) LR 5 CP 646, 655 that "it is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer without distinct notice to the principal so that the latter may object to it if he thinks proper". *Clarke v Tipping*, (1846) 9 Beav 284, it is an accepted rule that an agent must give his principal the free and unbiased use of his own discretion and judgment.

31. (1878) 8 Ch D 828.

32. The principle is applicable even where there is a mere possibility of conflict and the agent acts in good faith. *Boardman v Phipps*, (1967) 2 AC 46; (1966) 3 All ER 721; (1966) 3 WLR 1009. Such dealings can be only with full disclosure and consent. *Charter v Trevelyan*, (1844) 65 RR 305, 315.

33. Detriment of the principal is a question of fact. *Rameshwaradas Banarsidas v Tansookhray Bashesharila*, AIR 1927 Sind 195. Repudiation by the principal must be within reasonable time after discovering the facts. *Flint v Woodin*, (1852) 29 Hare 618; *Armstrong v Jackson*, (1917) 2 KB 822.

therefore, it has been pointed out that the conflict is in itself a sufficient disadvantage to the principal.³⁴

5. Duty not to make secret profit

Another aspect of this principle is the duty of the agent not to make any secret profit in the business of agency. His relationship with the principal is of fiduciary nature and this requires absolute good faith in the conduct of agency. What is meant by secret profit? It means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make but for his position as agent. Acceptance of bribe is a profit of this kind, even "if the employers are not actually injured, and the bribe fails to have the intended effect".³⁵ A military officer who took bribe and allowed goods to pass under the authority of his uniform, was held liable to account for the same to the Crown.³⁶ Similarly, where an auctioneer received from the buyer commission in addition to what his principal paid him, he was held bound to hand over the commission to the principal.³⁷

Where an agent sells his own stock to the principal without disclosing the fact, he is bound to account for any profit he made in the transaction. It is immaterial that the agent charged only the prevailing market price.³⁸ A principal agreed to buy horses from a dealer provided that his veterinary surgeon would pass them as sound. The seller bribed the surgeon and obtained his certificate. The horses turned out to be unsound. The principal was held justified in rejecting them and countermanding the cheque which he had issued for the price.³⁹

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34. See, for example, *Jankidas v Dhunamal*, AIR 1917 Sind 5. But it has been held in *Manchand v Chajuram & Sons*, (1937) 169 IC 827, that some disadvantage in addition to this bare conflict must be shown. *Grant v Gold Exploration Standard*, (1900) 1 QBD 233, an agent for sale and purchase cannot act for the other party at the same time or take a commission from him unknown to the principal.
35. *Harrington v Victoria Graving Dock Co*, (1878) 3 QBD 549. *Gluckstein v Barnes*, (1900) AC 240, recovery of promoter's secret profits.
36. *Reading v King*, (1951) AC 507.
37. *Andrews v Ramsay & Co*, (1903) 2 KB 635. The principle of these cases is incorporated in Section 216. See *Triplex Safety Glass Co v Scorch*, (1938) Ch 211 and *Sterling Engg Co v Patchett*, (1955) AC 534, misuse of information.
38. *Bentley v Craven*, (1853) 18 Beav 75; 104 RR 373. See Section 216 and its illustration, cited at p. 458 above. See also *Damodar Das v Sheoram Das*, (1907) 29 All 730 or that he was running the risk of loss or that the principal suffered no loss. *Williams v Stevens*, (1866) LR 1 PC 352; *Parker v McKenna*, (1874) LR 10 Ch App 96; *Kaluram Bholaram v Chinniram, Motilal*, (1934) 36 Bom LR 68; *Cape Breten, & Co, Re*, (1884) 29 Ch D 795; *Ladywell Mining Co v Brookes*, (1887) 35 Ch D 400. BEAUMONT CJ of the Bombay High Court observed in *Kaluram v Chinniram*, AIR 1934 Bom 86, 88 that the words of S. 216 are quite general and contain no such qualification on the liability of an agent to account for the profit made by sale of his own goods to the principal as was approved in *Cape Breten & Co, Re*, (1884) 29 Ch D 795. The decision in *Cape Breten* was approved by the Privy Council in *Burland v Earl*, (1902) AC 83.
39. *Shipway v Broadwood*, (1899) 1 QB 369. The principal is entitled to claim interest on the illicit profits made by the agent. *Totaram v Zalim Singh*, AIR 1940 All 69, following *Regir v Cambell Stuart*, (1939) 3 All ER 235, the agent forfeits his commission. *Salomons v Pender*, (1865) 3 H&C 639; 34 LJ Ex 93; 159 ER 682, by selling to himself; *Andrews v Ramsay*, (1903) 2 KB 635, by taking bribe; the section gives option to the principal to avoid the transaction in reference to the third party or to affirm it and hold the agent liable for his breaches. *Vinayak Rao v Ransordas*, (1870) 7 BHC (OC) 90; *Joachinson v Meghjee Vallabhdas*, (1910) 34 Bom 292; *Haslam, Re*, (1902) 1 Ch 705, recovery of commission from solicitor.

Knowledge which is acquired by an agent in the course of the business of agency and which he converts into advantage does not require accountability if the agent neither uses the principal's property in the process nor diverts his business opportunities.⁴⁰

As a part of the agent's duty to be honest to his principal, it is necessary that the agent should not disclose any confidential information received by him from his principal. If he does so, the principal may terminate the contract and hold the agent liable in damages for his loss, if any.⁴¹

6. Duty to remit sums [S. 218]

218. Agent's duty to pay sums received for principal.—Subject to such deductions⁴², the agent is bound to pay to his principal all sums received on his account.

The agent is bound to pay to his principal all sums received on his account.⁴³ The agent is, however, entitled to deduct his lawful charges, but subject only to this right, the principal's money must be remitted to him even if it has been received in pursuance to a void or illegal contract. The agent has to perform this duty even if his earnings for the principal flow out of void or illegal transactions. "If an agent receives money on his principal's behalf under an illegal and void contract, the agent must account to the principal for the money so received and cannot set up the illegality of contract as a justification for withholding payment, which illegality the other contracting party has waived by paying the amount."⁴⁴

7. Duty to maintain accounts [S. 213]

213. Agent's accounts.—An agent is bound to render proper accounts to his principal on demand.

Accounts are necessary for the proper performance of the agent's other duties, for example, the duty to remit sums to the principal.⁴⁵

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40. *Novdisk Insulin Laboratorium v C.L. Bencard*, (1953) Ch 430; *Aas v Benham*, (1891) 2 Ch 244 CA. For accountability of a pretended agent see *Phipps v Boardman*, (1967) 2 AC 46. For the position of an agent drawing commission from both sides see *Fullwood v Hurley*, (1928) 1 KB 498.
41. *L.S. Harris Trustees v Power Packing Services*, (1970) 2 Lloyd's Rep 65. The agent can also be restrained by means of an injunction from disclosing confidence. *Anton Piller K.G. v Mfg Processes Ltd*, (1976) Ch 55. Burden of proving breach of duty is on the principal. *Gokal Chand Jagan Nath v Nand Ram Das Aima Ramn*, (1939) AC 106.
42. Deductions indicated in S. 217.
43. He must receive payment in cash or in such manner that he can conveniently perform this duty. *Pearson v Scot*, (1878) 9 Ch D 102.
44. *Bholanath v Mulchand*, (1903) 25 All 639 (wagering transactions); *Palaniappa v Chokalingam*, (1921) 44 Mad 334. Illegal agency is itself not as such enforceable. *Sykes v Beadon*, (1879) 11 Ch D 170.
45. As a part of the obligation to render accounts the agent has to produce vouchers in support of expenditure incurred by him. See *S. Paul & Co v State of Tripura*, AIR 1984 Cal 378; *Annoda Prasad v Dwarkanath*, (1881) 6 Cal 754; *Ramdas v Bhagwati Das*, (1905) 1 All LJ 347; the duty is owed to the principal. No other person can demand agent's accounts. *Chidambaran Chetty v Pichappa Chetty*, (1907) 30 Mad 243. Accounts which have been submitted and kept by the principal cannot be questioned. *Ram Swaroop v Partap Narain*, AIR 1948 All 130; *Gray v Haig*, (1854) 20 Beav 219; 109 ER 396. Accounts cannot be demanded from legal representatives of the agent. The principal can recover from agent's

There is no provision in the Act enabling an agent to institute a suit for accounts against the principal. The Supreme Court in *Narandas v Pappamma*⁴⁶ laid down that the provisions of the Contract Act are not exhaustive in this regard and that the right of an agent to sue the principal for accounts is an equitable right arising under special circumstances. One of those special circumstances is where all the accounts are in the possession of the principal. In a case before the Madras High Court,⁴⁷ an agent was running a mill which was taken over by the owners. The agent claimed that he lost his accounts in the process of take-over and, therefore, claimed accounts from the principal. The court did not provide him any relief because he was not able to give any proof of the loss of his accounts.⁴⁸ Where an agent was appointed to secure orders for supply of goods, his commission to be payable when the principal received payment for supplies, it was held that quite naturally an account would have to be maintained by the principal and the agent had the right to demand an account.⁴⁹ The same is the position where the accounts are so complicated that a suit for a definite sum of money is not possible. In cases where settlement of accounts alone can do complete justice between the parties, the agent can sue the principal for accounting even if he is having some evidence of the transaction with him.⁵⁰

The Lahore High Court faced a case of this kind in *Ram Lal v Asian Commrel*.⁵¹ TAPPJ observed:

“The right to claim a statement of accounts is an unusual form of relief, only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights.”

In that case, the plaintiffs, who were insurance agents, were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them. The court held that as the plaintiffs could not know which of the policies had lapsed, matured or forfeited, they were entitled to demand rendition of accounts.

The Sind High Court⁵² explained the position in the following words:

“An agent has no statutory right to the account from his principal. Nevertheless where it is equitable from the particular circumstances and the relationship of the parties that one should account to the other, a suit for account will lie. If an agent can satisfy that all accounts are rightly in possession of the principal and that he (the agent) has not and could not have in his possession accounts which would enable him to determine his claim for commission against his principal, he will be entitled to sue for an account. But if it is found that the agent has no accounts because of his own failure or fault,

estate anything that he can show to be due from the deceased agent. *Bhawani Singh v Maulvi Mishah-ud-din*, AIR 1929 PC 119; *Purshottam v Ramkrishna*, AIR 1945 Bom 21.

46. AIR 1967 SC 333.

47. *State of TN v Alagir Subramaniam*, AIR 1988 Mad 248.

48. See at p. 253. There is no right to demand accounts where the claimant is not an agent but an independent contractor. *Dalmia Cement (Bharat) Ltd v T.V. Oman*, 1987 Reports 8 Ker 588.

49. *Saroj Kapur v Nitin Castings Ltd*, AIR 1987 Del 149.

50. *Thiruvendikam v Quilon Pencil Factory*, (1990) 2 Ker LT 327.

51. AIR 1933 Lah 483.

52. *Gulabrai v India Equitable Ins Co*, AIR 1937 Sind 51.

he should not be granted the relief he claims, much less if it is found that he has accounts which he is withholding."

A suit by an agent against his principal for a specific sum of money is not a suit for accounts. It is only in exceptional cases where the agent's remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the amount due to him unless the accounts of his principal are gone into, that a suit by an agent for accounts against his principal might be competent.⁵³

The Division Bench of the Nagpur High Court allowed a sale pusher of books to know from his principal an account of the volume of sale induced by his efforts.⁵⁴

The principle behind these rulings was affirmed by the Supreme Court in *N.M. Gaziwala v Papammal*.⁵⁵ The agent sued for an account and the principal sought enforcement of promissory note given by the agent to the principal. The court passed a decree on the promissory note subject to set-off for amounts due from the principal to the agent. The principal thus became accountable for those dues.⁵⁶

Inspection of Agent's Accounts

Conceding the right to the principal of inspecting his underwriting agent's computerised accounts, the court said:

"That obligation to provide an accurate account in the fullest sense arises by reason of the fact that the agent has been entrusted with the authority to bind the principal to transactions with third parties and the principal is entitled to know what his personal contractual rights and duties are in relation to those third parties as well as what he is entitled to receive by way of payment from the agent. He is entitled to be provided with those records because they have been created for preserving information as to the very transactions which the agent was authorised by him to enter into. Being the participant in the transactions, the principal is entitled to the records of them."⁵⁷

Explaining the source of the agent's obligation to maintain accounts and to provide inspection the court held that the obligation to keep records and provide records to the principal arises out of the agency relationship and does not depend on that relationship having been created by contract. The duty would coexist with a contract of agency. The express arrangements for inspection do not oust this, though they qualify the implied duty, for instance, by relieving the agent of duty to deliver their original books, accounts and records.

The duty to provide access to the records survives the termination of the contract. It would be extremely inconvenient and potentially very damaging to the principal if the obligation does not survive termination of the contract. It is clear that

53. *Ramachandra M. Co v Biran Kutti & Bros*, AIR 1938 Mad 707.

54. *Basant Kumar v Roshanlal*, AIR 1954 Nag 300.

55. AIR 1967 SC 333; 1966 SCR 38.

56. Followed in *State v Alagir Subramanian*, AIR 1988 Mad 248, the special circumstances would have to be established by the agent.

57. *Yasuda Fire and Marine Ins Co v Orton Marine Insurance Underwriting Agency*, (1995) 3 All ER 211.

there can be obligations under the contract which do survive its termination. The classic example is of course an agreement for arbitration.⁵⁸

8. Duty not to delegate [S. 190]

Delegatus non potest delegare is a well-known maxim of the law of agency. The principal chooses a particular agent because he has trust and confidence in his integrity and competence. Ordinarily, therefore, the agent cannot further delegate the work which has been delegated to him by his principal.⁵⁹

It was laid down in *John McCain and Co v Pow*⁶⁰ that unless so authorised by the principal, an estate agent has no right to appoint a sub-agent and delegate to him his powers which require special skill and care. No implied authority could be pleaded. In this case the sub-agent effected a sale on his own account. The agent (plaintiff) had sued for his commission. The court negatived the claim as the contract of agency did not permit appointment of sub-agent.

This principle and its exceptions are stated in Section 190:

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

But there are exceptions. In the following cases the agent may delegate the work to another:

1. Nature of Work

Sometimes the very nature of work makes it necessary for the agent to appoint a sub-agent. For example, an agent appointed to sell an estate may retain the services of an auctioneer and the one authorised to file a suit may engage a lawyer. A banker instructed to make payment to a particular person at the particular place may appoint a banker who has an office at that place.⁶¹ A banker authorised to let out a house and collect rents may entrust the work to an estate agent.⁶²

2. Trade Custom

Secondly, a sub-agent may be appointed and the work delegated to him if there is ordinary custom of trade to that effect. Thus architects generally appoint surveyors.⁶³

3. Ministerial Action

An agent cannot, of course, delegate acts which he has expressly or impliedly undertaken to perform personally, e.g., acts requiring personal or professional skill.

58. *Heyman v Darwins*, (1942) 1 All ER 337.

59. See THESIGER LJ in *De Busche v Alt*, (1878) 8 Ch D 286, 310.

60. (1975) 1 All ER 129; relying on (1882) 22 Ch D 194; (1871) LR 6 CP 445.

61. *Summan Singh v National City Bank of New York*, AIR 1962 Punj 172; ILR 1952 Punj 189.

62. *Mohinder v Mohan*, AIR 1939 All 188; *Union of India v Amar Singh*, (1960) 2 SCR 75; AIR 1960 SC 233, goods received from another railway, sub-agency not constituted; *Nagpur Electric Light and Power Co v R.B.S.R. Pandit*, AIR 1937 Nag 379, director of a company appointing an advocate; *Ramdeo v Lalumatha*, AIR 1937 Nag 65, a general agent appointing an advocate for a suit.

63. *Moon v Witney Union*, (1837) 43 RR 802.

But the agent may delegate acts which are purely ministerial in nature, e.g., authority to sign.⁶⁴

4. Principal's Consent

The principal may expressly allow his agent to appoint a sub-agent. His consent may also be implied from the conduct of the parties. The principal may ratify his agent's unauthorised delegation.

A person who is appointed by the agent and to whom the principal's work is delegated is known as "sub-agent". Section 191 defines "sub-agent" as "a person appointed by and acting under the control of the original agent in the business of the agency".

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

In a case before the Supreme Court:⁶⁵

A person had sent certain parcels by V.P.P. to a destination in Pakistan. The articles reached Pakistan. They were delivered to the addressee and their value was collected. The Government of Pakistan, having snapped the postal treaty with the Government of India, did not forward the amount. The Indian Post Office could not pay to the sender. The sender sued the Government.

Holding the Government not liable, the court said that when two sovereign powers enter into a postal treaty, neither of them can be described as an agent of the other. Neither can be said to be employed or acting under the control of the other as required of a sub-agent under Section 191.

When a sub-agent is appointed, what relationship is constituted between the principal and the sub-agent and the agent? The answer depends upon whether the sub-agent has been properly or improperly appointed.

1. Improper delegation [S. 193]

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

Delegation is improper when it is not authorised, that is, when it is not within any of the recognised exceptions. The effect is that the principal is not bound by the appointment. He is not represented by that person, nor bound by his acts. That person is also not responsible to the principal. But the agent will be responsible to

64. *Mason v Joseph*, (1804) 1 Smith KB 406.

65. *Union of India v Mohd Nazim*, (1980) 1 SCC 284; AIR 1980 SC 431.

the principal for any act of that person. The agent stands in the position of principal towards that person and is as such responsible for his acts to third parties.⁶⁶

2. Proper delegation [S. 192]

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

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

Sub-agent's responsibility.—The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

In *Calico Printers' Association v Barclays Bank*⁶⁷ WRIGHT J explained the effect of proper delegation:

“Even where the sub-agent is properly employed, there is no privity between him and the principal; the latter is entitled to hold the agent liable for breach of the mandate, which he has accepted, and cannot, in general claim against the sub-agent for negligence or breach of duty.”

The following effects of the appointment are stated in Section 192:

1. Principal Represented by Sub-Agent

In the first place, so far as regards third persons, the principal is represented by the sub-agent. He is bound by and responsible for his acts as if he were an agent originally appointed by the principal.⁶⁸

2. Agent's Responsibility for Sub-Agent

Secondly, the agent is responsible to the principal for the acts of the sub-agent. If, for example, the sub-agent has misappropriated the principal's property or its sale-proceeds, the agent is responsible for the same. There is no privity of contract between the principal and the sub-agent and, therefore, he cannot sue the sub-agent, except for fraud or wilful wrong. Even where fraud or wilful wrong is established the principal has the choice to sue either the agent or the sub-agent.⁶⁹ But the agent may exempt himself from such liability.⁷⁰

66. A person who was appointed as a sole agent was held to have no authority to delegate. *John McCann & Co v Pow*, (1974) 1 WLR 1643.

67. (1931) 145 LT 51. A similar explanation occurs in *Mercantile Bank v Chetumal*, AIR 1930 Sind 247, 250.

68. See also *Raghunath Pd v Sewa Rqm*, AIR 1980 All 15.

69. *Nensukhdas v Birdichand*, (1917) 19 Bom LR 948.

70. *Summan Singh v N.C. Bank of New York*, AIR 1952 Punj 172.

3. Sub-agent's Liability to Principal

The sub-agent is not directly liable to the principal, except for fraud and wilful wrong. A well-known illustration is *Calico Printers' Association v Barclay's Bank*⁷¹.

A sub-agent failed to insure the principal's goods, which were destroyed by fire. But the principal could not recover against the sub-agent.

Similarly, in *Summan Singh v N.C. Bank of New York*:⁷²

The plaintiff in a foreign country appointed the N.C. Bank to deliver a sum of money to one Pritam Singh of Jullundur, whose address was given. The bank instructed its Bombay branch accordingly. The Bombay branch appointed the Punjab National Bank which delivered the money to a wrong person.

The plaintiff's action against either bank failed. The Punjab National Bank was held not liable on the principle that a sub-agent is not liable to the principal except when he is guilty of fraud or wilful wrong. The wrong delivery was due only to negligence. The N.C. Bank had exempted itself from the consequences of wrong delivery.⁷³

A sub-agent is, however, bound by all the duties of an ordinary agent.

His rights cannot go beyond those of the main agent and they have to be exercised through the agent except where direct action would be necessary to give business efficacy to the appointment of a sub-agent. Where a sub-agent (fire-protection coating specialist) was appointed on agreed basis for the purpose of coating the 52-storey building undertaken by the contractor, it was held to be an implied term that his work would not be rejected except on reasonable basis.⁷⁴

Substituted agent [Ss. 194 and 195]

194. Relation between principal and person duly appointed by agent to act in business of agency.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

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

71. (1931) 145 LT 51 CA; *New Zealand and Australian Land Co v Watson*, (1881) 7 QBD 374, privity not constituted by mere knowledge or consent to appointment; *Stephens v Badcock*, (1832) 37 RR 448, money paid to sub-agent, principal could sue only the agent, not sub-agent.

72. AIR 1952 Punj 172.

73. See also *Amritlal Raichand v Bhagwandas Fateh Chand*, (1940) 186 IC 9; *New Zealand & Australian Land Co v Watson*, (1881) 44 LT 675; 7 QBD 374 and *Peacock v Baij Nath*, (1891) 18 Cal 573.

74. *Obbayashi-Gumi Ltd v Industrial Fireproofing P Ltd*, (1991) 3 Current LJ 2330 HC Singapore.

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

Illustrations

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

A sub-agent has to be distinguished from a substituted agent. Sections 194 and 195 contain special provisions about substituted agents. According to Section 194 when an agent has an express or implied authority of his principal to name a person to act for him and the agent has accordingly named a person, such person is not a sub-agent, but he becomes an agent for the principal in respect of the business which is entrusted to him. The two illustrations to the section further explain the position of a substituted agent. A solicitor is appointed to sell an estate by auction and to employ an auctioneer for the purpose. The auctioneer thus appointed is not a sub-agent but an agent of the employer himself for the purpose of the sale. Similarly, when an agent is authorised to recover debts and he appoints a solicitor for the purpose, the latter is not a sub-agent, but a full-fledged agent for the purpose.⁷⁵

One of the effects of appointing a substitute is that a direct privity of contract is established between the principal and the "substitute". The agent is not concerned about the work of the substitute. His only duty is to make the selection of the substitute with reasonable care. Section 195 says that "in selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected". The two illustrations appended to the section explain the point. A merchant is instructed to buy a ship for his principal. The merchant employs a ship surveyor of good reputation to choose a ship for the principal. The surveyor makes the choice negligently, the ship turns out to be unseaworthy, and is lost.

75. See also the decision of the Supreme Court in *Qamar Shaffi Tyabji v Commr, Excess Profits Tax*, (1960) 3 SCR 546: AIR 1960 SC 1269, where a person named as an agent for the company with the approval of the Board of Directors was held to be a substituted agent; *Aggarwal Chamber of Commerce Ltd v Ganpat Rai Hira Lal*, 1958 SCR 938: AIR 1958 SC 269, privity of contract established. *Central Bank of India v Rur Chand*, AIR 1958 Punj 159, the principal asking his bank to collect the proceeds of their invoice through a particular bank, the matter handed over to that bank which, therefore, became a substituted agent; *Nensukhdas v Birdichand*, (1917) 19 Bom LR 948, explaining the position of the substituted agent. *A. C. Rangaswami v D.J. Renuka*, (1997) 11HC 975 Kant, holder of power of attorney is equal in the right of transfer to the owner, part payment taken by the attorney, sale failed to go through, attorney liable for refund as much as the owner.

The surveyor, but not the agent, is liable to the principal. In the second illustration, goods are consigned to a merchant for sale. The merchant employs an auctioneer in good credit to sell the goods and allows him to receive the proceeds. The auctioneer becomes bankrupt without having accounted for the proceeds to the principal. The agent is not liable.

Remedies of principal for breach of duty

"A principal has threefold rights against an agent who fails in his duty:

(a) to ask for an account and also demand payment of secret and illicit profits earned by him as an agent;⁷⁶

(b) to seek damages for disregard of the terms of agency as also for want of skill and care;

(c) to resist the claim of the agent for commission and indemnity by the plea that the agent had acted for himself, i.e. as a principal."⁷⁷

RIGHTS OF AGENT

The following are some of the important rights of an agent:

1. Right to remuneration [S. 219]

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

Every agent is clearly entitled to his agreed remuneration, or if there is no agreement, to a reasonable remuneration.⁷⁸ Where the amount of remuneration is left on principal's discretion, even then reasonableness would be the criterion.⁷⁹ The

76. *Beaumont v Boulthee*, (1802) 7 Ves 599, 608, account of profits made by lessee-agent by entering into arrangement with adjacent owners.

77. V.G. Ramchandran, *LAW OF AGENCY*, 401 (1985) citing *Manek v Jwala*, AIR 1947 Bom 135. Where no loss is caused by breach of duty, the principal is entitled to recover only nominal damages. *Manchubhai v John H. Tod*, (1896) 20 Bom 633. In the case of a delayed sale, the difference recoverable is the price actually realised and that which would have been realised when the goods ought to have been sold, *Challapathi v Suruyya*, 12 Mad LJ 375; *Mathradas Mutsaddilal v Kishanchand Ramjidas*, AIR 1925 Lah 332, nominal damages.

78. For example, the Lahore High Court held in *Khursheed Alam v Asa Ram*, AIR 1933 Lah 784 that "where a person is proved to have acted as broker, he is entitled to his commission; and even if he fails to prove the rate of commission agreed upon, a reasonable amount ought to be awarded to him as such commission". The mode, manner and time of payment may be provided for by a special contract. *Green v Mules*, (1861) 30 LJ CP 343, contract providing for payment on completion, no *quantum meruit* claim. *Cutter v Powell*, (1795) 6 TR 320; payment to broker if title approved, *Ayyannah v P.K. Subramania*, AIR 1924 Mad 212; *Mehta v Cassimbai*, (1922) 24 Bom LR 847, where remuneration is payable on completion of sale, no *quantum meruit* if the transaction proved unsuccessful. *Hindustan Antibiotics Ltd v Kohli Medical Stores*, (1997) AHC 2630 MP, recovery of agreed commission for the extended period of agency.

79. *Kofi Sunkersette Obu v A. Strauss & Co Ltd*, 1951 AC 243; *Bryant v Flight*, (1839) 5 M & W 114; *British Bank for Foreign Trade Ltd v Novinex Ltd*, (1949) 1 KB 623; *Powell v Braun*,

difficult question is as to when remuneration becomes due. Section 219 says that "in the absence of any special contract, payment for the performance of any act is not due until the completion of such act...".

This provision raises two questions. When is the act complete? and secondly, is the act a result of the agent's services? Both questions depend "first and last on particular terms of the particular contract".⁸⁰ Thus where an agent was appointed to secure orders for advertisements in a newspaper, the commission in respect of an advertisement being payable when it was published, the agent was held entitled to commission on orders actually obtained by him although the advertisements to which the orders related were not published until after the termination of employment.⁸¹ As against it, where an agent was engaged to negotiate for the purchase of a house at a commission of 2 per cent on the purchase price, he was held not entitled to any commission till the completion of the purchase of the house.⁸² Much depends upon the nature of the service that the agent undertakes to provide. Thus, in a case before the Allahabad High Court,⁸³ an agent was appointed to introduce a purchaser willing to purchase the defendant's property. He did introduce one and even the sale was settled and earnest money paid, but it could not be completed through the purchaser's inability to find money. The agent was nevertheless held entitled to his agreed commission.⁸⁴

Secondly, the transaction that results must be due to the agent's services. The bargain must be direct result of his service.⁸⁵ In *Green v Bartlett*⁸⁶ an agent was appointed to sell a house. He held an auction but failed to find a purchaser. One of the persons attending the auction obtained from him the address of the principal and purchased the house from him without intervention of the agent. Even so the transaction was held to be a result of the agent's effort entitling him to his commission.

(1954) 1 WLR 401. Where there is no express contract, custom or usage of the particular trade become applicable. *Read v Mann*, (1830) 10 B&C 438.

80. *Sellers v London County Newspapers*, (1951) 1 All ER 544.
81. *Ibid.* Another similar case is *Bilbee v Hasse & Co*, (1889) 5 TLR 677, the agent was entitled to commission on orders received from the customer introduced by him even after the termination of his agency.
82. *Ayyanath Chetty v Subramania Iyer*, (1923) 45 Mad LJ 409. The court relied upon the following statement of Lord ESHER in *Peacock v Freeman*, 4 TLR 541: "Land could only be said to have been sold when the conveyance was complete not when there was a mere contract to sell."
83. *Sheikh Farid Baksh v Hargul Singh*, AIR 1937 All 46.
84. See also *Saraswati Devi v Motilal*, AIR 1982 Raj 108; (1982) Raj LR 251. Where commission was payable to an estate agent as and when he introduced a ready and willing customer but the principal refused to sign the agreement, held, the agent entitled to commission. Following *Abdulla Ad v Animendra Kissen*, AIR 1950 SC 15 and *Jaques v Lloyd D. George*, (1968) 1 WLR 625; *Alpha Trading Co v Dumn Shaw Patten Ltd*, (1981) 2 WLR 169 CAB.
85. See, for example, *Bray v Chandler*, (1856) 18 CB 718; *Gribson v Crick*, (1862) 31 LJ Ex 304; it need not necessarily be the immediate cause of the transaction, but it must be shown that it was brought about as the direct result of his intervention. *Burton v Hughes*, (1885) 1 TLR 205. It is not sufficient for the agent to show that it would not have been entered into but for his services, if it resulted therefrom only as a casual or remote consequence: *Tribe v Taylor*, (1876) 1 CPD 505 and *Jordon v Ramchandra Gupta*, (1903) 8 Cal WN 831. As explained by TEKCHAND J in *Andley Brus v K.M. McCready*, AIR 1928 Lah 605, 607.
86. (1863) 14 CB (NS) 681; 8 LT 503; 11 WR 834; 32 LJCP 261. Approved by the Privy Council in *Burchell v Gowie*, (1910) AC 614.

The principle of this case has been followed by the Bombay High Court.⁸⁷ The defendants appointed the plaintiff, a broker, to obtain a loan on the mortgage of his premises. He introduced the manager of a bank who would have made an advance if the security offered had not proved to be insufficient. Ultimately, the bank did make an advance, but through another broker. The plaintiff was held entitled to his commission.

Where the agent's services are only remotely connected with the transaction, his remuneration is not earned. *Tribe v Taylor*⁸⁸ is an apt illustration.

The defendant requested the plaintiffs to introduce a purchaser of his premises or a source of capital. The plaintiff introduced one Wood who advanced a sum of money by way of loan. The agreed commission was paid to the plaintiffs. Subsequently Wood entered into partnership with the defendant and advanced a further sum. The plaintiff's action to claim commission on this second advance failed.

The judge said: "The question which arose was... whether the subsequent advance was the result of any act of the plaintiffs. If... the plaintiffs had introduced any new person, who had advanced the money, I should have thought the defendant would have been bound to pay the commission claimed. If they had induced Wood to become a partner and to introduce further capital, I should have thought they would have been entitled to commission on that.... Was the subsequent partnership the result of the introduction or of an independent negotiation? *Causa proxima* is not the question; the plaintiffs must show that the act of theirs was the *causa causans*. It is true that (second) advance might not, and probably would not have been made by Wood, but for the original introduction by the plaintiffs. But that is not enough."⁸⁹

The principal is, of course, under a duty not to prevent the agent from earning his commission.⁹⁰ But this does not prevent the principal from selling the property himself or from refusing to sell at all. A well-known case is *Luxor (Eastborne) Ltd v Cooper*⁹¹.

An agent was promised his commission if he brought about the sale of the defendant's cinemas. The agent introduced a customer but the company refused to sell. The agent brought an action for his commission.

The House of Lords held against him: "There was no implied term that the principal would not dispose of the property himself, or through other channels or otherwise act so as to prevent the agent from earning his commission."⁹² Viscount SIMON LC said:⁹³ "The agent necessarily incurs certain risks, e.g. the risk that his nominee

87. *Vasanji Moolji v Karsonda Tejpal*, AIR 1928 Bom 270.

88. (1876) CPD 505.

89. At p. 509, *ibid.*, per BRETT J.

90. Where the transaction fell through because of the defective title of the principal, the broker was allowed his commission. *Ellas v Govind Chandar*, (1903) 30 Cal 202.

91. (1941) AC 108.

92. Chorely and Tucker, *CASES ON MERCANTILE LAW*, 118 (1962, 4th edn). The court has to find out the intention of the parties from the terms of the contract and all the surrounding circumstances. *Sachidanand Dutt v Nritya Nath*, AIR 1924 Cal 517.

93. At p. 117, *ibid.* For the purposes of his remuneration the agent has the right to demand accounts from the principal though there is no statutory provision on it, *Narandas Movardas Gajiwala v S.P.A.M. Papanmal*, AIR 1967 SC 333, 335.

cannot find the purchase price and will not consent to terms reasonably proposed to be inserted in the contract of sale.... The agent also takes the risk of his principal not being willing to conclude the bargain with the agent's nominee. The last risk is ordinarily a slight one for the owner's reason for approaching the agent is that he wants to sell."

Effect of Misconduct [S. 220]

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

Illustrations

- (a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees and he must make good the 2000 rupees to B.
- (b) A employs B to recover 1000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

An agent is not entitled to any commission in respect of that part of the business which he has misconducted.⁹⁴ Section 220 accordingly provides that an agent who is guilty of misconduct in the business of agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

The effect of misconduct is twofold. Firstly, the agent forfeits his right to commission. This is irrespective of any loss suffered by the principal. "The principle underlying the rule is that 'a principal is entitled to have an honest agent and it is only the honest agent who is entitled to any commission'."⁹⁵ The commission is forfeited only in respect of that part of the agency business which has been misconducted.⁹⁶ An agent was employed to sell leasehold premises. Great many tailors were interested in acquiring the premises. The agent, being afraid that the original landlord would not permit lease to tailors, obtained his permission in advance. This considerably increased the price. The agent, however, kept this fact from his principal and induced him to

94. There is no misconduct where commercial practices of a trade allow the broker commission from both parties, or where the principal leaves the agent to look for remuneration to a third party or where he knows that the agent will get remuneration from third party. *Bow's Emporium v Brett*, (1927) 44 TLR 194; *Baring v Stanton*, (1876) 3 Ch D 502; *Municipal Corp'n of Bombay v Cavariji Hirji*, (1895) 20 Bom 124, a custom or knowledge of that kind would have to be proved by the agent. But otherwise commission from the other party is a misconduct. *Andrews v Ramsay & Co*, (1903) 2 KB 635. Discount money retained in the honest belief that the agent is entitled to it is not a misconduct though the amount may have to be handed over. *Hippisley v Knee Bros*, (1905) 1 KB 1. Misconduct may comprise unauthorised acts, improper delegation, *Beale v Dickenson*, (1885) 1 TLR 654; accounts not properly rendered, *White v Lincoln*, (1803) 8 Ves 363; dishonestly overcharging, conflict of duty and interest, secret commissions.

95. *Sirdhar Vasanta Rao v Gopal Rao*, AIR 1940 Mad 299, 301, quoting Lord ALVERSTON CJ in

Andrews v Ramsay & Co, (1903) 2 KB 635, 638.

96. See *Purushottam v Amruth Ghee Co*, AIR 1961 AP 143.

accept lower price. This was a misconduct and breach of duty on the part of the agent. He was not allowed to recover his commission.⁹⁷

Secondly, the principal is entitled to recover compensation for any loss caused by the misconduct. "The illustrations to the section make it clear that payment of damages caused by the misconduct is in addition to the forfeiture of commission or remuneration...."

2. Right of retainer [S. 217]

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

The agent has the right to retain his principal's money until his claims, if any, in respect of his remuneration or advances made or expenses incurred in conducting the business of agency are paid. The right can be exercised on "any sums received on account of the principal in the business of the agency". He can retain only such money as is in his possession.⁹⁸ He is not entitled to an equitable lien, that is, the right to have his claims satisfied in preference to other creditors out of the principal's money not in his possession. But a solicitor or vakil is entitled to an equitable lien on the proceeds of an action conducted by him till his costs are paid. His fee is first charge on the proceeds even if they are not in his possession. He is also entitled, for this purpose, to have the proceeds pass through his hands.⁹⁹

3. Right of lien [S. 221]

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

In addition to the above right of retainer, the "agent has the right to retain goods, papers and other property, whether movable or immovable, of the principal

97. *Heath v Parkinson*, (1926) 42 TLR 69; *E.I.D. Farry (India) Ltd v Far Eastern Marine Transport Co Ltd*, (1988) 1 Mad LJ 144, short delivery of goods by carrier: (1988) 2 TAC 387.

98. *Bombay Saw Mills Co, Re*, ILR (1888) 13 Bom 314, where the claim of secretaries and treasurer of a company, who had advanced money to the company, to be paid first out of the company's money was rejected, because they were not in possession of the money. This right does not confer any ownership on the agent. The money remains that of the principal. *Turner Morrison & Co Ltd v CIT*, 1953 SCR 520: AIR 1953 SC 140.

99. *Menon v Cochine Mercantiles Ltd*, (1962) 32 Comp Cas 378; *Morrison, ex p*, (1868) LR 4 QB 153; *Cullianji Sangibhoy Raghavji Vijpal, Re*, (1906) 30 Bom 27; *Subba Pillai v Ramaswamy Ayyar*, (1903) 27 Mad 512.

received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him".¹

The conditions of this right are:

- (1) The agent should be lawfully entitled to receive from the principal a sum of money by way of commission earned or disbursements made or services rendered in the proper execution of the business of agency.
- (2) The property over which the lien is to be exercised should belong to the principal and it should have been received by the agent in his capacity and during the course of his ordinary duties as agent.² The property is considered to be sufficiently in the possession of the agent where he has been dealing with it. Thus where an auctioneer was engaged to sell furniture at the owner's house, he was held to be sufficiently in possession to exercise lien for his commission. The property held by an agent for a special purpose cannot be subjected to lien. The existence of a special purpose implicitly excludes the right.³ Similarly, where possession is obtained without the principal's authority or by fraud or misrepresentation, there is no lien. Briefly, the agent's possession must be lawful.
- (3) The agent has only a particular lien. A particular lien attaches only to that specific subject-matter in respect of which the charges⁴ are due. No other property can be retained.

For example, in *Bombay Saw Mills Co, Re*:⁵

The secretaries and treasurers⁶ of a company claimed lien over the company's property for their advances.

SCOTT J rejected the claim "because the sums advanced and expended were not, as required (by Section 221) 'disbursements and services in respect of' the property on which the lien was claimed, but were loans made on behalf of the company generally and for the purpose of the whole concern".⁷

Effect of lien

The effect of lien as between the principal and the agent has been thus stated by A.H. KHAN J in *Gopaldas v Thakurdas*:⁸

"The agent's lien does not give unrestricted authority to the agent to deal with the property in any manner the agent may like. The right is limited in

1. Lord ELLENBOROUGH in *Houghton v Mathew*, (1803) 3 Bos & P 485, 494, described lien "to be the right in one man to retain that which is in his possession belonging to another until certain demands of the person who is in possession are satisfied". Cited by A.H. KHAN J in *Gopaldas v Thakurdas*, AIR 1957 MP 20, 22.

2. See MEHTA AJC in *Pestonji Bhinji v Ravji Javerchand*, (1934) 150 IC (Sind) 483, 447.

3. *Williams v Milliadgton*, (1788) 1 HB B1 81: 2 RR 724.

4. Section 171 confines general lien only to bankers, factors, wharfingers, attorneys and policy brokers. A general agent is not covered by any one of these categories.

5. ILR (1888) 13 Bom 314.

6. Who were a sort of managing agents, now banned.

7. At p 321 in *Bombay Saw Mills*' case.

8. AIR 1957 MB 20, 22.

nature. It enables the agent to retain the property till his dues are paid. But this confers no authority on the agent to sell or otherwise dispose of the property without the consent of the owner".⁹

A partnership firm acting as the clearing and forwarding agents of the principal detained the goods of the principal because of a dispute about their commission amount and had the goods sold on an interim court order. The firm was held to be in the wrong. It had no right to sell because lien does not give that right. An agent can no doubt dispose of the goods with the consent of the principal or with court order, but in this case the order of the court was not valid because the firm being not registered could not have filed a suit. The sale was wrongful. The court directed the firm to keep intact the money equivalent of the value of the goods so that the remedy of accounts would be effectively available to the principal.¹⁰

Where, however, in terms of his agreement with the principal, the agent has become a pledgee of the goods, he may sell them after giving a reasonable notice to the principal of his intention to sell.¹¹

As against third parties the lien is effective only to the extent of the principal's rights on the property. If the principal has limited rights, the lien will be equally limited. If the property is already subject to some rights or equities in favour of third persons, the lien will also be subject to them. But where the property on which lien is being exercised is a negotiable instrument, the agent will become a holder for value to the extent of his lien and will acquire a title free of prior equities if he acts in good faith and without notice of them.¹²

If the principal creates any charge on the property subsequently to the attachment of the lien, that will be subject to the lien.

Loss of Lien

The agent's lien is lost in the following cases:

- (1) Lien, being a possessory right, is lost as soon as possession is lost. Possession is lost when the agent delivers the goods to the principal himself or to a carrier for the purpose of transmission to the principal. In the latter case, the agent cannot revive his lien by stopping the goods in transit.¹³ But where the property has been delivered for a special purpose, like safe custody, which is inconsistent with lien, the lien is not lost.

As long as the agent remains in possession, his lien is effective, and is not affected by the fact that the company to which the goods belonged has been ordered to be wound up,¹⁴ or that the principal has become insolvent. The agent's possession is not terminated where property has been obtained from him by unlawful means or by fraud or misrepresentation.

9. The learned Judge relied upon *Balamal v Budhumal*, AIR 1926 Lah 94; *Mulchand Shib Dhan v Sheo Mal Sheo Pd*, AIR 1929 Lah 666.

10. *Kavita Trehan v Balsara Hygiene Products*, AIR 1992 Del 92.

11. *Gopaldas v Thakurdas*, AIR 1957 MB 20, 22.

12. *London & Joint Stock Bank v Simons*, (1892) AC 201.

13. *Kishun Das v Ganesh Ram*, AIR 1950 Pat 481; *Sweet v Pym*, (1860) 5 RR 497.

14. *Chidambaran Chettiar v Tinnevely Sugar Mills Co*, (1908) 31 Mad 123.

- (2) The lien is lost, when the agent waives his right. Waiver may arise out of an agreement express or implied or may be inferred from conduct inconsistent with the right.
- (3) The agent's lien is subject to a contract to the contrary and, therefore, does not exist where the agent has by his agreement with the principal excluded it.¹⁵

4. Right to Indemnity [Ss. 222 and 223]

The right to indemnity is founded upon the statutory provision contained in Section 222.

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

Illustrations

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

The right to indemnity extends to all losses and expenses incurred by the agent in the conduct of the business.¹⁶ Where, for example, a stockbroker, on the instructions of a solicitor, contracted to sell certain shares and had to incur liability to the purchaser by reason of the owner's refusal to complete the sale, the stockbroker was held entitled to recover indemnity from the principal.¹⁷

The agent must have been damaged in the lawful conduct of the business of agency. A wagering agreement is not unlawful. It is only void. Accordingly, the Supreme Court in *Kishanlal v Banwarilal*,¹⁸ allowed an agent to recover indemnity for losses incurred by him in wagering transactions entered into on instructions of his principal.¹⁹

Where the act done by the agent on instructions from his principal is apparently lawful, but it turns out to be unlawful or injurious to a third person, the agent is entitled to indemnity against the consequences of the act.

15. *Ram Prasad v State of MP*, (1969) 3 SCC 24, 27; AIR 1970 SC 1818; (1970) 2 SCR 677, the right is excluded where the property is accepted for a special purpose.

16. B.K. MUKHERJEE J in *Kishanlal v Banwarilal*, AIR 1954 SC 500, 502.

17. *Hichens v Jackson*, (1943) AC 266, HL; *Christo Forides v Terry*, (1924) AC 566.

18. AIR 1954 SC 500.

19. See the judgment of MUKHERJEE J at p 502, *ibid*. See also *Read v Anderson*, (1884) 13 QBD 779, where it was held that a principal may have to indemnify his agent for lost bets, though the bets were themselves void. Acts done in excess of authority do not create right to indemnity. *Davison v Fernandes*, (1889) 6 TLR 73.

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

Illustrations

- (a) A, a decree-holder and entitled to execution of *B*'s goods, requires the officer of the Court to seize certain goods representing them to be the goods of *B*. The officer seizes the goods, and is sued by *C*, the true owner of the goods. *A* is liable to indemnify the officer for the sum which he is compelled to pay to *C*, in consequence of obeying *A*'s directions.
- (b) *B*, at the request of *A*, sells goods in the possession of *A*, but which *A* had not right to dispose of. *B* does not know this, and hands over the proceeds of the sale to *A*. Afterwards *C*, the true owner of the goods, sues *B* and recovers the value of the goods and costs. *A* is liable to indemnify *B* for what he has been compelled to pay to *C* and for *B*'s own expenses.

One of the illustrations appended to Section 223 seems to be based upon the facts of *Adamson v Jarvis*:²⁰

An auctioneer sold certain cattle on instructions from the defendant and was held liable to the true owner for conversion. He recovered indemnity from the principal because the act in question was apparently lawful.

Where, however, the act in question is apparently unlawful or criminal, such as beating a person or publication of a libel, the principal will not be liable upon an express or implied promise to indemnify the agent against the consequences of such act. For example, an agent, appointed to import adulterated mustard oil, suffered loss and punishment, but he could not recover indemnity.²¹ Where, however, the plaintiff on instruction, from the defendant, paid a sum of money to the caste panchayat to have the defendant's caste disqualifications removed, he was allowed to recover the money from the defendant.²²

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

Illustrations

- (a) *A* employs *B* to beat *C*, and agrees to indemnify him against all consequences of the act. *B* thereupon beats *C*, and has to pay damages to *C* for so doing. *A* is not liable to indemnify *B* for those damages.
- (b) *B*, the proprietor of a newspaper, publishes, at *A*'s request, a libel upon *C* in the paper, and *A* agrees to indemnify *B* against the consequences of the

20. (1827) 4 Bing 66; 29 RR 503. The Supreme Court has held in *A. Thangal Kunju Mudaliar v M. Venkatasachalam Potti*, (1955) 2 SCR 1196, 1211; AIR 1956 SC 246, that there can be no agency for the commission of a crime. The wrongdoer would be personally liable.

21. *Ram Kumar v Laksmi Narayan*, AIR 1947 Cal 157.

22. *Hazarimal v Khemchand*, AIR 1962 Raj 86.

publication, and all costs and damages of any action in respect thereof. *B* is sued by *C* and has to pay damages, and also incurs expenses. *A* is not liable to *B* upon the indemnity.

Where the act in question is apparently tortious, the agent, who has been held liable on it, may recover contribution from the principal (not indemnity) under the Law Reform (Married Women's and Tortfeasors) Act, 1955.²³

5. Right to Compensation [S. 225]

225. Compensation to agent for injury caused by principal's neglect.—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Thus every principal owes to his agent the duty of care not to expose him to unreasonable risks.²⁴ The illustration appended to the section makes the point clear:

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

23. Section 6(1)(c), (2). "Contribution" is different from "indemnity" because indemnity covers the whole of the loss suffered by the agent.

24. *Federal Insurance Co v Nakano Singapore P Ltd*, (1992) 1 Current LJ 539 CA Singapore, liability for weak scaffolding.

Relations of Principal with Third Parties

AGENT'S AUTHORITY

The acts of the agent within the scope of his authority bind the principal.¹ Section 226 of the Contract Act gives statutory effect to the principle by declaring that:

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

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

It is necessary for this effect to follow that the agent must have done the act within the scope of his authority. The authority of an agent and more particularly its scope are subjects of some controversy.² The uncertainty is largely due to the fact that the authority of an agent does not depend upon one source. It emanates from the principal, but its dimensions depend upon legal inferences, which, in turn, depend upon the purpose of the agency, the surrounding circumstances and a desire to

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1. See *Palestar Electronics P Limited v Addl Commr*, (1978) 1 SCC 636, where it was held that sales made by a taxpayer through his branches run by his agents would be regarded as sales made by him. *V. Ramesh v Convenor, EAMCET*, AIR 1997 AP 79, a candidate who was entitled to a reserve seat for admission to engineering college was invited by telegram for interview. Telegraph Department delayed message. Taking the Telegraph Department to be the agent of the sender, its lapse was the lapse of the principal which the principal must rectify. Direction for admission. *Vinoth Kumar R. v Secretary, Selection Committee*, (1995) 1 Mad LW 351; *R. Maheshwari v Secretary, Selection Committee*, AIR 1995 Mad 168; (1995) 1 Mad LW 348 and *Arul Latha Gold v Govt of TN*, (1994) 2 Mad LW 686, principle of agency attracted when post office is selected as a carrier of message. *Oriental Insurance Co Ltd v Rukminibai*, AIR 1995 Kant 18, the mere issue of a risk note by an agent does not conclude the contract of insurance. It has to be followed by proposal, acceptance and payment of premium which was not done in this case.
 2. The varying viewpoints have been presented by J.L. Montrose in *The Basis of the Power of an Agent in Cases of Actual and Apparent Authority*, (1938) 16 Can BR 757. The following articles are there considered: Cook, *Agency by Estoppel*, (1905) 5 Col LR 35; Ewart, *Agency of Estoppel*, (1905) 5 Col 354; Cook, *Agency of Estoppel—A Reply*, (1906) 6 Colum LR 34; Cook, *Estoppel as Applied to Agency*, (1903) 16 Harv LR 324. He who does an act through another is deemed in law to do it himself. See *Municipal Corpn, Delhi v Jagdish Lal*, (1969) 3 SCC 389; (1970) 1 SCR 579; AIR 1970 SC 7.

protect *bona fide* commercial transactions. For, agency came into being to promote and not to hinder commerce.³

The authority of an agent means his capacity to bind the principal. It refers to "the sum total of the acts it has been agreed between principal and agent that the agent should do on behalf of the principal".⁴ When the agent does any of such acts, it is said he has acted within his authority.

Actual Authority

Actual authority of an agent is the authority conferred on him by the principal. It is of two kinds, namely, express or implied. Sections 186 and 187 provide this:

186. Agent's authority may be expressed or implied.—The authority of an agent may be expressed or implied.

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

Illustration

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

Express authority

Where the authority is conferred by words, spoken or written, it is called express authority.⁵ A power of attorney, for example, which is a kind of deed and authorises the agent to do certain acts, is an illustration of express authority.⁶ But, however precisely the authority of an agent may be drawn, disputes as to its scope are likely to arise. The scope of express authority is worked out by construction of the words used in the documents. For example, where a principal, while going abroad, authorised his agent and partner to carry on the business, and his wife to accept bills on his behalf for his personal business, he was held not bound when his wife accepted bills for the business, which the agent was conducting and which was different from his personal business.⁷ The decision has been criticised, particularly because the agent and the third party had acted in good faith to meet the principal's genuine business needs. Accordingly, in a subsequent case of agency by power of attorney, where the agent obtained a loan outside his authority by signing a cheque on behalf of his principal to pay the principal's workmen, the principal was held

3. See, for example, Stoljor, *THE LAW OF AGENCY: ITS HISTORY AND PRESENT PRINCIPLES*, (1961).

4. J.L. Montrose, *Actual and Apparent Authority*, (1938) 16 Can BR 757, 761.

5. Sections 186 and 187.

6. See, for instance, the decision of the Supreme Court in *Syed Abdul Khader v Rami Reddy*, (1979) 2 SCC 601: AIR 1979 SC 553, where a power of attorney was construed.

7. *Attwood v Munnings*, (1827) 7 B&C 278. The decision has been criticised in Stoljor, *THE LAW OF AGENCY*, 94 (1961).

bound.⁸ Where the appointment was for "fixing" a steamer, intention being to let it out, the principal was held liable when the agent instead hired a steamer.⁹

But where the third party has knowledge of the limitation on the agent's authority or could have discovered it by reasonable examination, he would be bound by it.¹⁰ Thus, where an agent was given very wide power of withdrawing the principal's money "without restriction", the principal was held not bound when the agent gave a cheque to a car dealer to purchase a car for himself,¹¹ and paid a few cheques into his banking account to wipe out his overdraft.¹² In either case it was the duty of the third party to make a reasonable inquiry whether the agent had the authority to use the principal's money for his personal purposes.¹³

An agent cannot borrow on behalf of his principal unless he has clear authority to do so. The power to draw or endorse bills or notes does not include the power to borrow.¹⁴ Where the agent has the power to borrow, the fact that he borrowed beyond the authorised limit, does not prevent the third party from holding the principal liable,¹⁵ because the third party has no means of ascertaining that fact. Similarly, the fact that an agent has acted from improper motive does not take the case beyond the scope of authority. Thus in *Hambro v Burnard*:¹⁶

An agent was appointed to underwrite policies. He underwrote a policy which in fact amounted to a guarantee of a company's debts. He knew the precarious condition of the company, but being interested in it, wanted to help it. The principal was held liable because the third party could not have known with what motive the agent was underwriting a particular policy.

Implied authority

"An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written or the ordinary course of dealing, may be accounted circumstances of the case." This definition of implied authority in Section 187 is illustrated thus:

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8. *Reid v Rigby*, (1894) 2 QB 40.
 9. *Weigall v Runciman*, (1916) 85 LJKB 187; cf *Ireland v Livingston*, 1872 LR 5 HL 395; explained in *Woodhouse A.C. Israel v Nigerian Produce Marketing Co.*, 1972 AC 741, 757, 771-772.
 10. *Ferguson v Um Chand Boid*, (1905) 33 Cal 343, the power of attorney expressly restricting borrowing.
 11. *Reckitt v Bernet, Prembroke & Slater*, (1929) AC 176.
 12. *Midland Bank Ltd v Reckitt*, (1933) AC 1.
 13. *United Province Government v Church Missionary Trust Assn Ltd*, (1948) 22 Luck 93; AIR 1948 Oudh 54, the third party knew that the agent was acting under power of attorney, but did not bother to acquaint himself with its terms.
 14. *Jacobs v Morris*, (1902) 1 Ch 816. *Pasumarti Durga Srinivasa Murthy v Sri Sai Agencies*, (1997) 6 Andh LD 306; (1998) 2 Andh WR 284, a husband has no authority to act as such for his wife; if he is authorised by reason of business matters he cannot go beyond the authority conferred for business purposes. A pronote was executed by three persons in favour of the wife. The husband had no authority to discharge the two of them and confine liability to only one of them. *Devkubai V.N. Mankar v Rajesh Builders*, (1997) 1 Bom CR 664, power of attorney, unless so authorised, had no right to strike a deal and to perform the same. *Raymond Woollen Mills Ltd v Coal India Ltd*, (1998) 1 Cal HN 53, an agent cannot initiate legal proceedings on behalf of principal without express authorisation.
 15. *Withington v Herring*, (1829) 5 Bing 442.
 16. (1904) 2 KB 10 (CA).

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

Implied authority is an instance of real or actual authority for it is conferred upon the agent by the conduct of the principal as interpreted in the circumstances of the case.

The distinction between express and implied authority is not fundamental, but depends merely on whether the authority is delimited by words or by conduct. If P tells A that he is to act as manager, this is really a compendious way of stating that he is to do all the acts as manager would ordinarily do. Those acts might well be termed as express authority. However, it is often said that if an agent is placed in a certain position he has implied authority to do all the acts a person in that position ordinarily does.¹⁷

An illustration of implied authority is to be found in *Ryan v Pilkington*.¹⁸ An estate agent was appointed to find a purchaser for certain property. He accepted a deposit from a prospective customer and misappropriated it. The principal was held liable, because an estate agent has an implied authority to take a deposit. He cannot, however, receive payment or give any warranty unless actually authorised.¹⁹

Thus the extent of an agent's authority, whether express or implied, depends upon—

- (1) the nature of the act or business he is appointed to do;
- (2) things which are incidental to the business or are usually done in carrying it out;²⁰
- (3) the usual customs and usages of the trade.

This is the essence of Section 188 which defines the extent of the agent's authority in the following words:

17. J.L. Montrose, *Actual and Apparent Authority*, (1938) 16 Can 764. The American Restatement refers to this kind of authority as "incidental". Article 35 says: "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it."
18. (1959) 1 WLR 403; (1959) 1 All ER 689 (CA). Other instances of implied authority are to be found in *Ramanathan v Kumarappa*, AIR 1938 Cal 423; *Goverdhandas v Friedmans Diamond Trading Co*, AIR 1939 Mad 543; *Paboodan v Miller*, AIR 1938 Mad 966; *Jaunpur Municipal Board v Banwarilal*, AIR 1939 All 623.
19. See BOWSTEAD ON AGENCY, (13th edn by Reynolds and Davenport, 1968), p 73. See also *Faujdar Kameshwar Dutt Singh v Ghanshyamdas*, 1987 Supp SCC 689, where the elder brother sold property and was held to be impliedly authorised by long acquiescence with open knowledge; *Banarsee Das v Goolam Hoosein*, 13 Moore IA 358, drawing and accepting of bills, implied authority if incidental to business. *Bank of Bengal v Ramanathan*, (1916) 43 IA 48; 43 Cal 527, authority to borrow implies authority to create a charge, pledge or mortgage. *Malukchand v Sham Mohan*, (1890) 14 Bom 590; *Bank of Bengal v Fagan*, (1849) 5 Moore IA 27, authority to sell does not include authority to mortgage; *Pestonji v Gool Mohd*, (1874) 7 Mad HC 369, authority of a firm of merchants to run their ordinary business does not imply authority to accept bills, etc; *Satyannarayanan v Vithal*, AIR 1959 Bom 452, authority to sell present goods does not include authority to sell future goods.
20. Things necessary means things necessary for carrying out the purposes of agency. *Murugesu v Province of Madras*, AIR 1947 Mad 74, an agent appointed to take possession of land on expiry of lease cannot accept rent; *Sutlej Cotton Mills Ltd v Ranjit Singh*, AIR 1952 Punj 263, an agent acting ultra vires the company.

Scope of authority

188. Extent of agent's authority.—An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

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

Illustrations

- (a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for purpose of recovering the debt, and may give a valid discharge for the same.
- (b) A constitutes B, his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

A well-known illustration is the case of *Dingle v Hare*²¹.

An agent was authorised to sell artificial manure. He had no authority to give any warranty about the goods. Yet he warranted to the buyer that the manure contained 30 per cent phosphate of lime.

The warranty turned out to be false and the principal was sued for its breach. He was held liable, because it was usual in the artificial manure trade to give a warranty of this kind. BYLES J said:

“When the jury found that it was usual to sell these artificial manures with a warranty, the nice distinction as to the extent of the agent's authority became quite immaterial. An agent to sell has general authority to do all that is usual and necessary in the course of such employment.”

Thus every agent has the implied authority to act according to the customs and usages of a particular market or trade.²² The principal is bound by such usages even if he is unaware of them²³ or even if they conflict with his instructions. Thus, where a bill-broker in London was entrusted with certain bills for discounting, and he pledged them, the principal was held bound as it was usual for bill-brokers in London to raise money by depositing their customers' bills *en bloc*.²⁴

But the custom or usage must not be unlawful or unreasonable. Whether a custom or usage is unlawful is a question of law. Any custom which changes the very nature of the agency, as for example, which converts the agent into a principal is unreasonable. *Robinson v Mollet*²⁵ is an illustration in point.

21. (1859) 7 CB (NS) 145; 29 LJ (CP) 143; 1 LT 38.

22. *Sutton v Tatham*, (1839) 10 A&E 27; 8 LJ QB 210; *Harker v Edwards*, (1887) 57 LJ QB 147. *Dhanpat Rae v Allahabad Bank*, AIR 1927 All 44, authority to carry on business, to receive and to spend moneys includes authority to borrow. *Australia and New Zealand Bank v Ateliers de Constructions*, (1967) AC 86 where such inference is necessary to give business efficacy to the transactions.

23. *Scott & Harton v Godfrey*, (1901) 2 KB 726.

24. *Foster v Pearson*, (1835) 1 CM & R 489; 4 LJ Ex 120.

25. (1874) LR 7 HL 802; 44 LJ CP 362; 33 LT 544.

R authorised a broker *M* to purchase for him 50 tons of tallow. *M* supplied his own tallow as there was a custom in his trade to buy large quantities of tallow in his own name and then to allocate it to his principals.

The House of Lords held the custom to be unreasonable. It made *M* a wholesaler rather than an agent. It also created a conflict between his duty to the principal and his personal interest.²⁶

Similarly, a custom which gives the agent liberty to adjust his personal account by way of set-off or otherwise for the claims of the principal is unreasonable. Thus, where an agent was authorised to collect from the underwriters a sum of money due under a policy of insurance, he was not allowed to set-off his personal debts to the underwriters against that money although a custom to that effect was alleged.²⁷ The principal would, however, have been bound by this custom if he were aware of it.

The principle of *Dingle v Hare*²⁸ applies to all cases where the agent acts as a seller. For example, an agent appointed to sell a horse may warrant it as good if the principal is a horse dealer,²⁹ or if the sale is being held at a market place,³⁰ but not if it is a private sale.³¹ Similarly, an agent to sell a property has authority to state the condition and value of the property to a proposed purchaser³² and an agent to discount a bill may warrant it as a good bill, but he cannot endorse it.³³

Authority of special agents

Factor

A factor is a mercantile agent who is put in possession of the goods of his principal for sale. He has the authority to sell them in his own name,³⁴ to warrant them if it is usual to do so,³⁵ to fix the selling price and to receive payment.³⁶

Broker

A broker is a mercantile agent appointed to sell the goods of his principal, but he is not given possession thereof. He may sell the goods in his own name, and may receive payment.³⁷ But if he discloses the name of the principal, he cannot receive

26. See also BOWSTEAD ON AGENCY, 84 (13th edn by Reynolds and Davenport, 1963) where in Article 31 the circumstances in which a custom is regarded unlawful or unreasonable are explained.

27. *Sweeting v Pearee*, (1859) 7 CB (NS) 449; another such case is *Blackburn v Mason*, (1893) 9 TLR 286: 68 LT 510.

28. (1859) 9 CB (NS) 145.

29. *Howard v Sheward*, (1866) 2 CP 148.

30. *Brooks v Hassal*, (1883) 49 LT 569.

31. *Brady v Todd*, (1861) 9 CB (NS) 592: 127 RR 797.

32. *Mullens v Miller*, (1882) 22 Ch D 194.

33. *Fenn v Harrison*, (1791) 3 TR 757. *Amali English Medium High School v Govt of AP*, AIR 1993 AP 338, concession made by the Advocate-General on behalf of the State, binding.

34. *Baring v Corrie*, (1818) 2 B & Ald 137: 20 RR 383: *Ex p Dixon*, (1876) 4 Ch D 133.

35. *Dingle v Hare*, (1859) 7 CB (NS) 145: 121 RR 424.

36. *Drinkwater v Goodwin*, (1775) Cowp 251.

37. *Campbell v Hassel*, (1816) 1 Stark 233.

payment.³⁸ He may act according to the usual course of business except where a usage is unreasonable or unlawful.³⁹ He may sell on reasonable credit.⁴⁰

Estate or House Agent

"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 has to deal and 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 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 bind him and make him a purchaser'." This passage occurs in the judgment of the Supreme Court in *Abdulla Ahmed v Animendra Kissen Mitter*⁴¹.

The facts of the case were that an estate broker was appointed with an authority for one month to negotiate the sale of a property on certain terms as to price and with which his commission was also linked. Before the expiry of the month he found a customer ready and willing to purchase and communicated the fact to the principal. The principal terminated the authority of the agent and directly entered into account with a nominee of the person found by the agent. The agent claimed his commission.

It was held that the agent having negotiated the sale and secured a buyer who made a firm offer acquired the right to commission on the basis of the preferred price subject to the condition that the buyer should complete the transaction, and as this condition was fulfilled, the agent's right to commission became absolute and could not be affected by the circumstances that the principal for some reason of his own sold the property at a lower price.

A general power of attorney was constituted for dealing with existing properties of the principal as well as properties acquired after the appointment of the attorney. A contract made by him in the exercise of the power could not be cancelled. The purchaser had himself cancelled the agreement to buy. He claimed refund of the consideration. The vendor wanted to set-off his claim for damages for breach. The court said that this could be possible only on showing that he remained ready and willing to perform his part. The purchaser had justification in cancelling because the vendor's title was defective. The court said that this right of refund is available also to a person who had prior knowledge of the defect.⁴²

38. *Linck v Jameson*, (1886) 2 TLR 206.

39. As to when a Custom is unreasonable or unlawful, see *Robinson v Mollet*, (1874) LR 7 HL 802; 44 LJ CP 362; 33 LT 544.

40. *Boorman v Brown*, (1842) 3 QB 511; 61 RR 287.

41. 1950 SCR 30, 36; AIR 1950 SC 15; see also *John v Philip*, (1987) 2 Ker LT 50 (SN).

42. *R.L. Pinto v F.F. Menezes*, AIR 2001 Kant 141.

Auctioneer

An auctioneer is an agent appointed to sell goods at a public auction. He, therefore, does not have the authority to sell by private contract.⁴³ He cannot sell on credit,⁴⁴ or accept any payment other than cash, or warrant the goods.⁴⁵ He acts both for seller and buyer and, therefore, can sign the contract for both.⁴⁶

Ostensible or apparent authority

The apparent authority of an agent is thus explained by DENNING LJ:⁴⁷

"Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board (of directors) appoint one of their members to be a managing director they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without sanction of the board. In that case his actual authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his *ostensible* authority in his dealings with those who do not know of the limitation. Thus, if he orders goods worth £1000, the company is bound to the other party who does not know of the £500 limitation."

Thus, "when it is said that an agent's act was within the scope of his apparent authority all that is meant is that the act appeared to be authorised".⁴⁸ A leading authority is *Watteau v Fenwick*.⁴⁹

The defendants had forbidden the manager of their hotel from buying cigars on credit. The plaintiff gave cigars to the manager on credit, which were used in business. The manager's name appeared over the board, the plaintiff trusted him and had never heard of the defendants. Being unable to recover the price from the manager, the plaintiff sued the defendants.

The court found that "cigars were... such as would naturally be supplied to and dealt in such an establishment". WILLS J, therefore, held that "once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent

43. *Mews v Carr*, (1856) 1 H&N 484; 108 RR 683; *Marsh v Jelf*, (1862) 3 F&F 234; 130 RR 836; *Beldon v Campbell*, (1851) 86 RR 534.

44. *Williams v Evans*, (1866) LR 1 QB 352. Payment by cheque, etc. may be accepted if there is a custom to that effect, *Farrer v Lacy Hartland & Co*, (1855) 31 Ch D 42; *Bharat Survoydaya Mills Co Ltd v Shree Ram Mills*, AIR 1959 Bom 309.

45. *Payne v Leconfield*, (1882) 51 LJ QB 642.

46. *Emerson v Heclis*, (1809) 11 RR 520; *Bartlett v Furnell*, (1836) 43 RR 404; *Bell v Balls*, (1897) 1 Ch 663, but not his clerk.

47. *Hely-Hutchinson v Brayhead Ltd*, (1967) 3 All ER 98; (1968) 1 Comp LJ 263, 267. For the authority of the managing director of a company in business matters and to deal with the property of the company and to appoint a counsel for that purpose see *Happy Home Builders P Ltd v Delite Enterprises*, (1995) A:HC 1320 Kant. The company was estopped from denying his authority in the above respects.

48. J.L. Montrose, *Actual and Apparent Authority*, (1938) Can BR 757, 765.

49. (1893) 1 QB 346.

applied, that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority".⁵⁰ In another similar case, the manager of a public house was authorised to buy spirits only from A, but he bought them from another person telling him that he was a manager. The principal was held not liable, because the fact of agency was disclosed and it was well known that such managers had authority to buy only from authorised sources.⁵¹ But if in the above case the fact of agency had not been disclosed, the principal would have been liable in the manner of a dormant partner.

Similarly, in a case before the Kerala High Court,⁵² it was held that a person having responsibility to carry on the business of the store of a cooperative society must be deemed to have authority to purchase goods on credit notwithstanding that the society had advanced him enough money for the purpose.

A decision of the Allahabad High Court furnishes another illustration.⁵³

In pursuance of an agreement the plaintiff despatched a wagonload of potatoes to the defendant. The latter refused to take delivery. The plaintiff then sent his agent to take delivery and to sell them at the available price. The defendant offered to the agent a less sum of money in full payment, which the agent accepted. The plaintiff received the money but brought an action for the balance.

It was held that the defendant could presume that the agent who was sent to sell at the available price had the ostensible authority to settle with the defendant at a less price.

In the above-cited Kerala case the court adopted from Smith and Watt's *MERCANTILE LAW*⁵⁴ the following statement on the distinction between "implied" and "ostensible authority":

"Implied authority is real authority, the exercise of which is binding not only as between the principal and the third party, but also between principal and agent. It differs only from an express authority in that it is conferred by no express words, but is to be gathered from surrounding circumstances. The term "ostensible authority", on the other hand, denotes no authority at all. It is a phrase conveniently used to describe the position which arises when one person

50. See also *Edmunds v Bushell*, (1865) LR 1 QB 97 where at p 99 COCKBURN CJ observed: "[A] well-established principle is that if a person employs another as an agent in a character which involves a particular authority, he cannot by secret reservation divest him of that authority."

51. *Daun v Simmins*, (1879) 41 LT 783.

52. *Valapad Co-operative Stores Ltd v Srinivasa Iyer*, AIR 1964 Ker 176.

53. *Ishaq v Madan Lal*, AIR 1965 All 34. See also *Trickett v Tomlinson*, (1863) 11 CBNS 663: 134 RR 688, communication to the third party that an agent was approaching him for amicable settlement, but the agent was secretly advised not to settle for a less than a certain amount, held that the other party was not bound by the secret reservation and, therefore, the settlement for a sum less than that was binding on the principal. The decision would have been otherwise if the third party had notice of the private instruction. See *National Bolivian Navigation Co v Wilson*, (1880) 5 App Cas 176, where Lord BLACKBURN observed that once an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal.

54. 177 (8th edn, 1924). *Valapad Co-operative Stores Ltd v Srinivasa Iyer*, AIR 1964 Ker 176.

has clothed another, or allowed him to assume an appearance of authority to act on his behalf, without actually giving him any authority either express or implied, by which appearance of authority a third party is misled into believing that a real authority exists."⁵⁵

Apparent Authority is Real Authority

The statement portrays the truth in Lord ELLENBOROUGH'S observation that "apparent authority is the real authority".⁵⁶ Whether there is appearance of authority in a particular case depends upon the facts of the case. An appearance of authority may, for example, arise from the course of business. A well-known authority is *Humbro v Burnard*.⁵⁷ Here an agent was authorised to underwrite insurance policies. The principal was held liable when he underwrote a guarantee policy because underwriting of guarantee policies was within the ordinary course of business of a Lloyd's underwriter.

Appearance of Authority arising from Course of Dealing

An appearance of authority may arise from the course of dealing adopted in a particular case. Thus, where a principal once authorised his servant to purchase iron on credit and paid for it, he was liable when on a subsequent occasion he sent the servant with ready cash, but the servant again incurred credit.⁵⁸ But if the original act had been unauthorised, the principal would not have been liable for the second, even if he had paid for the first. "Thus in *Barret v Irvine*,⁵⁹ it was laid down that a mother who has once paid for a horse for her infant son does not thereby raise an inference of a general authorisation to him to pledge her credit for his future equine purchases."⁶⁰

Representation of Authority by Conduct

A representation of apparent authority has to emanate from some conduct of the principal. There must be some conduct on his part which enables the agent to occupy a position of apparent authority. For example, a principal used to order goods from the plaintiff. He had a servant whom he never authorised nor ever sent out for buying goods. The servant was dismissed and after that on two occasions he bought goods from the plaintiff in the principal's name. Each time the principal paid the account in ignorance. He was held entitled to recover back the money, for he had done nothing to enable his servant to acquire an appearance of authority.⁶¹ Where a Crown agent without ever having been so authorised, sold steel plates belonging to the Crown, the latter was not bound by the sale. The agent's own

55. Cited by MATHEW J in *Valapad Co-operative Stores Ltd v Srinivasa Iyer*, AIR 1964 Ker 176, 177.

56. *Pickering v Busk*, 1812 KB 15: 15 East 38. The facts of the case are stated under *Agency by Estoppel*.

57. (1904) 2 KB 10.

58. *Hazard v Tredwell*, (1722) 1 Stra 506.

59. (1907) 2 Ir. R 462.

60. Borrowed from Hanbury, THE PRINCIPLES OF AGENCY, 28 (1952), Irish reports being not available here. See also *Gillman v Robinson*, (1825) 1 C&P 642, where BEST CJ said (at p 643): "I agree that one transaction is not enough to raise the presumption of a general authority, but several instances are sufficient."

61. *Bailey & Whites Ltd v House*, (1915) 31 TLR 583

representations could not create an apparent authority.⁶² On the other hand, in the American case of *Kannelles v Locke*,⁶³ the principal was held liable for the act of a complete imposter. The plaintiff arrived at night at a small hotel. She was greeted by a man in the corridor. He booked a room for her and took charge of her valuable articles and issued a receipt in the principal's name. He disappeared with the articles. The hotel-keeper was held liable because the imposter could not have occupied that position of apparent authority without the hotel-keeper's negligence. In *Panorama Development (Guildford) v Fidelis Furnishing Fabrics*⁶⁴ the facts were:

The plaintiff ran a cars-on-hire business. The defendant company's secretary hired cars from the plaintiff ostensibly for the company's business, telling him that the cars were wanted to carry important customers of the company. He wrote on the company's paper ordering the cars, signing himself "Company Secretary". In fact, he used the cars himself and not for the company's purposes.

It was held that the secretary had ostensible authority to enter into contracts for hiring cars for which the company must pay.

Continuance of Apparent Authority till Termination

An apparent authority once created continues to exist unless it is terminated by a notice to the third party. It cannot be terminated or restricted privately. Thus a principal who had terminated the authority of his agent who had occasionally bought wool for him was nevertheless held liable for the agent's further purchases as the supplier had no notice of the termination.⁶⁵ Similarly, where a man lived with his mistress as husband and wife and used to pay for the mistress's purchases, he was held liable for the purchases made after he had left her, because the supplier did not know of that fact.⁶⁶

Agent's Possession

The possession of servant or agent is that of his master or principal for all purposes. A suit against servant or agent cannot be maintained on the basis of such possession.⁶⁷

Statutory Provision about Apparent Authority

The doctrine of ostensible authority is given statutory shape in Section 237 of the Contract Act.

237. Liability of principal inducing belief that agent's unauthorised acts were authorised.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf

62. *Att.-Gen. for Ceylone v Silva*, 1953 A.C. 461. See also *Armagas Ltd v Mundogas SA, The Ocean Frost*, (1986) 2 A11 ER 385 agent's own representation as to charter-party.

63. (1919) 12 Ohio App 210.

64. (1971) 2 QB 711.

65. *Dodsley v Varley*, (1840) 12 A&E 632.

66. *Ryan v Sams*, (1848) 12 QB 460. In *Summers v Soloman*, (1857) 7 E&B 879, the principal became responsible to a supplier who supplied jewellery to the shop manager as usual not knowing that he had been removed.

67. *Mahabir Prasad Jain v Ganga Singh*, (1999) 8 SCC 274.

of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

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

The provision has been used in quite a few cases to fix the principal with liability for unauthorised acts of his agent.⁶⁸ The prominent among them seems to be a decision of the Nagpur High Court,⁶⁹ where a banking firm was held liable for the misappropriation of the funds of a customer by a person who, to the knowledge of the firm, was accepting deposits from customers. The Court said:

"Their Lordships of the Judicial Committee of the Privy Council ruled in *Ram Pertab v Marshall*⁷⁰ that the right of a third party against the principal on the contract of his agent though made in excess of agent's actual authority was nevertheless to be enforced when the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him."

Actual or Constructive Notice of Lack of Authority

Where, however, a person contracting with the agent has actual or constructive notice of any restriction on the agent's ostensible authority, he is bound by the restriction. Thus where an agent, authorised by a power of attorney to operate a business, but not to borrow money, produced the power of attorney to a lender whom he asked for a loan, but the lender did not read it and advanced a loan, he could not recover it from the principal as he had constructive notice that the agent had no power to borrow.⁷¹ Where a broker was permitted to receive payment for his principal's goods by drawing upon the seller a bill of exchange and securing his acceptance to it, a payment made in that manner became binding upon the principal.

68. See, for example, *Moosa Bhoy v Kristiah*, AIR 1952 Hyd 79, where a petty contractor was held liable for the money misappropriated by his agent put by him in charge of the work. See also *Dinabandhu Saha v Abdul Latif Molla*, ILR (1922) 50 Cal 258; *Virdhman Bros v Radha Kishan*, AIR 1924 Nag 79; *Ramachandran v Registrar, Co-op Societies*, AIR 1963 Mad 105; (1962) 2 MLJ 407, where a clerk of the society was held to be authorised to receive payments. Representation of authority should have been towards the particular plaintiff and not to the world unless the plaintiff acted on that wider representation. *Farquaharsan v King*, (1902) AC 325; *Long v Smyth*, (1831) 7 Bing 284; *Kerala Valley Tea Co v Lachminarayanan*, AIR 1939 Cal 14; it is necessary that the agent acted on behalf of his principal or that the principal acquiesced in his acts. *Morarji Premji v Mufi*, AIR 1924 Bom 232; (1923) 48 Bom 20.

69. *Bissessardas Kasturchand v Kabulchand*, AIR 1945 Nag 121; ILR 1945 Nag 204. An agent authorised to borrow on exceptional terms in an emergent situation, borrowed on exceptional terms without any emergency, yet the principal was held liable for the loan. *Montaignac v Shilla*, (1890) 15 App Cas 357.

70. ILR (1898) 26 Cal 701.

71. *Jacobs v Morris*, (1902) 1 Ch 816.

But where the broker was authorised to receive payment only in respect of one previous contract, that was held to be not sufficient to create an apparent authority to receive such payments in the future also.⁷² Once an ostensible authority is created, the principal becomes bound by agent's acts within the scope of such authority. He cannot rely upon any private restrictions upon the agent's authority.⁷³

Just and Reasonable Solution

The ultimate question is whether the circumstances under which a servant has made a fraudulent misrepresentation which has caused loss to an innocent party contracting with him are such as to make it just for the employer to bear the loss. Such circumstances exist where the employer by words or conduct has induced the injured party to believe that the servant was acting in the lawful course of the employer's business. They do not exist where such belief, although it is present, has been brought about through misguided reliance on the servant himself, when the servant is not authorised to do what he is purporting to do, when what he is purporting to do is not within the class of acts that an employee in his position is usually authorised to do and when the employer has done nothing to represent that he is authorised to do it. Applying these principles to the facts of a case before it, the House of Lords held that where an agent was authorised to dispose of a ship, a charter-party granted by him did not bind the principal. The sale of a ship backed by a three-year charter-party is a transaction of wholly different character from a straightforward sale.⁷⁴

Rule 8 of the Life Insurance Corporation (Agents) Rules, 1981 framed under Section 48(2)(cc) of the Life Insurance Corporation Act, 1956 prohibits agents from collecting premium on behalf of LIC. Accordingly, an implied or apparent authority could not be inferred for that purpose. The fact that LIC accepted the premium amount from him, which he had taken from his client, would not create an apparent authority in favour of the agent.⁷⁵

Agent's Authority in Emergency [S. 189]

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

72. *Kamal Singh Deegar v Corporated Engineers Ltd*, AIR 1963 Cal 454.

73. *Sarshar Ali v Roberts Cotton Assn*, (1963) 1 SC 244 (Pak); *Ram Pertab v Marshall*, (1899) 26 Cal 701, where their Lordships of the Privy Council ruled that the rights of a third party against the principal on the contracts of his agent though made in excess of the agent's actual authority were nevertheless to be enforced when the evidence showed that the contracting party had been led into an honest belief in the existence of the authority to the extent apparent to him; *Ram den v Dyson*, (1866) LR 1 HL 129, honest belief in the authority of the agent; *Moosa Bhoj v Kristiah*, AIR 1952 Hyd 79, where a petty contractor was held liable for the money misappropriated by his agent who was made by him in charge of the work entrusted to the contractor by the third party; *Fazal Illahi v E.I. Rly Co*, AIR 1922 All 324, a railway company holding out a clerk as having authority to accept consignments.

74. *Armagas Ltd v Mundogas SA, The Ocean Frost*, (1986) 2 All ER 385 HL.

75. *Harshad J. Shah v LIC of India*, (1997) 5 SCC 64; AIR 1997 SC 2459. The policy lapsed because of delay in payment by the agent. The Supreme Court ordered on compassionate grounds the insurer to pay back the total deposit amount with interest.

Illustrations

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

This section creates a special authority in emergency. It constitutes the agent into an agent of necessity to counteract the emergent situation. An act done in the exercise of this extended authority would bind the principal if the agent was not able to communicate with his principal and the course he took was necessary in the sense that it was the only reasonable prudent course left open to him and that he acted in good faith in the interest of the parties concerned.⁷⁶

Where agent exceeds authority**227. Principal how far bound, when agent exceeds authority.—**

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

Illustration

A, being owner of a ship and cargo authorises B to procure an insurance for 4000 rupees on the ship. B procures a policy for 4000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

228. Principal not bound when excess of agent's authority is not separable.—When an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Illustration

A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6000 rupees. A may repudiate the whole transaction.

Where an agent exceeds his authority, actual or apparent, the principal is not bound by the excess work, but where it is separable from the authorised work the principal is bound to that extent.⁷⁷ For example, an agent is authorised to insure a ship. He insures the ship as well as the goods under separate policies. The principal is bound only by the policy on the ship. If he had taken out only one policy in

76. The ordinary examples are an agent shipping goods from a different port because the designated port presented shipping difficulties and an agent signing a salvage agreement. *Dayton Price & Co v Rahomootallah & Co*, AIR 1925 Cal 609; *China Pacific Ltd v Food Corp of India*, (1981) 3 WLR 860 HL, noted in 1982 JBL 114. For further details see under "Agency of Necessity" *supra*. For an account of the provisions of the American Restatement on the subject, see V.G. Ramachandran, LAW OF AGENCY, notes under S. 189 at p 205 (1985 edn).

77. Section 227. The principal, being not bound, is also not entitled to claim the benefit of the work, e.g., principal not allowed to take advantage of the testimony of his agent beyond his authority. *Vijayalatha Chit Fund P Ltd v Krishna Shetty*, (1988) 1 Ker LJ 143.

excess of instructions, the principal would not have been bound.⁷⁸ Where the agent was authorised to sell half a right over a property and he contracted to sell all the rights, the principal was held to be bound to the extent of half rights, they being separable from the rest.⁷⁹

Where the authorised work is not separable from the rest, the principal may repudiate the whole of the transaction.⁸⁰ For example, an agent is authorised to buy 500 sheep. He buys 500 sheep and 200 lambs for one sum of 6000 rupees. The principal may repudiate the whole transaction.⁸¹ Where an agent was authorised to draw bills up to Rs 200 each, the principal was held not liable when the agent drew up to Rs 1000 each.⁸² Similarly, where an agent was instructed to contract for the purchase of cotton to be delivered at the end of January, the principal was held not liable when the agent contracted for delivery in the middle of that month.⁸³

Effect of notice to agent

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

Illustrations

- (a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.
- (b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learned that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

The effect of the provision is that notice given to or information obtained by an agent in the course of the business transacted by him on behalf of his principal, shall, as between the principal and third parties have the same legal consequences as if it had been given to or obtained by the principal. Acting on the principle of the section the Calcutta High Court held that where the secretary of a society was *de facto* as well as *de jure* incharge of the affairs of the society, a notice given to him of the fact that a

78. *Brains v Ewing*, (1866) 1 Ex 320.

79. *Ahamed v Mamnad Kunshi*, AIR 1987 Ker 228. Where breach of contract is caused by agent's want of authority and the purchaser through the agent loses his purchase and sues the agent, his damages can be assessed as at the date when he lost his purchase if that is a more just measure of compensation and not on the basis of the difference between the market and contract value on the completion date. He was allowed recovery on the basis of the difference on the date of judgment, that being the date when he lost his purchase. *Suleman v Shahsavari*, (1989) 2 All ER 460 Ch D.

80. Section 228.

81. Illustration to Section 228.

82. *Premhai v Brown*, (1873) 10 Bom HC 319.

83. *Avlapa Nayak v Narsi Keshawji*, (1871) 8 Bom HC App Cas 19.

partner of a firm with which the society had dealings had retired, operated as a notice to the society.⁸⁴

Knowledge of Broker

Whether a broker is acting as an agent of the assured or the insurer, depends upon the facts of each case. It has been held that when a broker has the power to bind the insurer, popularly known as "binder", he will be an agent of the insurer and his knowledge will be deemed to be the knowledge of the insurer. Thus, where a member of the broker's firm knew of the criminal past of the assured, the insurer was not permitted to deny liability on the ground that the past had not been disclosed.⁸⁵

In such circumstances an assurance given by the broker would bind the insurer. In one such case the broker orally assured that the new car purchased by the assured would be substituted under the same policy for the old. The insurer was held liable though he was not in a position to give such substitution.⁸⁶

Liability for agent's wrongful acts [S. 238]

Section 238 of the Contract Act lays down the principle by which the liability of the principal for the wrongful acts of the agent is to be determined.

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

Illustrations

- (a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.
- (b) A, the captain of B's ship signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignee.

To fix the principal with vicarious liability for the wrongs of his agent it is necessary that the wrong must have been committed in the course of the principal's business. Although the particular act may not be authorised but if it is done in the course of carrying on the authorised business, the principal is liable.⁸⁷

84. *Jani Nautamlal Venishanker v Vivekanand Co-op Housing Society*, AIR 1986 Guj 162.

85. *Woolcott v Excess Insurance Co Ltd*, (1978) 1 Lloyd's Rep 633.

86. *Stockton v Mason*, (1978) 2 Lloyd's Rep 430.

87. For example, Lord LINDLEY in *Citizens' Life Assurance Co v Brown*, (1904) AC 423, 427, stated the principle of vicarious liability in the following words: "Although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised then the master is liable for the act of his servant." This doctrine has been approved and acted upon by this Board in *Mackay v Commercial Bank of New Brunswick*, (1874) 5 PC 94; *Swire v Francis*, (1877) 3 App Cas 106, and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v English Joint Stock Bank*, (1867) 2 Ex 259, which is the leading case on this subject. It was distinctly approved by Lord SELBORNE in the House of Lords, in *Houldsworth v City of Glasgow Bank*, (1880) 5 App Cas

A master is liable for the wrongs of his servant committed in the course of the servant's employment, whereas a principal is liable for wrongs done by the agent in the course of business. The expression "course of business" has been generally taken to mean the same thing as "course of employment". Accordingly, the principles governing the master and servant relationship have been applied to that of principal and agent and also to partners. To quote Professor Street: "There has never been a time when cases on master and servant were not cited as authority in the law of principal and agent."⁸⁸

Secondly, although Section 238 speaks of "misrepresentations" and "frauds" in reference to "agreements made by agents" the principle is applicable to all cases whether an agreement is involved or not.

Misrepresentations and frauds

An agent appointed to sell his principal's goods or property has often to make statements concerning the nature and quality of the property and, in his enthusiasm to find a customer, may make exaggerated statements. The law does not like to hold the principal liable for the agent's extravagant statements unless it finds some fault with the principal himself. If, for example, the principal has authorised a false statement to be made, or knows that it is being made by the agent or keeps the real facts from the agent, obviously the principal is liable. The liability of the principal is enforced, at the option of the third party, by avoiding the contract if it is still executory or by holding the principal liable in damages. Such liability came to the principal in the following three cases:

Fuller v Wilson:⁸⁹ An estate agent stated to the purchaser that the house under sale was free from rates and taxes. The principal was aware, but the agent was not, that the house was subject to taxes and taxes were levied soon after the plaintiff purchased the house. The principal would have been held liable if the plaintiff had relied on the representation. DENMAN CJ said "...if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified, and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them."

London County Freehold & Leasehold Properties Ltd v Berkerly Property & Investment Co Ltd:⁹⁰ Negotiations were afoot for the sale of a block of flats by the defendant company to the plaintiff company. The solicitors of the plaintiff company, while going through the draft agreement, put a marginal note inquiring whether all the tenants were paying their rents regularly. The solicitors of the defendant company consulted the property manager of the company and then informed the plaintiffs, also by way of marginal note to the draft, that the tenants were paying rents regularly with immaterial exceptions. The statement turned out to be false. The defendant company was held liable in fraud because one of its

317, 326, and has been followed in numerous other cases. There can be no agency for doing wrongful acts. *A. Thangal Kunju Mudaliar v M. Venkatachalam Pillai*, (1955) 2 SCR 1196: AIR 1956 SC 246. The agent would be personally liable.

88. Street, FOUNDATIONS OF LEGAL LIABILITY, Vol 2, p 454.

89. (1842) 3 CB 58.

90. (1936) 2 All ER 1039.

agents (property manager) who knew the real facts had made a false statement, and the company has necessarily to act through its agents.

Briess v Wooley:⁹¹ A director of a company started negotiations for a contract without any authority and made fraudulent misrepresentations. Subsequently he was authorised to complete the contract, but did nothing to correct the misrepresentations. The company was held liable.

In the following cases the principals were held not liable:

Cornfoot v Fowke:⁹² The plaintiff had employed an agent to let a house. The defendant was in contact with the agent for a house. The defendant asked the agent: "if there was any objection to the house", to which he answered that there was not; the defendant entered into and signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the agreement. He claimed the right to avoid the agreement as there was fraudulent concealment of a material fact. But he was held bound by the agreement. There was no guilt in the principal because he neither knew nor had authorised the statement to be made. There was no guilt in the agent because he did not know that there was a brothel.

This decision has been criticised.⁹³ It should be the duty of the principal to apprise the agent of the whole situation, otherwise he creates the risk of innocent misrepresentation being made by the agent. Moreover, rescission is allowed even for innocent misrepresentation and there was no reason why this should not have been attributed to the principal. If the principal had himself said "there was no objection to the house" he would have been guilty of fraud, and when he gives an ostensible position to his agent to make this statement, the elementary principle that "he who acts through another is deemed to act himself" should have been followed.

Despite criticism, the decision has been followed in *Armstrong v Strain*:⁹⁴

One Mr Strain, a retired practitioner, "owned a bungalow in an area notoriously prone to produce settlements because of the heavy clay sub soil. The bungalow had suffered severely from this scourge and had already been underpinned three times".⁹⁵ He was naturally anxious to dispose it of and entrusted it to his partners for this purpose. His partners arranged it with another firm, which found Armstrongs as buyers. The bungalow was described to be "in a very nice condition" and one of the partners of the latter firm valued it at £2000 for mortgage purposes. The agents knew of the last underpinning but not of the two earlier ones. Within two months of the transaction the bungalow collapsed finally. But Armstrong's action to hold the principal liable in damages for the fraud failed. The court found no conscious falsehood and, therefore, acquitted the principal "and the unfortunate Armstrongs were left with the ruins of a bungalow".

91. (1954) AC 333; (1954) 2 WLR 832; (1954) 1 All ER 909 HL.

92. (1840) 6 M&W 358; 55 RR 655.

93. For a critical analysis of this and contrary decisions see Patrick Devlin, *Fraudulent Misrepresentation: Division of Responsibility between Principal and Agent*, (1937) 53 LQR 344; Stoljar, *THE LAW OF AGENCY*, 68 (1961) and also (1949) 12 Mod LR 44.

94. (1952) 1 All ER 139 (CA).

95. L.C.B. Gower, *Agency and Fraud*, (1952) 15 Mod LR 232.

The decision has been described by L.C.B. Gower as one that is socially undesirable and logically unsatisfying.¹ The learned writer has stated the position of English law in the following words:

The law is that a principal is not liable for fraud in respect of his agent's acts unless—

- (a) he intends or knowingly permits the agent to make a false statement, or
- (b) his agent acting within the actual or apparent scope of his authority makes a statement with knowledge of its falsity or recklessly not caring whether it be true or false.

Agent's torts

"One who chooses to do business through an agent may in certain situations be liable for a tort committed by the agent. The doctrine of *respondeat superior* (let the superior answer) will be applied to make the principal liable where the agent commits a tort while engaged in the business of the principal, or, as it is commonly said, when the tort is committed by the agent while acting in the course of and within the scope of his agency."²

"An agent kicked a boy from a moving streetcar. The principal was held liable for assault and battery.³ An agent, employed to collect evidence for his principal in a pending lawsuit, offered to bribe a witness. It was held that the act was within the course of the employment of the agent and that the principal was bound by it."⁴

It was at one time said, on the authority of *Barwick v English Joint Stock Bank*⁵ that the principal would not be liable where the agent committed a tort for his personal benefit and not for the benefit of the principal. But the House of Lords in their decision in *Lloyd v Grace Smith & Co*⁶ clearly ruled that *Barwick case* was not an authority for any such principle and that the only condition of the principal's liability is that the act in question must be within the course of the agency business. The facts of the case were as follows:

Grace Smith & Co were a firm of solicitors of some repute and respectability. Mrs Lloyd, a widow, being dissatisfied with the income of her two cottages, consulted the firm's clerk, who was in charge of the conveyancing business, as to how to improve the income. He advised her to dispose of the cottages. He asked her to bring the title deeds which she did and obtained her signature on two papers. He converted these papers into a sale deed to himself and subsequently disposed of the property and misappropriated the proceeds. It

1. LCB Gower, *Agency and Fraud*, (1952) 15 Mod LR 232 at p 234. See *Armagas Ltd v Mundogas SA, The Ocean Frost*, (1986) 2 All ER 385 where there was no ostensible authority.

2. *Atlantic Die Casting Co v Whiting Tubular Products, Inc.* 337 Mich 414; 60 NW 2d 174, reported in Stimson and Lazar, *RECENT CASES AND MATERIALS ON BUSINESS LAW*, 131 (1955).

3. *Schultz v La Crozes City Rly Co*, (1907) 133 Wis 420.

4. *Chicago City Rly Co v McMohan*, (1882) 117 Ill 485. The statement is borrowed from Spencer and Gillam, *A TEXT BOOK OF LAW AND BUSINESS*, 280 (3rd edn, 1952).

5. (1867) LR 2 Ex 259.

6. (1912) AC 716.

was held "that the firm were responsible for the fraud committed by their representative in the course of his employment".⁷

RIGHTS AND LIABILITIES OF UNDISCLOSED PRINCIPAL

The rights and liabilities of a principal under contracts made by his agent depend upon whether—

- (a) The principal's existence and name were disclosed by the agent;
- (b) The principal's existence was disclosed but not his name;
- (c) Neither existence nor name of the principal was disclosed.

Where the principal is disclosed

Where the existence of the principal is disclosed, Section 226 applies, according to which the agent's acts and contracts "will have the same legal consequence as if the contracts had been entered into and the acts done by the principal in person". The principal may sue the third party upon the contract and *vice versa*. For example, where the agent is authorised to receive payment, a payment to him discharges the third party from his liability to the principal.

The agent can neither sue nor be sued upon a contract made by him on behalf of his principal. "The contract is the contract of the principal, not that of the agent, and *prima facie* at common law the only person who can sue is the principal and the only person who can be sued is the principal."⁸

Unnamed principal

Even where the agent does not disclose the name of his principal, but discloses his own representative character, the contract will be the contract of the principal, unless there is something in its form or signature to show that the agent intended to be personally liable. Where an agent signed the contract as a broker, "to my principals", but did not disclose who the principals were, he was not personally liable.⁹ "There is nothing whatever on the contract to show that the defendant intended to act otherwise than as a broker."

Undisclosed principal

The doctrine of undisclosed principal comes into play when the agent neither discloses the existence of his principal nor his representative character. In such circumstances the question arises what are the mutual rights and liabilities of the principal, the agent and the third party.

There is nothing unusual in this doctrine insofar as the relations between the agent and the third party are concerned. Since the agent has contracted in his own name, he is bound by the contract. He may be sued on it and he has the right to sue the third party, and the principal is not liable in such case.¹⁰

But the principal too has the right to intervene and assert his position as an undisclosed party to the contract. This right of the principal is protected by the Contract Act itself. Section 231 declares:

7. The relationship of a locker-holder with the bank is that of bailee and bailor and not that of landlord and tenant. The bank will be liable if an employee fraudulently tampers with a locker. *National Bank of Lahore v Sohan Lal*, AIR 1962 Punj 534: ILR (1962) 1 Punj 566.

8. *Montgomerie v United Kingdom Steamship Assn.*, (1891) 1 QB 370, 371, per WRIGHT J.

9. *Southwell v Bowditch*, (1875) 1 CPD 374.

10. *J. Thomas & Co v Bengal Jute Making Co*, AIR 1979 Cal 20.

If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract;

This right of the principal has been described as "anomalous" because it does not fit in any of the established principles of the law of contract.¹¹

"The rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well-established, is itself an anomaly."¹²

Similarly, in Bowstead's LAW OF AGENCY¹³ the doctrine is described as "surprising but well-established by the cases." Yet the doctrine has business convenience to recommend itself. But for this doctrine, the property or money of one person would have gone to enrich the estate of another person.¹⁴ If, for example, an agent sells his principal's property in his own name and receives the price, the principal is obviously entitled to trace his money and recover it, even if the agent has gone bankrupt. An action of this kind was allowed as early as (1710) in *Gurratt v Cullum*.¹⁵

But the principal's right to sue the third party was established with an initial setback. In what has been considered to be the very first case, namely, *Scrimshire v Alderton*:¹⁶

A farmer's oats were sold by a *del credere* factor without disclosing the name or existence of the farmer. The factor became bankrupt. The farmer discovered the buyer and informed him not to pay the factor. Even so the buyer paid him.

LEE CJ was of opinion that the buyer should be responsible to the undisclosed principal in such cases. "Here being notice before actual payment, there could be no harm done." But the jury obstinately held for the defendant.

The right of the undisclosed principal to intervene and sue the third party is, however, subject to the following qualifications. They are laid down in Sections 231 and 232.

231. Rights of parties to a contract made by agent not disclosed.—If an agent makes a contract with a person who neither knows, nor has reason to suspect that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

11. Cheshire and Fifoot, THE LAW OF CONTRACT, 418 (6th edn, 1964).

12. Lord DAVEY in *Keighley Maxted & Co v Durant*, (1901) AC 240, 256. For collection of expressions like this see Muller Frieufels, *The Undisclosed Principal*, (1953) 16 Mod LR 299.

13. 13th edn by Reynolds & Davenport (1968), p 273.

14. The historical foundation of the doctrine is traced in Stoljar, THE LAW OF AGENCY, pp. 204-211 (1961).

15. (1710) Bull NP 42; Willes 400, 405-406.

16. (1743) 2 Stra 1182.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract or if he had known that the agent was not a principal, he would not have entered into the contract.

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

Illustration

A, who owes 500 rupees to B, sells 1000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

Subject to Equities

Firstly, the other contracting party would have against the principal "the same rights which he would have had against the agent if the agent had been principal". This declaration of Section 231 is further supplemented by Section 232 which says that "the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract".¹⁷ The main concern of these sections is to ensure that the third party is not put to any disadvantage by the intervention of the principal. If, for example, the agent owes some money to the third party, which the latter could have set-off against the price of the goods sold to him, he would have the same right if the principal sues him for the price.¹⁸ *Montagu v Forwood*¹⁹ is an illustration in point.

The plaintiffs, who were acting for the owners of a cargo, employed B & Co as their agents to collect from underwriters contributions in respect of general average loss. B & Co not being brokers, employed the defendants, who were brokers at Lloyd's, to collect the money, and they did so. At the time when the defendants received the money there was a debt due to them from B & Co. The defendants did not know and there was nothing to lead them to suppose, that B & Co were not acting as principals in the matter and the defendants believed that B & Co were acting as principals.

It was held that the defendants were entitled to stand in the position in which they would have stood if B & Co had really been principals; and that consequently, the

17. According to Pollock & Mulla these two sections emphasise the same principle: COMMENTARIES ON THE CONTRACT ACT, 708 (8th edn by Setalvad & Gooderson, 1957).

18. See *Greer v Downs Supply Co*, (1927) 2 KB 28, where timber was purchased under the impression that the buyer would have set-off against the seller and the undisclosed principal of the seller was not allowed to intervene.

19. (1893) 2 QB 350 (CA).

defendants were entitled to set-off against the demand of the plaintiffs for the money which they had collected the debt due to them from *B & Co.*²⁰

The illustration appended to Section 232 is more or less to the same effect.

A, who owes 500 rupees to B, sells 1000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable grounds of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

A contract to underwrite the shares of a company, i.e., to take up that portion of the shares which is not applied for by the public, was not allowed to be enforced by the undisclosed principal of the underwriter because an engagement of this kind proceeds upon the personal reputation and integrity of the underwriter.²¹

But where the third party does not believe the agent to be a principal or there are suspicious circumstances he may not be able to claim a set-off. Thus, for example, in *Cook v Eshelby*:²²

L & Co sold cotton to C, in their own names, but really on behalf of an undisclosed principal. C knew that *L & Co* were in the habit of dealing both for principals and on their own account and had no belief on the subject whether they made this contract on their own account or for a principal.

It was held that C could not, in an action brought by the principal for the price of cotton, set-off a debt due from *L & Co*.

Third Party's Right to Repudiate Executory Contract

Secondly, if the principal discloses himself before the contract is completed, the third party may repudiate the contract if he can show that if he had known who the principal was or that the agent was not the principal, he would not have contracted.²³ The right of the third party to repudiate the contract arises only when the identity of the undisclosed principal would have been so material to him that if he had known the true facts, he would not have contracted. Thus in *Said v Butt*:²⁴

A theatre ticket was purchased by a person through an undisclosed agent knowing full well that a ticket would not have been issued to him on personal grounds. It was held that the theatre-owner had the right to repudiate the contract and exclude him from admission.

It means that an undisclosed principal cannot intervene when he knows that the other party would not have dealt with him.²⁵ This principle will apply only when "some personal consideration (forms) a material ingredient".²⁶ In *Dyster v Randall*²⁷ a piece of land was purchased by somebody for an undisclosed principal. The owner

20. The court followed *George v Clagget*, (1797) 7 TR 359 and *Fish v Kempton*, (1849) 7 CB 687: 18 LJ CP 206.

21. *Collins v Associated Greyhound Racecourses Ltd*, (1930) 1 Ch 1.

22. (1887) 12 App Cas 271.

23. Section 231.

24. (1920) 3 KB 497.

25. Treitel, *LAW OF CONTRACT*, 540 (2nd edn), cited in *BOWSTEAD ON AGENCY*, 277 (13th edn by Reynolds and Davenport), (1968).

26. *Dyster v Randall*, (1926) Ch 932, 939.

27. (1926) Ch 932.

would not have sold the land to him, yet he was allowed to intervene and enforce the contract.²⁸

Undisclosed Principal cannot Intervene against Express Terms

Lastly, an undisclosed principal cannot intervene if some express or implied term of the contract excludes him from doing so. Where, for example, an agent described himself in the contract as "owner",²⁹ "proprietor",³⁰ it shows an intention to make a personal contract and consequently precludes the undisclosed principal from intervening. But where, in a contract of letting out, the agent described himself as the "landlord", evidence was allowed to show that he was only an agent. Similarly, "the description in a charter-party of one of the contracting parties as 'charterer' does not, of itself, designate him as the only person to fill that position", and the undisclosed principal was allowed to sue for the breach of the charter-party.³¹

Third Party's Right against Undisclosed Principal

Just as the undisclosed principal has the right to sue the third party, the latter has the right to sue the principal. Difficult questions in this connection have arisen where the principal has already paid the agent, trusting that he has paid or will pay the third party, but the agent has defaulted or has gone bankrupt before payment. This happened in *Davison v Donaldson*.³²

The managing owner and the husband of a ship purchased goods on credit from the plaintiff for the purposes of the ship. The undisclosed partner settled his account with the husband believing that the latter had paid the plaintiff. But he had not done so and had gone bankrupt. The plaintiff sued the principal.

The court said: "Where a person is supplied with goods it is his duty to see that the seller is paid.... Partners ought not to settle with their co-partners without satisfying themselves that the payments have been actually made."³³

PERSONAL LIABILITY OF AGENT [S. 230]

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

Presumption of contract to contrary.—Such a contract shall be presumed to exist in the following cases—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

28. Even where no personal considerations are involved and the third party was told that the agent was not acting for any principal, the third party can avoid the contract for fraud. *Archer v Stone*, (1898) 78 LT 34, cf *Berg v Sadler & Moore*, (1937) 2 KB 158.

29. *Humble v Hunter*, (1848) 12 QB 310, 317.

30. *Formby Bros v Formby*, (1910) 102 LT 116.

31. *Fred Drughorn Ltd v Rederiaktieb Olaget Transatlantic*, (1919) AC 203.

32. (1882) 9 QBD 623.

33. *Ibid.*, at p 629 per JESSEL, M.R.

- (2) where the agent does not disclose the name of his principal;
- (3) where the principal, though disclosed, cannot be sued.

It has already been seen that the chief function of an agent is to establish contractual relationship between his principal and third parties. The agent then drops out. He can neither sue nor be sued on contracts made by him on his principal's behalf. Section 230 accordingly provides: In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.³⁴ Where a consignment was landed from a ship but the consignee did not take delivery and the question arose as to who was liable to pay demurrage, it was held that the liability was solely that of the consignee and not that of the shipping agent.³⁵ Similarly, in a case before the Calcutta High Court³⁶ it was apparent from the bill of lading that the document was signed by the agent of a principal who was named in the document. There was no contract to the effect that the agent would be bound by the contract. Thus, unless it is shown that there is a contract to the effect of binding the agent, entered into on behalf of the named principal, the agent cannot be bound by it. The attachment of the bank account of the agent was not allowed to be continued. Earning of commission by the agent cannot make his agency as one coupled with interest. The mere fact that some of the persons were directors in the principal company as well as in the agency company was not a material fact when the principal was fully disclosed.³⁷

This is known as the principle of the agent's immunity from personal liability. This rule applies even where the agent has contracted beyond his authority and the principal would not be liable. Even then the agent cannot be sued on the contract if he professed to act for the principal,³⁸ though he will then be liable to compensate the third party for his loss.³⁹

But there are certain circumstances in which the agent incurs personal liability. Section 230, which incorporates the principle of agent's immunity for personal liability, says that there may be a contract to the contrary. In other words, the agent may contract to undertake personal liability. The section further goes on to provide that such contract is presumed in the following cases:

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34. See *Marine Container Services South P Ltd v Go Go Garments*, AIR 1999 SC 80, an agent of a contractor against whom there was a complaint under the Consumer Protection Act, 1986 for deficient services was held to be entitled to raise the defence of immunity and that defence could not be brushed aside without due consideration.
 35. *Board of Trustees of Port of Madras v Southern Shipping Corpn P Ltd*, AIR 2001 Mad 413. See at p 417.
 36. *Jaytee Exports v Natvar Parekh Industries Ltd*, AIR 2001 Cal 150.
 37. Another case to the same effect *Midland Overseas v C.M.B.T. Tana*, AIR 1999 Bom 401, the contract of carriage was entered into by agent on behalf of foreign principal who was named and disclosed. The agent did not undertake any personal liability. The agent could not be sued personally for the alleged breach of contract.
 38. *Lewis v Nicholson*, (1852) 18 QB 502; 88 RR 683; *Jenkins v Hutchinson*, (1849) 13 QB 744; 78 RR 500. Where the matter is doubtful as to who between the two is sueable, both should be sued. (1989) Malaysian LJ 187, SC Kuala Lumpur.
 39. This liability arises under Section 235 as that of a pretended agent. He may be also sued for deceit.

1. Foreign principal

When an agent contracts for "a merchant resident abroad"⁴⁰ there is the presumption that the agent undertakes personal liability. The original presumption of English law was that the agent alone was liable and he had no right to pledge the credit of a foreign principal. The presumption still stands, but it has declined in importance. The presumption was needed at a time when it was difficult to sue foreign principals and for the convenience of merchants a usage came into existence that the agent of a foreign principal incurs personal liability. But now on account of changed conditions of international trade, merchants trust each other and agents do not like to incur personal liability. The resulting position has been summed up by SCRUTTON LJ in the following words:

"While I think that one cannot at the present day attach the importance which used to be attached forty or fifty years ago to the fact that the supposed principal is a foreigner, it is still a matter to be taken into account in deciding whether the person said to be an English agent has or has not made himself personally liable."⁴¹

The presumption being still a part of the law, an agent can only overthrow it by contracting in a manner showing an intention not to incur personal liability. Thus, where a contract was signed "by the authority of our principals,... as agents", or "Greenwich Marine Incorporated as agents for Trader Export S.A."⁴² it was held that this was sufficient manifestation of the intention to exclude personal liability.⁴³ Where a charter-party contract was signed by agents "for and on behalf of J.M. & Co (as agents), J.A.M." they were held to be not personally liable under the charter-party, although they were described as charterers.⁴⁴ Where a contract made through an agent for the import of metallic recovery expressly provided that the obligations of the principal or seller were not enforceable against the agent, a claim for shortage in metallic recovery against the agent was held to be not maintainable.⁴⁵

By virtue of the provision in Section 230 the presumption has statutory force in India. A company registered in England, and having a place of business in India, has

40. Section 230(1).

41. *H.O. Brandt & Co v H.N. Morris & Co*, (1917) 2 KB 784, 797, in some of the cases, however, it has been stated that the presumption has ceased to exist altogether and the whole question turns upon the intention of the parties. See, for example, PRITCHARD J in *J.S. Holt & Mosley Ltd v. Sir Charles Cunningham & Partners*, (1949) 83 LIL Reports 141; quoted in Powell, *THE LAW OF AGENCY*, 252 (1961). Mr A.H. Hudson in his three contributions, namely, *Agent of a Foreign Principal*, (1960) 23 Mod LR 695, and (1957) 35 Can BR 336; *Agents for Foreign Principals*, (1966) 29 Mod LR 353 has argued that the presumption still exists as part of the law. See also *Teheran Europe Co Ltd v S.T. Belton Ltd*, (1968) 2 QB 545. The matter depends upon as to whom the third party gave credit or may be presumed to have given credit. He cannot be presumed to have given credit to a foreign principal about whom he knows nothing. *James Macintosh & Co v Sree Yamuna Mills Co Ltd*, (1990) 2 Ker LJ 141.

42. *Tudor Marine Ltd v Tradax Export S.A.*, (1976) 2 Lloyd's Rep. 135.

43. *Miller, Gibb & Co v Smith & Tyre Ltd*, (1917) 2 KB 141. See also *Lilly v Smales*, (1892) 1 QB 456, where also the mode of signature excluded liability of the agent who mistakenly quoted a wrong rate of freight.

44. *Universal Steam Navigation Co v James McElvie & Co*, (1923) AC 492. The liability of an agent does not arise where the principal has contracted directly. *Union of India v Chinoy Chablani & Co*, AIR 1982 Cal 365.

45. *Nandan Iron and Metal Industries v Fenesty Inc*, AIR 1992 Del 364.

been held to be a foreign principal for the purposes of this presumption and the Indian agent acting for it was held personally liable.⁴⁶

2. Principal unnamed

The presumption of agent's personal liability arises when he "does not disclose the name of his principal". Where an agent contracts for an undisclosed principal, he definitely is personally liable, being a party to the contract. But when he contracts for an unnamed principal, there is only a presumption of his personal liability. The presumption may arise even where the agent discloses his representative character, but not the name of his principal. Accordingly, the honorary secretary of a school was held personally liable for the rent of a house hired by him in his own name though for purposes of the school.⁴⁷ But where an agent disclosed his character as the secretary of a club, personal liability could not be imposed on him.⁴⁸ The same result would follow where the representative character is already known to the third party.⁴⁹ But in every such case the form of contract will be the deciding factor. In an English case, a broker signed a contract in his own name, but had added: "Messrs Southwell, to my principal, etc." It was held that he was not personally liable.⁵⁰ "There is nothing whatever in the contract to show that the defendant intended to act otherwise than as broker."⁵¹ Where an order was placed over telephone by a broker to another broker for the supply of bunkers, the ordering broker was held to be not personally liable. The general practice in placing orders by telephone was not to disclose the name of the principal and, moreover, the supplier already knew that the order was sent by a broker.⁵² Where, on the other hand, the usual mode of operation over telex of a forwarding agent was to remark, without disclosing the name of the principal, "We can do this for you", he was held personally liable, though in that case he indicated the name of the liner to whom he was forwarding the goods.⁵³

3. Non-existent or incompetent principal

An agent is presumed to incur personal liability where he contracts on behalf of a principal who, "though disclosed cannot be sued". An agent who contracts for a minor, the minor being not liable, the agent becomes personally liable. This result may not, however, follow where the other party already knows that the principal is minor.⁵⁴ Similarly, where promoters buy goods on behalf of a projected company they become personally liable to pay for them. The company, being not in existence at the time of the contract, cannot be sued.⁵⁵ Now, by virtue of the provision in Section 9(2) of the European Communities Act, 1972, an agent of an unformed principal will be deemed to be contracting personally so as to entitle him to sue and

46. *Tutika Basavraj v Parry & Co*, (1903) 27 Mad 315. See also *Radhakrishna Sivadutta Rai v Tayeballi Dawoodbhai*, 1962 Supp (1) SCR 81, 101, 103; AIR 1962 SC 538.

47. *Bhojabhai v Hayen Samuel*, (1898) 22 Bom 754.

48. *North-Western Provinces Club v Sadullah*, (1898) 20 All 497.

49. *Mackinon v Lang*, (1881) 5 Bom 584.

50. *Southwell v Bowditch*, (1876) 1 CPD 374.

51. *Per* JESSE MR, *ibid*.

52. *N.&J. Vlassopoulos v Ney Shipping Ltd*, (1977) 1 Lloyd's Rep 478.

53. (1977) 2 Lloyd's Rep 57.

54. *Shet Manibhai v Bai Rupaliba*, (1899) 24 Bom 166.

55. *Kelner v Baxter*, (1866) 2 CP 174. By virtue of S. 9(2) of the European Communities Act, an agent of an unformed company becomes personally liable. See *Phonogram Ltd v Lane*, (1981) 3 All ER 182 CA.

be also sued on the contract. The Calcutta High Court did not permit an agent of the Russian Government to be sued personally because it was neither averred nor proved that the Government of Russia could not be sued in India or elsewhere. The mere fact that such a suit required permission of the Government of India could not be taken to mean that no suit was possible.⁵⁶

Election by Third Party [S. 233]

In all the above situations "where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable." The only illustration given in the section says:

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

This seems to be a departure from the English law, where the third party has to elect between the liability of the principal or agent and the election once made is final and binding on him.⁵⁷ If, for example, he has obtained judgment against the agent, he cannot afterwards sue the principal even if the judgment against the agent has remained unsatisfied.⁵⁸ But this rule has been criticised.⁵⁹ Clearly it is contrary to justice that T should not be able to sue P if his judgment against A is unsatisfied. The rule works particularly harshly where T does not even know of P's existence until after he has obtained judgment against A.⁶⁰

It is perhaps for this reason that the Indian Legislature marked a departure from the English rule and allowed the third party to sue the agent and the principal jointly. COUTTS-TROTTER CJ of the Madras High Court doubted whether this was the intention of the Legislature and opined that the English rule should be followed.⁶¹ But a subsequent Division Bench of the same High Court disagreed with him. LEACH CJ said: "There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule, which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter, but we are not called upon to consider that question here."⁶² Earlier the Bombay High Court had also held that the section plainly intends to create joint liability.⁶³

But it seems that even under this section some kind of election is likely to be involved. The third party has to choose between the liability of the agent, or the principal or both and the choice once made shall bind him.⁶⁴

56. *Union of India v Chinoy Chablani & Co*, AIR 1976 Cal 467.

57. *Kendall v Hamilton*, (1879) 4 App Cas 504.

58. Mere commencement of proceedings constitutes evidence of election but that is rebuttable. *Clarkson Booker Ltd v Andjel*, (1964) 2 QB 775.

59. See the dissenting judgment of Lord PENZANCE in *Kendall v Hamilton*, (1879) 4 App Cas 504, where he described it as "unbending and indiscriminate".

60. Powell, *THE LAW OF AGENCY*, 270 (1961, 2nd edn).

61. *Kuttikrishnan Nair v Appa Nair*, (1926) 49 Mad 900, 902: AIR 1926 Mad 1213.

62. *Shamsuddin v Shaw Wallace & Co*, (1939) Mad 282: AIR 1939 Mad 520.

63. *Shivlal Motilal v Birdi Chand*, (1917) 19 Bom LR 370.

64. This opinion is expressed in Pollock & Mulla, *THE INDIAN CONTRACT AND SPECIFIC RELIEF ACTS*, 712 (8th edn) by Setalvad & Gooderson, 1957.

Election may be express or implied from conduct. An implied election takes place when the third party debits the account of the principal or the agent,⁶⁵ receives a negotiable instrument from one or the other in payment of the price, or sues one or the other. Filing of a suit is a strong *prima facie* evidence of election, but is not conclusive.⁶⁶

Estoppel of Third Party [Section 234]

234. Consequences of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

One method of electing between the principal and the agent is indicated by Section 234. If the third party leads the agent to believe that only the principal will be held liable or the principal to believe that only the agent will be held liable, he cannot afterwards change his stance. He would have to confine himself to the liability of a person whom he has selected by that process. Thus where a purchaser of goods gave notice to the seller's agent that the agent alone would be held responsible if the goods did not turn out to be of contract quality, he could not proceed against the principal.⁶⁷

4. Pretended agent [S. 235]

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

Thus where a person pretends to act as the agent of another, he may be saved by the principal by ratifying his act. But if no ratification is forthcoming the pretended agent becomes personally liable to the third party for any loss that he may have suffered by relying upon the representation of authority. It would make no difference to his liability that he honestly believed that he had the authority in question or that, even if he did not have it, his principal would ratify his act.⁶⁸ The false representation must be the cause of the contract. A person who acknowledged the liability of a firm pretending to be one of its partners was held to have incurred personal liability under the acknowledgment.⁶⁹ Since the action in such cases is

65. *Addison v Gandasequi*, (1812) 4 Taunt 574.

66. *Scarf v Jardine*, (1882) 7 App Cas 345; *Clarkson Booker Ltd v Andjel*, (1964) 2 QB 775 (CA).

67. *Madhava Ganga Pd v Gouri Shanker*, (1949) 1 Cut 453; AIR 1950 Ori 42.

68. *Collins v Wright*, (1857) 8 E&B 647, approved: *Starkey v Bank of England*, 1903 AC 114 followed, *V/o Rainaimport v Guthrie & Co Ltd*, (1966) 1 Lloyd's Report 1. For comments: Reynolds, 83 LQR 189.

69. *Bheek Chand v Prabhuji*, AIR 1963 Raj 84; (1963) 13 Raj 84.

under the tort of deceit, tort principles as to damages would apply rather than those applicable to breach of contract.⁷⁰ If the truth is already known to the other party, no liability arises.⁷¹

Where the pretension is as to a matter of law, the agent would not be liable. For example, the borrowing power of a company is a matter of interpretation of its constitutional documents and governing statutes. A misrepresentation as to this will not create liability.⁷² But whether borrowing powers have been exhausted, is a question of fact. Liability would follow if this fact is misrepresented.⁷³

The agent himself cannot sue on a contract which he has made pretending to be an agent. This disability is clinched upon him by Section 236.

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

When a person has, in fact, no principal, yet persuades the other to contract with him as an agent of another, he is estopped from saying that he had no principal, and since the contract was with his principal and not with him he has no *locus standi* to sue under that right. This will be so whether he feigns a named or unnamed principal.⁷⁴ Where a shipping agent gave a personal commitment of issuing a bill of lading after mate's receipt but did not do so, he was held personally liable to the principal for the tort of conversion and for breach of contract under Section 73 of the Contract Act.⁷⁵

5. Breach of warranty of authority

Closely allied to the liability of a pretended agent is the liability of an agent for breach of warranty of authority. Where a person is in fact an agent, but exceeds his authority, or represents to have a kind of authority which he in fact does not have, he commits breach of warranty of authority and is personally liable to the third party for any loss caused to him by reason of acting on the false representation.⁷⁶ This is the principle of *Collins v Wright*⁷⁷.

W was land agent for one G. W agreed to grant to the plaintiff a lease of G's farm for 12½ years. He honestly believed that he had the authority to do so. But G refused to execute the lease and he proved that he had given no such authority to the agent. W, having died in the meantime, the plaintiff sued his

70. *Vairavan Chettiar v Avicha Chettiar*, (1915) 38 Mad 275.

71. *Shet Manibhai v Bai Rupaliba*, (1899) 24 Bom 160, a mother representing herself to be the agent of her minor son, was held not liable as the other party already knew the principal's minority; *Jones v Hope*, (1880) 3 TLR 247; *Lilly, Wilson & Co v Smales Esles & Co*, (1892) 1 QB 456; *Halbet v Lens*, (1901) 1 Ch 344.

72. *Saffron Walden B.S. v Rayner*, (1880) 14 Ch D 406.

73. *Oliver v Bank of England*, (1901) 1 Ch 652, 660; *Rashdall v Ford*, (1866) LR 2 Eq 750; *Cherry v Colonial Bank of Australasia*, (1869) LR 3 PC 24; *Weeks v Property*, (1873) LR 8 CP 427.

74. *Sewdutt Roy Maskara v Napapiet*, (1907) 54 Cal 628; *Nand Lal Roy v Gurupada Haldar*, (1924) 51 Cal 588; 81 IC 721; *Shree Shree Gopal Sridhar v Shashibhushan*, (1932) 60 Cal 111; AIR 1933 Cal 109.

75. *Nepal Food Corpn v U.P.T. Import and Export Ltd*, AIR 1988 Cal 263.

76. *Ganpat Pd v Sarju*, (1911) 9 All LJ 8.

77. (1857) 8 E&B 647; 27 LJ QB 215; 30 LT 209.

executors for the loss he had suffered in entering upon the farm, and they were held liable.

WILLES J said:⁷⁸ "The fact that the professed agent honestly thinks that he has authority that affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person, or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person, professing to contract as agent for another, impliedly, if not expressly, undertakes to or promises the person who enters into such contract, upon the faith to the professed agent being duly authorised, that the authority which he professes to have does in point of fact exist."⁷⁹

Similarly, in *Young v Toynbee*⁸⁰ an agent was held liable for prosecuting an action even after his principal, though unknown to him, had become insane, for the insanity had determined the agent's authority at once. An agent was held liable to a person to whom he chartered his principal's ship without authority of the principal who repudiated the transaction.⁸¹ An agent gives warranty of his authority; he does not guarantee that, if the contract is within authority, the principal would not commit breach.

RATIFICATION

The doctrine of ratification comes into play when a person has done an act on behalf of another without his knowledge or consent. The doctrine gives the person on whose behalf the act is done an option either to adopt the act by ratification or to disown it. Ratification is thus a kind of affirmation of unauthorised acts. It is thus explained in Section 196:

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

Where, for example, a person insures the goods of another without his authority, the owner may ratify the policy and then the policy will be as valid as if the agent had been authorised to insure the goods.⁸²

Ratification may be expressed or implied. Section 197 provides:

78. *Collins v Wright*, (1857) 8 E&B 647 (657): 27 LJ QB 215: 30 LT 209.

79. The principle of this case applies to all cases where a person induces another to do an act on the faith of his representation. See, for example, *Starkey v Bank of England*, (1903) AC 114, transfer to consols by the bank on the faith of the defendant's representation that he had the power of attorney to authorise the transfer; *Sheffield v Barclay*, (1905) AC 392, a banker innocently inducing a corporation to act on the basis of a forged deed; *Bank of England v Culter*, (1908) 2 KB 208, the agent innocently introducing certain person as the owner of stock, when he was not so in fact.

80. (1901) 1 Ch 344.

81. *Weigall v Runciman*, (1916) 85 LJKB 187, the agent was authorised to hire a ship but he mistook the instruction and let out a ship.

82. *Williams v North China Insurance Co*, (1876) 1 CPD 757; *Secy of State in Council for India v Kamachee Boye*, 7 Moore IA 476, unauthorised act of an agent ratified by the Government.

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

Illustrations

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

Where the manager of an insurance company effected an assurance which he had no authority to do, but the company accepted the money which was received under the policy, that was held to be a sufficient ratification.⁸³ "Ratification will be implied from any act showing an intention to adopt the transaction, even silence or mere acquiescence⁸⁴ and if an act is adopted at all, it will be held to have been adopted throughout." Ratification of a contract required to be in writing need not be in writing, but ratification of a contract made by deed must be by deed.⁸⁵

Requirements of ratification

A valid ratification has to fulfil certain conditions. Some of them are as follows:—

1. On Behalf of Another

In the first place, it is necessary that the act in question must have been done on behalf of the person who wants to ratify it. The agent must profess to act as an agent and on behalf of an identifiable principal. "It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."⁸⁶ If the agent acts in his own name and "makes no allusion to agency"⁸⁷ his act cannot be ratified by any other person, even if the agent in his secret mind intended to act for another. This is the principle of the famous case of *Keighley, Maxted & Co v Durant*.⁸⁸

K.M. & Co, authorised their agent to buy Karachi wheat at specified rates on their joint account. Wheat was not obtainable at those rates. He bought wheat from Durant at a higher rate. He did so in the hope and confidence that his act would be adopted by the principals, but he never mentioned the principals and contracted in his own name. The principals approved the purchase, but, when the price of wheat fell, refused to take delivery. Durant sued the agent and the principals for breach of contract.

83. *Hukumchand Ins Co v Bank of Baroda*, AIR 1977 Kant 204. A mere participation in arbitration proceedings has been held to be no ratification. *Union of India v K.D. Rallia Ram*, (1964) 3 SCR 164; AIR 1963 SC 1685. *Bhavani Shanker v Gordhandas*, AIR 1943 PC 66, 68. Ratification becomes effective when it is communicated. *Raja Gopalacharyulu v Secy of State*, 38 Mad 997.

84. *Allard v Bourne*, (1863) 15 CBNS 468; *Smith v Hull Glass Co*, (1852) 11 CB 897; *Bank of Mellie Iren v Barclays Bank*, (1951) 2 TLR 1057, silence of landlord as to repairs by tenant.

85. CHITTY ON CONTRACTS, 9, para 2019 (24th edn, 1977), citing *Commercial Banking Co of Sydney v Mann*, (1916) AC 1.

86. *Watson v Swann*, (1862) 11 CB (NS) 756, 771, WILLES J: 31 LJ (CP) 210.

87. Cheshire and Fifoot, THE LAW OF CONTRACT, 405 (6th edn, 1964).

88. (1901) AC 240.

But the principals were held not liable. The agent, having contracted in his own name, his act was not open to anybody's ratification and, therefore, the purported ratification was ineffective. Lord MACNAGHTEN said:

"... [B]y a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? On principle I should say certainly not. . . . [O]bligations are not to be created by, or founded upon, undisclosed intentions."⁸⁹

Similarly Lord JAMES said:

"To establish that a man's thoughts unexpressed and unrecorded can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of, seems a somewhat difficult task."⁹⁰

The words "on behalf of another" as used in Section 196 expressly recognise this rule.⁹¹ The section, however, does not insist upon the name of the principal being disclosed. Marine insurance policies are often effected on behalf of anybody interested and are, therefore, open to anybody's ratification.⁹² Where the act is purported to be done on behalf of another, that other may ratify even if the agent used his name to commit a fraud upon the third party.⁹³

2. Competence of Principal

Since ratification relates back to the date when the contract was originally made by the agent, it is necessary that the principal who purports to ratify must be in existence at the time of the contract and should also be competent. It is this principle which prevents a person from ratifying a contract made by him during his minority. Similarly, a company cannot ratify a contract made in its name before its incorporation.⁹⁴ But this is subject to the provisions of the Specific Relief Act, 1963. Section 15 of the Act⁹⁵ provides that where the promoters of a public company have made a contract before its incorporation, for the purposes of the company, and if the contract is warranted by the terms of incorporation, the company may enforce it.

89. *Keighley, Maxted & Co v Durant*, 1901 AC 240 at p 247.

90. At p 251 *ibid*.

91. See, for example, *Raja Rai Bhagwat Dayal v Debi Dayal Sahu*, (1908) 35 IA 48, 58; *Raghavachari v Pakkiri Mohammad*, (1916) 30 Mad LJ 497, 501; *Raghavachari v M.A. Pakkiri Mohd Rowther*, 30 Mad LJ 497, an agent buying in his own name against the directions of his principal a property at a court auction, the principal's subsequent ratification of no effect.

92. *Hagedorn v Oliverson*, (1814) 2 M&S 485; *Arnold, MARINE INSURANCE*. In other cases, there is a general insistence that the principal should be named and disclosed. *Boston Fruit Co v British & Foreign Marine Ins Co*, (1906) AC 336, 338-339.

93. *Tiedemann & Ledermann Freres, Re*, (1899) 2 QB 66. After ratification the principal is bound by the act whether it is to his advantage or detriment and whether liability therefor is founded in contract or in tort, to the same extent and with all the same consequences as if it has been done by his previous authority. *Wilson v Tinsman*, (1843) 6 Man & G 236, 242; 64 RR 770; the agent is similarly bound, *Foster v Bates*, (1843) 12 M&W 226; *Lawson (Inspector of Taxes) v Housmester Machine Co Ltd*, (1966) 2 All ER 944, 951; (1966) 1 WLR 1300 CA.

94. Except as provided in Specific Relief Act, 1963, an unincorporated company is not able to act before incorporation. *Kelner v Baxter*, (1866) LR 2 CP 174; 15 LT 213; (1861-73) All ER Ext 2009; *Empress Engg Co, Re*, (1880) 16 Ch D 125; *Ganesh Flour Mills Co v Piran Mal*, (1905) Punj Rec No 2. An unauthorised act once ratified does not create an authority for such future acts. *Irvine v Union Bank of Australia*, (1877) 3 Cal 280, 285-286.

95. Section 23 of the Indian Specific Relief Act, 1877, now repealed.

"Warranted by the terms of incorporation" means within the scope of the company's objects as stated in the memorandum. The contract should be for the purposes of the company. A contract to allot shares after the company is incorporated is not for the purposes of the company so that the company cannot enforce it against the other party.⁹⁶

Section 19 of the same Act provides that the other party can also enforce the contract if the company has adopted it after incorporation and the contract is within the terms of incorporation.

3. What Acts can be Ratified [S. 200]

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

Illustrations

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

ONLY LAWFUL ACTS CAN BE RATIFIED.—Only lawful acts are open to ratification. An act which is void from the very beginning cannot be ratified. The Privy Council observed in a case⁹⁷ that ratification "must be in relation to a transaction which may be valid in itself and not illegal". Where money was entrusted to a person for investment and he put it to his own use, it was held by the Privy Council that the doctrine of ratification could not be used to validate this breach of fiduciary obligation.⁹⁸

Subject to this, any act may be ratified "whether it is founded on a tort or on a contract". A forgery of signatures, being a crime, cannot be ratified.⁹⁹ A minor's agreement being void cannot be ratified by him on attaining majority.

96. *Imperial Tea Mfg Co v Munchershaw*, (1899) 13 Bom 415.

97. *La Banque Jacques-Cartier v La Banque d'Epargne*, (1887) 13 App Cas 111, an appeal from the Province of Quebec. Void acts cannot be ratified. *Mulam Chand v State of M P*, (1968) 3 SCR 214: AIR 1968 SC 1218; *State of UP v Murari Lal*, (1971) 2 SCC 449: AIR 1971 SC 2210. No ratification of a Government contract made in contravention of Article 299(1) of the Constitution. Their Lordships observed: "There can in truth be no notification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of illegality." *Premila Devi v People's Bank*, AIR 1938 PC 284; *United Provinces Govt v Church Missionary Trust Assn*, AIR 1948 Oudh 54. A void agreement may not be ratifiable. *Damish Mercantile Co v Beaumont*, (1951) Ch 680, unauthorised proceedings held to be ratifiable.

98. *Murugappa Chetti v Official Assignee of Madras*, (1937) 64 IA 343: AIR 1937 PC 296.

99. *Brook v Hook*, (1871) 6 Exch 89. For ratification of Government contracts see *Chaturbhuj Vithaldas Jasani v Moreshwar Parashram*, 1954 SCR 817: AIR 1954 SC 236. There may, however, be estoppel against forgery, i.e., the principal may by prior or subsequent conduct be deprived of his right to say that there was forgery of signature. *Greenwood v Martins Bank Ltd*, (1933) AC 51.

ACTS WHICH WOULD BECOME INJURIOUS BY RATIFICATION.—Similarly, acts which would become injurious to others by ratification cannot be ratified. This principle is incorporated in Section 200 which says that an act cannot be ratified which by ratification “would have the effect of subjecting a third person to damages”.¹ The illustrations to the section are that an unauthorised notice terminating a lease cannot be ratified.²

ACTS DONE ON BEHALF OF GOVERNMENT.—Such acts are ratifiable in the same way in which private acts can be. In one of the cases it was observed:³ “If there had been any doubt about the original intention of the Government, it has clearly ratified and adopted the acts of its agents which according to the principle in *Buron v Denman*⁴ is equivalent to previous authority.” Thus acts of public servants in excess of their authority may be ratified by the Government.

Where public officers exceed their authority the State will be liable only to the extent it has expressly or impliedly ratified or approved the acts of such officers. This was laid down specifically as early as 1861 in *Collector of Masulipatam v Cavalry Vencata Narriapah*,⁵ where the court said:

“The acts of a Government officer bind the Government only when he is acting in the discharge of certain duty within the limits of the authority or if he exceeds that authority, when the Government in fact or in law directly or by implication ratifies the excess.”

4. Knowledge of Facts [S. 198]

198. Knowledge requisite for valid ratification.—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

“To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were.”⁶

1. For example, ratification of a contract after its breach by the third party. *Kidder Minister v Hardwick*, (1873) LR 9 Exch 13.
2. Facts of this kind were involved in *Cassim Ahmed v Eusuf Haji Azam*, (1916) 23 Cal LJ 453, where notice to quit was given by one of joint lessors and the other joint lessor was not allowed to ratify it.
3. *Secy of State v Kamachee Boyce*, 7 Moore IA 476, 539.
4. (1848) 2 Ex 167.
5. (1861) 8 Moore IA 529, 554 PC. *Buron v Denman*, (1848) 2 Ex 167 ratification of the acts of a British Naval Commander and thereby making them sovereign acts and therefore entitled to sovereign immunity. *Chatturbhuj v Moreswar*, 1954 SCR 817, ratification of contracts made without complying with Art. 299 of the Constitution. For a full account of such cases see V.G. Ramachandran, LAW OF AGENCY, 270-278 (1985).
6. See *Fitzmaurice v Bayley*, (1856) 6 E&B 868 where the principal without knowledge of the fact whether the agent had exceeded authority, stood by his acts whatever they were. Compare: *Haseler v Lemayne*, (1858) 5 CB (NS) 530; *Marsh v Joseph*, (1897) 1 Ch 213, followed in *Gouri Shanker v Jwala Prasad*, AIR 1930 Oudh 312; *Tukaram v Madhorao*, AIR 1948 Nag 293, ratification of contract made on behalf of a minor without the knowledge of facts.

5. *Whole Transaction* [S. 199]

199. Effect of ratifying unauthorised act forming part of a transaction.—A person ratifying any unauthorised act done on his behalf, ratifies the whole of the transaction of which such act formed a part.

A person cannot ratify a part of the transaction which is beneficial to him and repudiate the rest. So a ratification of a part of a transaction operates as a ratification of the whole of the transaction.⁷

6. *Within Reasonable Time*

A ratification to be effective must come within reasonable time.⁸ If a time is fixed for performance of the contract, ratification must come before that time otherwise it will be too late.⁹ For example, a tender for supply of eggs was approved by a board, but not formally. The time for commencement of performance was September. Before this date the tender was withdrawn. The board ratified its approval of the tender on October 6. It was held this was too late as it was done after the date fixed for performance.¹⁰ Similarly, a policy of fire insurance was not allowed to be ratified after the occurrence of the loss, because the owner himself could not have insured at that time.¹¹ The only exception is marine insurance, where a policy can be ratified even after the owner has come to know of the loss.¹² "The principal has no right to pause and wait for the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial. He is bound if he decides to notify his determination in a reasonable time provided he has an opportunity of doing it."¹³

Effects of Ratification

Ratification has the following effects:

- (1) It establishes the relationship of principal and agent insofar as the act ratified is concerned between the person ratifying and the person doing the act.
- (2) Ratification establishes the relationship of contract between the principal and the third party.

7. *Hovill v Park*, (1806) 7 East 164; *Commercial Banking Co of Sydney v Mann*, (1916) AC 1; *Bristow v Whitmore*, (1861) 9 HL Cas 391, principal bound to perform the contract in its entirety.
8. *Portuguese Consolidated Copper Mines, Re*, (1890) 45 Ch D 16.
9. *Dibbins v Dibbins*, (1896) 2 Ch 348. It is observed in POLLOCK ON CONTRACTS that ratification must in every case be within a reasonable time and where a time is expressly delimited within which an act must be done, ratification after the time has expired will not serve.
10. *Metropolitan Asylum Board v Kingham & Son*, (1890) 6 TLR 217. *Dibbins v Dibbins*, (1896) 2 Ch 348.
11. *Grover & Grover Ltd v Mathews*, (1910) 2 KB 401.
12. *Williams v North China Ins Co*, (1876) 1 CPD 757.
13. *Prince v Clarke*, (1823) 1 B & C 186. Followed, *Madura Municipality v Alagiriswami Naidu*, AIR 1939 Mad 957, 960; *Phillips v Humphrey*, (1871) 6 Ch App 779; *Morrel v Studd*, (1913) 2 Ch 648.

Doctrine of Relation Back

Ratification relates back to the date on which the agent first contracted. Section 196 declares that if an unauthorised act is ratified by the person on whose behalf it was done, "the same effects will follow as if they had been performed by his authority". Thus there is a contract between the principal and the third party, not from the date of ratification, but from the date when the agent first contracted. One of the effects of relation back is demonstrated by *Bolton Partners v Lambert*¹⁴.

The defendant made an offer to the managing director of a company who, having no authority to do so, accepted it. That gave the company an option to ratify the contract. But the company ratified only after the defendant had withdrawn his offer. The company sued the defendant for specific performance. The company was held entitled to it. The company's ratification related back to the date on which the managing director first accepted the offer. Thus there was a contract between the company and the defendant from that date. The defendant's revocation of his offer was ineffective. LINDLEY LJ believed that it was not a question of withdrawal of offer, but withdrawal from contract. The managing director having accepted the offer, though without authority, there was contract, and it was not an offer, but a contract that was ratified. He said:

"I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view on the contrary appears to be that the doctrine as to retrospective action of ratification is applicable."¹⁵

The decision has been criticised on the ground that it leaves the third party in a worse position than he would have been in if he had contracted with the principal, for then he would have revoked his offer until the principal had accepted it.¹⁶ But if he contracts through an unauthorised agent, he neither has a contract (until ratified) nor can withdraw from it. The *American Restatement* suggests a different rule:

"To constitute a ratification, the affirmation of a transaction must occur before the other party has manifested his withdrawal from it either to the purported principal or to the agent, and before the offer or agreement has been otherwise terminated or been discharged."¹⁷

The decision has also been justified. The defendant had contracted to sell the property for certain price and was given the same terms. The ratification had not caused him any prejudice.¹⁸

14. (1889) 41 Ch D 295.

15. *Ibid.*, at pp. 308-309.

16. See, for example, NORTH J in *Portuguese Consolidated Copper Mines, Re*, (1890) 45 Ch D 16, 21. Lord LINDLEY himself observed in a subsequent case: "The decision presents difficulties, and their Lordships reserved their liberty to reconsider it if on some further occasion it should become necessary to do so." *Fleming v Bank of New Zealand*, (1900) AC 577. See also George R. Tamaki, *The rule in Bolton v Lambert*, 19 Can BR 733; Wambaugh, *A Problem of Ratification*, (1895) 9 Har LR 60; Fry on SPECIFIC PERFORMANCE, 3rd edn.

17. Section 88, RESTATEMENT.

18. See Stoljar, *THE LAW OF AGENCY*, 190-191, (1961); Powell, *THE LAW OF AGENCY*, 143 (2nd edn, 1961).

But the general trend of opinion is against the decision. That is why it is not to be extended and was not followed in *Watson v Davies*¹⁹.

The defendant offered to sell his property to a charitable institution. The offer was accepted by a few members of the board "subject to approval by full members of the board". The day on which the board was to meet, the defendant withdrew his offer. The board ratified it and brought an action for specific performance.

The ratification was held to be too late, and the revocation effective. MAUGHAM J said: "An acceptance by an agent... subject in express terms to ratification by his principal is legally a nullity until ratified, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance."²⁰

The above decision may be said to constitute an exception to the principle in *Bolton Partners v Lambert*²¹. Another exception is where ratification would prejudice the interests acquired by others. For example, an unauthorised stoppage of goods in transit cannot be ratified after the transit has ended.²²

The doctrine of relation back does not come into play where the contract made by the agent says that it is "subject to approval or ratification". In such cases the other party would have the option to withdraw until ratification.²³ Retrospective ratification also becomes ruled out where the agent and third party have already by mutual consent cancelled the contract.²⁴

19. (1931) 1 Ch 455.

20. At pp 468-469.

21. (1889) 41 Ch D 295.

22. *Bird v Brown*, (1850) 4 Exch 786; also not where third parties have in the meantime acquired property rights. *Whitehead v Taylor*, (1839) 10 A&E 210.

23. *Ibid* and *Warehousing and Forwarding Co of East Africa Ltd v Jafferli & Sons Ltd*, 1964 AC 1.

24. *Walser v James*, (1871) LR 6 Ex 124.

Determination of Agency

The relationship of principal and agent may end in any of the ways mentioned in Section 201.¹

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

The section provides for the following modes of termination:

1. Revocation;
2. Renunciation by agents;
3. Completion of business;
4. Principal or agent's death;
5. Principal or agent becoming person of unsound mind;
6. Insolvency of principal;
7. Expiry of time.

These modes are considered below:

By Revocation [S. 203]

The principal may revoke his agent's authority and that puts an end to the agency.

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

Section 207 further provides that revocation may be expressed or implied in the conduct of the principal. An illustration appended to the section says:

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

Thus where the owner of a colliery appointed a sole selling agent for his coal for seven years, it was held that the owner could sell the colliery even before the expiry of this period and thus terminate the agency. He was not bound to keep his colliery.² Lord PENZANCE said:³

1. See generally *Khila Dhish v Mool Chand*, (1969) 3 SCC 411, 413-414.

2. *Rhodes v Forwood*, (1876) 1 App Cas 256. Other cases of the same kind are *Martin-Baker Aircraft Co v Canadian Flight Equipment Ltd*, (1955) 2 QB 556; (1955) 2 All ER 722; *Spenborough UDC's Agreement, Re*, (1968) Ch 139; *Richard v Koefod*, (1969) 1 WLR 1812, 1814. The principle laid down in *Llanelly Rly & Dock Co v L&NW Rly Co*, (1875) LR 7 HL 550 that there would be a presumption of perpetual duration in contracts specifying no time-limit, does not apply to agency. See Carnegie, 85 LQR 392 and Treitel, *THE LAW OF CONTRACT*, 570 (5th edn, 1979).

3. At p 272 *ibid*.

"Upon such an agreement as that... unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as a matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive."

Similarly, an agent had provided a charter-party to the owner of a ship to run for a period of 18 months, the agent receiving commission on hire paid and earned. The owner sold the ship to the charterers within four months. The charter-party ended and so did the agency. The agent could not recover any damages, for the principal was not bound to keep the ship for the period of the charter-party.⁴ An agent was appointed by a shirt manufacturer as a canvasser and traveller for five-year period to sell such goods as may be forwarded to him. The principal's factory was burned down by a chance fire while there were still three years for the agency to go. The principal never resumed business and ended the agency. He was held liable in damages as the agency seemed to have been created for a definite term.⁵

An agency was deemed to have ended automatically by operation of law when a war broke out between the two countries to which the principal and agent respectively belonged.⁶ This is so because "agency as a contract is determined by any event which terminates a contract".⁷

Revocation may be express or implied. Section 207 so provides in the following words:

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

Illustration

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

An example of implied revocation was found in a case in which a father, after executing a power of attorney in favour of his son, fell into strained relations with

4. *French & Co Ltd v Leeston Shipping Co*, (1922) 1 AC 451; *E.P. Nelson & Co v Rolfe*, (1950) 1 KB 139, also involving sale of the subject-matter of agency.
5. *Turner v Goldsmith*, (1891) 1 QB 544. See also *M.S. Desai & Co v Hindustan Petroleum Corpn Ltd*, AIR 1987 Guj 19 where it was held that the termination of the dealership by an instrumentality of the State raises wider questions than mere breach of contract. *Madhabananda Nayak v State of Orissa*, AIR 1998 Ori 1, an agency under the public distribution system was held to have been wrongfully terminated when the alleged points of misconduct on the part of the agent were not proved. A similar matter, *Ashok Agarwal v State of Orissa*, (1996) 82 Cut LT 239. Declaration of Government policy that agencies for National Savings Certificates should not be given to relatives of employees was held to be not a good ground for termination of existing agencies, *Union of India v V.P. Parukutty*, AIR 1997 SC 1903.
6. *Stevenson & Sons Ltd v Akt fur Cartonnagen Industries*, (1917) 1 QB 842. Another example of justified termination, *G.L. Kilikar v State of Kerala*, (1971) 3 SCC 751; AIR 1971 SC 1196.
7. Treitel, *LAW OF CONTRACT*, 570 (5th edn, 1979), citing *English v Dedham Vale Properties Ltd*, (1978) 1 WLR 93.

him so that the son became an adversary and was, therefore, no more capable of acting as an agent.⁸

Revocation is subject to the following conditions:

Revocation operates prospectively [S. 204]

204. Revocation where authority has been partly exercised.—

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

Illustrations

- (a) A authorises B to buy 1000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.
- (b) A authorises B to buy 1000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Even where the agent has partly exercised his authority, the principal may revoke it for the future. But it is irrevocable "as regards such acts and obligations as arise from acts already done in the agency". Where, for example, an agent has been appointed to buy something for the principal and he has purchased it by involving his personal liability, his authority cannot be revoked. Where a sale deed was executed by an agent under his power of attorney before his power was revoked by a newspaper notification, it was held that it could not upset the deed already executed and the registration of the deed could not have been refused because of the revocation.⁹

Where the agent carries on business even after his authority has been revoked by the principal, the latter cannot recover profits, if any, made by the agent in that business.¹⁰ The agent cannot have any claim to remuneration for a period after the revocation.¹¹ He can, however, recover compensation for wrongful dismissal. He may even restrain his principal from appointing any other person in his place if there was a restrictive covenant to that effect.¹²

8. *Amrik Singh v Sohan Singh*, (1988-1) XCIII Punj LR 541.

9. *Kishni Devi v State of Rajasthan*, AIR 1992 Raj 24, following *Goswami Malti v Purushottamlal*, AIR 1984 Cal 297; *Nand Ballabh Gurnani v Maqbool Begam*, (1980) 3 SCC 346; 1981 All Rent Cases 516 SC; *J.D. Pathak v V.B. Barot*, AIR 1982 Guj 317; *Kailash v Sub-Registrar of Assurances, Indore*, AIR 1985 MP 12 and *Krishna Gopal Kataria v State of Punjab*, AIR 1986 P&H 328. An auctioneer's authority is revocable before he knocks down but not afterwards, *Hare and O'More, Re*, (1901) 1 Ch 93; *Warlow v Harrison*, (1859) 120 ER 920.

10. *Harihar Prasad Singh v Kesho Prasad Singh*, AIR 1925 Pat 68.

11. *Denmark Productions Ltd v Boscobel Productions Ltd*, (1969) 1 QB 699; *Roberts v Elwells Engineers Co Ltd*, (1972) 2 QB 580; *Freedland*, 32 Modern LR 314; *Drake*, 1969 JBL 113; remuneration earned up to the date of revocation remains recoverable. *Madusudan Sen v Rakal Chandra Das Basak*, AIR 1916 Cal 698, if the agent continues to work for the legal heirs, a new agency is created.

12. *Decro-Wall International SA v Practitioners in Marketing Ltd*, (1971) 1 WLR 361.

Notice precedent to revocation [S. 206]

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

Where an agency has been created for a fixed period, a reasonable notice would be necessary to terminate it.¹³ The length of notice will depend, among other things, upon the length for which the agency has continued. Thus the Privy Council held that "the notice of 3½ months given by the respondents was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expense incurred by the agents".¹⁴ Their Lordships would have accepted without question that two years was a reasonable notice.

Liability to compensate [Ss. 205-206]

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

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

If the agency is determined without reasonable notice, "the damages thereby resulting to the agent must be made good" by the principal. Where an agency has been created for a fixed period, compensation would have to be paid for its premature termination, if the termination is without sufficient cause. Reasonable notice for premature determination of an agency was not given. The agent was earning Rs 4000 per month. The court was of the view that at least three months' notice should have been given. A compensation of Rs 12,000 was accordingly allowed.¹⁵ The liability to pay compensation does not arise where the agency is not for a fixed period. The Madras High Court did not allow any compensation to the agent for the unilateral termination of an agency, which though created without any

13. A termination without notice is ineffective. *Om Prakash Pariwal, Re*, AIR 1988 Cal 143, FCI terminating the agency of a storing agent without notice. The requirement of notice is mandatory. *Popular Shoe Mart v K. Srinivasa Rao*, (1989) 2 Andh LT 541.

14. *Sohrabji v Oriental Government Security Assurance Co*, AIR 1946 PC 9, per Sir JOHN BEAUMONT. See *Shipping Corpn of India Ltd v Machado Bros*, (1996) AIHC 3869 Mad, termination of agency held bad because on the reorganisation of the firm, the agency was continued, subsequent termination on that ground not proper; notice was necessary before termination, which was not given.

15. *J.K. Sayani v Bright Bros*, AIR 1980 Mad 162.

stipulation for its duration, had lasted from 1952 to 1964.¹⁶ Thus no compensation is payable in the following cases:

- (1) Where the agency has not been created for any definite period;
- (2) Where, though created for a specified length of time, reasonable notice for its termination has been given or the termination is otherwise based upon a sufficient cause.

Agency coupled with interest [S. 202]

In certain circumstances, however, an agency becomes irrevocable. This happens when the agent is personally interested in the subject-matter of agency. Section 202 provides:

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

Illustrations

- (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
- (b) A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

In the well-known case of *Smart v Sanders*¹⁷ WILDE CJ stated the rule thus:

"Where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest, and which is commonly said to be irrevocable."¹⁸ The simplest case of such agency occurs when the principal owes something to the agent and authorises him to sell the principal's goods and pay himself out of the sale proceeds.¹⁹ But an authority to pay debts which the principal owes to some third person does not make the agency irrevocable.²⁰ In a case before the Madras High Court, a person was entitled to be maintained out of the income of a property, known as *tarwad* property. He was subsequently given the authority to

16. *Bright Bros v J.K. Sayani*, AIR 1976 Mad 55.

17. (1848) 5 CB 895; 17 LJ (CP) 258; 11 LT (OS) 178.

18. *Ibid.*, at p 917. Citing from *Clark v Lawrie*, (1857) 2 H&N 159. The agency is irrevocable during the subsistence of such security or interest. *Frith v Frith*, (1906) AC 254. *Corporation Bank v Lalitha H. Hala*, AIR 1994 Kant 133, mere declaration that the agency is coupled with interest does not make the power of attorney irrevocable.

19. *Pestonji v Maichett*, (1870) 7 BHC App Cas 10; *Subrahmania v Narayanan*, (1901) 24 Mad 130; *Subba Rao v Varadaiah*, AIR 1943 Mad 482, buyer authorised to pay off mortgage out of sale proceeds in his hands. *Jogabhai v Rustomji Nasarvanji*, (1885) 9 Bom 311, an assignment of a debt is not revocable.

20. *Clerk v Laurie*, (1857) 2 H&N 199; 155 RR 489. See also *Bristow & Porter v Taylor*, (1817) 6 Stark 50.

collect rents of the property. The authority was held to be not revocable.²¹ In another case before the same High Court, in consideration of advances made by the plaintiff, all the properties of a *devason* were given over to him on lease for 18 years with authority to receive rents. That was held to be an authority coupled with interest and, therefore, irrevocable.²² Thus the essence of the matter is that "[t]he agent has, as it were, bought his authority in order to ensure the payment of a debt due from the principal".²³ Where an agent was authorised to do all acts in connection with the performance of a contract and to receive running payments, it was held to be an equitable assignment of the contract for a consideration making the arrangement irreversible.²⁴ The amounts payable to the agent were not permitted to be attached for the debts of the principal, but the rest of the amounts, such as security deposits and retention money, which were not assigned, remained attachable.

An agency of this kind is not even terminated by the principal's death.²⁵ A principal owed a sum of money to his agent and gave him an accepted bill of exchange with an authority to fill in the drawer's name. The principal died before the agent could complete the bill. His authority to fill in the drawer's name was held to be not terminated.²⁶ But the matter is not free from controversy. For, in *Watson v King*,²⁷ Lord ELLENBOROUGH said: "How can a valid act be done in the name of a dead man?" Commenting upon the decision, Powell says: "The decision overlooks the fact that an authority coupled with an interest is really a transfer of property."²⁸ An authority coupled with interest is also not determined by the principal's insolvency.²⁹

Interest Existing at the Time of Creation of Agency

But the doctrine of agency coupled with interest is not without qualification. In the first place, the interest of the agent must exist at the time of the creation of the agency.³⁰ "[T]his doctrine applies only to cases where the authority is given for the purpose of being a security, or... as a part of the security: not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only."³¹ This statement of the law

21. *Paliyankotan Kuruvan Parambath & Chattu Kutti Nair v Kundan Appa*, AIR 1932 Mad 70.

22. *Chathu Kutti v Kundan Appa*, AIR 1932 Mad 70.

23. Powell, *THE LAW OF AGENCY*, 392 (2nd edn, 1961).

24. *Joseph George v Cochin Sanitary Wares*, (1991) 2 Ker LT 447.

25. *Maharani Shantadevi v Savjibhai H. Patel*, (1999) 2 Guj CD 3190 (Guj), in the absence of express contract for termination, even death of the principal would not result in termination of such an agency. The agency in this case was for the development and construction activity on land for weaker sections of society.

26. *Carter v White*, (1883) 2 Ch D 666.

27. (1815) 4 Camp 272.

28. *THE LAW OF AGENCY*, 388, f.n. 5 (1961, 2nd edn).

29. *Alley v Hotsan*, (1815) 4 Camp 325. The Supreme Court has held in *Loonkaran Sethiya v Ivan E. John*, (1969) 1 SCR 22; AIR 1969 SC 73 that where an agency is created for valuable consideration and the agent is given authority to secure his interest, the authority cannot be revoked.

30. *Kodayya v Narasimhalu*, 20 Mad 97 (1893), advance given for the purpose of getting agency and to recoup from proceeds, irrevocable.

31. WILDE CJ in *Smart v Sandars*, (1848) 75 RR 849. See *M. John Kotalah v A. Divakar*, AIR 1985 AP 30, it was a power of attorney to manage an estate, the agent was to receive

occurs in *Smart v Sanders*.³² In this case goods were consigned to a factor for sale and he subsequently made advances to his principal on the credit of the goods. It was held that the subsequent advance could not convert the agency into one coupled with interest. "The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable, but such an effect will not arise independently of agreement."³³ An agency created by an irrevocable power of attorney for enabling the agent to construct houses on the land of the principal for sale was held to be an agency coupled with interest. The court said that the interest of the agent need not be a pre-existing interest. Such interest may be created simultaneously with the agreement. The agent had to seek approval of the building plan. His agency was not allowed to be revoked.³⁴ An agency created through power of attorney authorising the agent to apply for renewal of permits of the vehicles and, if necessary, to replace the vehicles by transferring them and spend money for this purpose, the agency was held to be one coupled with interest and, therefore, not revocable to the prejudice of the interest. The acts done by the agent within the scope of his authority were held to be binding on the principal.³⁵

Protection of Existing Interest, Primary Purpose of Agency

Secondly, "the test to be applied for finding out whether a power of attorney given to an agent is irrevocable or not is to see whether the primary object in giving the power was for the purpose of protecting or securing any interest of the agent. If the primary object was to recover on behalf of the principal the fruits of his decree and, in doing so, the agent's rights were also incidentally protected, then the power is revocable".³⁶ Similarly, the prospect of earning a commission is not an interest for this purpose.³⁷ Again, a "mere arrangement that the plaintiff's salary should be paid out of the rents could not be regarded as giving to the agent an interest in the property, the subject-matter of the agency, within the meaning of Section 202".³⁸

commission at the rate of 5% of the market value of the property. Held, this was not an agency coupled with interest.

32. *Ibid.*

33. *Per WILDE CJ*, 75 RR at p 862.

34. *Shantidevi Pratap Singh Rao Gaekwad v Savjibhai S. Patel*, (1998) 2 Guj LR 1521, investment by the agent on the basis of the promise creates an interest.

35. *Goutham Surana & Sons v K. Kesavakrishnan*, (1995) 1 Mad LJ 493. The court considered *Board of Revenue, Madras v Annamalai & Co P Ltd*, AIR 1968 Mad 50, debtor authorising the creditor-banker to sell his properties to pay himself, held, agency coupled with interest.

36. *MOCKET J* in *Palani v Krishna Swami*, (1946) ILR Mad 191. In *Dalchand v Hazarimal*, AIR 1932 Nag 34, security given as against a pre-existing debt, S. 202 does not apply.

37. *Lakshmi Chand v Chotooram*, (1900) ILR 24 Bom 403; even where the commission agency was for a period of five years it did not become one coupled with interest. *Edward Dickson & Co v Williams & Co*, (1893) 6 TLR 316. The earning of commission by a booking and shipping agent was held to be not an interest for the purposes of the section. *Shri. D. S. Narayan v Parvati Induram Ltd*, AIR 20-ii Cal 150 at p 155.

38. *Wishniak Lary v Bimchandani*, ILR (1881) 5 Bom 753. The agent with power authorisation to sell is authorised to deduct his commission from sale proceeds. *Lipin v Chintamani*, AIR CB 744 and of an agent for execution of a decree, his remuneration to be paid for on the proceeds of the decree. *Dalini Vannan v Krishnaswami Koner*, AIR 1946 Mad 9, a factor's authority is revocable. *Jafferbhoy v Charlesworth*, 17 Bom 520 (1893).

Renunciation by agent [S. 206]

An agent may renounce the business of agency in the same manner in which the principal has the right of revocation. In the first place, if the agency is for a fixed period, the agent would have to compensate the principal for any premature renunciation without sufficient cause.³⁹ Secondly, a reasonable notice of renunciation is necessary. Length of notice is to be determined by the same principles which apply to revocation by the principal.⁴⁰ If the agent renounces without proper notice, he shall have to make good any damage thereby resulting to the principal.⁴¹

Completion of business [S. 201]

An agency is automatically and by operation of law determined when its business is completed. Thus, for example, the authority of an agent appointed to sell goods ceases to be exercisable when the sale is completed. He cannot afterwards alter the terms of the sale.⁴² But the Allahabad and Calcutta High Courts have held that agency is not terminated on the completion of the sale but continues until payment of the sale proceeds to the principal.⁴³

Death or insanity [S. 201]

An agency is determined automatically on the death⁴⁴ or insanity⁴⁵ of the principal or the agent. Winding up of a company or dissolution of a partnership has the same effect.⁴⁶ Acts done by the agent before death would remain binding. Where an attorney appointed a counsel for his principal, it was held that such an appointment would survive the death of attorney.⁴⁷ The court cited the following passage from *Business etc. Industrial Co Ltd v Interchem Corpn*⁴⁸. "An attorney is merely an agent of the principal and what he does, he does for the principal. So long as the principal is alive, any act done by the attorney or his counsel is valid and continues to be valid irrespective of the fact whether the attorney is alive or dead. But the counsel for the attorney cannot act if the principal is dead." A reading of Section 201 makes it clear that on the death of an agent his agency comes to an end but it does not obliterate acts done by the agent on behalf of the principal during the tenure of his agency.

Where a principal authorised his power of attorney to present a document disposing of his property for registration, but the principal died before the agent

39. Section 205.

40. See Revocation, *supra*.

41. Section 206.

42. *Blackburn v Scholes*, (1810) 2 Camp 343; 11 RR 723; *Venkatachalam v Narayanan*, (1914) 39 Mad 376. In the matter of an agency for collection of bills and remitting the amount, agency terminates as soon as the drafts are despatched to the principal. *Alliance Bank of Simla v Amritsar Bank*, AIR 1915 Lah 214.

43. *Babu Ram v Ram Dayal*, (1890) 12 All 541; *Fink v Baldeo Das*, (1899) 26 Cal 715.

44. *Campanari v Woodburn*, (1854) 15 CB 400; *Pool v Pool*, (1889) 58 LJP 67.

45. *Younge v Toynbee*, (1910) 1 KB 215.

46. *Salton v New Breston Cycle Co*, (1900) 1 Ch 43; see also *Brace v Calder*, (1895) 2 QB 253; *Harold Fielding Ltd v Mansi*, (1974) 1 All ER 1035.

47. *Nasib Kaur v Chanan Singh*, (1991-1) 99 Punj LR 216.

48. 1970 Current LJ 387.

could do so, a subsequent registration was held to be invalid. In this case the Registrar also knew that the principal was dead.⁴⁹

Principal's insolvency [S. 201]

An agency ends on the principal being adjudicated insolvent.⁵⁰

On expiry of time [S. 201]

"Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not."⁵¹

Effects of termination [S. 208]

208. When termination of agent's authority takes effect as to agent, and as to third persons.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

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

As between the principal and the agent, the authority of the agent ends when he comes to know of the termination. Where, for example, the authority of an agent appointed to sell goods is revoked, but he sells the goods before receiving the letter of revocation, the sale is good. Illustration (a) is relevant to this point.

But as regards third persons, the agency does not terminate until they come to know of the fact of termination. Where, for example, an agent sells the principal's goods even after receiving notice revoking his authority, the sale is binding on the principal and the buyer gets a good title provided he did not know of the fact of

49. *Mujib-un-Nisa v Abdul Rahim*, (1901) 23 Aii 233; 28 IA 15. *A.B. Ramulu v B. Yadagir*, (1993) 2 Andh LT 425, proceedings could not be continued by the power of attorney after the death of the principal without taking power from legal representatives.

50. *Elliott v Jurquand*, (1881) 7 App Cas 79; involency of an agent would also have the same effect if it makes him unfit to perform his duties, *McCall v Australian Wheat Co Ltd*, (1870) 19 WR 188.

51. *Lalljee v Dadabhai*, (1915) 23 Cal LJ 190, 202, per MOOKERJEE J.; AIR 1916 Cal 964.

termination. Illustration (b) is relevant to this point.⁵² Where the power of attorney-holder executed the sale deed in favour of the third party who had already paid the price to the principal under an agreement with him, the principal became bound though he had terminated the power of attorney but the third party was not aware of the fact of termination at the crucial moment.⁵³ The court cited the following passage from the decision of the Madras High Court in *Khatoon Bivi Ammal v Arulappa Nadar*:⁵⁴ "Policy of law apparently in the interest of trade and commerce is that the agent's action should bind the principal even though the principal might have cancelled the agent's authority, unless the third party with whom the agent enters into the contract know of the termination of the agency." The court also placed reliance upon the judgment in *Trueman v Loder*.⁵⁵ Here A traded as B's agent. With the authority of B, all parties with whom A made contracts in that business, were held to have a right to hold B liable to them until B gives notice to the world that A's authority is revoked and it makes no difference if in a particular case the agent intended to keep the contract on his own account. The court repelled the contention that it was very unreasonable to expect that the principal should inform the whole world that he has cancelled the power of attorney given to his agent and that he cannot be expected to approach everybody with whom the agent was likely to enter into a contract and inform him of the cancellation."

Even when the agency is terminated by the death of the principal, the termination is effective only when it comes to the knowledge of the agent. Illustration (c) is relevant to this point. A wife was authorised by her husband to keep buying goods from a dealer. The husband became a person of unsound mind. The wife kept up her purchases from the seller, the latter not knowing of the husband's incapacity. The husband was held liable to pay for the goods.⁵⁶

Termination of Sub-Agency

When the authority of an agent terminates, it entails the termination of the authority of all sub-agents appointed by him. Section 210 is as follows:

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

The allotment of works to a contractor is not the creation of an agency or sub-agency for the purposes of this section.⁵⁷

52. Where in the case of a partnership firm the authority of partners could be terminated by a public notice which was not done and the bank not knowing took acknowledgment from a partner, the same was effective. *Assiamma v State Bank of Mysore*, (1950) 1 Ker LT 18.

53. *Kashi Ban v Raj Kumar*, AIR 2000 Raj 405. Other authorities of the same kind, *Kulsekharapatnam Hand Match Workers Co-operative Storage Industrial Society Ltd v Radhesh Lalitani*, AIR 1971 MP 191; *Janardhan v Ganga Ram*, AIR 1951 Nag 313; *Dasrath v Brojo Mahan*, 22 IC 90; *Union of India v Moti Lal Kamath*, AIR 1962 Pat 384 (DB).

54. *Khatoon Bivi Ammal v Arulappa Nadar*, AIR 1973 Mad 76.

55. (1840) 11 Ad & Cl 589.

56. *Drew v Nunn*, (1879) 4 QBD 651. Registration of a transfer deed effected by a person whose authority had ended, held void. *Sekar Mudaliar v Shajathi Bi*, AIR 1987 Mad 239.

57. *Dalmia Cement (Bharat) Ltd v T.V. Coenen*, (1957) 1 Ker LT 534.

Agent's duty on termination [S. 209]

Section 209 gives the duty of the agent on termination.

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Section 210 provides that the termination of an agent's authority amounts to termination of all sub-agents appointed by him. Section 209 charges the agent with duty to protect his principal's interest where the principal has died or become a person of unsound mind.

*Specific Relief Act, 1963*The
Specific Relief Act, 1963¹

[Act 47 of 1963]

[13th December, 1963]

*An Act to define and amend the law relating to certain
kinds of Specific Relief*

Prefatory Note.—The following extract from the Statement of Objects and Reasons is given below:

“This Bill seeks to implement the recommendations of the Law Commission contained in its Ninth Report on the Specific Relief Act, 1877, except in regard to Section 42 which is being retained as it now stands. An earlier Bill on the subject introduced in the Lok Sabha on the 23rd December, 1960, lapsed due to dissolution. The notes on clauses, extracted from the Report of the Law Commission, explain the changes made in the existing Act.” (*Vide* Gazette of India, Extra., Part II, Section 2, dated June 15, 1962.)

Be it enacted by Parliament in the Fourteenth Year of the Republic of India as follows:—

PART I
PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called the Specific Relief Act, 1963.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date² as the Central Government may, by notification in the Official Gazette, appoint.

Act not exhaustive

Though Specific Relief Act widens the sphere of the civil court, its preamble shows that the Act is not exhaustive of all kinds of specific reliefs. The Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields. Even so, the Act does not cover all specific reliefs conceivable.³

1. The Act received the assent of the President on 13th December, 1963 and published in the Gazette of India, Extra, Part II, Section 1, dated 16th December, 1963.

2. March 1, 1964, *vide* Notification No S.O. 189, dated January 13, 1964, Gazette of India, Part II, Section 3(ii), p. 214.

3. *Ashok Kumar Srivastav v National Insurance Co Ltd*, (1998) 4 SCC 361; 1998 SCC (L&S) 1137; (1998) 2 LLN 987; (1998) 2 LLJ 699.

2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) “obligation” includes every duty enforceable by law;
- (b) “settlement” means an instrument [other than a will or codicil as defined by the Indian Succession Act, 1925 (39 of 1925)] whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of;
- (c) “trust” has the same meaning as Section 3 of the Indian Trusts Act, 1882 (2 of 1882), and includes an obligation in the nature of a trust within the meaning of Chapter IX of that Act;
- (d) “trustee” includes every person holding property in trust;
- (e) all other words and expressions used herein but not defined, and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings respectively assigned to them in that Act.

3. Savings.—Except as otherwise provided herein, nothing in this Act shall be deemed—

- (a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract; or
- (b) to affect the operation of the Indian Registration Act, 1908 (16 of 1908), on documents.

4. Specific relief to be granted only for enforcing individual civil rights and not for enforcing penal laws.—Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the mere purpose of enforcing a penal law.

SPECIFIC RELIEF

Introduction to the outline of the Act

A large number of remedial aspects of law have been taken care of by the Specific Relief Act of 1963 (47 of 1963). This Act is a replacement of the earlier Act of 1877. A mere declaration of rights and duties is not sufficient to give protection to life and property. Enumeration of rights and duties must be supplemented by legal devices which can help the individual to enforce his rights. Every person who is injured in the social process must have a social redress. Only then it will be possible to say that human societies have been so organised as to assure that wherever there is a wrong there must be a remedy. This is the mission of the Specific Relief Act. Generally, remedies are also provided by the branch of substantive law which defines rights and duties for its own purposes. The law of contract provides the remedy of damages for breach of contract. The law of torts similarly provides for recovery of damages in several cases of tortious wrongs.

Substantive laws, however, can never afford to be exhaustive in terms of their remedies and reliefs. Scope remains for an Act whose only purpose is to provide a network of reliefs in certain specific terms. Such an Act does not confer any right in itself. It only provides a specific relief so as to remedy the violation of a legal right. The network of reliefs allowed by the Act falls under the following outlines:

1. *Recovery of Possession of Property*

Though the Specific Relief Act is concerned only with the enforcement of civil rights and not penal laws, even civil law has to take care of certain rights, the violation of which is capable of creating serious violent clashes, and these are rights to possession of property. The very first chapter provides relief to those who have been dispossessed of their property.

2. *Specific Performance of Contracts*

One of the most important aspects of civil rights is the fulfilment of expectations created by a contract voluntarily made by the parties. Contracts are at the base of almost all economic relations. All employments and professions are contract bound. All property, whether business assets or personal, remain locked up under contracts. For example, money in banks and in other forms of investment is contractually bound. Thus contracts constitute the modern wealth. They are sacred *per se*. Moreover, a particular contract is not just an isolated transaction. It is often a link in a chain of several contracts. A failure at one place can cause a serious dislocation of economic and social life. Contracts must be enforced. But the only way the law of contract can enforce a contract is by awarding compensation to the injured person. In many cases, however, compensation fails to serve the economic purpose of the contract. A hospital is, for example, interested in the fulfilment of its requirements and not in receiving compensation from a failed supplier. There was thus the need for a remedy which would compel a defaulting contractor to actually perform his contract. This important function is undertaken by the second chapter of the Specific Relief Act under the heading: SPECIFIC PERFORMANCE OF CONTRACTS.

3. *Rectification and Cancellation of Instruments and Rescission of Contracts*

Many transactions are required by law to be in writing. Many more transactions are put into writing because of expediency. A written transaction is an instrument. An instrument is the result of negotiations. Occasionally it happens that the instrument that emerges fails to express the intention of the parties. Its rectification may become necessary. Accordingly, Chapter III of the Specific Relief Act helps parties who want to have their mistakenly executed documents rectified.

Closely allied with documents mistakenly executed is the category of documents which are afterwards discovered to be void or which become void. They ought to be cancelled. Chapter V provides relief from such kinds of documents.

Then there is a category of contracts which, for one reason or another, such as, for example, lack of free consent, are voidable at the option of the party whose consent was not free. He has a right to have the contract rescinded. Relief by way of rescission is provided by Chapter IV of the Act.

4. Preventive Relief

There are cases in which the nature of the contract does not admit of specific performance, nor damages are likely to serve any purpose. In such cases the court may have to restrain the party threatening breach, to the extent to which it is possible to do so. For example, a person contracts to sing at a particular place and also undertakes not to sing elsewhere during the same period. He threatens breach. The court cannot force him to sing. The positive side of the bargain is not specifically enforceable. But the negative undertaking "not to sing elsewhere" can be enforced by restraining him from giving his performances elsewhere. When he is so prevented from resorting to other openings, it may exert some pressure upon his mind and he may be persuaded to go ahead with the performance of his contract. This type of remedy is known as preventive relief. It is granted by issuing an order, known as "injunction", upon the party concerned directing him not to do a particular act or asking him to perform a particular duty, known as a mandatory injunction. Such relief is granted under the provisions of Part III of the Act running from Chapter VII to the end.

5. Declaratory Relief

There is one more matter of which the Specific Relief Act takes care and that is "declaratory relief". Occasionally it may happen that a person is entitled to some status or character or has a right in some property, but there are persons who are denying him the enjoyment of his right. He is allowed by Chapter VI of the Specific Relief Act to proceed against any person who is denying or interested in denying him his right and the court may issue a general declaration as to his entitlement to such right (declaratory decrees).

Recovery of possession of immovable property

Section 5 of the Specific Relief Act, 1963 provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, 1908.

5. Recovery of specific immovable property.—A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

This section deals with action for recovery of possession of specific immovable property based on title. The essence of the section is that whoever proves a 'better title' is a person 'entitled to possession'. The title may be on the basis of ownership or possession. Thus, suppose A enters into peaceful possession of land claiming it as his own although he might have no title to it, still he can sue another who has forcibly ousted him from possession and who has no better title to it, because A, although he has no legal title, has at least a possessory title. The purpose behind Section 6 is to restrain a person from using force and to dispossess a person without his consent otherwise than in due course of law.⁴

4. *East India Hotels Ltd v Syndicate Bank*, 1992 Supp (2) SCC 29, 36, lease premises had to be vacated because of fire, earlier the lessor had terminated the lease on expiry of term, the lessee was seeking extension for another term, whether the lessee was entitled to be put back into possession, directed to be referred to larger Bench.

A suit under Section 5 is an ordinary suit under the general law and the plaintiff has to prove that he has a better title. Further, specific performance can be decreed only against the executant of the contract having the right to dispose of the property in question.⁵

It is a principle of law that a person who has been in long continuous possession of an immovable property, can protect the same by seeking an injunction against any person in the world other than the true owner. It is also well settled that even the owner of the property can get back his possession only by resorting to the due process of law.⁶

6. Suit by person dispossessed by immovable property.—(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such suit.

(2) No suit under this section shall be brought—

- (a) after the expiry of six months from the date of dispossession; or
- (b) against the Government.

(3) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

(4) Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

Sections 5 and 6 give alternative remedies and are mutually exclusive. Under Section 5 a person dispossessed can get possession on the basis of title, whereas under Section 6 a person dispossessed may recover possession merely by proving previous possession and subsequent wrongful dispossession. Under Section 6 he need not prove a better title against the occupier. The occupier will not be allowed to show his title by ownership, contract, prescription or inheritance.

Clause (4) of Section 6, however, provides that the person against whom a decree may be passed under clause (1) of Section 6 may, notwithstanding such a decree, sue to establish his title and to recover possession.

The objects of Section 6 are:

- (i) To discourage people from taking the law into their own hands, however good their title may be.
- (ii) To provide a summary, cheap and useful remedy to a person dispossessed of immovable property otherwise than in due course of law.

Section 6 is applicable only if the plaintiff proves—

- (1) that he was in juridical possession of the immovable property in dispute;

5. *Annappoorani Ammal v G. Thagapalam*, (1989) 3 SCC 287.

6. *Prataprai N. Kothari v John Braganza*, (1999) 4 SCC 403; AIR 1999 SC 1666.

- (2) that he had been dispossessed without his consent and otherwise than in due course of law; and
- (3) that the dispossession took place within six months from the date of the suit.⁷

Possession here means legal possession which may exist with or without actual possession and with or without a rightful origin. Thus where a trespasser is allowed to continue on the property and the owner sleeps upon his rights and makes no efforts to remove him, he will gain possession under Section 6. The possession of a tenant after the termination of the tenancy continues to be a juridical possession. His right to possession remains unless the owner gets a decree of eviction against him. Till then if he is dispossessed he is entitled to seek restitution of his possession.⁸ In the matter of the struggle of the Express Newspapers P. Ltd against the Union of India⁹ the Supreme Court reminded the Government that even where a perpetual lease for construction of an office block provided for the lessor's right of re-entry upon forfeiture of lease upon breaches of the conditions of the lease, the lessor would not have the right to declare such forfeiture all by itself and then take to itself to throw out the lessee either directly or through the summary procedure under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The Court said that where a breach is found, the lessor must adopt the due process of law by filing a civil suit to enforce the right of re-entry. Such a lessee is not an "unauthorised occupant" of a "public premises". He will be entitled to relief against such eviction.

Regarding appeals, the section itself says that there is no right of 'appeal' against a decree in a suit under this section. Similarly a 'review' of the decision is also barred. But a revision under Section 115, CPC may lie to the High Court, although courts have not favoured this remedy because the aggrieved party has another remedy open to him by way of a regular suit.

An interesting question may arise: Whether an action under Section 6 can be maintained in relation to incorporeal or intangible property, e.g. right of ferry, right of fishery, right to collect rents, right to cut grass, etc. There is a conflict of decisions on the point. The High Courts of Bombay and Madras have answered this question in the affirmative.¹⁰ These courts have held that a man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which interfered with it is removed. But a contrary view has been expressed by the Calcutta High Court,¹¹ which has pointed

7. *Nair Service Society Ltd v K.C. Alexander*, (1968) SCD 500: AIR 1968 SC 1165. *Tirupati Devasthanams v K.M. Krishnaiah*, (1998) 3 SCC 331: AIR 1998 SC 1132, where the suit for possession could not be filed within 6 months, the court said that a regular civil suit could be filed thereafter.

8. See *K.K. Verma v Union of India*, AIR 1954 Bom 358: 1954 ILR Bom 950; *Yeshwant Singh v Jagdish Singh*, AIR 1968 SC 620; *Krishna Ram Mahale v Shobha Venkat Rao*, (1989) 4 SCC 131: AIR 1989 SC 2097; *Krishna Kishore v Govt. of A.P.*, (1991) 1 SCC 184: AIR 1990 SC 2292, the provision is founded more on public policy rather than on jurisprudence. *S.R. Ejaz v T.N. Handloom Weavers' Co-op Society Ltd*, (2002) 3 SCC 137, the tenant proved that he was dispossessed, remand of the matter after a long period was held to be wrongful because it had defeated the very purpose of the summary remedy.

9. *Express Newspapers P Ltd v Union of India*, (1986) 1 SCC 133: AIR 1986 SC 872.

10. *Mangaldas v Jivan Ram*, 23 Bom 673; *Krishna v Akilanda*, 13 Mad 54.

11. *Pedu Jhela v Gour Mohan Jhela*, 19 Cal 544.

out that this section does not extend to incorporeal rights because they are not rights of which possession can be taken and delivered to the plaintiff.

Further, it should be noted that the only prayer in a suit under Section 6 can be a prayer for recovery of possession. Consequently a claim for damages cannot be combined with that for possession. The section does not apply to suits based on title to property.¹²

Possession, under the section, may be actual (i.e. physical) or constructive. Hence the possession of a mortgagee or a lessee is that of the mortgagor or the lessor and *vice versa*.¹³

Recovery of possession where possession gratuitous [S. 6]

Where the grant of possession was purely gratuitous, the owner had the right to reclaim possession even without the knowledge of the person in possession. The party in possession in this case was using the garage owned by his sister. The owner dispossessed him. The trial court ordered restoration of possession. The High Court confirmed this order. The Supreme Court described this as an error.

It was evident that the respondent was using the garage of the appellant on permission having been granted by the sister to the brother. According to the judgment of the High Court the respondent was claiming no legal interest in the said garage as he was not claiming its ownership because he was not claiming to be a tenant or even a licensee. His possession was purely gratuitous and even if without the knowledge of the respondent the appellant has reclaimed the possession, it was not a fit case for the High Court to have interfered under Article 227 of the Constitution.¹⁴

Prayer for declaration of title

Although normally such a suit is not maintainable in the absence of a prayer for declaration of title, it was held on facts that as the necessary averments were made in the plaint (that registered lease deed for 99 years in favour of appellant-lessee was void and not binding and that suit property was trust property), and answered in the written statement, issues framed, evidence led and arguments advanced, no prejudice was caused to the appellant-defendant by the fact that there was no formal prayer seeking a declaration. The High Court rightly dismissed the LPA filed by the appellant-defendant under the Civil Procedure Code, 1908, Order 6, Rule 1.

The Court said:

'Even though there was no formal prayer, no prejudice has been caused to the appellant inasmuch as he has not been prevented from leading evidence on this aspect and has not been precluded from raising contentions in this behalf. All that was necessary to cure the defect was an amendment by incorporating one prayer. This could have been done at any stage.'¹⁵

RECOVERY OF POSSESSION OF MOVABLE PROPERTY [SECTIONS 7 AND 8]

Sections 7 and 8 of the Specific Relief Act, 1963 provide methods for recovery of possession of some specific movable property.

12. *Nagar Palika v Jagat Singh*, (1995) 3 SCC 426; AIR 1995 SC 1377.

13. *Jogeshwar v Jawahar*, 1 All 311.

14. *Anima Mallick v Ajoy Kumar Roy*, (2000) 4 SCC 119.

15. *Santokh Singh v Mahant Iqbal Singh*, (2000) 7 SCC 215.

7. Recovery of specific movable property.—A person entitled to the possession of specific movable property may recover it in the manner provided by the Code of Civil Procedure, 1908 (5 of 1908).

Explanation I.—A trustee may sue under this section for the possession of movable property to the beneficial interest in which the person for whom he is trustee is entitled.

Explanation II.—A special or temporary right to the present possession of movable property is sufficient to support a suit under this section.

By Section 7, a person entitled to the possession of the specific movable property may recover the same in the manner prescribed by the Code of Civil Procedure.¹⁶

This 'Section' corresponds to Section 10 of the erstwhile Specific Relief Act, 1877. That Section carried the following illustrations:

- (a) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds. B may recover them from C.
- (b) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody. [Based on *Donald v Suckling*¹⁷.]
- (c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B. [Based on *Oliver v Oliver*¹⁸.]
- (d) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under Section 168 of the Indian Contract Act, 1872.
- (e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession, A may sue B for the goods.

The main ingredients of this section are:

- (i) The plaintiff must be entitled to the possession. A person may be entitled to possession either by ownership or as provided by Explanation 2 to Section 7 by virtue of a special or temporary right. It is not necessary, however, that the plaintiff should have been previously in possession, or that the goods should have been removed from his possession. A special or temporary right may arise by either:

16. *Punjab Urban Planning & Development Authority v Shiv Saraswati Iron & Steel Re-Rolling Mills*, (1998) 4 SCC 539, the plaintiff has to prove his own case. He cannot think of succeeding because of the weakness of the defendant's case.

17. (1866) LR 1 QB 585.

18. (1861) 11 CB NS 139; 132 RR 505.

- (a) the act of the owner of the goods, e.g., bailment, pawn, etc. In this case the bailee or pawnee has special right, or;
- (b) not by the act of the owner of goods, e.g., finder of lost goods. In this case the finder of lost goods has a special right to possession except against the true owner.

Explanation 1 makes it clear that a trustee is the person entitled to the immediate possession of trust property. Hence if trust property is taken away by someone, he can recover the same.

A person who does not have a right to present possession of movable property cannot maintain a suit under this section. An illustration in point is: A pledges certain jewels with B to secure a loan. B disposes the jewels to C before he is entitled to do so. A without having paid the amount of the loan, sues C for possession of jewels. The suit should be dismissed, as A is not entitled to immediate possession of jewels, whatever interest he may have to secure their safe custody.

- (ii) Property in question must be specific movable property. Specific means that which is ascertained or ascertainable. Specific property means the very property itself, not its equivalent. Thus coins or grains are not specific movable property, because they cannot be distinguished from other coins¹⁹ or grain.

The specific movable property must be capable of being seized and delivered. Where the goods have ceased to be recoverable or are not in possession or control of the defendant, the plaintiff is not entitled to a decree for recovery *in specie*; his only remedy then being damages or compensation.

Limitation

Article 91(b) of the Limitation Act, 1963 prescribes a period of three years' limitation for the suit computable from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Liability to deliver possession to person entitled

Section 8 of the Specific Relief Act, 1963 provides:

8. Liability of persons in possession, not as owner, to deliver to persons entitled to immediate possession.—Any person having the possession or control of a particular article of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:

- (a) when the thing claimed is held by the defendant as the agent or trustee of the plaintiff.¹⁹ (In cases under this class, there is a fiduciary relationship existing between the parties.)

19. Proof of entrustment of the property in question would be necessary. *Ganga Bishen v Jai Narain*, (1986) 1 SCC 75; AIR 1986 SC 441.

- (b) when compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed. (There may be a thing which may not have much intrinsic value, but, by reason of peculiar association or some special consideration, have obtained in the eyes of its holders a value that cannot be estimated in money, e.g. family idol. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not their feelings upon it.²⁰ A thing may have a *pretium afflictions* which it is impossible to value in sordid gold or silver. However, the principle must not be extended to cases founded in weakness and folly. It would, therefore, be a perversion of the rule to apply it to the delivery of a lady's lap dog.)
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss; (*i.e.* there exists no standard to ascertain their value, e.g. rare picture painted by a dead painter, articles of antiquity and the like).
- (d) when the possession of the thing claimed has been wrongfully transferred from the plaintiff (e.g. by a tort, or where defendant has obtained the goods by fraud or where servant has pawned the goods of master without the authority of the master).

Explanation.—Unless and until the contrary is proved, the court shall in respect of any article of movable property claimed under clause (b) or clause (c) of this section, presume—

- (a) that compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or, as the case may be;
- (b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

Illustrations in preceding Act

This section corresponds with Section 11 of the repealed Specific Relief Act, 1877. That section carried the following illustrations:

Illustration as to clause (a).—A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the

20. Proof of entrustment of the property in question would be necessary. *Ganga Bishen v Jai Narain*, (1986) 1 SCC 75: AIR 1986 SC 441.

furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A*, for he holds it as *A*'s trustee. [Based on *Wood v Rowcliff*²¹.]

Illustration as to clause (b).—*Z* has got possession of an idol belonging to *A*'s family, and of which *A* is the proper custodian. *Z* may be compelled to deliver the idol to *A*.

Illustration as to clause (c).—*A* is entitled to a picture by a dead painter and a pair of rare China vases. *B* has possession of them. The articles are of too special a character to bear an ascertainable market value. *B* may be compelled to deliver them to *A*. [Based on *Falcke v Gray*²².]

In order that Section 8 may come into operation the following ingredients must coexist—

- (1) the defendant has possession or control of the particular article claimed;
- (2) such article is movable property;
- (3) the defendant is not the owner of the article;
- (4) the person claiming, that is, the plaintiff, is entitled to immediate possession; and
- (5) the thing claimed is held by the defendant as the plaintiff's agent or trustee; or when compensation in money would not afford adequate relief for the loss of the thing claimed; or
when it is extremely difficult to ascertain the actual damage caused by the loss of the thing claimed; or
when the possession of the thing claimed has been wrongfully transferred from the claimant.

An illustration of the types of cases falling under this section would be like this. A person, while going abroad, leaves his furniture under the care of his friend. The friend is a trustee of the articles and is bound to return them when demanded. If the friend pledges the furniture, the pledgee will also remain subject to the same trust and similarly bound to return to the owner when demanded by him.²³

An illustration under clause (*b*) would be, for example, when the idol of a family temple is in the custody of a retired priest, he is bound to return it to the family.

Cases coming under clause (*c*) would be, for example, when articles of rare value, like original paintings of a deceased painter, are in the possession of another. Since they are articles of irreplaceable nature and their market value is of unascertainable nature, the owner has a right to recover them *in specie*.²⁴

Under clause (*a*) the onus is on the plaintiff to prove the fiduciary relationship and under clause (*d*) the onus is on the plaintiff to prove the wrongful transfer. The *Explanation* deals with the onus under clauses (*b*) and (*c*), which is placed on the defendant and the defendant has to prove that compensation in money would be adequate relief and that it would not be extremely difficult to ascertain the actual damage caused by the loss of the chattel.

21. (1844) 3 Hare 304: 64 ER 303.

22. (1859) 4 Drew 651: 113 RR 493.

23. Based on *Wood v Rowcliffe*, (1844) 3 Hare 304: 64 RR 303.

24. Based on *Falcke v Gray*, (1859) 4 Drew 651: 113 RR 493.

Difference between Sections 7 and 8

(i) Under Section 8, no suit can be brought against the owner, while under Section 7, a person having a special or temporary right to present possession may bring the suit even against the owner of the property.

(ii) Under Section 7, a decree is for the return of movable property, or for the money value thereof in the alternative, while under Section 8 the decree is only for the return of the specific article.

SPECIFIC PERFORMANCE OF CONTRACTS

Specific performance is equitable relief given by a Court in case of breach of contract in the form of a judgment that the defendant is to actually perform the contract according to its terms and stipulations.²⁵

A contract, according to the Indian Contract Act, is an agreement enforceable by law. From every contract there immediately and directly results an obligation on each of the contracting parties towards the other to perform such of the terms of the contract as he has undertaken to perform. And if the person on whom this obligation rests, fails to discharge it, there results in morality to the other party a right at his election either to insist on the actual performance of the contract or to obtain satisfaction for the non-performance of it.²⁶

An obligation includes every duty enforceable by law. Consequently, whenever a man comes under a liability to do or forbear from doing anything, he remains under an obligation. This liability may be a consequence of either a contract or a tort. An obligation to forbear is a positive duty generally imposed by a contract. This form of specific relief is described as 'the specific performance of contract'.

Defences against suits for specific performance based on contracts [S. 9]

Section 9 of the Specific Relief Act, 1963 provides that except as provided in this chapter (*i.e.* Chapter II, Sections 9 to 25) all defences open under the law of contract shall be open to a defendant, where any relief is claimed under this Chapter in respect of a contract. Defences that are available under the law of contract, such as incapacity of parties, the uncertainty of contracts, coercion, undue influence, fraud, misrepresentation, mistake, etc. have all been dealt with in the Indian Contract Act. This section avoids their repetition in the Specific Relief Act. Thus it is necessary that the contract in question should be valid and enforceable. The Supreme Court refused to grant the relief of specific performance where the contract was in an alternative form and one form had failed to materialise and the other was void, being not enforceable by virtue of uncertainty. It was a contract of sale stipulating that if the co-seller failed to sign the sale deed then the principal seller would execute a sale deed of her own "one of two shares", otherwise pay back the advance and compensation in the same amount. The co-seller did not sign. The alternative for the promisor was either to sell her share or pay compensation. If she opted for compensation there was no breach and no question of specific performance, which was also not possible because her share was not defined nor

25. Nelson, SPECIFIC RELIEF ACT.

26. Austin, JURISPRUDENCE.

was there any indication of the part of the lump sum consideration which was applicable to her share.²⁷

A contingent contract to the effect that the mortgaged house would be sold as soon as the mortgage was redeemed was held by the Supreme Court to be specifically enforceable on the redemption of the mortgage, though no relief could be provided on facts because the claim was filed more than three years after the date of redemption.²⁸

Government contracts

It has been held that a Government contract which is concluded without fulfilling the requirements prescribed by Article 299 of the Constitution of India cannot be specifically enforced.²⁹

Validity of original contract

In a suit for specific performance, the subsequent purchaser challenged the contention that the original contract to sell was fictitious and not genuine, but the suit was ultimately decreed. It was held that the first appellate court ought to have considered the evidence and recorded its own finding as to whether the original agreement was true and valid.³⁰

The defence that the purchase was made *bona fide* for consideration without notice of the earlier agreement for sale would have to be proved by the second purchaser. This defence can be defeated by showing that a notice of the sale was given to him. Where the only evidence of prior notice was a copy of an application appearing to be endorsed by the Sub-Registrar but there was no corresponding record or entry in the records of the Sub-Registrar, it was held that such an application would not constitute prior notice.³¹

Delay as ground of defence under law of contract

Where a suit was within the period of limitation, but delay had resulted in third parties acquiring rights in the subject-matter of the suit or had given rise to a plea of waiver it was held that it would provide grounds of defence in a suit for specific performance of contract for sale of immovable property.³²

The present appeal arises out of an agreement for sale of the suit property, between the appellant would-be purchaser and respondent vendor. Under the agreement the consideration fixed was Rs 25,000, of this sum the appellant paid Rs 17,000 at the time of the execution of the contract on 20-2-1977. The balance amount was to be paid within five months, i.e. before 19-7-1977, at the time of the

27. *Mayawanti v Kausalya Devi*, (1990) 3 SCC 1. A contract with the Government which did not comply with the requirements of Article 299 of the Constitution was not allowed to be enforced. *Sohan Lal v Union of India*, (1991) 1 SCC 438; AIR 1991 SC 955.

28. *Ramzan v Hussaini*, (1990) 1 SCC 104. *Parmanand v Bajrang*, (2001) 7 SCC 705, the defence raised was that money was not taken as a consideration for sale but by way of loan and the property was offered as a security for repayment of loan and he sought adjournment for adducing evidence to prove the real nature of the transaction, rejecting his defence without giving him the opportunity to prove it was held to be wrong. The suit was remanded for retrial.

29. *Bishandayal & Sons v State of Orissa*, (2001) 1 SCC 555; AIR 2001 SC 544.

30. *Ram Niwas v Bano*, (2000) 6 SCC 685; AIR 2000 SC 2921.

31. *Zorawar Singh v Sarwan Singh*, (2002) 4 SCC 460.

32. Limitation Act, 1963, Article 34.

execution of the sale deed. According to the appellant, the respondent would not accept the balance amount due and did not execute the sale deed. Therefore the appellant sent three notices dated 15-3-1978, 4-4-1978 and the last on 26-11-1978, through his lawyer to no avail. On 10-8-1979, about nine months after the date of the last notice, the appellant filed a suit for specific performance and, in the alternative, for damages to the sum of Rs 38,000. The respondent-defendant denied the execution of the agreement for sale, his signature on it and the receipt of Rs 17,000 as part-consideration. The trial court found that the agreement had been executed as averred and decreed the suit for specific performance.

On appeal the Bombay High Court affirmed the finding as to the existence of the agreement but set aside the relief as to specific performance and allowed compensation. The Supreme Court allowed the appeal against this judgment with costs. The Court said:

“The aspects of delay which are relevant in a case of specific performance of contract for sale of immovable property are:

- (i) delay running beyond the period prescribed under the Limitation Act;
- (ii) delay in cases where, though the suit is within the period of limitation, yet:
 - (a) due to delay the third parties have acquired rights in the subject-matter of the suit;
 - (b) in the facts and circumstances of the case, delay may give rise to plea of waiver or otherwise it will be inequitable to grant a discretionary relief.

Here none of the above-mentioned aspects applies. The last notice was issued on 26-11-1978 and from that date the suit was filed only after nine months and not after more than a year as noted by the High Court. Therefore on the facts of this case the ground of delay cannot be invoked to deny relief to the plaintiff.”³³

Contracts which are specifically enforceable [S. 10]

Section 10 of the Specific Relief Act enumerates those cases in which the specific performance of contracts can be enforced.

10. Cases in which specific performance of contract enforceable.—Except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

- (a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or
- (b) when the act agreed to be done is such that compensation in money, for its non-performance would not afford adequate reliefs.

33. *Motilal Jain v Ramdasi Devi*, (2000) 6 SCC 420: AIR 2000 SC 2408.

For the guidance of the discretion of the Court, the section lays down the following explanation:

Explanation.—Unless and until the contrary is proved, the Court shall presume—

- (i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and
- (ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases—
 - (a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff or consists of goods which are not easily obtainable in the market;
 - (b) where the property is held by the defendant as the agent or trustee of the plaintiff.

Clauses (a) and (b) of this section correspond with clauses (b) and (c) of Section 12 of the repealed Specific Relief Act, 1877. The relevant illustrations of that Act may be reproduced:

Illustration as to clause (a)—A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance. [Based on *Falcke v Gray*³⁴.]

Illustrations as to clause (b)—(1) A contracts with B to sell him a house for Rs 1000. B is entitled to a decree directing A to convey the house to him, he paying the purchase-money.

(2) In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contracts with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the court may appoint a proper person to superintend the construction of the archway, road, siding and wharf. [Based on *Storer v G.W.R. Co*³⁵.]

(3) A contracts to sell, and B contracts to buy, a certain number of railway-shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

34. (1859) 4 Drew 651: 113 RR 493.

35. (1842) 2 Y&CCC 48: 60 RR 23.

(4) A contracts with B to paint a picture for B, who agrees to pay therefor Rs 1000. The picture is painted. B is entitled to have it delivered to him on payment or tender of Rs. 1000.

In a case before the Supreme Court a family woman (appellant's mother) borrowed a sum of money from a family member (respondent's father) and executed a deed of sale of her property in favour of the lender's minor son with an agreement of reconveyance on repayment of the loan. The dues under the loan were paid back and on denial of reconveyance, the Supreme Court upheld the decree of specific performance ordering reconveyance. The mortgagee having disposed of the property, the decree was allowed to be enforced against such buyer also.³⁶

Agreement for reconveyance or repurchase

An agreement to repurchase property which had been sold, popularly known as agreement for reconveyance, has been held to be specifically enforceable. Referring to such an agreement in *V. Pechimuthu v Gowrammal*³⁷, the Supreme Court said:

"Such an agreement, not being merely a privilege or concession, such as an option to purchase, granted to the owner, remains an agreement for sale of immovable property and must be governed by the same provisions of law as are applicable to ordinary agreements for sale. Decision as to whether an agreement is an option to purchase or an ordinary agreement depends on interpretation of its terms. It was held on the facts that the reconveyance agreement in favour of the appellant-plaintiff, the original vendor, was an ordinary agreement for sale. The High Court in second appeal erred in reversing the decree of specific performance in his favour granted by trial court and affirmed by first appellate court."

Delay

Unreasonable delay by a plaintiff in performing his part of the contract operates as a bar to his obtaining specific performance, provided that—

- (i) time was originally the essential element of the contract; or
- (ii) it was made an essential element by a subsequent notice; or
- (iii) the delay has been so unreasonable and long that it amounts to abandonment of the contract.³⁸

As a general proposition of law, 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 within a reasonable time if the conditions are evident:

- (i) from the express terms of the contract;
- (ii) from the nature of the property; and

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- 36. *Nivarti Govind Ingale v R.B. Patil*, (1997) 1 SCC 475. *Kaulashwari Devi v Nawal Kishore*, 1955 Supp (1) SCC 141; AIR 1994 SC 1200, subsequent buyer of the property affected by the decree.
 - 37. (2001) 7 SCC 617; AIR 2001 SC 2446. *Bismillah Begum v Rahamatullah Khan*, (1998) 2 SCC 226; (1998) 2 Mad LJ 6, time is of the essence in a contract of reconveyance.
 - 38. *K.S. Vidyanandam v Vairavan*, (1997) 3 SCC 1, delay of 2½ years after paying a small amount by way of earnest money for purchasing immovable property, disentitled from claiming specific recovery of property. *Deokabai v Utam*, (1993) 4 SCC 131, delay in executing the conditions of the sale deprived the right to specific performance, refund of earnest money ordered.

- (iii) from the surrounding circumstances, for example, the object of making the contract.

From the expression, 'Rs 98,000 (rupees ninety-eight thousand only) will be paid by the second party to the first party within a period of ten days only' in the contract, it is clear that the amount of Rs 98,000 ought to have been paid on or before the 10th day. Failure to do so constituted a breach committed by the defendant. 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. The evidence also showed that the plaintiff was not willing to pay this amount unless vacant delivery of possession of one room on the ground floor was given. The notices which were exchanged between the parties have to be looked into in determining readiness and willingness.³⁹

It has been held that a person seeking specific enforcement of a contract must approach the court within reasonable time even if time is not of the essence of the contract. It was further held that "reasonable time" means as soon as circumstances permit. Where the defendant was to remove a telegraph pole from a property and then to execute the sale deed, but he only removed the pole and did not execute the sale deed despite notice and the plaintiff filed a suit within one month of removal of the pole, it was held, on the facts, that the suit was filed within reasonable time. Time was not of the essence of the present contract. The Court said:

"The word 'reasonable' has in law a prima facie meaning of reasonable in regard to those circumstances of which the person concerned is called upon to act reasonably knows or ought to know as to what was reasonable. It may be unreasonable to give an exact definition of the word 'reasonable'. The reason varies in its conclusion according to idiosyncrasy of the individual and the time and circumstances in which he thinks. The dictionary meaning of 'reasonable time' is to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. In other words it means, as soon as circumstances permit.

The legal action initiated by the appellant-plaintiff was rightly held by the trial court and the first appellate court to have been commenced without delay and definitely within a reasonable time. The High Court was not justified in disturbing the finding of fact arrived at on appreciation of the evidence, while disposing of the second appeal."⁴⁰

Sale by joint owners

The Supreme Court propounded the following proposition:

"Where any property is held jointly, and once any party to the contract has agreed to sell such joint property by agreement, then, even if the other co-sharer has not joined, at least to the extent of his share, he is bound to execute the sale deed. However, in the absence of the other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the

39. *Chand Rani v Kamal Rani*, (1993) 1 SCC 519; AIR 1993 SC 1742.

40. *Veerayee Ammal v Seeni Ammal*, (2002) 1 SCC 134; AIR 2001 SC 2920. Where there is no concluded contract, the relief of specific performance cannot be had, *Ganesh Shet v C.S.G.K. Setty*, (1998) 5 SCC 381.

appellants in such property to other such contracting party. In the present case, it is not in dispute that the appellants have 5/6ths share in the property. So, the plaintiff's suit for specific performance to the extent of this 5/6ths share was rightly decreed by the High Court which requires no interference."⁴¹

Performance of trust

Section 11(1) provides another circumstance when contracts can be specifically enforced. It provides:

Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

The creation of a trust imposes a duty on the trustees, which may be enforced even by strangers to the transaction who may not have been in existence at its date, if they have an interest under the contract. Thus contracts connected with trusts can be specifically enforced either at the instance of the beneficiaries or at the instance of the trustees.

Section 11(2), however, provides that a contract made by a trustee:

- (i) in excess of his powers, or
- (ii) in breach of trust,

cannot be specifically enforced.

In the first case it is beyond his competence and, in the second case, it is unlawful. 'In breach of trust' means acting in violation of the duties and obligations imposed by the trust.

Illustrations in preceding Act

Section 11 brings together Sections 12(a) and 21(e) of the repealed Specific Relief Act, 1877. The relevant illustrations of that Act may be reproduced:

(1) *A* holds certain stock in trust for *B*. *A* wrongfully disposes of the stock. The law creates an obligation on *A* to restore the same quantity of stock to *B*, and *B* may enforce specific performance of this obligation. [This illustration was repealed wherever the Indian Trusts Act, 1882 is in force—see Section 2 and Schedule of that Act.]

(2) *A* is a trustee of land with power to lease it for seven years. He enters into a contract with *B* to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced. [Based on *Mort Lock v Buller*⁴².]

(3) The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

(4) Two trustees, *A* and *B*, empowered to sell trust property worth a lakh of rupees, contract to sell it to *C* for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. *C* cannot enforce its specific performance. [Based on *Mort Lock v Buller*⁴³.]

41. *A. Abdul Rashid Khan v P.A.K.A. Shahul Hamid*, (2000) 10 SCC 636.

42. (1804) 10 Ves 292: 7 RR 417.

43. (1804) 10 Ves 292: 7 RR 417.

(5). The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property—and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase money. This contract cannot be specifically enforced.

A suit for specific enforcement should be filed for specific performance within the period stipulated under Article 54 of the Limitation Act, 1963.⁴⁴

Specific performance of part of contract

Section 12 deals with specific performance of a part of a contract. It provides in clause (1) that as a general rule, the court shall not grant specific performance of a part of a contract. The section, however, recognises in clauses (2) to (4) certain exceptions to the above rule. Whether specific performance of a part of the contract is to be ordered or not has been wholly left by the section to one deciding factor, namely, the proportion the part which can be performed bears to that which cannot be performed. Where the part which cannot be performed bears only a small proportion to the whole in value and the unperformed part can be compensated adequately in terms of money, the court may order specific performance of one part and compensation for the other.

A slightly different principle comes into play where the part which cannot be performed forms a considerable part of the whole. In such cases the court has first to see whether the major part which has to be left out admits of money compensation or does not do so. If the unperformed portion can be compensated in terms of money the court may order specific performance of the rest, provided that the party seeking relief has paid his consideration under the contract as reduced by the amount of compensation for the unperformed portion. Where the matter does not admit of compensation the court may order specific performance only when the party seeking relief has paid his whole consideration without any reduction whatsoever.

Where the part that would remain unperformed does not admit of compensation in terms of money, the court would order specific performance only if the party seeking performance undertakes to pay the consideration for the whole of the contract without any abatement.

In either situation, the party seeking performance of a part of a contract has to relinquish all claims to the performance of the remaining part and also all rights to compensation either for the deficiency or for any loss or damage sustained through the defendant's default as to performance.

An illustrative account of the working of the principle is to be found in *Rutherford v Acton Adams*⁴⁵.

If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with

44. *Thakamma Mathew v M. Azamathula*, AIR 1993 SC 1120.

45. (1915) AC 866 (appeal from New Zealand): 84 LJPC 238; 113 LT 931. Where the property came to the share of two brothers jointly and one of them sold the whole to a neighbour, the buyer was allowed to recover only the selling member's share. *Sardar Singh v Krishna Devi*, (1994) 4 SCC 18.

compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to this remedy. Another possible case arises where a vendor claims specific performance and where the court refuses it unless the purchaser is willing to consent to a decree on the terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the court holds him to have even a larger right. Subject to considerations of hardship, he may elect to take all he can get, and to have a proportionate abatement of the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract.

The Specific Relief Act, 1877 (now repealed) carried the following illustrations in the corresponding Section 14:

A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A, and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B 98 bighas and to make compensation to him for not conveying the two remaining bighas; or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase money less a sum awarded as compensation for the deficiency.⁴⁶

In a contract for the sale and purchase of a house and lands for 2 lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Where a contract was incapable of being performed and a party categorically refused to accept part-performance, it was held that there was no readiness and willingness at all stages to accept part-performance. Therefore such a party could not be permitted later to change its position and elect to accept part-performance.⁴⁷ The Court said:

“In cases where a contract is not capable of being performed in whole then the readiness and willingness, at all stages, is the readiness and willingness to accept part-performance. If a contract is not capable of being performed in whole and a party clearly indicates that he is not willing to accept part-performance, then there is no readiness and willingness, at all stages, to accept part-performance. In that case there can be no specific performance of a part of the contract at a later stage.”⁴⁸

In a case under the J&K Specific Relief Act, 1977 (S. 15) it was held that where a party was unable to perform the whole of his part, the court could direct the

46. Based on *Richardson v Smith*, (1870) LR 5 Ch 648 and *Arnold v Arnold*, (1880) 14 Ch D 278.

47. *Surjit Kaur v Naurata Singh*, (2000) 7 SCC 379; AIR 2000 SC 2927.

48. *Ibid.*

performance of so much of his part as he was capable of performing (1/3rd share of the property).⁴⁹

Section 12 is reproduced below:

12. Specific performance of part of contract.—(1) Except as otherwise hereinafter provided in this section, the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.⁵⁰

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(i) in a case falling under clause (a), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and, in a case falling under clause (b), the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.⁵¹

49. *Manzoor Ahmed Magray v Ghulam Hassan Aram*, (1999) 7 SCC 703.

50. For example, see the Illustration to Section 14 of the old Act, cited above. Under clause (2) performance can be enforced either by the promisor or by the promisee.

51. While clause (2) relaxes the rule that part of a contract cannot be specifically enforced in favour of both the parties, clause (3) does so in favour of the party not in default. Party in default is the party who is unable to perform the whole of his part of the contract. The principle underlying clause (3) is that the party who is not at default is entitled to specific performance of so much of a contract as the other can perform. *Rachakonda Nerrayana v Ponthala Parvathamma*, (2001) 8 SCC 173, the relief of directing the defendant party to perform specifically so much of his part of the contract as he can perform can be pleaded at the appellate stage also when the fact of the defaulting party's inability to perform a part of the contract comes to the knowledge of the party seeking specific performance.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.⁵²

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

Illustrations in preceding Act

Sub-sections (1), (2), (3), (4) and Explanation of this section correspond with Sections 17, 14, 15, 16 and 13 of the repealed Specific Relief Act, 1877. That Act carried the following illustrations:

Illustrations as to sub-section (2).—(a) A contracts to sell B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A, and the two remaining bighas to a stranger, who refuses to part with them. The two bighas are not necessary for the use or enjoyment (of the 98 bighas, nor so important for such use or enjoyment) that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bighas and to make compensation to him for not conveying the two remaining bighas; or B may be directed, at the suit of A, to pay to A on receiving the conveyance and possession of the land, the stipulated purchase money, less a sum awarded as compensation for the deficiency. [Based on *Richardson v Smith*⁵³.]

(b) In a contract of the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract notwithstanding that the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

Illustrations as to sub-section (3).—(a) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase money.

(b) A contracts to sell to B an estate with a house and a garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the

52. For example, if, at an auction, a person purchases several plots of land, the inability of the vendor to make out good title to one plot will not prevent him from enforcing specific performance of the sale of other plots.

53. (1870) LR 5 Ch 648.

specific performance of the contract; but if *B* is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through *A*'s neglect or default, *B* is entitled to a decree directing *A* to convey the house to him on payment of the purchase-money.

Requirements of order of specific performance under the sub-section

The requirements were stated by the Supreme Court as follows:⁵⁴

"The ingredients which would attract specific performance of the part of the contract under the latter part of sub-section (3) of Section 12 are: (i) if a party to an agreement is unable to perform a part of the contract, he is to be treated as defaulting party to that extent, and (ii) the other party to an agreement must, in a suit for such specific performance, either pay or have paid the whole of the agreed amount, for that part of the contract which is capable of being performed by the defaulting party and also relinquish his claim in respect of the other part of the contract which the defaulting party is not capable of performing and relinquishes the claim of compensation in respect of loss sustained by him. If such ingredients are satisfied, the discretionary relief of specific performance is ordinarily granted unless there is delay or laches or any other disability on the part of the other party."

Illustrations as to Explanation.—(a) *A* contracts to sell a house to *B* for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase-money.

(b) In consideration of a sum of money payable by *B*, *A* contracts to grant an annuity to *B* for *B*'s life. The day after the contract has been made, *B* is thrown from his house and billed. *B*'s representative may be compelled to pay the purchase-money.

Rights of purchaser or lessee where seller's or lessor's title imperfect

Section 13 deals with the rights of a purchaser or lessee against a person with no title or imperfect title. The idea underlying this section is that when a person enters into a contract without the power for performing that contract and subsequently he acquires the power of performing the same, he is bound to do so. This section is, however, limited to contracts to sell or let property.

The different clauses of Section 13 affect the remedy of the buyer and the obligation of the seller. The section comes into play when the seller of immovable property has no title or only an imperfect title. If he acquires any interest in the property subsequently, the purchaser can compel him to make good the contract out of such interest. Where concurrence of or conveyance by some other person is necessary to enable the vendor to validate his transfer, and if that person is bound to concur at the direction of the vendor, the purchaser can compel the vendor to procure such concurrence and validate the transfer. Where the vendor purported to sell the property as free from any encumbrance, etc., but the property is in fact subject to a mortgage and, if the amount of the mortgage is equal to the sale price, the buyer may compel the vendor to redeem the mortgage and transfer the property

54. *Rachakonda Narayana v Ponthala Parvathamma*, (2001) 8 SCC 173.

to him free from the mortgage. Where the contract of transfer was subject to the responsibility of the vendor to apply for and to get the agricultural land converted into non-agricultural use and though he had not obtained such permission, the land in question was held to be specifically recoverable from him when, by virtue of an intervening statutory enactment, the vendee was able to get the land converted to his use.⁵⁵ Where the vendor sues the buyer for specific performance and the suit is dismissed on the ground of want of title or imperfect title, the vendee would be entitled to refund of his deposit along with interest and also costs and this claim will operate as a charge upon the interest, if any, of the vendor in the property.

13. Rights of purchaser or lessee against person with no title or imperfect title.—(1) Where a person contracts to sell or let certain immovable property having no title or only an imperfect title, the purchaser or lessee (subject to the other provisions of this Chapter), has the following rights, namely—

- (a) if the vendor or lessor has subsequently to the contract acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;
- (b) where the concurrence of other persons is necessary for validating the title, and they are bound to concur at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;
- (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it the purchaser may compel him to redeem the mortgage and to obtain a valid discharge, and, where necessary, also a conveyance from the mortgagee;
- (d) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his want of title or imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, if any, of the vendor or lessor in the property which is the subject-matter of the contract.

55. *Rajasara Ramjibhai v Jani Narottamas Lallubhai*, (1986) 3 SCC 300: AIR 1986 SC 1912.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property.

Contracts which cannot be specifically enforced

14. Contracts not specifically enforceable.—(1) The following contracts cannot be specifically enforced, namely—

- (a) a contract for the non-performance of which compensation in money is an adequate relief;
- (b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;
- (c) a contract which is in its nature determinable;
- (d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.

(2) Save as provided by the Arbitration Act, 1940, no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases—

- (a) where the suit is for the enforcement of a contract,—
 - (i) to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once:

Provided that where only a part of the loan has been advanced the lender is willing to advance the remaining part of the loan in terms of the contract; or

- (ii) to take up and pay for any debentures of a company;
- (b) where the suit is for—
 - (i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership; or
 - (ii) the purchase of a share of a partner in a firm;

(c) where the suit is for enforcement of contract for the construction of any building or the execution of any other work on land:

Provided that the following conditions are fulfilled, namely:—

- (i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;
- (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and
- (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.

Illustrations in preceding Act

The section is based on Section 21(a), (b), (d) and (g) of the repealed Specific Relief Act, 1877. That Act carried the following illustrations:

*Illustrations as to sub-section (1)(a).—*A contracts to sell, and B contracts to buy, a lakh of rupees in the four per cent loan of the Central Government;

A contracts to sell, and B contracts to buy, 40 chests of indigo at Rs. 1000 per chest:

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced, for in the first and the second both A and B, and in the third A, would be reimbursed by compensation in money.

*Illustrations as to sub-section (1)(b).—*A contracts to render personal service to B:

A contracts to employ B on personal service:

A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer, but before the valuation is made, A instructs his valuer not to proceed;

By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London;

A lets land to B and B contracts to cultivate it in a particular manner for three years next after the date of the lease;

A and B contract that, in consideration of annual advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery;

A contracts with B that, in consideration of Rs 1000 to be paid to him by B, he will paint a picture for B;

A contracts with B to execute certain works which the Court cannot superintend;

A contracts to supply B with all the goods of a certain class which B may require;

A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, "if the drawing-room is handsomely decorated", even if it is held to have so much certainty that compensation can be recovered for its breach;

A contracts to marry B.

The above contracts cannot be specifically enforced.

Illustration as to sub-section (1)(c).—A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either A or B might at once dissolve the partnership. [Based on *Scott v Rayment*⁵⁶].

Illustration as to sub-section (1)(d).—A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine-power, and that A should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

The effect of the provisions in Section 14 can be stated in terms of certain propositions, namely, that in the case of the following contracts the relief of specific performance cannot be allowed:

1. Where Compensation is Adequate

Courts will not order specific performance of a contract where the aggrieved party can be adequately compensated in terms of money. An ordinary contract to lend or borrow money whether with or without security is an example of a contract which cannot be specifically enforced, though where a loan has been already advanced on the understanding that a security would be provided against it, this can be specifically enforced.⁵⁷

2. Contracts Involving Personal Skill

It is not possible for the court to supervise the performance of a contract which runs into minute and numerous details or is dependent upon the personal

56. (1968) LR Eq 112.

57. Section 14(3). *Meenakshisundara v Rathnasami*, (1918) 41 Mad 959.

qualifications of the promisor or is otherwise of volitional nature. Contracts of employment, contracts of personal service, contracts involving performance of artistic skill, like contracts to sing, to paint, to act, contracts of authorship, are ordinary examples of things requiring personal skill and, therefore, beyond the capacity of the judicial process to enforce their actual performance. The only choice in such cases is to be content with damages.⁵⁸ An employer may not be compellable to keep an employee in accordance with a contract of employment, but the position will be different where an employee has been removed, for, in that case, if the removal is wrongful, the employee can be reinstated. The Supreme Court, however, did not approve of an arbitrator's award reinstating a professor removed by the Delhi University.⁵⁹ A contract to publish a piece of music and a contract to build a house⁶⁰ have been specifically enforced because both are purely mechanical functions. It is observed in CHITTY ON CONTRACTS:⁶¹

"But specific performance of a contract to build can be decreed if (i) the work is precisely defined; (ii) damages will not adequately compensate the plaintiff; and (iii) the defendant is in possession of the land on which the work is to be done so that the plaintiff cannot get the work done by another builder."⁶²

3. Contracts of Determinable Nature

Specific performance is not ordered of a contract which is in its nature determinable. An illustration appearing under the corresponding provision in the repealed Act of 1877 sufficiently explains this point:

A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. The contract cannot be specifically performed, for, if it were so performed, either A or B might at once dissolve the partnership.⁶³

Similarly, no order of specific performance is likely to be passed when the contract is revocable at the option of the opposite party. A revocable lease is in this category.⁶⁴ But a tenancy from year to year, determinable by either party by half a year's notice to quit, is specifically enforceable.⁶⁵

A contract of employment is not specifically enforceable. A person who was selected was not allowed to get the position to which he was selected. The Court observed: "Courts do not ordinarily enforce performance of contracts of a personal character, such as a contract of employment. The remedy is to sue for damages. The grant of specific performance is purely discretionary and must be refused when not

58. *Re, Gunpat Narain Singh* (1876) 1 Cal 74, contract of marriage; *Bansi Sah v Krishna Chandra*, AIR 1951 Punj 508, a lease carrying personal covenants for repair.

59. *S.B. Dutt (Dr) v University of Delhi*, (1959) SCR 236; AIR 1958 SC 1050.

60. *Barrow v Chappel & Co* (unrep) cited in *Joseph v National Magazine Co*, (1959) Ch 14, cited in CHITTY ON CONTRACTS, p 1645 (Vol 1, 24th edn, 1977).

61. *Ibid.* at p 1646.

62. Citing *Wolverhampton Corp v Emmons*, (1901) 1 QB 515 as modified by *Carpenters Estates Ltd v Davies*, (1940) Ch 160; *Jeune v Queens Cross Properties Ltd*, (1974) Ch 97 (Landlord ordered to restore collapsed balcony in performance of repairing covenant).

63. Based on *Scott v Rayment*, (1868) LR Eq 112, otherwise where the agreement is for a definite term, *England v Curling*, (1844) 8 Beav 129; 68 RR 39.

64. *Lewis v Bond*, 18 Beav 85; 104 RR 377.

65. *Lever v Koffler*, (1901) 1 Ch 543.

warranted by the ends of justice. Such relief can be granted only on sound legal principles. In the absence of any statutory requirement, courts do not ordinarily force an employer to recruit or retain in service an employee not required by the employer. There are, of course, certain exceptions to this rule, such as in the case of a public servant dismissed from service in contravention of Article 311 of the Constitution; reinstatement of a dismissed worker under the Industrial Law; a statutory body acting in breach of statutory obligations, and the like. The facts of this case do not fall within the exceptions. Therefore, the plaintiff's suit for mandatory injunction, on the facts of the case, was rightly dismissed by the trial court and wrongly decreed by the first appellate court and the High Court.⁶⁶

A distributorship was held to be determinable in nature. An order could not be passed for its restoration.⁶⁷

4. *Contract requiring Constant Supervision*

Clause (d) of Section 14(1) says that a contract cannot be specifically enforced where it involves the performance of a continuous duty which the court cannot supervise.

For this reason courts have refused specifically to enforce an undertaking by the lessor of a service flat to have a porter "constantly in attendance";⁶⁸ a tenant's undertaking to cultivate a farm in a particular manner;⁶⁹ the obligation of a railway company to operate signals and to provide engine power;⁷⁰ a contract to keep an airfield in operation;⁷¹ the obligation of a shipowner under a charter party⁷² and a contract to deliver goods by instalments.⁷³

Where a tenant vacated a site for purposes of reconstruction under an understanding that a portion of the building would be reallocated to him, the court held that the landlord was bound to provide the premises as promised.⁷⁴

Sub-section (3) qualifies to a certain extent the operation of the clauses dealing with situations where compensation is an adequate relief and where the contract is unilaterally revocable. It says that an agreement to provide a security or to execute a mortgage against a loan which has already been provided is specifically enforceable, if the borrower is not willing to pay back the loan at once. Where the lender has advanced only a part of the loan, he can claim specific relief only when he is ready and willing to advance the remaining part of the loan also. An agreement to take up, and pay for the debentures of a company is also specifically enforceable. Agreements to execute a formal deed of partnership where the partners have already commenced business and to purchase the share of a partner in a firm are also specifically enforceable.

66. *Nandganj Sihori Sugar Co Ltd v Badri Nath Dixit*, (1991) 3 SCC 54; 1991 SCC (L&S) 981; AIR 1991 SC 1525; (1991) 2 SLR 768; (1991) 2 CLR 135; 1991 All LJ 213.

67. *Indian Oil Corpn. v Amritsar Gas Co*, (1991) 1 SCC 533.

68. *Ryan v Mutual Tontine Assn*, (1893) 1 Ch 116.

69. *Rayner v Stone*, (1762) edn, 123; *Phipps v Jackson*, (1887) 56 LJ Ch 550.

70. *Powell Duffryn Steam Coal Co v Taff Vale Rly. Co*, (1874) LR 9 Ch App 331; *Blackett v Bates*, (1865) LR 1 Ch App. 117.

71. *Dowty Boulton Paul Ltd v Wolverhampton*, (1971) WLR 204.

72. *De Mattos v Gibson*, (1858) 4 D&J 276; 124 RR 250.

73. *Dominion Coal Co v Dominion Iron & Steel Co*, (1919) AC 293.

74. *Jaina B... v Govindaswami*, AIR 1967 Mad 369.

As for agreements for the construction of a building, the principles crystallised in English law have been adopted by sub-section (3)(c). The agreement will be enforceable if the nature of the building is of exact nature, the plaintiff has a substantial interest in the work and the work is also of such nature that it cannot be compensated for in terms of money and the defendant is in possession of the whole or a part of the site.

In a case before the Supreme Court,⁷⁵ the Authority which had to supervise the performance of the contract had ceased to exist. The Court said:

"There is also force in the contention that the agreement is not specifically enforceable in view of clause (d) of sub-section (1) of Section 14 of the Specific Relief Act, 1963. This provision provides that a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise, is not specifically enforceable. Having regard to the nature of the Scheme and the facts and circumstances of the case, it is clear that the performance of the contract involves continuous supervision which is not possible for the court. After repeal, such continuous supervision cannot be directed to be undertaken by the competent authority as such an authority is now non-existent."

Arbitration

Section 14 provides in sub-section (2) that, except as provided by the Arbitration Act, 1940, (now Arbitration and Conciliation Act, 1996) a contract to refer a present or future dispute to arbitration shall not be specifically enforced. An arbitration agreement operates as a bar to the filing of a suit.

Persons for or against whom Contracts may be Specifically Enforced [S. 15]

15. Who may obtain specific performance.—Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by—

- (a) any party thereto;
- (b) the representative-in-interest or the principal, of any party thereto:

Provided that where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative-in-interest, or his principal, has been accepted by the other party;

- (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between the members of the same family, any person beneficially entitled thereunder;

75. *Her Highness Maharani Shantidevi P. Gaikwad v Savjibhai Haribhai Patel*, (2001) 5 SCC 101; AIR 2001 SC 1462.

- (d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman;
- (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant;
- (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;
- (g) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
- (h) when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company:

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract.

The expression "representative-in-interest" includes the assignee of a right to purchase the property and, therefore, he would have the title to claim specific performance.⁷⁶

All buyers or contractees must join

In order to obtain the relief of specific performance, all co-contractees must be before the court but all of them need not be on the same side. Others can be joined as co-defendants. Where there is a single indivisible contract to convey land to several persons, some of them only cannot seek specific performance if the others do not want it.⁷⁷

Personal bars to relief [S. 16]

The relief of specific performance cannot be awarded in favour of the following persons:

1. A person cannot seek specific performance where the circumstances are such that he would not have been entitled to compensation for breach of contract.
2. A person who is guilty of any of the following cannot claim specific performance:
 - (a) he has become incapable of performing his part of the contract;
 - (b) he has violated any essential term of the contract that on his part remained to be performed;
 - (c) he has acted in fraud of the contract;

76. *T.M. Balakrishna Mudaliar v M. Satyanarayana Rao*, (1993) 2 SCC 740: AIR 1993 SC 2449; *Khiria Devi v Rameshwar Sao*, AIR 1992 SC 1482, suit for reconveyance.

77. *Mukesh Kumar v Col Harbans Waratch*, (1999) 9 SCC 380.

- (d) he has wilfully acted at variance with or in subversion of the relation intended to be established by the contract.
3. A person who has failed to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which were to be performed by his excepting those terms which he has been prevented from performing by the other party or the performance of which the other party has waived.

Where the contract involves payment of money, it is not essential for the plaintiff to actually tender to the other party or to deposit in court any money except when so directed by the court. Performance must be offered according to the true construction of the contract.

Before acting under Order 8, Rule 10 of the Civil Procedure Code, the court in a suit for specific performance has to scrutinise the facts set out in the plaint to find out whether all the requirements, in particular those indicated in Section 16 of the Specific Relief Act regarding readiness and willingness, have been complied with or not.⁷⁸

Section 16 is as follows:

16. Personal bars to relief.—Specific performance of a contract cannot be enforced in favour of a person—

- (a) who would not be entitled to recover compensation for its breach;
- (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
- (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purpose of clause (c),—

- (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;
- (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

78. *Syed Dastagir v T.R. Gopalkrishna Setty*, (1999) 6 SCC 337; AIR 1999 SC 3029. The court followed *R.C. Chandiook v Chuni Lal Sabharwal*, (1970) 3 SCC 140.

Ready and Willing

It is necessary for a party claiming specific performance to aver and prove that he has been all the time ready and willing to perform his part of the contract.⁷⁹ Continuous readiness and willingness to perform his part of the contract on the part of the plaintiff is a condition precedent for the grant of the relief. Where the plaintiff was found to be dabbling in real estate transactions without means to purchase the property and failed to pay the consideration money within the time given to him by the trial court, it was held that he was not ready and willing to perform his part.⁸⁰ Where a contract for sale of a house stipulated making of part-payment of purchase price within a specified period so as to enable the owner who was residing in the house to purchase a suitable residence by utilising the amount, it was held that the part-payment must be made within a reasonable time and failure to do so would seriously affect the proposed vendor's right to acquire an accommodation and show that the proposed vendee was not ready and willing to perform his part of the contract. The court said that the grant of a decree for specific performance in the circumstances would amount to an instrument of oppression giving an unfair advantage to the proposed vendee which the court should take care to avoid.⁸¹

In a suit, for specific performance of a contract for sale of land, the readiness and willingness of plaintiff to perform his part of the contract is to be ascertained from his conduct and attending circumstances. Where the plaintiff neither had sufficient funds to pay the consideration amount nor was he acting promptly within the stipulated time where time was the essence of the contract, it was held that he was neither ready nor willing to perform his part of the contract. Hence he was not entitled to a decree for specific performance of the contract.⁸²

A person who makes himself a party to an illegal contract cannot enforce his rights under this section.⁸³

Where one of the terms of an agreement for sale was that the appellants would withdraw their suit for specific performance and the suit was not withdrawn, it was held that the appellants-plaintiffs could not be said to be ready and willing to perform their part of the agreement. The finding in the impugned judgment that the condition regarding withdrawal of the suit was a condition precedent, was also correct. As the appellants did not withdraw the suit they could not be said to be ready and willing to perform their part of the agreement. For this reason also the claim for specific performance could not have been enforced.⁸⁴

79. *Gajanan Jaikishan Joshi v Probhakar Mohanlal Kalwar*, (1990) 1 SCC 166; *Sukhbir Singh v Brij Pal*, (1997) 2 SCC 200, the fact that the party was present in the Sub-Registrar's office with necessary funds was held to be a proof of the party's readiness and willingness. The plea that the vendee did not show readiness and willingness can be taken by vendor only and not by the subsequent buyer. *Jagraj Singh v Labh Singh*, (1995) 2 SCC 31; AIR 1995 SC 945.

80. *N.P. Thirugnanam v R. Jagan*, (1995) 5 SCC 115.

81. *P.R. Deb v Sunanda Roy*, (1996) 4 SCC 423; AIR 1996 SC 1504. The court followed *Chand Rani v Kamal Rani*, (1993) 1 SCC 519; *Sunil D. Chedda v Suresh Bansital Sethi*, AIR 1992 SC 1200, injunction for restraining alienation of property pending suit.

82. *Acharya Swami Ganesh Dassji v Sita Ram Thappar*, (1996) 4 SCC 526; AIR 1996 SC 2095; *Jagdish Singh v Nathu Singh*, (1992) 1 SCC 647; AIR 1992 SC 1604, on the question of "ready and willing".

83. *I.T.C. Ltd v George Joseph Fernandes*, (1989) 2 SCC 1; AIR 1989 SC 839.

84. *Bishandayal and Sons v State of Orissa*, (2001) 1 SCC 555; AIR 2001 SC 544; *Ram Kumar Agarwal v Thawar Das*, (1999) 7 SCC 303, a person who falsely claimed to have paid a part

Averment as to readiness and willingness in a plaint has been held to be sufficient if the plaint, read as a whole, clearly indicates that the plaintiff was always and is still ready and willing to fulfil his part of the obligations. Such averment is not a mathematical formula capable of being expressed only in certain specific words or terms.⁸⁵

The Court said:

"An averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit for specific performance of contract for sale.

In the instant case, a perusal of the plaint does clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. The appellant-plaintiff had parted with two-thirds of the consideration at the time of execution of the agreement for sale. There is no reason why he would not pay the balance of one-third consideration to have the property conveyed in his favour."

The judgment of the High Court was set aside and the judgment and decree of the trial court were restored.

Selling or letting property without title [S. 17]

A person who contracts to sell or let out immovable property with knowledge that he has no right to do so cannot ask for specific enforcement in his favour. This will be so even if he honestly believed that he had the title but is not able to give at the time of performance a title free from reasonable doubt. The same principle is applicable to sale or letting of movable property also. Section 17 is as follows:

17. Contract to sell or let property by one who has no title, not specifically enforceable.—(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

- (a) who, knowing himself not to have any title to the property, has contracted to sell or let the property;
- (b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or

of the money cannot be said to be ready and willing. *Syed Dastagir v T.R. Gopalakrishna Setty*, (1999) 6 SCC 337; AIR 1999 SC 3029, deposit of money in court without court order cannot go against the person seeking relief.

85. *Motilal Jain v Ramdasi Devi*, (2000) 6 SCC 420; AIR 2000 SC 2408; *Ajaib Singh v Tulsi Devi*, (2000) 6 SCC 566; AIR 2000 SC 2493, default in payment of instalment, readiness and willingness not proved. *A. Abdul Rashid Khan v P.A.K.A. Shahul Hamid*, (2000) 10 SCC 636, acting in accordance with the terms of the contract, no delay and, therefore, ready and willing. *Borannqa v Krishna Gowda*, (2000) 9 SCC 214, concurrent finding of fact by three lower courts as to readiness and willingness.

letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall not apply, as far as may be, to contracts for the sale or hire of movable property.

Where performance not possible without variation [S. 18]

Where the contract is in writing and, as against the party seeking specific performance, the other party sets up the defence of variation, then in the following cases specific performance cannot be awarded:

- (a) where by reason of fraud, mistake of fact or misrepresentation, the written contract is different from what the parties agreed to, or does not contain all the terms on the basis of which they entered into the contract;
- (b) where the object of the parties was to produce a certain legal result which the contract, as framed, is not calculated to produce;
- (c) where the parties have varied the terms of the contract subsequent to its execution.

The provisions of Section 18 are as follows:

18. Non-enforcement except with variation.—Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, with the variation so set up, in the following cases, namely—

- (a) where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought is in its terms or effect different from what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;
- (b) where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce;
- (c) where the parties have, subsequently to the execution of the contract, varied its terms.

^a Where a part of the property was inalienable on account of being excess land under a ceiling legislation and another part was inalienable because of acquisition by the State, it was held that the buyer could not seek specific performance of such a contract in respect of the remaining portion of the property only. The court said that such a situation was not covered by Section 18.⁸⁶

86. *K. Narendra v Riviera Apts (P) Ltd.*, (1999) 5 SCC 77; AIR 1999 SC 2309.

The word "court" includes an "arbitrator". Only because Section 20 confers discretion on courts to grant specific performance it does not mean that the parties cannot agree that the discretion may be exercised by a forum of their choice.⁸⁷

Relief against parties, their legal representatives or those claiming subsequent title [S. 19]

Section 19 provides that the relief of specific performance can be obtained against the following parties:

1. against either party to the contract;
2. against any other person who claims title arising subsequently to the contract, but not against a transferee for value who paid for the property in good faith and without notice of the original contract;
3. against any person claiming under a prior title which was known to the plaintiff, where the title was such that it could have been displaced by the defendant.
4. against a new company which arises out of the amalgamation of the transferor company;
5. against a company whose promoters entered into a contract for the purposes of the company before its incorporation, provided that the contract is warranted by the terms of the incorporation of the company.

The section is cast in the following terms:

19. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

- (a) either party thereto;
- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;
- (c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;
- (d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;
- (e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company:

87. *Olympus Superstructures P. Ltd v Meena Vijay Khetan*, (1999) 5 SCC 651: AIR 1999 SC 2102.

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract.

Parties claiming title under original owner

Under Section 19(b) of the Specific Relief Act, 1963, a specific performance of a contract can be enforced not only against either party thereto but against any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of original contract. Further, Section 91 of the Indian Trusts Act, 1882 lays down that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which a specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. In a case Defendants 4 to 7 had notice of the contract between the plaintiff and Defendant 1 and they were not bona fide purchasers, therefore, the High Court was quite justified in passing a decree against them as well.⁸⁸

In the case of a bona fide purchaser in good faith for value without notice of the original contract between persons in actual possession and owner of the property, it was held by the Supreme Court that in order to establish his bona fides such purchaser must show that he had made appropriate enquiries.⁸⁹ The Court said:

“Section 19(b) of the Specific Relief Act, 1963 protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of an exception to the general rule. Hence, the onus of proof of good faith is on the purchaser who takes the plea that he is an innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation to good faith. In the General Clauses Act emphasis is laid on honesty.”

“A transferee for value, who has paid his money in good faith and without notice of the original contract, is excluded from the purview of clause (b) of Section 19 of the Specific Relief Act providing for specific performance against ‘any other person claiming under him by a title arising subsequently to the contract’. In order to fall within the excluded class, a transferee must show that:

- (a) he has purchased for value the property (which is the subject-matter of the suit for specific performance of the contract);
- (b) he has paid his money to the vendor in good faith; and
- (c) he had no notice of the earlier contract for sale (specific performance of which is sought to be enforced against him).

The said provision is based on the principle of English law which fixes priority between a legal right and an equitable right. This principle is embodied in Section 19(b) of the Specific Relief Act.

88. *Vasantha Viswanathan v V.K. Elayalwar*, (2001) 8 SCC 133. For another authority see *Jaganath v Jagdish Rai*, (1998) 5 SCC 537: AIR 1998 SC 2028.

89. *R.R. Mohd. Ubaidullah v Hajee C. Abdul Wahab*, (2000) 6 SCC 402.

"Notice" may be (i) actual, (ii) constructive, or (iii) imputed. Under Section 3, Transfer of Property Act and *Explanation II* thereof, a statutory presumption of "notice" arises against any person who acquires any immovable property or any share or interest therein of the title, if any, of the person who is for the time being in actual possession thereof.

"The principle of constructive notice of any title, which a tenant in actual possession may have, was laid down by Lord Eldon in *Daniels v Davison*.

"In the present case, the purchasers have acquired a legal right under the sale deed. The right of the tenant under it, if it is true and valid, though earlier in time, is only an equitable right and it does not affect the purchasers if they are bona fide purchasers for valuable consideration without notice of that equitable right."⁹⁰

Discretion and powers of court [S. 20]

DISCRETION AND POWERS OF COURT

20. Discretion as to decreeing specific performance.—(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise discretion not to decree specific performance—

- (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
- (b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;
- (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation I.—Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).

90. *Ram Niwas v Bano*, (2000) 6 SCC 685: AIR 2000 SC 2921.

Explanation 2.—The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequences of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Section 20 of the Specific Relief Act further lists certain circumstances in which the court may at its discretion refuse specific enforcement. The section opens with the remark that the jurisdiction to decree specific performance is discretionary and the court is not bound to give such relief merely because it is lawful to do so. The section, however, immediately adds that such discretion shall not be arbitrarily exercised. It has to be exercised on sound and reasonable basis. Its exercise shall be guided by judicial principles and shall be open to correction by a court of appeal.⁹¹ A person seeking equitable relief should come with clean hands. Where the plaintiff's case was based on certain false and incorrect facts, the relief of specific performance was not granted to him.⁹² Specific recovery of property was granted where the buyer was all the time ready and willing to perform his part of the contract and had filed a suit for specific performance and yet the property was sold to another person who was not a bona fide buyer.⁹³

"Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the court. The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and the appellate court seriously flawed in its decision. Therefore, it is held that the respondent is not entitled to a decree of specific performance of the contract."⁹⁴

Discretion should be exercised in accordance with justice, equity, good conscience and fairness to both the parties. Where in suit for specific performance

91. *Kallathil Sreedharan v Kamath Pandiyala Prasanna*, (1996) 6 SCC 218, impecuniosity of the party to pay for the part of the joint-family property which came to her in excess of share, advance paid, ordered to be refunded and specific recovery not granted. *V. Pechumuthu v Gowarammal*, (2001) 7 SCC 617; AIR 2001 SC 2446, wrong exercise of discretion.

92. *Lourdu Mari David v Louis Chinnaya Arogiaswamy*, (1996) 5 SCC 589; AIR 1996 SC 2814.

93. *Pirithi v Jati Ram*, (1996) 5 SCC 457.

94. *A.C. Arulappan v Ahalya Naik*, (2001) 6 SCC 600.

filed by the respondent in 1970, alternative relief of Rs. 12,000 as damages was also claimed, and the defendant-appellant was then prepared to pay Rs. 10 lakhs as alternative relief, it was held that the decree for specific performance at this distance of time would be unrealistic and unfair. Hence, an alternative relief of payment of Rs 10 lakhs was ordered.⁹⁵

Sub-section (2) then enumerates situations in which the court can properly at its discretion refuse to order specific performance.

1. Unfair Contracts

The court may refuse specific performance where a contract gives an unfair advantage to the plaintiff over the defendant. The unfairness of the contract may appear from the terms of the contract, from the conduct of the parties at the time of entering into the contract, or other surrounding circumstances. It is not necessary that the contract should be voidable. It is enough if it is exploitative. An ordinary example would be a case where a signature is obtained under a state of utter surprise or drunkenness.⁹⁶ Where a person contracted to purchase a leasehold estate, the seller suppressing information that the landlord had served notice for repair of a dilapidated portion, specific performance was denied to the seller although the suppression was not sufficient in itself to allow rescission to the buyer.⁹⁷ Inadequacy of consideration may not be sufficient in itself unless it is shocking and it appears that the defendant has taken advantage of his superior bargaining position.⁹⁸

The conduct of the person claiming specific relief also has an important bearing upon the discretion of the court. Specific relief has been refused on this ground to persons who induced others to enter into contracts with them by holding out oral assurances which they did not fulfil though such assurances may not be expressed in the contract.⁹⁹ A person purchased another man's right to certain property but the sale could not be completed because of the death of the seller before the execution of the sale deed. Subsequently the purchaser acquiesced in the widow of the seller disposing of the same property to another person. Subsequently still, the original purchaser disposed of his rights under the contract to another person who instituted the present proceedings to specifically recover the property. The Supreme Court did not favour him with a decree of specific performance. The original buyer had lost or waived his rights by virtue of his acquiescence. The transferee of his rights had no

95. *Nahar Singh v Harnak Singh*, (1996) 6 SCC 699.

96. *Walters v Morgan*, (1861) 4 LT 758 a person induced to sell property which he had just purchased and not being able to know its real value; *Mallins v Free Man*, (1837) 6 LJ Ch 133, drunkenness.

97. *Beyfus v Lodge*, (1925) Ch 350.

98. *Falcke v Gray*, (1859) 29 LJ Ch 28; 112 RR 493; *S. Ramgaraju Naidu v S. Thiruvarakkarasu*, AIR 1995 SC 1769; *S.V.R. Mudaliar v R.S.E. Buhari*, (1995) 4 SCC 15; AIR 1995 SC 1607, inequitable conduct in assigning rights under the contract.

99. *Handley Page Ltd v Comms. of Customs and Excise*, (1970) 2 Lloyd's Rep 459, specific relief was resorted to in order to escape a set-off; *Lamare v Dixon*, (1873) 6 HL 414, oral promise to induce contract. *Surya Narain Upadhyaya v R.R. Pandey*, AIR 1994 SC 105, a failure to make up the deficiency in court fee, an indication of inability to pay consideration.

better rights than the letter's rights. Thus he was only entitled to recover the advance-money.¹

Illustrations in old Act

The old Act contained the following illustrations on this point:

(1) *A*, a tenant for life of certain property, assigns his interest therein to *B*. *C* contracts to buy, and *B* contracts to sell, that interest. Before the contract is completed, *A* receives a mortal injury from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact, *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*.

(2) *A* contracts to sell to *B* the interest of *C* in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that *C*'s interest is worth nothing. In fact, the value of *C*'s interest depends on the result of certain partnership accounts, on which he is heavily in debt to his partners. This indebtedness is known to *A*, but not to *B*. Specific performance of the contract should be refused to *A*.

(3) *A* contracts to sell, and *B* contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know this circumstances, and *A* conceals it from him. Specific performance of the contract should be refused to *A*.

(4) *A*'s property is put up to auction. *B* requests *C*, *A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*.

2. *Hardship*

Specific enforcement is refused where it would cause considerable hardship to the defendant which he did not foresee, whereas non-performance would cause no such hardship to the plaintiff. Specific enforcement was not granted where the buyer of land for farming purposes found it to be landlocked from all sides without any right of way;² where the cost of performance to the defendant was wholly out of proportion to the benefits to the plaintiff;³ and where it involved litigation with uncertain results to enable the defendant to perform.⁴

Ordinarily, the fact that the performance would cause severe hardship to the defendant has to be considered on the basis of facts existing at the time of the contract. And where the plaintiff has caused the hardship by his subsequent conduct, that would also be taken into account. The explanation gives effect to this principle. Where the grant of specific relief would have resulted in a special hardship to the defendants who had already built costly structures on the land in question, it was held by the Supreme Court that Section 20(2)(b) should be invoked even though the

1. *Parakunnan Vecchil Joseph's son Mathew v Nedumbara Kuruwila's son*, 1987 Supp SCC 340: AIR 1987 SC 2328.

2. *Denne v Light*, (1857) 26 LJ Ch 459.

3. *Morris v Redland Bricks Ltd*, (1979) AC 652.

4. *Wroth v Tyler*, (1974) Ch 30.

plaintiffs were ready and willing to perform the contract and it were the defendants who committed breaches of the contract. Accordingly, instead of executing the sale deed in favour of the plaintiffs, the defendants were directed to pay to the plaintiffs the specified present value of the land in instalments.⁵ The jurisdiction under Section 20 of the Specific Relief Act, 1963 to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the defendant which he did not foresee, while non-performance involving no such hardship, on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not constitute an unfair advantage to the plaintiff over the defendant or unforeseeable hardship on the defendant.⁶

Where the purchasers had purchased the property some 25 years before the case reached the Supreme Court and had spent huge sums of money on improvements, it was held that decreeing the suit in favour of the opposite party would have meant hardship to the purchasers. Therefore, compensation was awarded in favour of the opposite party.⁷

Price Escalation

"Where the court is considering whether or not to grant a decree for specific performance for the first time, the rise in the price of the land agreed to be conveyed may be a relevant factor in denying the relief of specific performance. But in this case, the decree for specific performance has already been passed by the trial court and affirmed by the first appellate court. The only question before the Supreme Court is whether the High Court in second appeal was correct in reversing the decree. Consequently the principle enunciated in *K.S. Vidyanadam* will not apply."⁸

In another case, the Supreme Court observed:

"The grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principles of justice, equity and good conscience.

The court should meticulously consider all facts and circumstances of the case and motive behind the litigation should also be considered.

In view of the clear finding of the High Court that the appellant tried to wriggle out of the contract between the parties because of escalation in prices of real estate properties, the respondent is held entitled to get a decree as he has not taken any undue or unfair advantage over the appellant. It will be

5. *Damacherla Anjaneyulu v Damcherla Venkata Seshiah*, 1987 Supp SCC 75; AIR 1987 SC 1641.

6. *K. Narendra v Riviera Apartments (P) Ltd.*, (1999) 5 SCC 77; AIR 1999 SC 2309.

7. *V. Muthusami v Angammal*, (2002) 3 SCC 316.

8. *V. Pechumuthu v Gowarammal*, (2001) 7 SCC 617; AIR 2001 SC 2446. The decision in *K.S. Vidyanadam v Vairavan*, (1997) 3 SCC 1 was distinguished on facts.

inequitable and unjust at this point of time to deny the decree to the respondent after two courts below have decided in favour of the respondent."⁹

Illustrations in preceding Act

The old Act contained the following illustrations on this point:

(1) *A* is entitled to some land under his father's will on condition that if he sells it within twenty-five years, half the purchase-money shall go to *B*. *A*, forgetting the condition, contracts, before the expiration of twenty-five years, to sell the land to *C*. Here the enforcement of the contract would operate so harshly on *A*, that the Court will not compel its performance in favour of *C*.

(2) *A* and *B*, trustees, join their beneficiary, *C*, in a contract to sell the trust estate to *D*, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not merely enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to *D*. [Based on *Wedgwood v Adams*¹⁰.]

(3) *A*, the owner of an estate, contracts to sell it to *B*, and stipulates that he, *A*, shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to *B* unless he waives his claim to the unknown property. [Based on *Baxendale v Sele*¹¹.]

(4) *A* contracts with *B* to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that *A* cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to *B*, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road. [Based on *Peacock v Penson*¹².]

(5) *A*, a lessee of mines, contracts with *B*, his lessor, that any time during the continuance of the lease, *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*. [Based on *Talbot v Ford*¹³.]

(6) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*. [Based on *Denne v Light*¹⁴.]

(7) *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods but if he does not supply them, *A* may be ruined, unless he

9. *Gobind Ram v Gian Chand*, (2001) 7 SCC 548. The court relied on *Parakkunan Veetill Joseph's son Mathew v Nedumbara Kuruvila's son*, 1987 Supp SCC 340 and distinguished *Danacherla Anjaneyulu v Damacherla Venkata Seshaiiah*, 1987 Supp SCC 75.

10. (1843) 6 Beav 600: 63 RR 195.

11. (1854) 19 Beav 60: 105 RR 261.

12. (1848) 11 Beav 355: 83 RR 193.

13. (1842) 13 Sim 173: 60 RR 314.

14. (1857) 8 DM&G 774: 114 RR 328.

is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*. [Based on *Hills v Croll*.¹⁵]

3. *Inequitable*

Where the circumstances of a contract are such that, though they do not make the contract voidable, they definitely render specific enforcement inequitable, the contract is one-sided, an imposition by one upon the other, the parties are not on equal footing, are some of the circumstances which the court keeps in mind in considering whether an order of specific enforcement would give rise to inequitable results. One of the illustrations appended to Section 22 of the repealed Act of 1877 affords an example. *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by him in his trade. The court cannot compel *B* to supply the goods but if he does not supply them, *A* may be ruined, unless he is allowed to buy them elsewhere. *B* cannot specifically enforce the contract against *A*.¹⁶

*The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

From the terms and conditions adumbrated in the second agreement it is clear that the respondent had been trying to take unfair advantage of the appellant and that the circumstances in which this agreement was executed was within a short period of termination of the first contract by the respondent, make it highly probable that the appellant might not have readily agreed to this contract.

There are other circumstances also to hold that the plaintiff-respondent had not approached the court with clean hands. It is clear that she had been trying to get possession of the house even before execution of the sale deed, for which she had apparently colluded with the tenant. Moreover, the appellant in this case was clearly in impecunious circumstances and so many loans were outstanding against him. He had executed the first agreement to pay off these debts and in order to raise some funds. From the first agreement it is clear that the parties were not very serious about the sale of the house. The fact that after a few months the respondent resiled from the agreement and sought repayment of the money also proves this fact. The appellant had voluntarily retired from service. Admittedly, he had no other house to stay in after retirement. The respondent-plaintiff had tried to take unfair advantage of the defendant and throughout the course of the transaction she had not been fair.

15. (1845) 2 Ph 60: 78 RR 23.

16. Based on *Hills v Croll*, (1845) 2 Ph 60: 78 RR 23.

The trial court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses, considered the relevant facts and reached a conclusion. The appellate court should not have reversed that decision disregarding these facts and the appellate court seriously flawed in its decision. Therefore, it is held that the respondent is not entitled to a decree of specific performance of the contract.¹⁷

Where the true object of an agreement (construction of houses under Section 21 of the Urban Land Ceiling Act for weaker sections of society in this case) could not be fulfilled (as a result of changes in the master plan in this case), it would be inequitable to enforce specific performance of the agreement. Harm to the reputation of the plaintiff was irrelevant.

“Grant of decree for specific performance is a matter of discretion under Section 20 of the Specific Relief Act, 1963. The court is not bound to grant such relief merely because it is lawful to do so. Discretion is to be exercised on sound and settled judicial principles. One of the grounds on which the court may decline to decree specific performance is where it would be inequitable to enforce specific performance. The present is clearly such a case. It would be wholly inequitable to enforce specific performance for (i) residential houses for weaker sections of society cannot be constructed in view of the existing master plan and, thus, no benefit can be given to the said section of society; (ii) in any case, it is extremely difficult, if not impossible, to continuously supervise and monitor the construction and thereafter allotment of such houses; (iii) the decree is likely to result in an uncalled-for bonanza to the plaintiff; (iv) patent illegality of the order of the Competent Authority dated 20-6-1998; (v) absence of law or any authority to determine excess vacant land after construction of 4356 dwelling units; and (vi) agreement does not contemplate the transfer of nearly 600 acres of land in favour of the plaintiff for construction of 4356 units for which land required is about 65 acres. The object of the Act was to prevent concentration of urban land in the hands of a few and also to prevent speculation and profiteering therein. The object of Section 21 is to benefit weaker sections of society and not the owners. If none of these objects can be achieved, which is the factual position, it would be inequitable to still maintain decree for specific performance.”¹⁸

Plaintiff to come with clean hands

Where a party instituted different proceedings in different forums within a short span of time, it was held that such a party who abuses the process of courts could not be said to be possessed of clean hands and is, therefore, not entitled to equitable relief under the Act.¹⁹

4. Substantial Performance by one Side

Where a party to a contract has already substantially performed his part of it, it would be highly inequitable to him if the other is not compellable to perform his part. Sub-section 3 accordingly provides that the court may properly exercise the discretion to decree specific performance in any case where the plaintiff has done

17. *A.C. Arulappan v Ahalya Naik*, (2001) 6 SCC 600.

18. *Her Highness Maharani Shantidevi P. Gaikwad v Savjibhai Haribhai Patel*, (2001) 5 SCC 101: AIR 2001 SC 1462.

19. *Mahabir Prasad Jain v Changa Singh*, (1999) 8 SCC 274.

substantial acts or suffered losses in consequence of a contract capable of specific performance. The old Act contained the following illustration on this point:

A sells land to a railway company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.²⁰

5. Mutuality of Remedy

Sub-section (4) declares that the court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party. It had been a common belief in this field "that the court will not order specific performance at the suit of one party unless it could do so at the suit of the other".²¹ The Privy Council had laid down in *Mir Sarwarjan v Fakhruddin Md. Chowdhury*²², that a contract of purchase of land on behalf of a minor was not specifically enforceable at the instance of the minor because it could not have been enforced against him. Their Lordships said that as the minor was not bound by the contract, there was no mutuality and that consequently the minor could not obtain specific enforcement of the contract. But beginning with the case of *Srikakulam Subramanyam v Kurra Subha Rao*²³, the Privy Council allowed specific enforcement even in cases where there was no mutual equality. Thus the doctrine of mutuality ceased to have any force. In English law also the requirement of mutuality has been subjected to such a large number of exceptions that it has been observed in CHITTY: "the number and importance of these exceptions has given rise to a doubt as to the existence of the requirement of mutuality."²⁴ The provisions of Section 12 are sufficient in themselves to rid the law of the requirement of mutuality. That section has been further supported by this sub-section which quite clearly says that the court should not decline specific relief only because of lack of mutuality.

It is also necessary that the plaintiff should have either done his part or should be ready and willing to do his part. In the case of a transfer of property, the Supreme Court observed that a transferee of immovable property can claim specific performance of the contract only by showing his performance or willingness to perform his part of the contract.²⁵ Accordingly, where the court in granting relief under Section 16 paid no attention to the side of the seller and confined its findings to the purchaser's side, this was described by the Supreme Court as a serious error.²⁶ In this case the plaintiff said that he had deposited the requisite amount in a bank account and though he did not produce the passbook of his own accord no adverse inference could be drawn against him because neither the defendant nor the court had called upon him to produce the passbook. The concurrent finding of the trial court and High Court was described by the Supreme Court as contrary to the evidence and palpably unreasonable. The court did not hesitate to set aside the

20. Based on *Storer v G. W. Rly. Co.*, (1842) 2 Y&CCC. 48: 60 RR 23.

21. CHITTY ON CONTRACTS, 1659 (24th edn, 1977), citing FRY ON SPECIFIC PERFORMANCE, 219 (6th edn.).

22. (1912) 39 Cal 232 PC: 39 IA 1.

23. AIR 1948 PC 95: (1948) 75 IA 115: 1949 Mad 141.

24. ON CONTRACTS 1659 (24th edn., 1977).

25. *Jawahar Lal Wadhwa v Haripada Chakroberty*, (1989) 1 SCC 76: AIR 1989 SC 606.

26. *Indira Kaur v Sher Lal Kapoor*, (1988) 2 SCC 488: AIR SC 1074; following *Ramrati Kuer v D.P. Singh*, AIR 1967 SC 1134: (1967) 1 SCR 153.

finding and decreed the plaintiff's suit for specific performance. The court said that the only inference that could reasonably be drawn was that the defendant wanted to defeat the claim of the plaintiff and wanted to wriggle out of the obligation undertaken by him. In another case, the High Court had refused to grant the relief of specific performance on the ground that it would be unjust to do so in view of passage of time resulting in escalation of prices and the Supreme Court did not agree with this view of the matter. The court went by the facts that the whole of the price had been paid long ago and the premises were in the possession of the purchaser in part-performance of the agreement. The case was remanded to the High Court for decision on merits.²⁷

Power of court to award compensation [S. 21]

The provisions of Section 21 are as follows:

21. Power to award compensation in certain cases.—(1) In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach, either in addition to, or in substitution of, such performance.

(2) If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

(3) If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

(4) In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872 (9 of 1872).

(5) No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation.—The circumstances that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

27. *Ajaib Singh v Gurbax Singh*, (1988) 1 SCC 143. Another decision emphasising the equitable and discretionary nature of the relief. *Om Prakash v Amarjit Singh*, 1988 Supp SCC 780.

Every party seeking the relief of specific performance is allowed by this Section to claim compensation for the breach of the contract. Such relief may be claimed either in addition to specific performance or in substitution of it. If the court is of opinion that specific performance ought not to be ordered, the court may award compensation if a valid contract and its breach are established. Should the court find that specific performance by itself would not be sufficient relief, it may, in addition, award compensation also to meet the ends of justice. Compensation would be assessed in accordance with the principles stated in Section 73 of the Contract Act.²⁸ Even where the contract has become incapable of specific enforcement, the court can exercise the power under this section to award compensation. In a case where reconveyance was refused, the court on ordering the same, observed as follows: "When the plaintiff by his option has made specific performance impossible, Section 21 does not entitle him to seek damages. Where the contract, for no fault of the plaintiff, becomes impossible of performance Section 21 enables the award of compensation in lieu and substitution of specific performance." The court continued: "So far as the proviso to sub-section (5) of Section 21 is concerned, two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific performance the Court will allow the amendment at any stage of the proceeding. That is a claim for compensation falling under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section (5). But different and less liberal standards apply if what is sought by the amendment is the conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17, Order 6, CPC. The fact that sub-section (4), in turn, invokes Section 73 of the Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction."

The measure of compensation is by the standards of Section 73 of the Indian Contract Act. Dealing with the facts, the court said:

"In the present case assuming that the respondent had not actually sought the amendment of plaint for compensation in lieu of specific performance, the amendment was hereby permitted so that complete justice could be done. The quantum of compensation is ascertainable with reference to the determination of the market value in the land acquisition proceedings. The compensation awarded may safely be taken to be the measure of damages, subject, of course, to the deduction therefrom of money value of the services, time and energy expended by the appellant in pursuing the claims of compensation and the expenditure incurred by him in the litigation culminating in the award. Accordingly, there will be a decree awarding to the respondent compensation in lieu and substitution of one for specific performance which, but for the acquisition, the respondent would have been entitled to the quantum and the measure of the compensation being the entire amount of compensation determined for the acquisition of the suit properties together with all the solatium, accrued interest and all other payments under the law authorising the acquisition, less a sum of Rs. 1,50,000 which was to go to the appellant towards

28. See Remedies under the Law of Contract, *below*.

his services, time and amounts spent in pursuing the claims for compensation as well as the consideration stipulated for reconveyance."²⁹

It is necessary that the plaintiff should have asked for the relief of compensation. The court may, however, allow the plaint to be amended at any stage to enable the plaintiff to claim compensation.

Where, for example, a buyer of land is allowed to recover it specifically and it takes him about a year to get the relief, the court may award compensation for the loss of time. The following four illustrations appeared under the earlier Act:

(1) *A* contracts to sell a hundred maunds of rice to *B*. *B* brings a suit to compel *A* to perform the contract or to pay compensation. The Court is of opinion that *A* has made a valid contract and has broken it, without excuse, to the injury of *B*, but that specific performance is not the proper remedy. It shall award to *B* such compensation as it deems just.

(2) *A* contracts with *B* to sell him a house for Rs 1000, the price to be paid and the possession given on the 1st January, 1877. *A* fails to perform his part of the contract, and *B* brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to *B* compensation for the loss which he has sustained by *A*'s refusal.

(3) *A*, a purchaser, sues *B*, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award *A* compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(4) *A* sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have certain shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award *A* compensation for the non-performance. [Based on *Ferguson v Wilson*.³⁰]

Order for delivery of goods

The court can issue a direction for delivery of goods despite there being an alternative plea for damages: On the facts of this particular case³¹, the court said:

"In case of non-delivery of goods, where there was an alternative plea for damages, court may not direct delivery of the goods (Units of UTI) after their purchase from open market along with benefit of rights issue. Instead the court can compensate the plaintiff with return of the money paid by him with interest and award of reasonable damages."

29. *Jagdish Singh v Nathu Singh*, (1992) 1 SCC 647: AIR 1992 SC 1604.

30. (1886) 2 Ch 77. *K. Narendra v Riviera Apts (P) Ltd*, (1999) 5 SCC 77: AIR 1999 SC 2309. Agreement, on facts having become incapable of performance, compensation equal to the amount of price already received by the vendor, directed to be paid to the vendee by the vendor in addition to the refund of the amount received. Interest directed to be paid on the amount of compensation from the date of decision and on the refundable amount, from the date the vendor had received the same.

31. *State Bank of Saurashtra v P.N.B.*, (2001) 5 SCC 75: AIR 2001 SC 2412: (2001) 103 Comp Cas 852.

An agreement was entered into for sale of units of UTI by the appellant to the respondent. Payments by way of consideration for purchase of the units were made by the respondent to the appellant and banker's receipt was issued by the appellant in respect of the said transaction. But units were not delivered by the appellant. By a letter dated 1-7-1992 the respondent claimed compensation for breach of contract treating the same to have taken place on 30-5-1992 and on that basis it claimed difference in price between the rate that was paid and the rate of UTI as on 30-5-1992. Since no amount was paid by the appellant, a suit was filed by the respondent claiming delivery of the units in respect of which payments had been made. An alternative prayer was also made for payment of a certain amount as damages plus further interest @ 17.5% p.a. on the said amount till the date of payment. The Special Court constituted under the Special Court Act of 1992 granted relief of specific performance requiring the appellant to buy the units for which payment had been made and also to purchase and sell to the respondent the units representing the right issue which the respondent was deprived of availing because of the non-delivery of the units. Costs of Rs 27,87,000 were also awarded. Disposing of the appeal, the Supreme Court said:

"The appellant admits that the respondent, to whom delivery of the units was not made, would be entitled to the refund of the money plus damages thereon calculated in accordance with the principles contained in Section 73 of the Indian Contract Act, 1872. Considering the fact that there was an alternative plea for damages, on the facts of the present case a decree for specific performance in the manner in which it was passed was probably not appropriate especially when the respondent could be compensated with the return of money and award of reasonable damages."

Relief of possession, partition, etc. [S. 22]

Where the relief sought is for the transfer of immovable property, the court may also grant, if so prayed by the party, relief by way of possession, partition and separate possession. The court may also grant any other relief, such as refund of earnest money or deposit paid in case specific performance is refused. Where the party has not made any such prayer in the original plaint, the court may permit amendment of the plaint.³²

Section 22 runs as follows:

22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

- (a) possession, or partition and separate possession, of the property, in addition to such performance; or
- (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

32. The section is an enabling provision, *Adcon Electronics Ltd v Daulat*, (2001) 7 SCC 698.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Section 21.

Relief for possession has to be pleaded

Relief of possession can be granted only if it is specifically prayed for.

Sub-section (1) of Section 22 of the Specific Relief Act, 1963 is an enabling provision. A plaintiff in a suit for specific performance may ask for further reliefs mentioned in clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically prayed for.

In the instant case the suit is for specific performance of the agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed, as such it cannot be treated as a "suit for land".

It is not possible to accept the contention that in the present case the suit is for acquisition of title to the land and is a "suit for land". In its true sense, a suit simpliciter for specific performance of a contract for sale of land is a suit for enforcement of the terms of a contract. The title to the land as such is not the subject-matter of the suit.³³

Liquidation of damages no bar [S. 23]

Where the parties to the contract have fixed the amount of compensation which would be payable in the event of default, this would not constitute any bar to the relief of specific performance. The court may examine the circumstances of the case. If they show that compensation was fixed in order to secure performance and not to allow the defaulting party an option to pay compensation, the court may allow specific performance. Where, on facts, the plaintiff-respondent was found ready, willing and able to perform his part of the agreement for the sale of orchard, it was held that such plaintiff was entitled to specific performance despite the existence of a penalty clause providing for payment of Rs 10,000 by the party violating the terms and conditions of agreement. The Division Bench of the High Court rightly

33. *Adcon Electronics (P) Ltd v Daulat*, (2001) 7 SCC 698.

dismissed the appeal of the appellant-Defendant 1 vendor.³⁴ The court cannot, however, in the same decree order the payment of the fixed amount also.

The Act of 1877 carried this power under Section 20 and had the following illustration:

A contracts to grant B an under-lease of property held by A under C, and that he will apply to C for a licence necessary to the validity of the under-lease, and that, if the licence is not granted, A will pay B Rs. 10,000. A refuses to apply for the licence and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the licence.

Alternative relief provided in contract

Where the agreement (for sale of agricultural land) itself providing for contingencies of (i) seller refusing to sell and (ii) purchaser refusing to buy by stipulating the return of earnest money plus another sum in either circumstance, it was held, that on facts, there was no obligation on the seller to complete the sale transaction and the contract could not be specifically enforced. The High Court erred in upholding the decree of specific performance awarded by the first appellate court.³⁵

Enforcement of awards and direction to execute settlements

Section 25 of the Act provides that the provisions of this chapter (*i.e.* Chapter II) shall apply to awards to which the Arbitration Act, 1940 does not apply and to directions in a will or codicil to execute particular settlement.

Rescission of contracts

The rescission of contract necessarily constitutes a bar to its performance by either of the party to it (Fry; Chapter XXIV). The grounds for bringing a suit for rescission have been given in Sections 27 and 28 of the Specific Relief Act, 1963:

27. When rescission may be adjudged or refused.—(1) Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:—

- (a) where the contract is voidable or terminable by the plaintiff.
- (b) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

(2) Notwithstanding anything contained in sub-section (1), the court may refuse to rescind the contract—

- (a) where the plaintiff has expressly or impliedly ratified the contract; or

34. *Manzoor Ahmed Magray v Ghulam Hassan Aram*, (1999) 7 SCC 703; *M.L. Devender Singh v Syed Khaja*, (1973) 2 SCC 515; *Prakash Chandra v Angadial*, (1979) 4 SCC 393; *Kartar Singh v Harjinder Singh*, (1990) 3 SCC 517, *relied on*.

35. *Dadarao v Ramrao*, (1999) 8 SCC 416.

- (b) where, owing to the change of circumstances which have taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or
- (c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or
- (d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

Explanation.—In this section “contract”, in relation to the territories to which the Transfer of Property Act, 1882, does not extend, means a contract in writing.

Illustrations in preceding Act

This section corresponds with Section 35 of the repealed Specific Relief Act, 1877. That section carried the following illustrations:

Illustration as to sub-section (1)(a).—A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

Illustration as to sub-section (1)(b).—A, an attorney, induces his client, B, a Hindu widow, to transfer property to him for the purpose of defrauding B’s creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

The relief of rescission comes handy to a person who has become the victim of an imposition by means of a contract. This burden of a contract has been imposed upon him by means of a fraud or illegality or something equivalent which makes the contract either void or voidable. He may ask the court that the contract should be declared as not binding upon him. This is rescission, that is, getting rid of a contract. Section 27 accordingly provides that the court may allow the relief of rescission in the following cases:

- (1) Where the contract is voidable or terminable by the plaintiff;
- (2) where the contract is unlawful for causes not apparent on its face and the defendant is more to blame.

The relief of rescission is available subject to very important limits. This is so because every voidable contract is valid as long as it is not avoided. If the relief of rescission is not quickly obtained, circumstances may so seriously change that it would then not be desirable to put an end to the contract. Sub-section (2) accordingly provides that the right of rescission is not available in the following cases:

1. Affirmation

The plaintiff loses the right of rescission when on becoming aware of his right he chooses to ratify the contract. Once the contract is affirmed it cannot afterwards be avoided. Affirmation may be express or implied. An express affirmation takes

place when the right to rescind is openly waived. An implied affirmation takes place when the party having the right to rescind is instead enjoying the benefits of the contract.

2. *Where restitution not possible*

The right of rescission is also lost where the position of the parties has been altered to such an extent that they cannot be put back to their original status. Where one party has already resold the goods or consumed them, restoration of the *status quo ante* becomes impossible.

3. *Intervention of Third Parties*

Where the rights of third parties have intervened, rescission cannot be allowed to the prejudice of such rights. Where, for example, a person has obtained goods by fraud and, before the seller is able to catch him, he transfers the goods to a *bona fide* buyer, the deceived seller would not now be allowed to get rid of the sale on account of the fraud.

4. *Severance*

Rescission is not allowed where the plaintiff is seeking rescission of only a part of the contract and that part is not severable from the rest of the contract.

28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed.—(1) Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract, either so far as regards the party in default or altogether, as the justice of the case may require.

(2) Where a contract is rescinded under sub-section (1), the court—

- (a) shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and
- (b) may direct payment to the vendor or lessor of all the rents and profit which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest money or deposit in connection with the contract.

(3) If the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section (1), the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate cases all or any of the following reliefs, namely:—

- (a) the execution of a proper conveyance or lease by the vendor or lessor;
- (b) the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

(4) No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

(5) The costs of any proceedings under this section shall be in the discretion of the court.

Section 28 enables the court to put an inbuilt remedy of rescission in a decree of specific performance. Where a decree of specific performance has been passed in respect of a contract for the sale or lease of immovable property, but the party to whom such relief has been granted does not pay the price within the time delimited, the seller may ask the court for rescission. The court will direct the purchaser or lessee, if he has already taken over possession, to restore it to the seller and also to pay him rent for the period during which he enjoyed the benefits of possession. Where justice so requires the court may order refund of the earnest money, if any, paid by the vendee or lessee. Where, on the other hand, the vendee or lessee has deposited the money as directed by the court, he may be allowed any relief as may seem just to the court in the circumstances.³⁶

Alternative prayer for rescission in suit for specific performance

As provided by Section 29 of the Specific Relief Act, 1963, the plaintiff delivery of the instrument for being cancelled.

But the converse is not true. So, the prayer for the rescission of the contract or, in the alternative, for a decree of specific performance is not permissible.³⁷

Rescission and equity

Section 30 lays down that the court may require parties rescinding to do equity. It provides:

36. Relief was allowed even where the deposit was late but it was made during the pendency of the appeal. The court retains control over the matter even after the passing of the decree, *Ramankutty Guptan v Avara*, (1994) 2 SCC 642; AIR 1994 SC 1699. *V.S. Patanichamy Chettiar v C. Algappan*, (1999) 4 SCC 702; AIR 1999 SC 918, application to the execution court for extension of time. The court explained the factors which have to be taken into account in dealing with such applications.

37. Fry, *SPECIFIC PERFORMANCE*, S. 1058 (5th edn.).

30. Court may require parties rescinding to do equity.—On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require.

It is a maxim of law that "he who seeks equity must do equity" in the transaction in respect of which relief is sought. So while decreeing rescission the Court might direct not only payment of compensation to the defendant but also restoration of any benefit received by the plaintiff under the contract.

A party seeking specific relief may at the same time ask that if specific performance cannot be allowed, the contract may be ordered to be rescinded. If the court refuses one relief, it may order the other.

The party at whose instance the contract is cancelled may be asked by the court to restore the benefits, if any, received under the contract to the extent to which justice requires.

Rectification of instruments [Section 26]

Section 26 of the Specific Relief Act, 1963 provides remedy for rectification of instruments. The term 'instrument' has been defined in Section 2, clause (14) of the Indian Stamp Act (II of 1899). Accordingly, 'instrument' includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded.

A suit, therefore, lies for the rectification of a will, a decree and also for the rectification of an award-decree on the ground of fraud.

The word 'instrument', however, does not include 'Articles of Association'.³⁸

Section 26 of the Specific Relief Act, 1963 runs thus:

26. When instrument may be rectified.—(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the articles of association of a company to which the Companies Act, 1956, applies) does not express their real intention, then—

- (a) either party or his representative-in-interest may institute a suit to have the instrument rectified; or
- (b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or
- (c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

38. *C.I.T. v Kamla Town Trust*, (1996) 7 SCC 349; AIR 1996 SC 626, power to order rectification of trust deed; rectification was ordered to declare that the trust was a charitable one.

(2) If in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed:

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

Illustrations in preceding Act

Sub-section (1) and clause (a) of this Section corresponds with Section 31 and sub-section (3) of this Section corresponds with Section 34 of the repealed Specific Relief Act, 1877. That Act carried the following illustrations:

Illustrations as to sub-section (1) and clause (a).—(a) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C, but it cannot be rectified so as to affect D's lease.

(b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

Illustrations as to sub-section (3).—A contracts in writing to pay to his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties. [Based on *Stedman v Collett*.³⁹]

39. (1854) 17 Beav 608; 99 RR 310.

In the matter of rectification, the true question, is what was the intention of the parties at the time of its execution and not what the parties intentionally omitted.⁴⁰ The plaintiff must establish that the alleged intention to which he desires the document to be made conformable, continued concurrently in the minds of all parties down to the time of its execution.⁴¹ For, if the parties after an agreement changed their minds and it is their changed intention that is embodied in the instrument, there is no ground for rectification. What is done on purpose, is obviously not done by mistake.⁴²

Essentials to be proved

- (1) That there was a mutual mistake or fraud, and
- (2) that the instrument on that account did not truly express the intention of the parties.⁴³

Mistake

The mistake to form a ground for the relief of rectification must be mutual and not unilateral. A mistake on one side may be a ground of defence or a ground for rescinding a contract, but not for correcting or rectifying an instrument. The mistake may be either of fact or of law although the court of equity will not generally grant relief against a mistake of law, except where the mistake results in an inequitable result.⁴⁴

The principle of granting relief by way of rectification is that where a contract as finally made fails to express or embody the agreement between the parties as originally made, it can be had rectified so as to bring it in accord with the intention of the parties. Thus where the final draft mentioned the price in weight when in fact it was agreed to be in count and riot risk was mentioned in an insurance cover by mistake, the court allowed rectification. The court said that the matter came within Section 26 of the Specific Relief Act of 1963 which provides that an instrument can be rectified if through fraud or a mutual mistake of the parties, the contract does not express their real intention.⁴⁵

Cancellation of instruments [Ss. 31-33]

Sections 31 to 33 of the Specific Relief Act, 1963 provide for the cancellation of instruments. They are reproduced below:

31. When cancellation may be ordered.—(1) Any person against whom a written instrument is voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. -

40. *Laxman v Ganpat*, 2 NLR 4.

41. *Ibid.*

42. *Ibid.*

43. AIR 1946 PC 42.

44. *Nawab Begum v Creet*, 27 All 678.

45. *New India Rubber Works P Ltd v Oriental Fire and Gen Ins Co*, (1969) 1 Comp LJ 153 Cal.

(2) If the instrument has been registered under the Indian Registration Act, 1908 the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Illustrations in preceding Act

This Section corresponds with Section 39 of the repealed Specific Relief Act, 1877. That section carried the following illustrations:

- (a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.
- (b) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.
- (c) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument, dated the 1st January, 1877. Soon after the day, A fraudulently grants to C a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. B may obtain the cancellation of this deed.
- (d) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances of four bills of exchange, for sums amounting to Rs 30,000, to be drawn by A or B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills. [Based on *Anglo-Danubian Co v Rogerson*.⁴⁶]

32. What instruments may be partially cancelled.—Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue.

Illustrations in preceding Act

This Section corresponds with Section 40 of the repealed Specific Relief Act, 1877. That Section carried the following illustration:

A draws a bill on B who endorses it to C, by whom it appears to be endorsed to D, who endorses to E. C's endorsement is forged. C is entitled to have such instrument cancelled, leaving the bills to stand in other respects.

33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.—(1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be, any benefit which he may have

46. (1867) LR 4 Eq 3.

received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the grounds—

- (a) that the instrument sought to be enforced against him in the suit is voidable, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;
- (b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under Section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.

The relief provided in Section 33 of the Specific Relief Act is based on the principle of protective or preventive justice. This section applies to instruments executed by the plaintiff as well as to other instruments which he seeks to have adjudged void or voidable.⁴⁷ It is not necessary that the plaintiff must be a party to a contract; he can maintain the suit under this section if the instrument is against his interest.

The conditions precedent to the applicability of this section are—

- (a) the instrument should be void or voidable against the plaintiff;
- (b) there is a reasonable apprehension of a serious injury;⁴⁸
- (c) that the case is fit for the exercise of the court's discretion to grant the prayer.⁴⁹

Void

An agreement not enforceable by law is said to be void [Section 2(8) of Indian Contract Act]. A contract is void—

- (i) where the consideration or object or an agreement is forbidden by law, or
- (ii) is of such a nature that, if permitted, it would defeat the provisions of any law, or
- (iii) is fraudulent, or
- (iv) involves or implies injury to the person or property of another, or,
- (v) the court regards it is immoral or opposed to public policy (Section 23, Indian Contract Act).

47. *Surajket v Chandra Mal*, AIR 1934 All 1071.

48. *Teka Dula v Bai Jivi*, 39 BLR 1072.

49. *Ibid.*

It will also be noted that an agreement in restraint of marriage of any person other than a minor⁵⁰, or by which anyone is restrained from exercising a lawful profession, trade or business⁵¹ or legal proceedings, or agreements of unmeaning or of wagering nature and an agreement without consideration as a general rule⁵² are void. A contract by a minor is void.⁵³

Voidable

An agreement which is enforceable by law, at the option of one or more parties thereto, but not at the option of the other or others, is a voidable contract.⁵⁴

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party, whose consent was so caused.⁵⁵

A contract induced by undue influence is voidable at the option of the party whose consent was so caused.⁵⁶

Reasonable apprehension

The relief provided under Section 31 of the Specific Relief Act is based upon protective justice and upon the idea of 'quia time' (for fear) and, therefore, where there is no apprehension of injury to the plaintiff, no suit can be instituted.⁵⁷ Reasonable apprehension is to be determined with reference to the circumstances of each case which the court has to deal with.

Limitations

(1) The relief under Section 31 of Specific Relief Act cannot be claimed as a matter of right; the court will act upon the principle of the exercise of sound discretion, having due regard to the conduct of the parties.⁵⁸

(2) Where the parties are *in pari delicto* and fraud is alleged as the ground for cancellation, the court may refuse the relief to the plaintiff, as he is equally to blame as is defendant.⁵⁹

(3) No relief can be granted under Section 31 of the Specific Relief Act where there is a question of mere inadequacy of consideration.⁶⁰

(4) No suit for the cancellation of a will can be instituted during a testator's lifetime.

Partial cancellation

Section 32 of the Specific Relief Act will be applicable only when rights and obligations under an instrument are distinct and separable.⁶¹

50. Section 26, Indian Contract Act.

51. Section 28, Indian Contract Act.

52. Section 25, Indian Contract Act.

53. *Mohri Bibi v Dharamdas*, 30 Cal 539.

54. Section 2(i), Indian Contract Act.

55. Section 19, Indian Contract Act.

56. Section 19-A, Indian Contract Act.

57. *Chaganlal v Dharamdas*, 7 Bom 607.

58. *Valley v Dallubhoy*, 25 Bom 10.

59. *Bindeshwari v Lekhranj*, 20 CWN 760.

60. *Kelam v Polavampur*, 191 Cal 746.

61. *Khub Singh v Jahan Lal*, 12 CPR 13.

Compensation

The plea of compensation must be taken in the first court.⁶²

Limitation

Article 59 of the Indian Limitation Act, 1953 prescribes a period of 3 years for a suit for cancellation of an instrument computable from the date when the fact entitling the plaintiff where the instrument cancelled first becomes known to him.

The provisions have been frequently used by the courts in rescuing minors from the burden of contracts made by them. One of the outstanding cases is the decision of the Privy Council in *Mohoribibi v Dharmodas Ghese*.⁶³ A minor, declaring himself to be of full age, mortgaged his two houses as against a loan, a part of which was paid to him in cash. He then applied to the court for cancellation of the mortgage. The court had to cancel the mortgage because it was in fact void. The moneylender pleaded for refund of his money. The provisions do authorise courts to require a minor to restore the benefits obtained or make compensation, but only to the extent to which justice so requires. In the present case their Lordships said that justice did not require any relief in favour of the lender because he was reckless in his dealings with the minor.

The provisions quite clearly contemplated that the court could ask only that person to make compensation who was seeking the relief of cancellation. In a case before the Lahore High Court⁶⁴ relief was sought by a person against a minor who had taken the price in advance of the land which he purported to sell but refused to complete the sale. It was powerfully contended that the provisions would permit relief only against a person who himself seeks cancellation and not against one who came to the court as a defendant. But the court ordered the minor to refund the money. As against it, the Allahabad High Court refused to ask the minor, who was a defendant in the court, to refund the mortgage money.⁶⁵ When the Specific Relief Act was re-enacted in 1963, in terms of the proposals of the Law Commission, Section 33 which provided for the relief of restitution on the cancellation of a contract contained provisions to cover both situations, namely, whether the person seeking relief is the plaintiff or the defendant. The provisions can be presented in terms of the following propositions:

- (1) Where a void or voidable contract has been cancelled at the instance of a party thereto, the court may require him to restore such benefits as he has received under the contract and to make any compensation to the other party which justice may require.
- (2) Where a defendant successfully resists any suit on the ground that the contract, by reason of his being incompetent, is void against him, he may be required to restore the benefits, if any, obtained by him under the contract, but only to the extent to which he or his estate has benefited thereby.

Declaratory decrees

Sections 34 and 35 lay down the law relating to declaratory decrees. A declaratory decree is a decree declaratory of a right which is doubtful or which

62. *Gokul v Karam*, 8 PC 782.

63. 30 IA 114; 30 Cal 539 (1903).

64. *Khan Gul v Lakha Singh*, ILR (1928) 9 Lah 701; AIR 1928 Lah 609.

65. *Ajudhia Pd. v Chandan Lal*, AIR 1937 All 610 FB.

requires to be cleared. The object of declaratory decrees is to prevent future litigation by removing the existing cause of the controversy. In other words, if a cloud is cast upon the title or legal character of the plaintiff, he is entitled to seek the aid of the court to dispel it.

Section 34 of the Specific Relief Act lays down the circumstances under which a declaratory decree may be passed. It provides:

34. Discretion of court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

Section 34 of the Specific Relief Act does not sanction every kind of declaration but only a declaration that the plaintiff is entitled to any legal character or to any property.⁶⁶ It is not a matter of absolute right to obtain a declaratory decree and it is discretionary for the court to grant or refuse to grant it.

It is essential for a decree under Section 34, Specific Relief Act, that the plaintiff must be entitled to any legal character to any right to property. 'Legal character' is a position recognised by law,⁶⁷ and a person's legal character is made up of the attributes which law attaches to him in his individual and personal capacity and the phrase is synonymous with the word 'status'.⁶⁸ It includes the right of franchise and the right of election.⁶⁹ It may be observed that the words 'legal character' and 'to any right as to any property' are separated by the disjunctive 'or' and, therefore, the plaintiff can maintain a suit for a mere declaration, if he can show that he is entitled to any legal character, even though he cannot lay an immediate claim to any property.

(i) *Essentials to be set up for relief under Section 34*

(1) That the plaintiff is entitled to a legal character at the time of the suit, or to any right as to any property.⁷⁰

66. AIR 1910 Guj 145.

67. *Hira Lal v Gulab*, 10 CPC 1; *Ram Das v Salim Ahmed*, (1998) 9 SCC 719, weakness in defendant's claim for title to the property cannot establish plaintiff's title. Plaintiff not entitled to get declaration of title if such title could not be established by him by leading convincing evidence. High Court failed to consider the specific finding made by the lower appellate court that the plaintiff had failed to establish its title.

68. *Ram Krishna v Narayan*, 27 MLJ 639.

69. *Sat Narain Gurwala v Hanuman Prasad*, 224 IC 322.

70. *Padmini Chandrasekharan v R. Rajagopal Reddy*, (1996) 8 SCC 632, entitlement to property on family partition. *Sowrashttra Vipra Sabha v Namakal Municipality*, (1996) 11 SCC 584, title perfected by formalities.

(2) Defendant has denied these or he is interested in denying that character or right of the plaintiff, and

(3) The plaintiff is not in a position to ask for relief consequential upon the declaration.

If these conditions are satisfied, the plaintiff need not ask for any further relief than a mere declaration. But the court shall not make any such declaration if he, being able to seek further relief than a mere declaration of title, omits to do so.⁷¹

(ii) *Frame of the plaint*

The plaint must disclose—

- (1) the title or right claimed by the plaintiff,
- (2) the circumstances in which the cloud was cast over the same or the same was denied or threatened,
- (3) the prayer.⁷²

The right to any property, mentioned in this section, must be a right actually existing at the date of the suit, though the enjoyment itself may be deferred, e.g., a right of the reversioner. But when the plaintiff had no vested or contingent right to any property but only a faint hope of being selected as a shesbait after the death of the existing shesbait, he could not maintain a suit for declaration.⁷³ In *Qabool Singh v Board of Revenue*⁷⁴, it was held that the plaintiff must show subsisting right not only on the date of the suit but also on the date of decree.

The defendant should be a person who actually denies or is interested to deny the plaintiff's title, status, right to any property; even the lease denied by a person or the agent of a person who is interested to deny invests the plaintiff with a cause of action for a declaratory suit under Section 34, Specific Relief Act,⁷⁵ but a mere apprehension existing in the mind of the plaintiff does not give him any right to bring a suit for declaration.⁷⁶

A suit for declaration will not lie in the following cases:

- (1) for a declaration that the plaintiff did not infringe the defendant's trade mark.⁷⁷ Negative declaration will not be allowed;
- (2) for a declaration that a disposition made by the father of the plaintiff in a will is invalid and that the property is ancestral and that the plaintiff is entitled to a share in it. This suit would be barred by the proviso of Section 42, Specific Relief Act, because the plaintiff can claim further relief or partition;⁷⁸
- (3) for a declaration, during the lifetime of the testator, that the will is invalid. The reason is that the will is revokable and no property is transferred during the lifetime of the testator;⁷⁹

71. *Man Kunwar Asram v Mst. Badlu Mukandi*, AIR 1957 MP 211.

72. *State v Gudge*, Pat (HC) 262.

73. *Satrohan v Gursaran*, AIR 1929 All 904.

74. AIR 1973 All 158.

75. *Nankhar Singh v Qaddir Bux*, 1251 Cal 14.

76. *Jagtu Mal v Laxman Das*, 157 IC 523.

77. 111 IC 176.

78. 25 Mad 504.

79. 27 All 15.

- (4) for a declaration that the plaintiff is a purchaser under an unregistered deed of sale;⁸⁰
- (5) no declaratory suit lies to set aside a succession certificate granted under Act XXVII of 1860;⁸¹
- (6) no one can ask for a declaration of a non-existent right, as of succession, i.e., the chance or possibility of acquiring a right in the future;
- (7) a suit by a student against a University for a declaration that he has passed an examination;⁸²
- (8) a declaration tending to affect the free flow of capital and commercial operations would be unjust.⁸³

(iii) Proviso

All that the proviso to Section 34 of the Specific Relief Act forbids is a suit for mere declaration without further relief if the plaintiff can sue for further relief. The term 'further relief' means 'the relief to which the plaintiff is necessarily entitled on the basis of declaration of the title'. This is done in order to avoid multiplicity of suits. Further, relief must be in relation to the legal character or right to such character or the right which the defendant denies or is interested in denying. It must also be relief appropriate to, and consequent on the right asserted.⁸⁴ Thus, the term simply means the relief which is necessary for the plaintiff to claim.

For example, where *A* claims that he is entitled to half portion of the house in the occupation of *B*, he must pray in his suit:—

- (i) that a declaration be made that *A* is entitled to half portion of the house and;
- (ii) that the defendant be asked to deliver the half portion of the house to *A*.
This is consequential relief.

In *Ram Saran v Ganga Devi*⁸⁵, the defendant was in possession of some of the suit properties and the plaintiffs in their suit did not ask for the possession of those properties. They merely prayed for a declaration that they were the owners of the suit properties. It was held that the suit was not maintainable and was hit by Section 42 of the Act of 1877 (now Section 34 of the Specific Relief Act, 1963).

Illustrations in preceding Act

Section 34 is a reproduction of the original Section 42 of the repealed Act. That section carried the following illustrations:

- (a) *A* is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. *A* may sue for a declaration that they are not entitled to the right so claimed.
- (b) *A* bequeaths his property to *B*, *C* and *D*, "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children". No such children are in existence. In a suit against

80. 10 WR 51 (FB). See also Section 53-A of Transfer of Property Act, 1882.

81. 22 WR 312. The new Act is the Indian Succession Act, 1925.

82. *Ramugrah v Banaras Hindu University*, 47 IA 434.

83. *Express Bank Ltd v Calcutta Steel Co.*, (1993) 2 SCC 199, 213.

84. 26 CWN 211.

IR 1972 SC 2685.

- A's executor, the court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.
- (c) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.
- (d) A alienates B's property in which A has merely a life interest. The alienation is invalid as against C, who is entitled as reversioner. The court may in a suit by C against A and B declare that C is so entitled.
- (e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime. (Section 14 of the Hindu Succession Act has now changed the position into this that a widow is entitled to full rights over her property.)
- (f) Out of date illustration, hence omitted.
- (g) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

Declaration of rights or status is one at the discretion of the court under Section 34 of the Specific Relief Act, 1963. Equally, the grant or refusal of the relief of declaration and injunction under the provision of that Act is discretionary. The plaintiff cannot claim the relief as of right. It has to be granted according to sound principles of law and *ex debito justitiae*. The court cannot convert itself into an instrument of injustice or vehicle of oppression. While exercising its discretionary power, the court must keep in its mind the well-settled principles of justice and fair play and the discretion would be exercised keeping in view the ends of justice since justice is the hallmark and it cannot be administered in vacuum. Grant of declaration and injunction relating to commercial transactions tend to aid dishonesty and perfidy. Conversely, refusal to grant relief generally encourages candour in business behaviour, facilitates free flow of capital, prompt compliance with covenants, sustained growth of commerce and above all inculcates respect for the efficacy of judicial adjudication. Before granting or refusing to grant relief of declaration or injunction or both the court must weigh pros and cons in each case, consider the facts and circumstances in their proper perspective and exercise discretion with circumspection to further the ends of justice. In this backdrop of fact situation it was held in a case that the relief of declaration granted was unjust and illegal as it tended to impede the free flow of capital, thwarted the growth of mercantile business and deflected the course of justice.⁸⁶

Section 35 lays down that a declaration made under this chapter (*i.e.* Chapter VI of the Act) is binding only:

- (i) on the parties to the suit,

86. *Thakamma Mathew v M. Azamathulla Khan*, AIR 1993 SC 1120.

- (ii) on persons claiming through them respectively, e.g. reversioners, widows and sons etc., and
- (iii) where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration such parties would be trustees.

For example, *A*, a Hindu, in a suit to which *B*, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnised and an order for the restitution of conjugal rights. The court makes the declaration and order. *C* claiming that *B* is his wife, then sues *A* for the recovery of *B*. The declaration made in the former suit is not binding upon *C*.

- (iv) *Limitation*.—The governing Articles in the Indian Limitation Act, 1963 are Articles 56, 57 and 58.

INJUNCTION

The term 'injunction' has been the subject of various attempts at a definition. It has been defined by Joyce as "An order remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party informed."

In Burney 'injunction' has been defined to be a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another is restrained from continuing or commencing such wrongful act.⁸⁷

Both of these definitions are expressive more of what is called a prohibitory injunction than mandatory injunction. The definition which clearly includes both is the one given by Lord Halsbury. According to him 'An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing'.

Injunction acts *in personam*. It does not run with the property. For example *A*, the plaintiff, secures an injunction against *B* forbidding him to erect a wall. *A* sells the property to *C*. The sale does not carry the injunction with the property.

An injunction may be issued for and against individuals, public bodies or even the State. Disobedience of an injunction is punishable as contempt of court.

There are three characteristics of an injunction:

- (i) it is a judicial process,
- (ii) the relief obtained thereby is a restraint or prevention, and
- (iii) the act prevented or restrained is wrongful.

Nelson suggests that "the nature of discretion and the rules for its guidance, in the case of Indian Courts are the same as in England".

Under English Law:

- (1) if the injury to the plaintiff's legal rights is small; and
- (2) is one which is capable of being estimated in money; and
- (3) is one which can be adequately compensated by a small money payment; and
- (4) the case is one, in which it would be oppressive to the defendant to grant an injunction,

87. ENCYCLOPAEDIA OF THE LAWS OF ENGLAND, by A.W. Renton, p 464 (1st edn, Vol 6).

then damages in substitution for an injunction may be given.

In India some of these points have been incorporated into rules of jurisdiction by being enacted as sections of the Specific Relief Act, 1963.

They may be stated as below:

An injunction will not be issued—

- (i) where damages are the appropriate remedy,
- (ii) where injunction is not the appropriate relief,
- (iii) where the plaintiff is not entitled to an injunction on account of his conduct,
- (iv) where the contract cannot be specifically enforced,
- (v) where the injunction would operate inequitably.

Kinds of injunction

Injunctions are either temporary (interlocutory) or perpetual. They are defined in Section 37, Specific Relief Act, which reads—

37. Temporary and perpetual injunctions.—(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act which would be contrary to the rights of the plaintiff.

(i) Temporary injunctions

The procedure for granting temporary injunction is governed by the rules laid down in Order XXXIX, Rules 1 and 2, Civil Procedure Code⁸⁸ which reads as under:

1. Cases in which temporary injunction may be granted.—Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,
- (c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

88. For the U.P. amendment of Order XXXIX, Rules 1 and 2, see Section 13 of the Uttar Pradesh Civil Laws (Reforms and Amendment) Act, 1976.

2. Injunction to restrain repetition or continuance of breach.—(1) In any suit for restraining the defendant from committing a breach of contract or other injury, of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the court thinks fit.

It should be noted that grant of injunction is discretionary with the court. Section 36 of the Specific Relief Act, 1963 expressly lays down that "Preventive relief is granted *at the discretion of the court* by injunction, temporary or perpetual"⁸⁹. Therefore the court will grant temporary injunction if the following conditions are satisfied:

- (i) The plaintiff must establish a prima facie case. He is not required to make out a clear title but he must establish that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the injunction is finally disposed of.
- (ii) An irreparable injury would result if the injunction were refused and that there is no other remedy open to the applicant by which he could protect himself from the consequences of the apprehended injury.
- (iii) The conduct of the plaintiff has not been blameworthy.
- (iv) The balance of convenience requires that the injunction should be granted.

Disobedience or breach of injunction

Section 94(c) and Rule 2-A of Order 39 of the Civil Procedure Code (Act V of 1908) provide for the consequences of disobedience or breach of injunction. Section 94(c) provides:

In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed . . . grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold.

And Rule 2-A of Order 39 provides:

2-A. Consequence of disobedience or breach of injunction.—(1) In the case of disobedience of any injunction granted or other order made under Rule 1 or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any Court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Court directs his release.

89. *Ravi Singhal v Manali Singhal*, (2001) 8 SCC 1; in an application for interim relief in respect of a settlement, the court said that it is at the discretion of the court to grant interim relief and exercise of discretion should not be perverse or irrational.

(2) No attachment made under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold and out of the proceeds, the Court may award such compensation as it thinks fit to the injured party and shall pay the balance, if any, to the party entitled thereto.

The above provisions provide for the penalty of either arrest or attachment of property of the person who has committed disobedience or breach of the injunction. But the detention in civil prison shall not exceed three months and the attachment of property shall not remain in force for more than one year. If the disobedience or breach continues, the property attached may be sold and out of the proceeds the Court may award such compensation as it thinks fit to the injured party.

(ii) *Perpetual injunctions*— Section 37(2) lays down that a permanent injunction can be granted only by a decree at the hearing and upon the merits of the suit. In other words for obtaining a permanent injunction, a regular suit is required to be filed in which the right claimed by the plaintiff is examined on merits and finally the injunction is granted by means of the decree. A permanent injunction therefore finally decides the rights of parties whereas a temporary injunction does not do so. A permanent injunction forbids the defendant from asserting a right or committing an act which would be contrary to the rights of the plaintiff.

Section 38 of the Specific Relief Act states the circumstances in which a permanent injunction can be granted. It provides:

38. Perpetual injunction when granted.—(1) Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely—

- (a) where the defendant is trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that compensation in money would not afford adequate relief;
- (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

The conditions prerequisite to the applicability of this section are—

- (1) there must be a legal right express or implied in favour of the applicant;

- (2) such a right must be violated or there should be a threatened invasion⁹⁰;
- (3) such a right should be an existing one;
- (4) the case should be fit for the exercise of court's discretion.⁹¹ Where the inconvenience likely to result from granting injunction is greater than that which is likely to arise from withholding it, the injunction should not be granted⁹²;
- (5) it should not fall within the sphere of the restraining provisions contained in, or referred to, in Section 41 of the Specific Relief Act.⁹³

Illustrations in preceding Act

Section 54 of the original Act upon which the present section is based carried the following illustrations:

- (a) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.
- (b) A trustee threatens a breach of trust. His co-trustee, if any, should; and the beneficial owner may, sue for an injunction to restrain the breach.
- (c) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.
- (d) The directors of a fire and life insurance company are about to engage in marine insurance. Any of the shareholders may sue for an injunction to restrain them.
- (e) A, an executor through misconduct or insolvency, is bringing the property of the deceased into danger. The court may grant an injunction to restrain him from getting at the assets.
- (f) A, a trustee for B, is about to make an important sale of a small part of the trust property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.
- (g) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.
- (h) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

90. 30 All 70.

91. *Gur v Bhag*, 96 PR 1911: 11 IC 213.

92. *Raja Maheshwar Dayal Seth v Yuvraj Dutt Singh*, AIR 1964, p. 42.

93. *Attar Singh Balram Singh v Kishan Das Prabhu Das*, ILR 18 Lah 345. An injunction is not allowed where the suit is an abuse of the process of court. *Surya Nath Singh v Khedu Singh*, (1994) Supp 3 SCC 561.

- (i) A is B's medical advisor. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communication to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.
- (j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from doing so.⁹⁴
- (k) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the land with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandry-like manner. [Based on *Partt v Brett*⁹⁵.]
- (l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act. [Based on *Miles v Thomas*⁹⁶.]
- (m) [* * *]
- (n) A, B and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family house and sell some of the family utensils. B and C may sue for an injunction to restrain him.
- (o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.
- (p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged rights of way over the land. A may sue for an injunction to restrain them.
- (q) A, in an administration suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debts. A may sue for an injunction to restrain B.

94. *Ishwara Bhatt v Annappa Naika*, AIR 1997 Ker 165, neighbour disturbing the peace of the person in possession and enjoyment of the land in question and threatened trespass, retained permanently. Also to the same effect, *Walter Louis Franklin v George Singh*, (1997) 3 SCC 503.

95. (1817) 2 Madd 62: 17 RR 187.

96. (1839) 9 Sim 606: 47 RR 320.

- (r) A and B are in possession of contiguous lands and of the mines underneath them. A works his mines so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.
- (s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.⁹⁷
- (t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.
- (u) A infringes B's patent. If the court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.
- (v) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.
- (w) A improperly uses the trade mark of B. B may obtain an injunction to restrain the user, provided that B's use of the trade mark is honest.
- (x) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing. [Based on *Routh v Wobster*.⁹⁸]
- (y) A, a very eminent man, writes letters on family topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.
- (z) A carries on a manufactory and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.
- (zz) A person who had played a role in the production of a serial film but his name was not included in the title was allowed to have an order for such inclusion.⁹⁹ Award of damages would not have been an adequate remedy.

The word 'obligation' in Section 38(1) has been used in a wide sense and it may arise from:

- (i) Contract,
- (ii) Trust,

97. *Shamboo Nath Tikoo v Gian Singh*, (1995) Supp (3) SCC 266, injunction against causing disturbance by religious prayers.

98. (1847) 10 Beav 561; 76 RR 211.

99. *Suresh Jindal v Rizoli Corriere Della Sera*, AIR 1991 SC 2092.

(iii) Tort,¹

(iv) Any other legal obligation.

Section 38 expressly states that where such obligation arises from a contract, the court shall be guided by the principles and rules given in connection with the specific performance of contracts. Thus a permanent injunction will be granted to prevent breach of contract only in those cases where the contract is capable of specific performance. It is again made clear by the language of Section 41(e) which says that an injunction will not be granted to prevent breach of a contract which is not capable of specific performance. Section 42, however, says that where a contract comprising a positive agreement to do a certain act is coupled with a negative agreement not to do a certain act, whether expressly or impliedly, the fact that that positive part is not capable of specific performance will not preclude the court from enforcing the negative part of the agreement by means of an injunction, provided that the plaintiff performs his part of the contract. For example, A contracts to sing at B's theatre for one year and not to sing elsewhere. 'To sing at B's theatre for one year' is a contract which depends upon the personal qualifications or volition of the parties and hence cannot be specifically enforced. But the negative part of this contract that A will not sing elsewhere can be specifically enforced. Hence A can be compelled by injunction not to sing elsewhere. Section 42 corresponds with Section 57 of the earlier Specific Relief Act and that provision carried the following illustrations:

Illustrations in earlier Act

- (a) A contracts to sell to B for Rs 1000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs 1000 but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on business in Calcutta.
- (b) A contracts to sell to B the goodwill of a business. A then sets up a similar business close by B's shop and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their goodwill may be withdrawn from B.

1. In a case before the Supreme Court an injunction was prayed for directing the Municipal Corporation, not to issue a licence for running or operating a "bhatti" (baking oven) for a bakery. The Court said:

"Insofar as the Municipal Corporation is concerned, the dismissal of the suit against it by the trial court was not challenged by the plaintiffs by filing an appeal. Grant of licence is a statutory function to be discharged by the Municipal Corporation. The licence having already been issued by the Municipal Corporation to appellant-Defendant 1, the trial court rightly observed that the plaintiffs were at liberty to approach the Municipal Corporation and seek cancellation of licence or pray for withholding the renewal thereof by making out a case for the grant of such relief within the framework of the legal provisions governing the grant and renewal of such licence. In the event of the plaintiffs being illegally or unreasonably denied relief by the Municipal Corporation, they would be at liberty to pursue the remedy of appeal or approach the superior authorities within the framework of the Punjab Municipal Corporation Act or such other remedy as may be available to them in accordance with law. *Kuldip Singh v Subhash Chander Jain*, (2000) 4 SCC 50; AIR 2000 SC 1410.

- (c) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from signing at any other place of public entertainment. [Based on *Lumley v Wagner*².]
- (d) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.
- (e) A contracts with B that, in consideration of Rs 1000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance. (But see Section 27 of the Indian Contract Act, 1872.)

The essence of the section is that where a contract contains both affirmative and negative agreements and although it may be beyond the powers of the Court to compel specific performance of the affirmative part, a party may be restrained from committing a breach of the negative part, provided that the plaintiff has performed his part of the contract.

The conditions essential to the applicability of this section are—

- (1) the contract must contain two agreements, that is, (i) an affirmative agreement to do a certain act, and (ii) a negative agreement (express or implied) not to do a certain act and the negative part must be capable of being separated from the rest of the contract; and
- (2) the applicant must have fully carried out his part of the contract.

The court is not bound to grant an injunction in every case. An injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer.³

Again, where the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the court may grant permanent injunction in the following cases:

- (i) Where the defendant is a trustee of the property for the plaintiff. For example, in the course of A's employment as an advocate, certain papers belonging to his client B, came into his possession. A threatens to make these papers public or communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing. A legal practitioner is under an obligation in the nature of trust not to disclose secrets of his clients.
- (ii) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion:

For example, A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in the neighbourhood. B and C may sue for an injunction to restrain A from polluting the air.

2. (1852) 1 DM&G 604; 91 RR 193.

3. *Gujarat Bottling Co Ltd v Coca-Cola Co*, (1995) 5 SCC 545; (1995) 84 Comp Cas 618.

(iii) Where the invasion is such the compensation in terms of money will not afford adequate relief, for example, A, a professor of law, delivers lectures to his students, the lectures being his own literary composition, does not communicate such lectures to the whole world. These lectures are the property of the professor and not of the students. A is entitled to restrain the students from publishing the notes without his consent.

(iv) Where it is necessary to prevent a multiplicity of judicial proceedings.

Section 41 lays down the circumstances when perpetual injunction will be refused by the court. In other words, Section 41 lays down the defences that can be raised against the prayer for grant of an injunction. It provides:

41. Injunction when refused.—An injunction cannot be granted—

- (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to restrain any person from instituting or prosecuting any proceeding in court not subordinate to that from which the injunction is sought;
- (c) to restrain any person from applying to any legislative body;
- (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- (g) to prevent a continuing breach in which the plaintiff has acquiesced;
- (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of trust;⁴
- (i) when the conduct of the plaintiff or his agent has been such as to disentitle him to the assistance of the court;⁵
- (j) when the plaintiff has no personal interest in the matter.

4. Thus where a wrong can be compounded in money, compensation will be an equally efficacious relief. But in such a case also if the defendant is an insolvent or pauper, a decree for damages would be a mere mockery and therefore the court may grant injunction.

5. This clause incorporates the maxim: "He who comes to equity must come with clean hands." For example, where an article name as 'Mexican Balm' is said to be consisting of rare medicinal qualities, but which really is nothing but an ordinary ointment, the vendor's description being dishonest no injunction can be issued to restrain another dealer from selling a similar article under the same name in order to misguide the people. *Premji Rataneq Shah v Union of India*, (1994) 5 SCC 547 at 550, no injunction can be issued in favour of a trespasser or a person who gained unlawful possession as against the true owner.

Illustrations in old Act

This section corresponds with Section 56 of the repealed Specific Relief Act, 1877. That section carried the following illustrations:

- (a) A seeks an injunction to restrain his partner, B, from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the book of the firm and refused B access to them. The Court will refuse the injunction.
- (b) A manufactures and sells crucibles, designating them as "patent plumbago-crucibles", though in fact they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.
- (c) A sells an article called "Mexican Balm", stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into a belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one and he cannot obtain an injunction. [Based on *Perry v Truefit*.⁶]

In a suit by a coparcener for a permanent injunction for restraining the Karta or manager of the joint Hindu Family from transferring the joint family property in pursuance of a sale agreement with a third party, it was held that such an injunction could not be granted. The court said that though in the case of waste or ouster an injunction may be granted against the manager but a blanket injunction restraining permanently from alienating the family property, even in the case of legal necessity, cannot be granted. The court further said that Section 38 of the Act has to be read with Section 41. As the coparcener has an adequate remedy to impeach the alienation under the family law, he cannot, in view of Section 41(h) move the court for an injunction restraining the Karta from alienating the coparcenary property.⁷

Mandatory Injunctions

The injunction which commands the defendant to do something is termed as 'Mandatory Injunction'. Salmond defines mandatory injunction as "an order requiring the defendant to do a positive act for the purpose of putting an end to a wrongful state of things created by him, or otherwise, in fulfilment of the legal obligations, for example, an order to pull down a building which he has already erected to the obstruction of the plaintiff's lights".⁸

Section 39 of the Specific Relief Act, 1963, reads: "When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

6. (1842) 6 Beav 66: 63 RR 11.

7. *Sunil Kumar v Ram Prakash*, (1988) 2 SCC 773; AIR 1988 SC 576; (1988) 1 HLR 573, overruling *Shiv Kumar Moolchand Arora v Mool Chand*, AIR 1972 P&H 147 and approving *Jujhar Singh v Gianj Talok Singh*, AIR 1987 P&H 14.

8. Salmond, *THE LAW OF TORTS*, 186 (13th edn., 1961, changed in later editions).

Illustrations in old Act

This section corresponds with Section 55 of the repealed Specific Relief Act, 1877. That section carried the following illustrations:

- (a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act⁹, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstruct B's lights.
- (b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.
- (c) In the case put as Illustration (i) to Section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.
- (d) In the case put as Illustration (v) to Section 54, the Court may also order A's letters to be destroyed.
- (e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.
- (f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.
- (g) In the cases put as Illustrations (v) and (w) to Section 54 and as Illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trade marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

When a mandatory injunction is granted under this section, two elements have to be taken into consideration: In the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation; in the second place, the requisite acts must be such as the Court is capable of enforcing.¹⁰ These acts may assume a variety of forms, e.g. pulling down of a building as in Illustration (a) above, the pulling down of eaves as in Illustration (b), the destruction of written communications and letters as in Illustrations (c) and (d), destruction of copies produced by piracy of copyright and of trade marks improperly used by the defendant as in Illustrations (v) and (w) of former Section 54, set out under Section 38 above, and Illustration (g) above.

Mandatory injunction, however, will not be granted in the following cases:

- (i) Where compensation in terms of money would be an adequate relief to the plaintiff.
- (ii) Where the balance of convenience is in favour of the defendant.

9. Now the Limitation Act, 1963.

10. *Lakshi v Tara*, (1904) 31 Cal 944, 949; *Khazan Singh v Ralla Ram*, AIR 1937 Lah 839; *Madho Singh v Abdul Qayyum Khan*, AIR 1950 All 505.

- (iii) Where the plaintiff is guilty of allowing the obstructions to be completed before coming to the court, i.e. where plaintiff has shown acquiescence in the acts of the defendant.
- (iv) Where it is desired to create a new state of things. Mandatory Injunction, as is clear, is granted to restore *status quo*. It cannot be granted to create a new state of things. Thus, it was held by the Allahabad High Court in *Sheo Nath v Ali*¹¹, that where the defendant constructed a structure which interfered with the privacy of the plaintiff's house, he could not be ordered to erect a wall on the roof, so as to prevent a view of the plaintiff's house from the roof.

Illustrations in old Act

Section 39 corresponds with Section 55 of the repealed Act. That section carried the following illustrations:

- (a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act (now Limitation Act of 1963). B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstruct B's lights.
- (b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.
- (c) The court may order a communication made in confidence to be destroyed where the person receiving the communication is threatening to disclose it.
- (d) The court may order the destruction of letters of literary value written by an eminent person to another where the person having the custody of the letters is threatening to publish them for money.
- (e) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.
- (f) A, being B's medical adviser, threatens to publish B's written communications with him showing that B has led an immoral life. B may obtain an injunction to restrain the publication.
- (g) The court can order the destruction of books produced by infringement of another person's copyright, documents constituting infringement of a trade mark or patent and communications made in professional confidence when there is a threat to misuse them.

Damages in lieu of or in addition to Injunction [S. 40]

This section provides that the plaintiff in a suit for perpetual injunction under Section 38, or mandatory injunction under Section 39, may claim damages either in addition to, or in substitution for, such injunction, and the court may, if it thinks fit, award such damages. The plaintiff has specifically to include in his plaint a claim for damages also. If he has not done so, he may seek permission of the court for the

11. 80 All 70.

amendment of his pleadings. But where a suit, in which damages were not claimed, is dismissed, a subsequent separate suit for damages would not lie. The court can award damages in lieu of injunction where the injury is threatened though not yet caused. The House of Lords in *Leeds, Industrial Co-op. Society Ltd v Black*¹², laid down that damages could be allowed to a person whose tenement is sure to suffer loss of his right to light when a planned building structure comes up. Where, for example, a person happened to raise his building to encroach upon the land of his neighbour up to three inches, the court allowed the neighbour compensation instead of an order for demolition of the building.¹³ Damages have also been allowed under this principle where information delivered in confidence was put to use.¹⁴

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12. (1924) AC 851; (1924) All ER Rep 259. Non-compliance is an offence of a perpetual nature. *Jai Dayal v Krishan Lal Garg*, (1996) 11 SCC 588.
 13. *Tilokchand v Dhundiraj*, AIR 1957 Nag 2, of the same kind; *Armstrong v Sheppard & Sh Ltd*, (1959) 2 All ER 651 CA.
 14. *Fraser v Thames Television Ltd*, (1983) 2 All ER 101 HL.