CHAPTER 13

BAILMENT AND PLEDGE

Meaning of bailment:

Section 148 says—

> A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."
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> *Explanation.*- If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

Elements of bailment:

After analyzing sections 148 and 149 the following elements are found which must be present to constitute a contract of bailment:

1. *Subject matter:* Only goods may be the subject matter of bailment and so the immovable property is not capable of being bailed.

2. *Delivery:* The goods must be delivered by one person to another. Delivery of goods generally means the handing over of the possession of the goods. Jurisprudentially speaking, obviously, that delivery may be actual or constructive.

   i. *Mode of delivery:* However, the mode of delivery of goods has been mentioned in section 149 which says—

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

   Thus it appears that by handing over the possession of the goods by putting it in the possession of the prospective bailee, the task of delivery of goods may be completed as required by the law.

   ii. *When such delivery is not required:* This fresh delivery of goods to the intended bailee may not be required in one particular exceptional case. This position has been made clear by adding the following explanation to section 148—

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

   Thus it appears that a bailment may be made based on an earlier delivery of possession. So, if a person keeps anything in possession of another person and subsequently they enter into a contract of

bailment then the thing need not be withdrawn from the earlier person to deliver it again newly by way of bailment. In such a case, delivery of possession is not required rather a contract of bailment may be constituted based on that earlier delivery.

3. *Purpose:* This delivery of possession of goods must be made with a specific purpose. It may be made in the form of specific object or in the form of certain instructions. In whatever way this is made, the law requires that this must be a purposeful act in whatever sense. Such purpose may be manifold. It may be for the exclusive benefit of the bailor or bailee or both.

4. *Contract:* There must have a contract, as bailment is nothing but one type of contract.

5. *Content of contract: provision of returning the goods:* The contract must imply ultimately the return of the goods bailed. Thus permanent delivery of possession shall never amount to bailment. It has been made absolutely clear in section 148 that after fulfilling the purpose the goods must be returned to the bailee or must be disposed of according to the direction given by the bailor. That means, if the bailor says to dispose of it otherwise, then only 'return to the bailor' may be waived. Thus, if a person delivers a watch to another by way of bailment for repairing it, then after repairing the watch it must be returned to the owner of the watch. But if the owner (bailor) gives the bailee any other direction regarding disposal of the watch, e.g., says to deliver it to any third person, then that must be disposed of accordingly.

Duties of bailor:

The following are the duties of a bailor which have been imposed by different sections of the Act:

1) *Duty of disclosure*: The bailor has a general duty to disclose the faults of the goods bailed. Section 150 says—

> The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailer is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.
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> If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.
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> *Illustrations*
>
> (a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.
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> (b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

After considering this section, regarding duty of disclosure, there may be two circumstances:

i. *Bailor is aware of the faults in the goods:* The first paragraph to section 150 imposes the duty upon the bailor to disclose the faults in the goods of which he has the knowledge and so that it does not impose any responsibility for any fault in the goods which was not disclosed of which the bailor did not have any knowledge. Moreover the bailor is not bound to

disclose every fault under every circumstance rather the section says that the bailor has to disclose the faults within his knowledge only under the following situations—

(a) The faults in the goods materially interfere with the use of them ; or

(b) Expose the bailee to extraordinary risks.

Thus in case of a gratuitous bailment, the bailor's duty has been confined to the faults known to him.

Consequence of non-disclosure of such fault: If the bailor does not make such disclosure as required by the above law, he will be responsible for damage arising to the bailee directly from such faults. Thus, even for non-disclosure of the faults the bailor will have the liability to compensate only for the injury which is directly consequential to such non-disclosure and negatively speaking in such a case he will not have any responsibility to pay the compensation for any indirect loss suffered by the non-disclosure of faults in the goods bailed.

11. *Bailor is not aware of the faults in the goods:* Second paragraph to section 150 imposes a strict liability on the bailor in a special case which says that if the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed. Thus, in case of goods bailed for hire the bailor is under an absolute duty of disclosing the faults whether he knows or not. In such a case he is made liable to pay compensation for loss caused by the non-disclosure of

faults in the goods bailed and in this case ignorance of the faults will not act as an excuse.

2) *Duty of repayment of necessary expenses:* The bailor has also a duty to repay the necessary expenses incurred by the bailee in case of non-gratuitous bailment. Section 158 says—

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

Thus by using the words".. ... ... and the bailee is to receive no remuneration ... ..." imply that the section applies in case of gratuitous bailment. Thus, in case of gratuitous bailment, the bailor shall repay the bailee the necessary expenses incurred by him for the purpose of the bailment. The justification of this duty imposed upon the bailor is that in such a bailment the bailor has been already agreed to receive no remuneration in lieu of the bailment and so that the bailee should not suffer any more loss. Thus the law is justified in imposing a duty upon the bailor to pay the necessary expenses to the bailee incurred by him for the purpose of such bailment.

3) *Duty to indemnify the borrower:* In case of gratuitous loan, the lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose; but in doing so he has to indemnify the borrower as section 159 says—

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

4) ***Duty to indemnify the bailee:*** If the bailor does not have any legal right to make a bailment, but he does so without lawful authority over the goods bailed, then the bailor must compensate the bailee for loss suffered due to that unauthorized bailment. Section 164 says—

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

Thus, the law imposes a duty upon the bailor to compensate the bailee for any loss for making the bailment which was done without lawful authority. For example, if X gives Y's car to Z for use without Z's permission and Z sues Y and receives compensation, then X is bound to indemnify Y for his losses.

It is worth mentioning here that the above mentioned section 164 imposes the following two more duties upon the bailor:

5) ***Duty to receive back the goods bailed:*** If section 164 is analyzed properly then it becomes absolutely clear before us that the bailor is bound to receive back the

goods bailed or he should give any other direction regarding the disposal of the goods bailed.

6) ***Duty to compensate the bailee:*** If the bailor does not comply with the above duty of receiving back the goods or giving directions respecting them and the bailee in consequence of it suffers any loss then the bailor is bound to make good the loss suffered by such bailee. Thus, if a person does not take his dress from the tailor after the date of delivery then the bailor is bound to give compensation to the bailee for safe custody.

Rights of bailee:

1. ***Bailee's right of particular lien:*** This is a possessory right of the bailee to retain the goods bailed till the payment of remuneration under certain circumstances. Section 170 deals with such particular lien which says—

> Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.
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> *Illustrations*
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> (a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.
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> (b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished,

and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

Thus subject to the satisfaction of the following conditions the bailee has a right to particular lien:

i. The bailee has to render a service in accordance with the purpose of the bailment.

ii. The service rendered by the bailee involves the exercise of labor or skill in respect of the goods bailed.

iii. The service rendered deserves some remuneration.

iv. This remuneration is unpaid.

v. There is no contract to the contrary.

vi. The bailee is in the possession of the goods bailed.

If the above conditions are fulfilled then the bailee has the right to retain such goods bailed to him till he receives due remuneration for the service he has rendered in respect of them. This type of lien is termed as 'particular lien' because the goods may be retained only for any amount due for the services rendered to the identical goods. Thus, if a bailee renders any service in respect of goods 'A', cannot retain goods 'B' till payment of remuneration due against goods 'A' and he can retain only goods 'A' for any remuneration due against it.

It was observed in *Muhammad Meah Vs. Pubali Bank*[1] that—

'The plaintiff did not make out any case under section 170 of the Act to retain the goods a bailee. In this case the

[1] (1989) 41 DLR (AD) 14.

> plaintiff could have exercised his right under section 170 of the Contract Act if he had possession over the scheduled materials. The High Court Division's finding on the basis of the documents on record and the evidence adduced in the matter that the bank had all through been in the possession of the attached goods does not suffer from any infirmity. In fact, the plaintiff did not make out any case that he was entitled under section 170 of the Contract Act to retain the scraps as a bailee till he recovered due remuneration for the services rendered by him. In the application for attachment the plaintiff did not mention the word 'lien' nor did he do so in his written objection to the application for vacating that order.'

In the same case[2] Badrul Haider, J., observed in the minority Judgment—

> 'Under section 170 of the Contract Act a ship breaker can retain goods for his remuneration ... ... The crux of the problem as to how he could execute the decree when all the properties of *Janapad* Enterprise are mortgaged to the Bank. The only available property was the scheduled property which was valued for only eight lacs. The question was whether the plaintiff could retain this property. Plaintiff's claim for his remuneration is grounded on lien and section 170 says that he has a right to retain such goods until he receives due remuneration for the services in the absence of the contract to the contrary. Is there any contract to the contrary in this case between the Bank and the borrower that the remuneration of the breaker must not be given out of the sale proceeds of the ships? The answer is in the negative. If so then why the ship breaker will be deprived of his remuneration. It was contended by the learned Counsel appearing for the respondent that in the application for attachment the plaintiff did not mention the word 'lien' nor did he do so

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[2] *Ibid.*

> in his written objection to the application filed by the Bank for vacating that order. To say the least rule of pleading does not warrant it.'

2. ***Bailee's right of general lien:*** This special right of lien is not given to all bailees, but this is available to specified types of bailees under certain circumstances. This general right of lien must be distinguished from the earlier particular lien. This one is wider than the particular lien. Because, general lien confers a right to retain any goods for any remuneration due from the bailor out of any goods bailed to him. Here the goods retained and the goods in respect of which the service is rendered need not be identical. Thus, if the bailee has this right of general lien, he can retain any property kept in his custody till payment of remuneration due out of any other goods bailed to him. Section 171 deals with this right of general lien which says—

> Bankers, factors, wharfingers, advocate of the Supreme Court and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

Thus it appears that if there is no contract to the contrary this right will be available to the following categories of bailee—

(a) Bankers;
(b) Factors;
(c) Wharfingers;
(d) Advocate of the Supreme Court;
(e) Policy brokers;

(f) Any other person who has an express contract to that effect.

In *Sonali Bank Vs. Bengal Liner Ltd* [1] money was held as a species of goods over which lien may be exercised. Where a banker has advanced money to another, he has a lien on all securities which come within his hand for the amount of his general balance unless there is an express contract to the contrary.[2]

It was observed in *Rupali Bank Vs. Haji Ahmed Sabur*[3] that—

> 'Depositor's money with the bank is not in the nature of any goods bailed to the bank ... ... Money deposited by the plaintiff in his account cannot be retained by the bank for the simple reason that by the said deposit a relationship of debtor and creditor is established between the bank and its customer and the bank can use the money in any manner it likes as the ownership in such deposit vests in the bank and there is no question of exercising lien on the money over which the bank has absolute right of ownership and possession ... ... The bank could not withhold the money deposited by the plaintiff with the defendant No. 1 in exercise of its right of general lien.'

3. ***Right regarding delivery of goods to one of several joint bailors:*** If more than one joint owners bail their goods to bailee then he may deliver them back to any one of joint owners provided that there is no contrary agreement to it is found. Section 165 says—

> If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one

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[1] (1989) 42 DLR 487.
[2] *Ibid.*
[3] (1991) 43 DLR 464.

> joint owner without the consent of all, in the absence of any agreement to the contrary.

Thus the law gives an option to the bailor in case of joint owners of the goods bailed that he can return it back to any one of them. But if any contrary agreement is entered into between them then that agreement will prevail and this option will be lost.

4. ***Right regarding delivery of goods to bailor without title:*** Sometimes it may happen that the bailor in fact does not have any title to the goods bailed and if in such a case the bailee delivers it back to the bailor or disposes of the goods as per the directions given by the bailor, then the bailee will have no liability to the actual owner of the goods for delivering it to the bailor who did not have any title to it. Section 166 says—

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

Thus the law gives the bailor an indemnity and in such a case the bailee enjoys the right to deliver it back to the bailor or to dispose of it according to the directions of the said bailor who does not have any title to it actually.

5. ***Right to claim damages for non-disclosure of the faults in the goods bailed:*** The bailor has a general duty to disclose the faults of the goods bailed. Section 150 says—

> The bailer is bound to disclose to the bailee faults in the goods bailed, of which the bailer is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such

disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

Thus the *first paragraph* to section 150 imposes the duty upon the bailor to disclose the faults in the goods of which he has the knowledge and the faults in the goods materially interfere with the use of them or expose the bailee to extraordinary risks. If the bailor does not make such disclosure as required by section 150 then the bailee may claim damages arising to him directly from such faults.

Second paragraph to section 150 imposes a strict liability on the bailor in a special case which says that if the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed. Thus in case of bailment for hire the bailee has the right to claim damages for every loss suffered by him due to the non-disclosure of the faults in the goods bailed whether that fault was known to the bailor or not.

6. ***Right to claim payment for necessary expenses:*** Section 158 gives the bailee the right to claim necessary expenses incurred by him in case of non-gratuitous bailment. It says—

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

7. ***Right to be indemnified by the bailor:*** Section 164 gives the bailee the right to be indemnified by the bailor which lays down that if the bailor does not have any legal right to make a bailment, but he does so without lawful authority over the goods bailed, then the bailee can claim any compensation for loss suffered by him due to that unauthorized bailment. It says—

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

8. ***Right to claim compensation for safe custody:*** If the bailor does not receives back the goods and the bailee in consequence of it suffers any loss then the bailor is bound to make good the loss suffered by such bailee. Thus, if a person does not take his dress from the tailor after the date of delivery then the bailee can lawfully claim the compensation from the bailor for safe custody.

Duties of bailee

1. ***Duty of care:*** The law imposes a duty upon the bailee to take care of the goods bailed to him. Now question

arises what will be the degree of that care to be taken by the bailee? Section 151 deals with this particular issue which says—

> In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Thus it appears from above section that the bailee is under an obligation to take care of the goods like a person takes care of his own goods. The law says that his care will be identical to the care taken by a man of ordinary prudence under similar circumstances in case of his own goods. It was affirmed in *D. P. Goenka Vs. Governor General of Pakistan* that the care which a bailee is bound to take is co-extensive with that of man of ordinary prudence.[1] So, the bailee is not bound to take any extra ordinary care which a man of ordinary prudence would not take of his own goods under similar circumstances. The bailee will not be liable if any loss is caused even after taking the proper care as desired by section 151 unless any special contract to the contrary to it is found. Section 152 says—

> The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Thus it was held in *Chittagong Port Authority Vs. Hongkong Shipping Lines*[2] that 'the Port Authority is not liable for any loss in this case as they informed the

[1] (1955) 7 DLR 134.
[2] (1989) 41 DLR 332.

owner of goods to locate the same. In this case as the owner of the drums did not remove the same from the jetty premises, without any fault on the part of the Jetty Administration, within clear 7 days from the time of landing of the drums in question the Jetty Administration is not liable for any loss as in this case the Port Authority informed the owners of the drums to find out the same and there was no fault on the part of the Port Authority to locate the goods.'[1]

It was held in *M/s. Jamiruddin Pradhan Vs. Federation of Pakistan*[2] that the liability of a railway while carrying goods entrusted to it is similar to the liability of a bailee. It was observed in *Chairman, Rly Board Vs. Commerce Bank Ltd.*[3] that—

> 'The Railway carries goods delivered to it as a bailee and is bound to take such care of the goods as that of a man of ordinary prudence. It is only when it wants to limit its liability that it can enter into special contract with the parties concerned.
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> It appears from the records that the booking clerk, one Mr. Ismail Howlader, was in the employment of the appellant and while discharging his official duties in the capacity of booking clerk delivered the goods in question to a third party. In view of the facts, circumstance, evidence and decision referred to above we are of the opinion, that the defendant-appellant is absolutely liable for the act done by the booking clerk under his employment.'

It was held in *Chittagong Port Authority Vs. Md. Ishaque*[4] that the goods (for import or export) when remain in possession

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[1] *Ibid.*
[2] (1957) 9DLR 99.
[3] (1994) 46 DLR 254.
[4] (1983) 35 DLR (AD) 364.

of the bailee (here the Chittagong Port authority), the later is liable as a bailee under the Contract Act (*vide* sections 151, 161). The Port Authority when receives the goods, from the ship, it receives them (as an agent) for delivery to the consignee and in this process it acts as bailee and therefore is liable to the consignee as provided in sections 151, 152 and 161 of the Contract Act.[5] It has been settled in *Pakistan Vs. M/s. Adamjee Jute Mills Ltd.*[6] that the consignor is ordinarily entitled to sue the carrier (Railway) for any loss or damage sustained by him due to negligence or default of the carrier but in certain circumstances a consignee who acquired title to the property by virtue of endorsement or otherwise of any document or is a party to the contract of consignment is also entitled to sue the carrier.

In was observed in *Central Bank of India Ltd. Vs. Messrs Jan Muahammad Haji Ismail* [7] that—

> 'Responsibility of the pledgee to take due care of the goods entrusted to its care does not disappear even though in terms of a special agreement the pledgee is absolved from every loss by theft, etc unless the pledgee discharges the onus of showing that theft takes place in spite of due care taken by it for the due safety of the goods lost by theft.
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> It is no doubt true that the contracting parties may enter into a contract on terms special if they are not contrary to the provisions of section 23 of the Contract Act and they shall be bound by the terms of such agreement. But a party seeking cover under such a special term must first establish that any of the clauses of the said special contract is attracted to the case.

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[5] *Ibid.*
[6] (1970) 22 DLR 741.
[7] (1965) 17 DLR 582.

> In the present case, the defendant Bank when seeking to rely on the terms of agreement from being excused from any liability of the pledged goods lost by theft, must firs prove satisfactorily that the theft was committed by a person or persons other than the agent or employees of the bank and the theft was committed in spite of the pledgee Bank having taken proper protection with regard to the safety of the goods. This, the pledgee Bank must do as even when a special agreement of this nature is entered into between the parties, failure of the party seeking cover under special term must attract the provisions of sections 151 and 152 of the Contract Act.
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> In the present case, the defendant Bank has failed to establish the case of theft by third party of the goods pledged by the plaintiff firm with it and therefore the defendant Bank cannot escape the liability contemplated by sections 151 and 152 of the Contract Act.
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> The defendant Bank, has after the theft was committed, attempted to lay the blame at the door of the plaintiff firm for having not engaged a *Darwan* themselves to look after the safety of the pledged goods as they had after pledging the goods handed over the possession of the *godown* to the Bank and did not even retain the duplicate key of the lock for them to inspect or jointly control the *godown*. They had also agreed to pay the salary of the *godown* keeper.'

2. ***Using the goods according to the conditions of bailment:*** The bailee is under an absolute obligation to use the goods as directed by the bailor and any type of unauthorized use is prohibited and if he makes so he will be strictly liable to the bailor for such an unauthorized use of the goods bailed to him. Section 154 says—

> If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable

to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

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

(b) A hires a horse in Dhaka from B expressly to march to Tangail. A rides with due care, but marches to Narayanganj instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

Thus the liability for unauthorized use is strict one which will be imposed upon him irrespective of any negligence on his part.

3. *No mixture without bailor's consent:* The bailee can not on principle mix the goods bailed to him with his own goods without bailor's consent. But obviously if mixture is done with the consent of the bailor then section 155 says that the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced. Sections 156 and 157 lay down the following two clear rules regarding the effect of mixture without consent:

i. *Mixture of the goods which can be separated:* Section 156 says—

> If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the

property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

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

ii. Mixture of the goods which can not be separated

Section 157 says—

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

Illustration

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

4. ***Duty of return of goods:*** This is the most important duty of the bailee i.e. to return the goods to the bailee or dispose of it otherwise as directed by the bailor after the expiry of time or accomplishment of the purpose for

which the goods were bailed. Section 160 describes this duty in clear terms which says—

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

If the bailee does not fulfill this duty then he will be responsible for any loss suffered by the bailor. This consequence of non-compliance of above duty has been mentioned in section 161, which says—

> If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

5. ***Duty to deliver any increase or profit:*** The goods bailed to the bailee may have any increase or profit gained during the continuance of bailment and in such case of any accretion to it the question arises that who will be the owner of such accretion. Law says that generally the bailor will be treated as its owner and so that it has to be returned by the bailee to the bailor unless there is any contract to the contrary. Section 163 says—

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

Illustration

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

Rights of bailor:

1. ***Right to claim compensation for non-delivery of goods at proper time:*** The bailor will have a right to claim compensation if the goods bailed are not delivered at the proper time due to the default of the bailee. Section 161 imposes a clear obligation in this regard upon the bailee from which this right to claim compensation by the bailor arises.

2. ***Right to terminate the bailment:*** The bailee cannot make any use of the goods bailed, which is not authorized by the bailor. So, if he does so then the bailor will have the right to terminate the contract. Section 153 says—

> A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.
>
> *Illustration*
>
> A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Thus the law declares a contract of bailment as voidable when the bailee does anything which is inconsistent with the conditions of bailment. Voidable contract always means that its validity will be dependent at the will of one of the parties to the contract and not at the option of other or others and here the law gives this option to the bailor. Thus the bailor is at liberty to terminate the contract of bailment where the bailee has done anything which is inconsistent with the conditions of the said bailment.

3. ***Right to demand return of goods:*** The bailor obviously has a right to demand the goods bailed after a certain time. But section 159 says that the lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. In doing so sometimes he has to compensate the other party which has been discussed earlier under the heading of bailor's duties.

4. ***Right to claim compensation:*** The law imposes certain duties upon the bailee to take care of the goods bailed to him as discussed above and if the bailee fails to perform the above duties then the bailor will have the following corresponding right to claim compensation:

   i. *Section 151* imposes a duty of care upon the bailee and if he fails to do so then the bailor will have the right to claim compensation for any loss caused to the goods bailed due to the negligence of the bailee.

   ii. *Section 154* implies that if the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, then the bailor will have the right to claim compensation for any damage arising to the goods from or during such use of them.

   iii. *Section 156* lays down that if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailor will have the right to claim the expense of separation or division, and any damage arising from the mixture.

iv. *Section 157* lays down that if the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

5. ***Right to claim return of goods:*** Section 160 imposes a duty upon the bailee to return the goods to the bailor or dispose of it otherwise as directed by the bailor, without demand, after the expiry of time or accomplishment of the purpose for which the goods were bailed. Thus the bailee is bound to return back the goods at proper time without even any demand made by the bailor and if he fails to do so then obviously the bailor will have a corresponding right to claim it from the bailee.

6. ***Right to claim any increase or profit:*** Section 163 implies that in the absence of any contract to the contrary, the bailor will have the right to claim any increase or profit which may have accrued from the goods bailed.

Rights of bailors and bailees against wrong doers:

The rights of bailors and bailees against wrong doers may be described under the following two headings:

1. ***Suit against wrong doer:***

Section 180 says—

> If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such

remedies as the owner might have used in the like case if no bailment had been made; and either the bailor of the bailee may bring a suit against a third person for such deprivation of injury.

Apportionment of relief or compensation:

Section 181 says—

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

Termination of bailment:

A bailment may be terminated by the following modes:

1. *Expiry of time:* If the bailment is made for a specified time then it will be terminated after the expiry of that stipulated time.

2. *Fulfillment of object:* If the bailment is made for a specific purpose then it will be terminated after the accomplishment of that purpose.

3. *Option of the bailor:* By exercising the option of the bailor bailment may be terminated under the following two circumstances:

    i. *If the bailee does any unauthorized act:* Section 153 implies that if the bailee does anything which is inconsistent with the conditions of bailment then the bailor may terminate the bailment.

    ii. *Gratuitous bailment:* Section 159 implies that in case of gratuitous bailment it can be terminated at any time at the will of the bailor, even before the

expiry of the specified time or before the accomplishment of the purpose of bailment.

4. ***By operation of law:*** Section 162 says that a gratuitous bailment is terminated by the death of the bailor or bailee.

Laws relating to Pledge:

What is pledge? Section 172says—

> The bailment of goods as security for payment of a debt or performance of a promise is called "pledge".

Thus it appears that pledge is a special type of bailment where the goods are kept as security for either of the following two purposes:

i. Payment of a debt;

ii. Performance of a promise.

Section 172 further adds that the bailor is in this case called the "pawnor" and the bailee is called the "pawnee."

Pawnee's right of retainer: Section 173 says

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

Thus this section enables the pawnee to retain the goods pledged for the following purposes:

i. Payment of the debt;

ii. Performance of the promise;

iii. For the interest of the debt;

iv. For all necessary expenses incurred by him—

(a) in respect of the possession; or

(b) for the preservation of the goods pledged.

Pawnee not to retain for debt or promise other than that for which goods pledged: Presumption in case of subsequent advances: Section 174 says—

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

Thus this section restricts the right of pawnee to retain the goods pledged and lays down the following three principles:

i. That the goods kept against one debt cannot be retained to realize anything out of another debt.

ii. But it is permitted only when a contrary contract to that effect is found.

iii. At the same time law speaks about the presumption of the existence of such contrary contract saying that such contract, in the absence of anything to the contrary,

shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee's right as to extraordinary expenses incurred: Section 175 says—

> The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Thus, under certain circumstances, it may happen that for preservation of the goods pledged pawnee had to do something and if he does so which involves any monetary expenditure then obviously the pawnor will be bound to give the necessary expenses incurred by him. This right of the pawnee to receive the extraordinary expenses incurred by him has been guaranteed by this section. This is termed as extraordinary expenses because it was not settled or foreseen exactly at the time of pledge, rather it has been occurred due to any extraordinary circumstance.

Pawnee's right where pawnor makes default: Section 176 says—

> If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.
>
> If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Thus this section deals with the rights of the pawnee in case of the default of the pawnor. If the pawnor fails to pay the debt or perform the promise in time, in respect of which the goods were pledged, the pawnee will have the following rights:

1) He may bring a suit against the pawnor upon the debt or promise; and

2) At the same time he may retain the goods pledged as a collateral security; or

3) He may sell the thing pledged. In case of such sale three more rules are there—

   i. A reasonable notice of such sale is to be given to the pawnor.

   ii. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance.

   iii. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Pawnee's right to sue and right to retention are two alternative remedies though it is not mentioned clearly as such by the Act. It has been observed in *Bengal Metro Engineering Co. Vs. Agrani Bank*[1] that—

> 'For realisation of payment of debt or pawn there is no bar to institute a proper suit by the pawnee and at the same

[1] (1994) 46 DLR 168.

> time to retain the pledged goods, if any, in his custody as a collateral security. But the two relieves though concurrent, are yet alternative and both cannot be resorted to at a time.'

It was observed in *Md. Obaidul Akbar Vs. East Pakistan Co-operative Bank* [1] that—

> 'Right of sale which has been conferred upon the pawnee by the section 170 of the Contract Act arises on default of the pawnor in payment of the debt at the stipulated time of the promise and after the accrual of the right to sell, the pawnee shall have to give a reasonable notice of the sale and not merely an intention to sell.
>
> Language of section 176 is sufficiently clear to indicate that what the pawnee is required under this provision is give a reasonable notice of the sale and not a notice of the mere intention to sell. To read intention to sell in place of the sale is reading something in the statute which is not there and according to the well established canon of interpretation of statute such a manner of reading is very much disapproved.
>
> Expression 'reasonable notice of the sale' as used in section 176 of the Contract Act, includes information about the time and place of the actual sale of the pawned goods, and any sale of such goods held without serving a notice containing the particular as to the time and place of the sale is not a valid sale binding upon the pawnor.
>
> The use of the word 'reasonable' before the word notice as used in section 176 clearly points out, that such a notice cannot mean merely a notice of the creditor's intention to sell the debtor's property without giving the owner an opportunity to watch over the proceeding of the sale in order to safeguard his own interest.

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[1] (1975) 27 DLR 523.

> The pawnor having have the right conferred by section 177 to redeem his property at any time before the actual sale, it seems to us that the Legislature intended that the pawnor should be apprised of the actual sale of his property.'

Defaulting pawnor's right to redeem: Section 177 says—

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

Pledge by mercantile agent: Section 178 says—

> Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized by the owner off the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.
>
> *Explanation.*- In this section the expressions 'mercantile agent' and 'document of title' shall have the meanings assigned to them in the Sale of Goods Act, 1930.

Pledge by person in possession under voidable contract: Section 178A says—

When the pawnor has obtained possession of the goods pledged by him under a contract voidable under section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

Validity of pledge where pawnor has only a limited interest: section 179 says—

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

Laws relating to finder of goods:

Responsibility of finder of goods: Section 71 simply lays down that—

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

Two more sections deal expressly with the law relating to finder of goods. They are—

Right of finder of goods; may sue for specific reward offered: Section 168 says—

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

When finder of thing commonly on sale may sell it: Section 169 says—

> When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence

be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

1) When the thing is in danger of perishing or of losing the greater part of its value, or,

2) When the lawful charges of the finder, in respect of the thing found, amount to two thirds of its value.

CHAPTER 14

AGENCY

Appointment and Authority of Agents:

It is interesting to note here that the Contract Act, 1872, does not define the term 'agency' directly. But after analyzing the definitions of 'agent' and 'principal' given by the Act[1] one can easily be able to find out the constituent elements of 'agency'.

Who is an agent? Section 182 of the Contract Act, 1872, says that an "agent" is a person employed to do any act for another or to represent another in dealings with third persons. Thus the following elements of an agent are found:

I. An agent is a person.

II. He is employed by another person

III. The purpose of such employment will be either of the following two, i.e., —

   i. To do any act for another (employer of the agent); or

   ii. Representing another in dealings with third person.

[1] Section 182, the Contract Act, 1872.

Who is a 'principal'? Section 182 also deals with the definition of principal which says that the person for whom an act is done, or who is so represented, is called "principal". Thus this definition of 'principal' must be understood together with the definition provided to mean an 'agent' as because this is in fact an extension of that definition. As it has been said in the definition of an agent that he is a person who does the act of another person or represents that person and the person whose act is so being done or he who is so represented by an agent is called the principal.

What is 'agency'? It has been mentioned earlier that the Contract Act, 1872 does not give any definition of 'agency' in clear terms. But it may be concluded that 'agency' is a legal device by which the above relationship, i.e., the relationship of principal and agent, is created. An important feature of agency is evident in the above two definitions of agent and principal, that is, the agent must have an authority to do any act for another person or he must have an authority to represent another and the existence of agency may be tested by examining the existence of such authority in the hands of the agent.

Who may employ an agent? The answer to this question lies, in fact, in the description of the qualifications required to be the principal as he is the person who employs an agent. Section 183 says—

> 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.

Thus, only the person who has the following qualifications is capable to employ an agent, or in other words, to become a principal:

i. The person must attain the age of majority according to the law to which he is subject. In Bangladesh, the applicable law is the Majority Act, 1875, which fixes the age of majority generally as 18 years. Thus to employ an agent one must be a person who is at least 18 years old.

ii. He must be a person of sound mind. The criteria of sound mind have been described in section 12 earlier and accordingly it is basically the ability of understanding the impact of one transaction upon his own interest.

Thus the person who has the above two qualifications is capable to employ an agent.

Who may be an agent? For the purpose of determining the qualifications of an agent the law lays down two principles. One permits any one to be appointed as an agent and the other requires to have certain qualifications. Section 184 deals with this particular issue which says—

> 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.

Thus it appears that to be an agent between the principal and third person no qualification is required but to make the agent responsible to his principal that agent must have the following qualifications—

i. He must attain the age of majority; and

ii. He must be a person of sound mind.

Thus the person who does not have the above two qualifications may be appointed as an agent as between the

principal and third person but to make that agent accountable to the principal lawfully he must have these qualifications.

Necessity of consideration: Section 185 makes it absolutely clear that no consideration is essential for the creation of an agency which says very simply—

'No consideration is necessary to create an agency'.

Thus, this is the distinguishing feature of agency which makes it different from ordinary contracts.

Agent's authority:

Nature of the agent's authority: Agent's authority may be of two types which have been mentioned in section 186 which says—

The authority of an agent may be expressed or implied.

Thus it appears that an agent may have the following two types of authorities:

i. Express authority;

ii. Implied authority.

What is express authority? Section 187 defines it in clear terms that 'an authority is said to be expressed when it is given by words spoken or written.'

What is implied authority? Section 187 defines implied authority by saying that '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.' Section 187 further adds the following illustration to make the concept of implied authority more clear. The illustration is as follows:

> A owns a shop in Mymensingh, living himself in Dhaka 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.

Extent of agent's authority: The extent of agent's authority has been described in section 188 adding two illustrations with it. Section 188 says—

> 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 purposes, or usually done in the course of conducting such business.
>
> *Illustrations*
>
> (a) A is employed by B, residing in London, to recover at Chittagong, a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.
>
> (b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

Thus it appears that the agent's authority is limited up to the lawful thing. It has been clearly indicated that the agent does not have the authority to do any illegal act though that becomes necessary for the agency or for the beneficial interest of the principal. Again by using the terms *'every lawful act,'* it is not the intention of law to authorize the

agent doing everything in practice, rather the intention of the legislator is to permit the agent doing every lawful act which is reasonably required to do. And what is 'reasonably required' is obviously a question of fact.

Agent's authority in an emergency: Apart from the above authorization, the law gives an agent a special authority in case of an emergency. Section 189 says—

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

Thus section 189 gives a wide range of power to the agent which empowers him to do everything in an emergency provided that is done—

i. To protect his principal from loss, and

ii. the same thing would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Thus the law sets the reasonableness as the test of authority in an emergency.

Laws relating to sub-agent:

Delegation of agency: Generally an agent cannot delegate his agency to someone else which he agreed to do. But obviously under certain circumstances law permits such delegation subject to the satisfaction of some conditions. Section 190 says—

> 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.

Thus it appears that what the agent agreed to do personally cannot be delegated to another person by creating a sub-agent, but he can appoint such a sub-agent to delegate his authority if he can prove that—

i. Ordinary custom of trade requires such a sub-agent to be employed under the similar circumstances; or

ii. The nature of the agency itself requires the appointment of such a sub-agent.

Who is a sub-agent? Section 191 defines sub-agent in the following words—

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

So, the conditions are of two-folds:

i. He must be employed by the original agent.

ii. He must act under the control of the original agent.

Thus, if A appoints B as his agent and B appoints C to do some of his jobs, then C will not be treated as a sub-agent. Because, to be a sub-agent one must be appointed and as well as must act under the control of the original agent in the business of the agency, otherwise he will not be treated as sub-agent by law.

Legal consequences of appointment of sub-agents properly:

An agent may appoint a sub-agent under the authority of the original principal, or he may do it in his own authority without being authorized by the principal. In these two cases legal consequences differ grossly. Section 192 deals with the legal consequences of appointment of sub-agents from various dimensions if the sub-agent is appointed properly. Section 192 says—

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

Thus this section deals with the following three consequences of appointment of sub-agents properly:

1) *Representation of principal by sub-agent properly appointed:* The first paragraph to section 192 clearly lays down that if anything is done by any sub-agent appointed properly, then as regards the third party the original

principal will be bound and responsible for every act done by the sub-agent.

2) *Agent's responsibility for sub-agent:* The second paragraph to section 192 deals with agent's responsibility for the acts of sub-agent which says that the agent will be responsible to the principal for the acts of sub-agent. Thus though the principal will be responsible to the third party for the acts done by sub-agent, but the principal still may make the agent responsible to him for those acts for which he was responsible to third party. It appears, in fact, that the rule in the first paragraph is made for the better protection of third party rights.

3) *Sub-agent's responsibility:* The third paragraph to section 192 deals with the following two types of responsibilities of sub-agent—

   i. *Liability to the agent:* Generally the sub-agent is responsible for his all acts to the agent and not to the principal.

   ii. *Liability to the principal:* This is an exception to the general rule which says that the sub-agent will be responsible to the principal only for fraud or willful wrong done by him.

Legal consequences of appointment of sub-agent without authority: Section 193 deals with the provisions relating to the responsibility of the principal and agent for the acts of the sub-agent if he is appointed without authority. It says—

> 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.

Thus, regarding the appointment of sub-agent without authority, the above section lays down the following rules:

i. The agent who appointed the later one will be treated as the principal in relation to that person.

ii. Such a sub-agent is responsible for his acts both to the principal and to third persons.

iii. The original principal is not represented by that appointed person.

iv. The principal is not responsible for the acts of the person so employed.

v. Even the person so employed will not be responsible to the original principal, rather his responsibility will be confined to the third person and the person who appointed him.

Relationship between principal and person duly appointed by agent to act in business of agency: If the principal authorizes his agent to name another person to act for the principal and the agent names so, then that later person will not be treated as a sub-agent, rather he will be treated as an agent of the principal to do that part of the job assigned for which he has been appointed. Section 194 says—

> 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 his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorises B, a merchant in Chittagong, 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.

Thus the above section removes the confusion which may arise regarding status of the person who has been appointed, after being named by the agent, being instructed to name so.

Agent's duty in naming such person: If the principal imposes a duty upon his agent to name another person to act for the principal then the agent cannot name any person as he pleases rather in naming so he has to exercise the same amount of discretion as a man of ordinary prudence as he would exercise in his own case. Section 195 says—

> 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 not responsible to A for the proceeds.

Thus the section lays down the following two principles regarding naming another person by the agent to act for the principal:

i. 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.

ii. And if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

So, if it can be proved that the agent named another person negligently and did not exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case, he will be responsible to the principal for the acts or negligence of the agent so selected.

Implied Agency 2. form

Agency by Ratification:

If a person does anything on behalf of another person without being authorized by the later then at the first sight it will be decided that the person who does so is not an agent. In such a case if the later one ratifies it afterwards then the first person will be treated as his agent though originally he was simply a stranger. Thus an agency may be created by ratification. The rules regarding agency by ratification are as follows:

Right of person as to acts done for him without his authority: Effect of ratification: Section 196 says—

> 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.

Thus if any act is done by one person on behalf of another, but without his knowledge or authority, he will have two options:

i. He may ratify it ; or

ii. He may disown it.

If he disowns that act then he will have no liability for such act done by another person. But if he elects to ratify it then the same effects will follow as if they had been performed by his authority, i.e., an agency will be created there by such ratification.

Types/modes of ratification: Section 197 says—

> 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.

Thus it appears that the ratification may be of the following two types:

i. Express ratification;

ii. Implied ratification.

Knowledge is a requisite for valid ratification: Section 197 says—

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

Thus section 197 mentions the condition of a valid ratification and it lays down clearly that a person whose knowledge of the facts of the case is somehow materially defective cannot make a valid ratification. In other words, to ratify the act of one person the person who ratifies it must have a complete knowledge of the facts of the case which is not materially defective. Again, mere defective knowledge will not make him incapable to ratify but the defect must be material one and what is a materially defective knowledge is obviously a question of fact.

Effect of ratifying unauthorised act forming part of a transaction: What will happen if a person ratifies only one part of a transaction? Section 199 says—

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

Thus a person cannot at his own sweet will ratify part of a transaction and repudiate the rest. So, if a person ratifies any unauthorized act does on his behalf it will amount to ratification not only of that part rather the whole transaction will be deemed to be ratified.

Ratification and third party rights: On principle, ratification of unauthorized act cannot be done in the way which injures the third person. Section 200 says—

> 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.

Thus this section gives a protection to third parties that a ratification of an unauthorized act cannot be done if that injures any third person.

❑ Revocation of Authority:

Termination of agency: The different modes of termination of agency have been described in section 201 which says—

> 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.

Thus it appear that an agency may be terminated in the following modes:

1. By the act of the principal if he revokes his authority.
2. By the act of the agent if he renounces the business of the agency.
3. By the completion of business of the agency.
4. By the death of principal.
5. By the death of agent.
6. If the principal becomes person of unsound mind.
7. If the agent becomes person of unsound mind.
8. If the principal is adjudicated as an insolvent under the provisions of any Act for the time being in force.

The termination of agency again is guided by the following rules enunciated in sections 202—210. The whole series of termination of agency is discussed hereafter:

Where agent has an interest in subject-matter: Section 202 says—

> Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.
>
> *Illustrations*
>
> (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him

from A. A cannot revoke this authority nor can it be; terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

This section deals with the termination of a special type of agency where the agent has an interest in the property which forms the subject-matter of the agency. In such a case, the agency cannot be terminated to the prejudice of such interest unless there is an express contract to that effect.

When principal may revoke agent's authority: Section 203 deals with the time for revocation of agent's authority to be made by the principal. It says—

> 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.

Thus it appears from the above section that once an authority is given to an agent that does not necessarily mean that the principal cannot revoke it later on. The law says that the principal will be at liberty to revoke the authority granted to his agent provided that that must be done before the authority has been exercised so as to bind the principal. In doing so the principal's power of revocation will be restricted by the provisions of the earlier sections, i.e., the principal can not revoke the authority if the agent becomes an interested party there unless there is an express contract to that effect.

The Court observed in *Abdun Naim Parvez (Md) Vs. Sachindra Kumar Mandal and others*[1] that—

> 'Where the agent has himself an interest in the property forming subject matter of the agency, as provided by sections 202 and 203 of the Contract Act, cannot be terminated to the prejudice of such interest in the absence of an express contract. In the present case, from the recital of the power of attorney it appears that the agent himself has an interest in the property and hence such agency cannot be revoked unilaterally to the prejudice of such interest.'

Revocation where authority has been partly exercised: If the agent has already done a part of the authorized transaction then the principal cannot revoke the authority so far as regards such acts and obligations as arise from acts already done in the agency. Section 204 says—

> 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 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in 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 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for

[1] 5 BLC 14.

> the price. A can revoke B's authority to pay for the cotton.

Thus, if a principal employs an agent to do something which, by law, involves the agent in a legal liability or even in a customary liability by reason of usage in that class of transactions known to both agent and principal, the principal cannot draw back and leave the agent to bear the liability at his own expense.[1]

Compensation for revocation by principal or renunciation by agent: Section 205 says—

> 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, of the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Thus if an agency is created for a specific time, then that cannot be revoked before the expiry of the time without showing sufficient cause. And if the principal does so then he is bound to make compensation to the agent for loss suffered by him by earlier revocation of agency. This similarly prevents the agent from renunciation of agency before the time if that was constituted for a particular period and if the agent does so, he has to compensate the principal for such earlier renunciation.

Notice of revocation or renunciation: For revocation or renunciation of agency by the principal or agent, as the case may be, a reasonable notice is required and that cannot be done suddenly. Section 206 says—

> Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to

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[1] *Read v. Anderson* (1884) 13 Q.B. 779, 783.

> the principal or the agent, as the case may be, must be made good to the one by the other.

Thus if the principal or the agent does not give reasonable notice before revocation or renunciation, as the case may be, the party who does so must compensate the other party who suffered loss for not giving such notice as required by the law.

Revocation and renunciation may be expressed or implied: Section 207 is simple enough which deals with the modes of revocation and renunciation which says—

> 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.

When termination of agent's authority takes effect as to agent, and as to third persons: Section 208 says—

> 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 Taka 100. The sale is binding on A and B is entitled to Taka five as his commission.

(b) A, at Chittagong, by letter, directs B to sell for him some cotton lying in a warehouse in Khulna, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Chittagong. 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.

This section deals with the time from when termination of the authority of an agent will be effective. Thus it will not be operative at the moment it is terminated. But the law says that revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before.

Agent's duty on termination of agency by principal's death or insanity: Section 209 clearly lays down agent's duty on termination of agency by principal's death or insanity which says—

> 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.

Thus the law imposes a duty of care upon the agent at the death or unsoundness of the principal and the degree of care required is of 'reasonable standard' which is a question

of fact and probably it means standard of care as would be taken by a person of ordinary prudence in his own case under the similar circumstances.

Termination of sub-agent's authority: Section 210 says—

> 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.

Thus the section lays down the rule regarding the automatic termination of the authority of a sub-agent with the termination of the agency. So, if an agent's authority is terminated then the authority of all sub-agents appointed by him will be terminated automatically in consequence of the termination of agency.

Agent's Duty to Principal:

Agent's duty in conducting principal's business: Section 211 says—

> An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.
>
> *Illustrations*
>
> (a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to

make such investments. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A, on credit to C, whose credit at the time was very high. C before payment, becomes insolvent. B must make good the loss to A.

How will the agent conduct the business of his principal?
This question has been answered in section 211. Law provides for two modes by which the agent has to conduct the business of his principal. They are as follows:

i. *An agency where the principal has given directions:* If the principal has given the directions then the agent is bound to conduct the business according to those directions.

ii. *An agency where the principal has not given directions:* If the principal does not give any direction then the agent has to conduct the business according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business.

Consequence of violation of above rules: The law adds further that if an agent does not conduct the business in any of the above manners, then the following two consequences will be there:

i. *Duty to compensate:* The agent must compensate the principal for any loss sustained for conducting the business of his principal at his sweet will without following the above instructions given by law.

ii. *Account for profit:* Moreover, even if any profit accrues in doing so, he must account for it.

Skill and diligence required from agent: Section 212 lays down a set of rules regarding the skill and diligence required from agent which says—

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

Illustrations

(a) A, a merchant in Chittagong, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct losses 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 inquiries 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 Chittagong 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 the section lays down the following rules:

i. 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.

ii. The agent will be excused from discharging his duty with above skill if he has actual want of that skill provided the principal has notice of such want of skill. So, if the principal does not have the notice of such want of skill then the agent will be liable irrespective of his actual skill and ability.

iii. The agent is always bound to act with reasonable diligence.

iv. The agent is also bound to use such skill as he possesses. It means that the agent must use best of his ability as he possesses.

v. The agent is liable to make compensation to his principal in respect of the direct consequence of his own neglect, want of skill or misconduct.

vi. But the agent does not have any liability and need not compensate the principal in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct. Thus the sole criterion to make the agent liable to pay compensation is the casual connection between the loss suffered and the want of skill, neglect or misconduct of the agent and it is to be shown that the loss is not the remote consequence of either of them but is one which is the direct result of his act.

Agent's accounts: Section 213 while dealing with an elementary duty of an agent says that—

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

Thus the law gives the principal a right to demand the accounts from the agent at any time and the law imposes the obligation upon the agent to render proper accounts to his principal whenever such demand is made by him.

Agent's duty to communicate with principal: At some difficult situations the law imposes an obligation upon the agent to consult with his principal. Section 214 says—

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

Thus in the difficult situations the agent is bound to communicate with his principal with his every honest ability and to seek instructions from him to face those difficult situations. In such difficult times law does not permit the agent to solve the problem in his own, rather it

imposes upon him a liability to consult with the principal and then to face the situation as per the instructions given by the principal.

Right of principal when agent deals on his own account, in business of agency without principal's consent: Section 215 says—

> 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.

Thus the law gives the principal to repudiate a transaction subject to the satisfaction of the following conditions:

i. The agent deals on his own account in the business of the agency.

ii. The agent does so without first obtaining the consent of his principal.

iii. Even the agent does not acquaint the principal with all material circumstances which have come to his own knowledge on the subject.

iv. The case shows either that the agent has dishonestly concealed any material fact from him, or that the dealings of the agent have been disadvantageous to him.

Principal's right to benefit gained by agent dealing on his own account in business of agency: If the agent conducts business of his principal on his account and gains any benefit still the principal will have the right to claim that benefit gained by the agent in doing business on his own account. Section 216 says—

> 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.

Agent's right of retainer out of sums received on principal's account: Section 217 says—

> 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.

Thus the above section gives the agent a special right to retain any sum received on principal's account for the following purposes:

i. Against all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business.

ii. For such remuneration as may be payable to him for acting as agent.

Agent's duty to pay sums received for principal: The agent is obviously bound to pay sums received for principal after legal deductions made from it. Section 218 lays down this principle clearly which says—

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

When agent's remuneration becomes due: Generally agent's remuneration becomes due after the completion of any act. But it may be so due if there is any contract to the contrary. Section 219 says—

> 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.

Thus section 219 lays down the following principles:

i. Payment for the performance of any act done by the agent becomes due after the completion of such act, and not before. But if there is any contract to the contrary then the payment may be due even after part performance made by the agent.

ii. An agent have a special right to 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.

Agent is not entitled to remuneration for business misconducted: This is absolutely a logical rule that the agent will not be paid remuneration for business misconducted. Section 220 says—

> 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 100,000 Taka from C and to lay it out on good security. B recovers the 100,000 Taka and lays out 90,000 Taka on good security, but lays out 10,000 Taka on security which he ought to have known to be bad, whereby A loses 2,000 Taka. B is entitled to remuneration for recovering the 100,000 Taka and for investing the 90,000 Taka. He is not entitled to any remuneration for investing the 10,000 Taka, and he must make good the 2,000 Taka to B [sic in the Act, but it should obviously be A.]

(b) A employs B to recover 1,000 Taka 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.

Agent's lien on principal's property: Section 221 gives the agent a special right to lien for the amount due to himself. It says—

> In the absence of any contract to the contrary an agent is entitled to retain goods, papers and other property, whether moveable 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.

Principal's Duty to Agent:

Agent to be indemnified against consequences of lawful acts: An agent is given the right to be indemnified by the principal for any loss suffered by him in doing the authorized acts, provided that act must be lawful. Section 222 says—

> 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 at Chittagong, contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and

incurs expenses. A is liable to B for such damages, costs, and expenses.

(b) B, a broker at Chittagong 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 contracts 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.

Agent to be indemnified against consequences of acts done in good faith: Section 223 says—

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 cause an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

Thus the law gives the agent the right to be indemnified not only against authorized acts, but it gives also the right to be indemnified against all acts done in good faith.

Non-liability of employer of agent to do a criminal act: There will be no right on the part of the agent to be indemnified due to doing a criminal act though that was authorized by his principal. Section 224 says—

> Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.
>
> *Illustrations*
>
> (a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.
>
> (b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

Compensation to agent for injury caused by principal's neglect: If the agent suffers any loss due to neglect or want of skill of the principal then the principal will be bound to compensate the agent for such loss. Section 225 says—

> 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.

Illustration

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

Effect of Agency on Contracts with Third Persons:

Enforcement and consequences of agent's contracts: All acts done by the agent within the scope of his authority or being ratified further by the principal, will be given the same legal status of the acts done by the principal, i.e., those will be deemed as if those acts have been done by the principal himself. Section 226 says—

> 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.

Principal's liability when agent exceeds authority: Sometimes the agent may exceed his authority and if he does anything

exceeding the authority, what will be the legal consequence of that act? This question has been answered in section 227 which says—

> When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.
>
> *Illustration*
>
> A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 Taka on the ship. B procures a policy for 4,000 Taka 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.

Thus the section may be dissected as such—

i. The agent exceeds his authority and does something beyond his authority.

ii. The whole transaction is not beyond his authority, rather a part of it is within his authority.

iii. The authorized part of the act done by him is separable from the part which is unauthorized.

iv. Under such circumstance, only the authorized portion of his agent's act will bind the principal and the principal will have no liability for the unauthorized portion of his agent's task.

Thus it appears that even if the agent exceeds his authority then the principal cannot deny his liability absolutely rather he will be bound by the authorized portion of his agent's act

provided that that is separable from the unauthorized portion of the act done by him exceeding the authority.

Principal is not bound when excess of agent's authority is not separable: When the agent does anything exceeding his authority another situation may arise that the unauthorized portion is not separable from the authorized portion and in that case the principal will not be bound by anything of that transaction, i.e., such transaction will fail absolutely to bind the principal. Section 228 says—

> Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.
>
> *Illustration*
>
> A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 Taka. A may repudiate the whole transaction.

Thus the section may be dissected as such—

i. The agent exceeds his authority and does something beyond his authority.

ii. The whole transaction is not beyond his authority, rather a part of it is within his authority.

iii. The authorized part of the act done by him is not separable from the part which is unauthorized.

iv. Under such circumstance, the principal may deny the liability for whole transaction. .

Consequences of third party's notice given to agent: How does a notice served to an agent by third person bind the principal?

This question has been answered in section 229 which says—

> 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 learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

Thus it appears that even if a notice is not served actually to the principal, it may bind him if that is served to his agent with the same status as if it has been actually served to him and the condition to be satisfied is that such notice must be served in the course of the business transacted by him for the principal.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal: Section 230 says—

> 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.

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

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

(2) Where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Thus the above section, in it first phase, says that generally an agent cannot personally enforce contracts entered into by him on behalf of his principal and he is even not personally bound by them. But if there exists any contract to the contrary then this rule will not be applied, i.e., in that case an agent can personally enforce contracts entered into by him on behalf of his principal and he also may be personally bound by them.

In the second phase, the section actually mentions the following three circumstances where such a contrary contract will be presumed even though there is no such actual contract to the contrary:

i. Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

ii. Where the agent does not disclose the name of his principal.

iii. Where the principal, though disclosed, cannot be sued.

Thus in the above circumstances the agent can personally enforce contracts entered into by him on behalf of his principal and he may be personally bound by them, because of the presumption of law regarding the existence of such a contract between the principal and agent to that effect. However, when an express contract will be found to that effect then the law need not to do such presumption to award the same legal consequence.

Since principal and agent both are parties, decree can be passed only against the principal.[1] In the case of *Argbats Aktiebolaget Bohuslanaka Kusten Vs. Central Hardware Stores*[2]—

> The master of a vessel of a foreign company which carried on business in Chittagong through its agent in Pakistan asked the plaintiff (respondent) to supply some materials needed for the vessel. Before making the supply the plaintiff contracted the agent appellant No.2 to ensure payment of the price of the goods and the agent undertook to pay the price if the Master of the vessel signed the bill in acknowledgment of the delivery of the goods. Goods as required were supplied and the bill for payment was also duly signed by the Master of the vessel. When, however, the bill was presented to the agent the latter declined to make the payment.
>
> In a suit brought by the plaintiff it was contended that since the contract of supply of the materials was made directly between the principal (the appellant No.1) and the plaintiff, the agent, appellant No.2 was not personally liable to pay the amount.
>
> *Held:*
>
> In the present case the agent had made himself personally liable as a guarantor and it was thus a case of personal

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[1] East and West Steamship Co. Vs. Hossain Brothers, (1967) 19 DLR 75.
[2] (1969) 21 DLR (SC) 245.

> liability by contract. The liability of the agent, being thus direct, both as a guarantor and as an agent, he cannot enjoy the negative protection afforded by section 230 of the Act, nor is it necessary in this case to invoke the presumptive clause of section 230 in favor of that contract to hold the agent liable because his principal (appellant No.1) was a merchant residing abroad.'

It was observed in *Hegge and Co. (Pak.) Ltd, Chittagong V. Arag Limited*[3] that—

> 'The provisions of clause 2 of section 230 of the Contract Act under which an agent becomes liable under a contract on the ground that he has not disclosed the name of his principal are attracted to a case when particular contract is entered into by the agent.
>
> When the contract is by the principal himself and the agent has nothing to do with it and it was entered into in his absence the exceptions mentioned in section 230 whereby an agent is deemed to be a contracting party himself are not attracted.

Rights of parties to a contract made by agent not disclosed: Section 231 says—

> 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.
>
> If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfill the contract, if he can show that, if he had known who was the principal in the contract, or if he had known

[3] (1967) 19 DLR 24.

> that the agent was not a principal, he would not have entered into the contract.

Thus, the above mention second paragraph gives the other contracting party the right to refuse to fulfill the contract if the principal discloses himself before the contract is complete. So, if the existence of the principal is not disclosed by the principal, rather it is somehow known to him, this provision will not be operative because the law uses the terms 'If the principal discloses himself', so such disclosure is to be made by the principal.[1]

Performance of contract with agent supposed to be principal: Section 232 says—

> 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 Taka to B, sells 1,000 Taka, 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.

Right of person dealing with agent personally liable: Section 233 says—

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

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[1] Lakshmandas Vs. Lane (1904) 32 Bom. 356; Kapurji Magniram Vs. Panaji Devichand, 53 Bom. 110.

Illustration

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.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable: Section 234 says—

> 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.

Liability of pretended agent: Section 235 says—

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

Person falsely Contracting as agent not entitled to performance: Section 236 says—

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

Liability of principal inducing belief that agent's unauthorized acts were authorized: Section 237 says—

> When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or

obligations if he has by his words or conduct induced such third persons to believe that such 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.

Effect, on agreement of misrepresentation or fraud by agent: Section 238 says—

Misrepresentation 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 misrepresentationss or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matter which do not fall within their authority, do not affect their principals.

Illustrations

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

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