CHAPTER 9

PERFORMANCE OF CONTRACT

The question of performance of a contract arises after the formation of a contract. Because, it is clear that a contract may be constituted even without having any performance from any of the two parties to a contract. Thus, after formation of a contract the first issue regarding that contract is about its performance.

Contracts which must be performed:

The law, even after formation of contracts, distinguishes those contracts into two categories, namely:

(a) Contracts which must be performed.

(b) Contracts which need not be performed.

Sometimes the law even accepts the tender of performance as valid instead of actual performance. All these rules are laid down in different sections of the Contract Act, 1872 clearly. The rules regarding the contracts which must be performed are going to be discussed at the first instance.

Section 37 says that—

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

Promises bind the representatives of the promisors in case of the death of such promisors before performances unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of Taka 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Taka 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Principles laid down by section 37: obligation of the parties:
A contract gives rise to certain legal obligations. The foremost legal consequence which a contract bears with it is the obligation of parties to it and it remains on the shoulder of the parties until it is discharged in the way as directed by law. A contract may take place without any performance made from any of the parties to a contract. But after the formation of a contract the parties are liable to perform their contractual obligations which arise out of the contract in which they are parties. Section 37 lays down certain basic principles regarding the above liability. Accordingly, after entering into a contract two options of the same dimension are open to the parties to a contract that—

i. the parties to a contract must either perform; or

ii. offer to perform, their respective promises.

Then the law declares that even the parties need not to do any of the above things, if –

such performance is dispensed with or excused under

i. this Act, or

ii. any other law.

Thus the law says about actual performance and tender of performance. That a person after entering into a contract either has to perform his obligation or at least offer to perform his obligation unless that is excused otherwise by law. Here, offer to perform has been made equal to actual performance, because sometimes it may happen that a party to a contract offering his part of performance but the other party is not accepting it. In fact in such case the person who could not perform it actually due to the fault of another party should not be made liable for non-performance. Such an offer to perform is in fact an alternative way of being discharged from one's contractual obligation as this same is possible by actual performance. Such an offer of performance is also technically known as 'tender of performance'.

Liability of the representatives of the promisors: The second paragraph to section 37 lays down the principles regarding the liability of the representatives of the promisors. What will happen if the promisor dies before the performance of the contract? Section 37 says that in such a case the representatives of the promisors will be held liable unless a contrary intention appears from the contract. Thus the liability of the representatives of the promisors is not made direct and absolute. It has been made subject to a limitation that if it appears from the contract that it was not the intention of the parties to make liable the representatives of the promisors in case of death of the promisors then the representatives will not be liable. So, in case of death of the promisor, the representatives of the same will be liable only if their liability was not barred by their contract. Thus, in

case of death of the promisor, to make his representatives liable, the first option is given to the parties. If, the parties assign the liability on the representatives of the promisor or no contrary intention appears from the contract then only law will come into operation to make such representatives liable for the performance of the promisor who died before performance.

Illustration (b) to section 37 makes another point clear which has not been expressly mentioned in the section. The principle which has been followed, in fact, in this illustration is that in case of contract which requires the personal skill and taste, e.g., painting a picture, singing a song, the representatives will not be made liable in case of death of the promisor. The reason is obvious that such performance cannot be made by the representatives in the same manner as it was expected by the contract. It is worth mentioning here that this principle is, in fact, implied in *paragraph 2* to section 37 as it is understood obviously that in case of contract which requires personal skill and taste, it must not be the intention of the parties to make liable the representatives for performance. It is natural that only personal performance by the promisor himself is expected by such type of contract.

Rules regarding offer of performance: What will be the effect of refusal to accept offer of performance? What are the conditions to be fulfilled to gain the advantage of such legal effect? These two questions have been answered in section 38 which, in this sense, is an extension of section 37. Section 38 says—

> Where a promisor has made an offer of performance to the promise, and the offer has not been accepted, the

promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.
Every such offer must fulfill the following conditions:-

(1) it must be unconditional;

(2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;

(3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration

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

Legal consequence of offer of performance: Paragraph 1 to section 38 says that if the promisor makes offer of performance and the other party does not accept it then

such an offer will give rise to the following two legal consequences:

i. *Liability of the promisor:* The promisor will not be responsible for non-performance though the promise has not been performed actually; and

ii. *Rights of the promisor:* The promisor will not lose his rights under the contract.

Thus, if the promisor supplies dinner for 100 persons as was ordered by the promisee and the promisee does not accept it after an offer of performance made by the promisor, e.g., he does not take the delivery even after submission made by the promisor. According to the first consequence such a promisor will not be further responsible though the delivery has not been made actually and as per the second consequence since the rights of such promisor under the contract is not lost so that still the promisor can validly claim the price for dinner offered to perform.

Offer made to one of several joint promisees: The last paragraph to section 38 makes it clear that if such an offer of performance is made to one of several joint promisees then it will have the same legal consequences as an offer to all of them. Thus, if 'A' makes a promise to 'B', 'C' and 'D' of which 'A' subsequently makes an offer of performance to 'B' which he refuses to accept then it will be deemed by law that it is denied by each of the promisees and after such refusal made by 'B', any other promisee cannot blame the promisor that he did not make it to him. Thus, 'A' can exercise his rights against each of the promisees.

Conditions of a valid offer of performance : *Paragraph 2* to section 38 mentions the following conditions to be satisfied

by an offer of performance to enjoy the equal status of actual performance and to claim the benefits of first paragraph:

i. *Nature of the offer of performance* : Such an offer must be unconditional and so if the promisor, in making such an offer, adds any type of condition with it then it will fail to be a valid offer of performance as required by section 38 to enjoy the legal benefits.

ii. *Time of the offer:* Section 38 uses the term 'proper' to specify the time for making such an offer of performance. What is the proper time? Obviously if any time is pre set for performance then that is the proper time and in cases where no such time is fixed this is a question of fact which ultimately implies to a reasonable time. Generally, reasonable time may imply the ordinary business hour.

iii. *Place for making such an offer:* The section uses the same term (proper) to specify the place for making such an offer of performance. Obviously if any place is pre fixed that is the proper place and if not, then it is to be decided from the circumstances being a question of fact and as such it has to be made at a reasonable place.

iv. *Two opportunities:* The person who is making such an offer of performance must give the following two reasonable opportunities to the promisee—

a) *Opportunity to see the ability:* The person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of

what he is bound by his promise to do. Thus an offer to perform a part of the promise will not suffice.

b) *Opportunity to see the quality of the goods:* If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

Thus the former opportunity relates to the quantity whereas the later deals with the quality.

Anticipatory breach of contract: refusal to perform: Section 37 clearly imposes the liability to perform the promise. So, if the party concerned does not perform the promise within the stipulated or reasonable time then after the expiry of that time it will be a clear case of breach of contract. But what will happen if the promisor before that refuses to perform or disable himself to perform the promise? This particular issue has been discussed in section 39 which says—

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

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 Taka for each night's performance: On the sixth night A willfully absents herself from the theater. B is at liberty to put an end to the contract.

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

The promisee, if he pleases, may treat the notice of intention as inoperative, and await till the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as of his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.[1]

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.[2]

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[1] Frost Vs. Knight (1872) L.R. 7 Ex. 111; Ratanlal Vs. Brijmohan (1931) 33 Bom. L. R. 703.

[2] *Ibid.*

By whom Contracts must be Performed.

A promise always imposes certain liability on the promisor, but it does not necessarily mean that the promise is to be performed always by the promisor himself. There are obviously some other promises which require personal performance of the promisors. Section 40 says—

> If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.
>
> *Illustrations*
>
> (a) A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another; and, if A, dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
>
> (b) A promises to paint a picture for B. A must perform this promise personally.

Thus it appears that after making a promise, it can be performed by the following two types of persons under different circumstances depending on the nature of the transactions:

1. The promisor himself; or
2. Any competent person.

The promisor himself: Section 40 tells it very clearly that the promise has to be performed by the promisor himself, if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself. For example, if a person makes a promise to sing five songs in a concert, it is natural to presume here that it is the intention of the parties that the promisor himself will sing a song. Here personal performance is required. Usually contracts involving personal skill or taste require personal performance to be made by the promisor himself, instead of performance by any authorized person.

Any competent person: In other cases the promisor or his representatives may employ a competent person to perform the promise. That means where it does not appear from the nature of the case that it is the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself in that case that need not be performed by the promisor himself, rather that type of promise may be performed by any competent person who is employed by the promisor or his representatives. For example, if there is a promise related to delivery of a car usually it is immaterial who is making the actual performance and it will suffice even if any authorized person does this act of delivery on behalf of the promisor being employed by the promisor or his representatives.

It was decided in *Laksman Mandal Vs. Muslem Uddin*[1] that as a general rule, benefits of a contract are assignable subject to any contrary intention exhibited in the contract or the document itself.[2] A contrary intention, may either be express

[1] (1953) 10 DLR 165.
[2] *Ibid.*

or arise by necessary implication. One illustration of the cases in which such a contrary intention is implied is to be found in what are commonly known as 'personal contracts' or contracts depending upon the learning, skill, solvency or any personal qualification of the assignor or the party to the contract or from whom the benefits of the contract are claimed under the particular agreement.[3] In case of a sale of immovable property accompanied by an *ekrarnama* for the reconveyance of the same property to the vendor, a subsequent purchaser of the vendor's right, he being the successor-in-interest, is entitled to enforce the right of reconveyance against the original vendee.[4] A contract in the *ekrarnama* to reconvey the land to the vendor, though does not create any interest in the land is yet capable of being transferred to a third person, and the transferee is entitled to enforce the contract of conveyance against the vendee except a *bona fide* purchaser for value without notice of the agreement.[5]

Effect of accepting performance from third person:

Does the third party has any right to perform? *or* Is the promisee bound to accept the performance from any third party? *or* What will happen if the promisee voluntarily accepts the performnace from any third party? All these questions are solved through the following sections. Section 41 says—

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

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[3] *Ibid.*
[4] Jalal Ahmed Vs. Thorais Mia (1968) 20 DLR 80.
[5] *Ibid.*

Analysis:

Is the promisee bound to accept performance of the promise from a third person? The answer is 'no'. But it has been indicated in this section that, in fact, the promisee is at liberty to accept the performance from any third person and if he accepts it from a third person it will be a valid acceptance. The law is that he is at liberty to have it and he cannot be compelled to accept it as such. Thus, if any third person makes any offer of performance to the promisee which is rejected by the promisee, in such a case it will not be treated as a valid offer of performance and consequently such promisee will still be entitled to claim compensation from the promisor for non-performance of contract.

What will happen if the promisee accepts the performance from any third person? It is true that the promisee is, in fact, not bound to accept the performance of the promise from any third person but if he accepts it once from such a third person then he cannot enforce it afterwards against the original promisor.

Rules regarding the performance of joint promises

Devolution of joint liabilities:
Section 42 says—

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

Analysis:

In case of joint promise—

1. During their joint lives, all such joint promisors are liable to perform the promise jointly.

2. In case of death of any of the joint promisors the representatives of the dead promisor will be jointly liable with the surviving promisor.

3. In case of death of all joint promisors all representatives of the dead promisors will be jointly liable to perform the promise.

Condition for the application of above rule: The above laws relating to devolution of joint liabilities will not come into operation *per se*. It is dependent firstly at the option of the parties. Obviously if the parties settle otherwise in their contract, these rule of devolution of joint liability will not be effective. In that case, the different intention of the parties by which they do not make their representatives liable will be applicable. If such contrary intention is not found in the contract only then these rules will be applicable.

The intention of the parties has to be gathered not only from the words used in the contracts by the parties but also from the circumstances, their belief, knowledge and intention as expressed in their correspondence.[1] In interpreting the terms of a contract, the Court ought not to imply a term unless there is evidence that both parties must have intended that it should be terms of the contract, and the power of the Court of implying terms which the parties have not

[1] PLD 1979 Karachi 88.

expressed should be exercised very sparingly and only in cases of necessity.[1]

Compelling any joint promisor to perdorm: Section 43 says—

> When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any [one or more] of such joint promisors to perform the whole of the promise.
>
> *Each promisor may compel contribution:* Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.
>
> *Sharing of loss by default in contribution:* If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.
>
> *Explanation.* Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.
>
> *Illustrations*
>
> (a) A, B and C jointly promise to pay D 3,000 Taka. D may compel either A or B, or C to pay him 3,000 Taka.
>
> (b) A, B and C jointly promise to pay D the sum of Taka 3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive Taka 500 from A.'s estate, and Taka 1,250 from B.

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[1] *Ibid.*

(c) A, B and C are under a joint promise to pay D Taka 3,000. C is unable to pay anything and A is compelled to pay the whole. A is entitled to receive Taka 1,500 from B.

(d) A, B and C are under a joint promise to pay D Taka 3,000, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

Effect of release of one joint promisor by the promisee: Section 44 says—

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

This section deals with the effect of release of one joint promisor. Thus the law says that if two or more persons have made a joint promise and any one of such joint promisors is released by the promisee, that will give rise to the following rules:

i. This release will not discharge the other joint promisor or joint promisors. In other words, other joint promisors can not argue to release them that they are of equal status and since one of them is released so the others should also be released.

ii. It does not free the joint promisor so released from responsibility to the other joint promisor or joint promisors. Thus, though that released promisor has been released by the promisee it does not release him from his liability towards his co-promisors. So, in between themselves, i.e., between the joint promisors,

the released promisor will still be liable for his promise, though not to the promisee.

Devolution of joint rights: Section 45 says—

> When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors and, after the death of the last survivor with the representatives of all jointly.
>
> *Illustration*
>
> A, in consideration of 5,000 Taka lent to him by B and C, promises B and C, jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

The rules enunciated in this section may be shown through the following Table:

Promisor	Promisee	Status of the promisee	Right to claim performance belongs to
A	B,C & D	They are alive.	B,C & D.
		B & C alive, but D dies.	B,C and representatives of D.
		B is alive, but C & D die.	B and representatives of C and D.
		They die.	Their representatives, i.e., representatives of B, C & D jointly.
Common condition: Provided no contrary intention to it is found			

Time and place for performance:

Where no application is to be made and no time is specified:

Section 46 says—

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> *Explanation.*- The question "what is a reasonable time" is, in each particular case, a question of fact.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*When is to be performed*
To perform the promise without application by the promisee.	No time for performance is specified.	It must be performed within a reasonable time. What is a reasonable time that is a question of fact.

Where time is specified and no application to be made:

Section 47 says—

> When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
>
> *Illustration*
>
> A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*When is to be performed*	*Where is to be performed*
The promisor has under-taken to perform it without application by the promisee.	It is to be performed on a certain day.	At any time during the usual hours of business on such day.	at the place at which the promise ought to be performed.

Application for performance on certain day to be at proper time and place: Section 48 says—

> When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.
>
> *Explanation*. The question "what is a proper time and place" is, in each particular case, a question of fact.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Time for performance: fixed/ not fixed*	*Duty of the promisor regarding the performance*
The promisor has not under-taken to perform it without application by the promisee.	It is to be performed on a certain day.	To apply for performance at a proper place and within the usual hours of business.
What is a 'proper time and place' is, in each particular case, a question of fact.		

Place for performance of promise where no application to be made and no place fixed for performance: Section 49 says—

> When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.
>
> *Illustration*
>
> A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

The rules enunciated in this section may be projected through the following Table:

Nature of the promise	*Place for performance: fixed/ not fixed*	*Duty of the promisor regarding the performance*	*Where is to be performed*
A promise that is to be performed without application by the promisee.	No place is fixed for the performance.	To apply to the promisee to appoint a reasonable place for the performance of the promise.	To perform it at such place which has been fixed according to the preceding column.

Performance in manner or at time prescribed or sanctioned by promisee: Section 50 says—

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

Illustrations

(a) B owes A, 2,000 Taka. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B, 2,000 Taka. B accepts some of A's goods in deduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him Taka 100, to send him a note for Taka 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

PERFORMANCE OF RECIPROCAL PROMISES.

Condition of performance:

Promisor not bound to perform unless reciprocal promisee ready and willing to perform: Section 51 says—

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

Illustrations

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

(b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.
A need not deliver, unless B is ready and willing to pay the first installment on delivery.
B need not pay the first installment unless A is ready and willing to deliver the goods on payment of the first installment.

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Order of performance*	*When is to be performed*
Reciprocal promises	To be performed simultaneously	When the pomisee is ready and willing to perform his promise. No promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Order of performance of reciprocal promises: Section 52 says—

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not

expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

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

The rules enunciated in this section may be shown through the following Table:

Nature of the promise	*Order of performance is fixed or not by the contract*	*In which order it is to be performed*
Reciprocal promises	Is expressly fixed by the contract.	They shall be performed in that order which has been fixed by the contract.
Reciprocal promises	Is not expressly fixed by the contract.	They shall be performed in that order which that nature of the transaction requires.

Liability of party preventing event on which the contract is to take effect: Section 53 says—

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he

may sustain in consequence of the non-performance of the contract.

Illustration

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

The rules enunciated in this section may be shown through the following Table:

Nature of the contract	*Action done by one party*	*Legal consequences*
It contains reciprocal promises.	One party to the contract prevents the other from performing his promise.	i. The contract becomes voidable at the option of the party so prevented. ii. The party so prevented is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises:

Section 54 says—

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance

of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

(a) A hires B's ship to take in and convey from Chittagong to the Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work, B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to

pay need not be performed and A must make compensation.

The rules enunciated in this section may be shown through the following Table:

Nature of the contract	*Circumstance*	*Legal consequences*
i. It consists of reciprocal promises. ii. The performance of one promise is dependent on the performance of other promise.	The promisor of the promise last mentioned fails to perform it.	i. Such promisor cannot claim the performance of the reciprocal promise. ii. And he must make compensation to the other party to the contract for any loss, which such other party may sustain, by the non-performance of the contract.

Effect of failure to perform at fixed time:
Section 55 says—

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

Effect of such failure when time is not essential: If it was not the intention of the parties that time should be of the

essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

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

Whether the time is in essence of the contract or not, is an important question to decide at first instance for application of the above mentioned rules. It was held in *Dula Mia Vs. Haji Md. Ebrahim*[1] that in the transactions relating to immovable property time, generally, is not the essence of the contract. Even fixation of the period of contract with power to treat it as cancelled, if not fulfilled within time, does not always make time essence of the contract.[2] The tendency of Courts relating to real property is to lean against a construction which would make time the essence of the contract unless it can be held to be the unmistakable intention of the parties.[3] It was observed in *Purnendu Kumar*

[1] (1956) 8 DLR 616.
[2] *Ibid.*
[3] *Ibid.*

Das Vs. Hiran Kumar Das[4] that there are three requisites to determine whether time is essence of contract, they are: (a) express stipulation between parties, (b) nature of property, and (c) surrounding circumstances. It was held in *Abdul Rahim Sardar Vs. Idris Ali Bepari*[5] that in case of a contract of sale generally the time may not be the essence of the contract, but, in the case of a contract, for the re-sale of the same, the time is the essence of the contract. In *Abdul Hamid Vs. Abbas Bhai*[6]—

> 'The payment of the purchase money by the vendor on account of the sale of the particular land was conditional on obtaining the necessary certificates for the Income tax and other authorities to enable registration to take place. Without arming himself with these certificates, the vendor began to call upon the vendee to complete the transaction.
>
> The vendee on the contrary was all the time insisting that the vendor should first perform his part of the contract and obtain the necessary certificates. Thereafter, on the 4th of September, 1953 when the vendor was equipped with the necessary certificates he intimated to the vendee that if the transaction be not completed within ten days from the date the contract would stand rescinded.
>
> *Held:*
>
> The principle is that if time is not originally made of the essence of a contract for sale of land, one of the parties is

[4] (1969) 21 DLR 918.
[5] (1959) 11 DLR 169.
[6] (1962) 14 DLR (SC) 24.

not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.

The rules enunciated in the above section may be shown through the following three Tables:

Table 1: *Paragraph 1 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
i. A party to a contract promises to do a thing at or before a stipulated time. ii. The intention of the parties was that time should be of the essence of the contract.	That party fails to do that thing at or before that specified time.	The contract so much of it as has not been performed, becomes voidable at the option of the promisee.

Table 2: *Paragraph 2 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
i. A party to a contract promises to do a thing at or before a stipulated time. ii. It was not the intention of the parties that time should be of the essence of the contract.	That party fails to do that thing at or before that specified time.	i. The contract does not become voidable. ii. But the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Table 3: *Paragraph 3 to section 55*

Nature of the contract	*Circumstance*	*Legal consequences*
The contract was voidable on the ground that the promisor failed to perform his promise at the time agreed.	The promisee elected to make the contract enforceable by law and accepts performance of such promise at any time other than that agreed.	*Rule:* The promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed. *Exception:* He can get the compensation if at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Reciprocal promise to do things legal, and also other things illegal: Section 57 says—

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

Illustration

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

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

The second set is for an unlawful object, namely, that B

> may use the house as a gambling house, and is a void agreement.

Thus, if the contract does not become separable then obviously the whole transaction will be void, as it is mentioned in the section that for the validity partly the transaction needs to be divisible.

Alternative promise, one branch being illegal:
Section 58 says—

> In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.
>
> *Illustration*
>
> A and B agree that A shall pay B 1,000 Taka for which B shall afterwards deliver to A either rice or smuggled opium. This is valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments:

Application of payment where debt to be discharged is indicated: Section 59 says—

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

Illustrations

(a) A owes B among other debts, 1,000 Taka upon a promissory note which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1,000 Taka. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts the sum of 567 Taka. B writes to A and demands payment of this sum. A sends to B 567 Taka. This payment is to be applied to the discharge of the debt of which B had demanded payment.

It was held in *Acker Rahman Vs. Province of East Bengal*[1] that 'in view of section 59 of the Contact Act , the money having been put in for certain purpose must be appropriated for that purpose and if either of the parties wanted to divert it to another channel, it could be done only with the express consent of the party affected.'

Application of payment where debt to be discharged is not indicated: Section 60 says—

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

Thus, in the absence of any instruction from the debtor regarding the adjustment of the payment, the creditor will be

[1] (1954) 6 DLR 93.

at liberty to adjust it against any debt, and in doing so, he can even adjust it against any time barred debt, because, the law for the purpose treats all debts, time barred or not, as equal.

Application of payment where neither party appropriates:
Section 61 says—

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

Thus the law at first gives debtor the option to decide against which debt a payment made by him will be adjusted. If he does not exercise the option then the law gives creditor the liberty to adjust against any debt. Last of all, if none of them adjust it then the settlement of law will come into operation according to section 61 which says that the payment, in such case, shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

The rules regarding the appropriation of payments laid down by sections 59—61 above may be shown briefly through the following table:

Nature of the debt	*Debtor's instruction*	*Application of payment*
Single debt	Whether gives any instruction or not regarding the appropriation of payment made by him.	The payment made by the debtor shall be applied against the debt.
Several debts	Expressly or impliedly intimates that the payment is to be applied to the discharge of some particular debt.	It has to be applied as the direction and intimation made by the debtor.
Several debts	Makes no intimation and gives no direction regarding the application of the payment.	The creditor may apply it at his discretion to any lawful debt. And that can be applied even against any time barred debt.
Special circumstance: Debts are several and neither party makes any appropriation of the payment made by the debtor.		The payment shall be applied in discharge of the debts in order of time. Even it may be applied against any time barred debt. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Contracts which need not be performed:

Effect of novation; rescission and alteration of contract:

Section 62 says—

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

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) A owes B 10,000 Taka A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 Taka in place of the debt of 10,000 Taka. This is a new contract and extinguishes the old.

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

Thus the section makes it clear that the original contract need not be performed in the following three circumstances:

i. If the parties to a contract agree to substitute a new contract for it; or

ii. to rescind; or

iii. to alter it.

It was observed in *Abul Hashem Khan Vs. Shamsuddin Khan*[1] that when the parties to a contract agree on substituting a new contract for it, it is known as *novatio* or novation. substitution of a new contract for the original contract, such as the reconstitution of the firm between the defendant Nos. 1 and 2, is not a novation within the meaning of section 62 of

[1] (1989) 41 DLR 415.

the Contract Act.[2] Novation of contract was explained in *Noor Ahmad Vs. Md. Shafi*[3] as there being a contract in existence, some new contract is substituted for it either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. It was held in *Nagendra N. Majumder Vs. Khitish Chandra Ghose*[4] that where a compromise or a contract or an agreement sets up a new contract it amounts to a novation of contract and since, in such a case the ordinary incident would be as indicated in section 62 of the Act, namely, that the original contract would no longer be liable to be performed, the effect would be to substitute the old debt for a new debt arising from the date of the compromise decree. Once a bank's borrower has become a defaulter, his stigma cannot be removed by invoking the provision of section 62 which only contemplates novation of contract or modification of the term of contract and it has little to do as to the elevation of the status of person who has already defaulted in making payment of any dues to the bank.[5]

Promisee may dispense with or remit performance of promise: Section 63 says—

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit.
>
> *Illustrations*
>
> (a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

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[2] *Ibid.*
[3] (1970) 22 DLR (WP) 39.
[4] (1957) 9 DLR 661.
[5] Abdul Momen Bhuiyan Vs. Hazi Payer Ali Mia 43 DLR 97.

(b) A owes B, 5,000 Taka. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 Taka paid at the time and place at which the 5,000 Taka were payable. The whole debt is discharged.

(c) A owes B 5,000 Taka. C pays to B 1,000 Taka, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 Taka. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 Taka and is also indebted to other creditors. A makes an arrangement with his creditor's including B, to pay them a composition of eight annas in the Taka upon their respective demands. Payment to B of 1,000 Taka is a discharge of B's demand.

Thus the law speaks about certain options of the promisee which he may exercise if prefers to do so. Generally, if a person willingly waives his right then obviously law will not bar him to do so, though in Bangladesh waiver of fundamental rights is not so far permitted within the scope of its constitutional law and jurisprudence. The promisee, in a contract, obviously deserves the performance from the promisor wholly as promised by him. But if voluntarily waive it or satisfies with a lesser degree performance then the law will discharge the promisor from his further liability which has been waived once. the above section deals with these types of situations. Accordingly, the promisee is at liberty to do the following acts and obviously the exercise of

that liberty will give rise to some legal consequences as well as:

i. The promisee may dispense with the performance of the promise wholly.

ii. The promisee may dispense with the performance of the promise partly.

iii. The promisee may remit with the performance of the promise wholly.

iv. The promisee may remit with the performance of the promise partly.

v. The promisee may extend the time for such performance.

vi. The promisee may accept instead of it any satisfaction that he thinks fit. This is the incorporation of English principle of 'accord and satisfaction' which implies that once the promisee becomes satisfied with the lesser degree performnace from the promisor, he can not oblige the promisor further to do the whole thing as promised earlier.

In each of the above cases the promisor will enjoy the benefit of the act of the promisee and after anything is done of the above nature by the promisee, the promisee can not oblige the promisor liable further for the original promise. It was affirmed in *Abdul Jalil Chowdhury Vs. Muhammadi Steamship Company Limited*[1] that the time for performance of contract can be extended under section 63 of the Contract Act.

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[1] (1961) 13 DLR (SC) 214.

Consequences of rescission of voidable contract: Section 64 says—

> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if, he has received any benefit thereunder from another party to such contract, restore such benefit so far as may be, to the person from whom it was received.

A voidable contract means it may be made enforceable by law at the option of one of the parties to a contract or may be rescinded by the same. The above section deals with the legal consequences of a voidable contract which has been rescinded. following are the legal consequences of rescission of voidable contract:

i. *Discharge from the liability:* The other party need not perform any promise therein contained in which he is the promisor.

ii. *Restoration of the benefit received:* The person who rescinded the contract will be bound to restore any benefit to the person from whom he received it under that contract.

Obligation of person who has received advantage under void agreement or contract that becomes void: Section 65 says—

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

Illustrations

(a) A pays B 1,000 Taka in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 Taka.

(b) A, contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred Taka for each night's performance. On the sixth night A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 Taka which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 Taka paid in advance.

Thus the section deals with the obligation of person who has received advantage under void agreement or contract that becomes void. Law says that if an agreement is discovered to be void, or when a contract becomes void, it will have the following legal consequence:

i. *Restoration of advantage:* The person who has received any advantage under such agreement or contract is bound to restore it to the person from whom he received it.

ii. *Making compensation:* If the person who has received any advantage under such agreement or contract can not restore it to the person from whom he received it, then he has to compensate that party for the same.

It was held in *Amanullah Vs. M/s. Karnaphuli Paper Mills Ltd.*[1] that any person receiving advantage under a void agreement is bound to restore the goods obtained under the agreement or to make compensation for it. In the case of *Shah Pasand Khan Vs. Ihsan*[2]—

> "Minor entering into mortgage by fraudulently representing him as major and subsequently instituted a suit as plaintiff for restitution of mortgaged property; it was held that restitution of property is to be ordered but the minor must be made to refund the consideration money. Maxim: he who seeks equity must do equity. In such a case the law is—
>
> 1) If there is a fraudulent representation as to age by the minor, and,
>
> 2) if he brings an action as a plaintiff, the restitution of the immovable property is to be ordered but the minor must refund the consideration."[3]

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[1] (1971) 23 DLR 207.
[2] (1969) 21 DLR (WP) 362.
[3] *Ibid.*

Mode of communicating or revoking rescission of voidable contract:

Section 66 simply says—

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

Effect of neglect of promisee to afford promisor reasonable facilities for performance:

Section 67 says—

> If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.
>
> *Illustration*
>
> A contracts with B to repair B's house.
>
> B neglects or refuses to point out to A the places in which his house requires repair.
>
> A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

Thus the law obliges even the promisee to afford reasonable facilities to the promisor for the perfromnace of the promise and the law made it absolutely clear that if due to the refusal or even neglect of the promisee to afford reasonable facilities to the promisor, the promisor will be excused by such neglect or refusal as to any non-performance caused thereby. So, if the promisor fails to perform his promise due to such non-cooperation then he will be excused from liability for such non-performance.

Performance of contract and supervening impossibility:

Section 56 deals with the doctrine of supervening impossibility which is an important issue in the field of performance of contracts. The supervening impossibility protects the promisor from the liability to perform the promise since that impossibility makes the contract void. As it has been said earlier that the impossibility may be of two types, i.e., initial and subsequent, it is the subsequent impossibility or illegality that makes a contract void. This is apparent in the definition of void contract which basically says that a void contract was once upon a time a valid contract and subsequently it lost its enforceability by law for some reasons. The contract caused by supervening impossibility is one example of void contract where the promisor is freed from his liability provided this is not self induced and even the promisor could not prevent it. Paragraph 2 to section 56 deals with this issue which says—

> A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible of unlawful.

The *illustrations (c), (d)* and *(e)* of section 56 of the Act explain the law clearly which are as follows:

(c) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several

occasions A is too ill to act. The contract to act on those occasions becomes void.

The rules enunciated in this section may be shown through the following Table:

Table 1: *Paragraph 2 to section 56*

Nature of the contract	*Circumstance*	*Legal consequences*
A contract to do an act. It implies the existence of a valid contract to do something.	It becomes impossible or unlawful, by reason of some event which the promisor could not prevent. It implies that the impossibility or illegality must not be self induced and it also must be proved that he applied his every force to prevent the impossibility but failed.	The contract becomes void when the act becomes impossible of unlawful.

Conditions for supervening impossibility under section 56:

Thus, to make a contract void under section 56 the following conditions must be satisfied:

(a) *Subsequent impossibility:* After a contract comes into existence it becomes impossible or unlawful. It was held in *Mokbul Hossain Khondker Vs. Jaheda Khatoon*[1] that to attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the happening of some unforeseen event.

(b) *Promiosr's inability:* This impossibility happens without any participation of the promisor. Even it must be

[1] (1995) 47 DLR 430.

proved also that the promisor could not prevent the incident which made it impossible. Thus, self induced impossibility or impossibility arising out of the negligence of the promisor will not come within the purview of this rule. So, even if it can be proved that if the promisor would be active and vigilant instead of being passive and negligent that impossibility had not been occurred, then it will not be treated as a case of void contract under this section.

Grounds for supervening impossibility:

The valid grounds for supervening impossibility are-

i. *If the subject matter is destroyed*. Suppose, after entering into a contract for sale of a house, if before the delivery of possession, the house is demolished with soil by a sudden earthquake. This is a subsequent impossibility in which the promisor did not participate, he could not prevent or even it did not occur due to his negligence.

ii. If after the contract is made, before its performance takes place, *the promisor dies or somehow his personal capacity to perform the same is lost*, which was beyond his power, that will be a case of supervening impossibility. For example, if a singer after entering into a contract to perform in an orientation program of the law students, the vocal cord of that singer becomes injured by an accident, the contract will be void.

iii. Sometimes even the *failure or frustration of the ultimate object* makes the contract void. Suppose, if a person of Chittagong hired a room in a hotel in Dhaka city to enjoy the test match to be held between Bangladesh

and Pakistan, the contract will be void if the test match is postponed for some reasons beforehand, because of the frustration of the ultimate object in the contract. In such a case obviously the other party must be aware of the fact of the ultimate object. But a mere failure of a mere object does not amount to make the contract void.

iv. By *passing a law subsequent to entering into a contract* which have the impact of making that very performance prohibited, will make the contract void.

v. *If war is started* between two states then all contracts entered into between the citizens of these two states may be void.

vi. But *the difficulty of performance or commercial impossibility will not be treated as a valid ground for supervening impossibility*. Suppose if after entering into a contract the production cost becomes higher than the sale price, this is a case known as commercial impossibility, which will not make a contract void.

The doctrine of supervening impossibility in Bangladesh is known in England as the 'doctrine of frustration of contract'.

Cases from DLR relating to section 56:

- **Azizur Rahman Vs. Abdus Sakur**[1]

  Doctrine of frustration of contract is applicable to leases of immovable property in case where provision of section 108(e) of the Transfer of Property Act cannot be attracted due to complete destruction of the subject matter of the tenancy.

[1] (1984) 36 DLR (AD) 195.

- **Chandpur Mills Ltd. Vs. Official Liquidator Economic Aid Corporation**[1]

  In order to invoke the doctrine of frustration of contract, the first and the most important condition is to show that an interference by some authority or circumstance beyond the control of the parties, has taken place as to have made it impossible to continue with the contract by destroying the very basis of the contract itself or striking at its root.

  But if the supervening difficulty or event has been deliberately brought about by the choice of one of the contracting parties, there is no room for the invocation of the doctrine of frustration.

  In the present case the seizure of the premises by the police having taken place by the misdeed of the tenant (one of the contracting parties) the tenancy has been frustrated and, therefore, the contract cannot be enforced.

  On the question as to what is the effect of the appointment of liquidator on a subsisting contract entered into between a Company in liquidation and third party (the petitioner Company) it cannot be laid down as a general proposition that where a liquidator is appointed, all contracts become automatically terminated and it is not possible for the liquidator to continue the said contracts.

  Thus, where the liquidator retains the premises belonging to the third party (the petitioner Company) for storing the assets of the company under liqudation which he intends to sell subsequently, he must be taken to have retained the possession of the premises for the purpose of the winding up and, therefore, the third party is entitled to recover arrears of rent from the liquidator which have accrued from the commencement of the winding up to the period

[1] (1960) 12 DLR 25.

of time that the liquidator retained the said premises for the purpose of the winding up.

Neither the sealing or the seizure of the premises, of which the liquidator has retained possession, by the police is of such a nature as to make the performance of the contract of lease entered into by the Company in liquidation and the 3rd party (the petitioner Company) impossible or that it was of such a kind that had it been in the contemplation of the parties they would definitely have provided for the termination of the contract in the event of such a thing happening.

- **Al Haj Kutubuddin Ahmed Vs. Abu Jafar**[2]

The plaintiff's contract of lease having been made before the coming into operation of section 75-A of E. B. State Acquisition and Tenancy Act was lawful at the time when it was made. But the object of the contract, that is, the demise of the suit property being now prohibited under section 75-A, this section has rendered the object of the plaintiff's contract of lease unlawful and thereby made the contract itself void.

Further, the doctrine of frustration coming within the purview of the second paragraph of section 56 of the Contract Act comes into play with the result that the plaintiff's contract of lease has become void and unenforceable also under the provisions of section 56, paragraph second, of the Contract Act.

An executory contract does not create a vested interest due to the operation of section 75-A of E. B. State Acquisition and Tenancy Act, section 56 of the Contract Act renders the contract for lease of land unenforceable.

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[2] (1962) 14 DLR 128.

The question to be considered is whether it is necessary that the right acquired by the plaintiff under his contract of lease may properly be called as a vested right.

The contract of lease in question is a mere executory contract, it is a simple agreement and is not a deed effecting an actual demise or operating as a lease in preasenti. Therefore the right acquired by the plaintiff under the contract is only a contractual right to have a lease of the suit properties on the fulfillment of the terms mentioned therein but is not a completed and accomplished right so as to be termed as vested right.

When no vested right accrued to the plaintiff under the contract of lease, that contract fall within the mischief of the aforesaid section 75-A and is, therefore, hit by section 56 of the Contract Act.

- **Abdul Mutalib Vs. Musammat Rezia Begum**[1]

The doctrine of frustration, as embodied in section 56 is applicable only to executory contract whereunder performance or further performance of a promise is outstanding, but does not apply to a transaction which is complete and has already created a right in immovable property in favor of a party.

- **M/s. Begum Mills Vs. Arag Ltd.**[2]

A buyer of Chittagong placed an order of purchase with the seller at Karachi for 700 bags of rape-seeds. The seller put the goods on board the ship on two dates, that is, 11.10.58 and 16.10.58. Notices to retire the shipping documents to the buyer were served on 1.11.58 and

[1] (1970) 22 DLR (SC) 134.
[2] (1974) 26 DLR 329.

2.11.58, but he failed to retire them. Martial Law Regulation fixing the price (at a lower rate) of rape-seeds was passed on 10.11.58. The seller thereupon sold them at a loss. Buyers responsible for the loss for the consignment in respect of which he was notified on 1.11.58, i.e., before price-fixation by the Martial Law but not for the latter except the incidental expenses in connection with the consignment.

Plaintiff (respondent herein) sued the defendant for Rs. 21,308/- being the amount of loss on resale of 700 bags of rape-seeds as a result of the defendant's refusal to pay the purchase price for the said number of rape-seeds bags.
The defendant (at Chittagong) wrote to the plaintiff (at Karachi) on 6.10.58 the following letter which shows the terms of purchase:

> "Please arrange shipment of 700 bags of rape-seeds weighing 1,400 maunds during November 1958 at the rate Rs. 89/15/9 per bag F. O. B. which we have purchased from you. Send the B/L to us and the mark on bags."

The steps that are taken (on F.O.B. contract) is that the plaintiff sends the bills of lading to their branch office at Chittagong who are to deliver them to the defendant against payment of price and other charges. the plaintiff shipped 350 bags under one bill of lading No. 187 and another 350 bags under another bill of lading on 11.10.58 and 16.10.58 respectively. On receipt of their bills of lading the defendant was notified on 1.11.58 and 21.11.58 respectively to retire them on payment of invoice value which the defendant failed to do. Ultimately the plaintiff had to resale those 700 bags on 2.12.58 and 31.12.58 at a price fixed by the Martial Law Regulation which came into operation on 10.11.58 fixing the price of rape-seeds (and which is lower than the price at which the rape-seeds were sold to the defendant) and as a result incurred the

loss of the aforesaid sums for recovery of which the plaintiff sued the defendant.

The defendant's plea was the frustration of contract due to the sudden fixation of price of rape-seeds under Martial Law Regulation and the loss incurred was due to the said price fixing regulation which, the defendant contended, rendered the contract illegal and void and its performance impossible.

The Trial Court found that according to the terms of contract the plaintiff-company shipped the required quantity long before the price of rape-seeds was fixed under the Martial Law Regulation, though one of the consignments consisting of 350 bags of rape-seed arrived at Chittagong after the Regulation came into force and accordingly decreed the plaintiff's suit.

The only question which arises for detrmination is whether, in view of the promulgation of the Martial Law Regulation fixing price of rape-seeds in both wings of Pakistan, the defendant's liability to make payment of the price of 700 bags of rape-seed as originally agreed upon against delivery of the bills of lading, still remained.

The question is when 700 bags of rape-seeds were purchased –on the dates of shipment or the dates of the notification to take delivery of the bills of lading?

Plaintiff's case is that delivery took place as soon as the goods were put on board the ships at Karachi, i.e., on 11.10.58 and 16.10.58. Upon shipment, the property in the goods passed from the plaintiff; and the passing of property it could not be said to have been postponed till the moment when the defendants were notified of the arrival of the shipping documents and were asked to make payment of the price and other charges against their delivery.

Held:

Since it is found that the practice of the plaintiff (company) is to send the shipping documents to their branch office at Chittagong to be delivered against payment, it is clear that the plaintiff (company) did not intend to pass the property at the moment the cargo was placed on board. Had the plaintiff company desired to pass the property in the goods at the time the goods were shipped they would have immediately sent the bills of lading and the invoice to the defendants or at least communicated to them the news of shipment of the goods.

The defendant became aware of what is technically known as appropriation of the goods to the contract and shipment on 1.11.58 and 21.11.58 respectively, the dates on which the plaintiff (company) communicated to the defendant to retire the shipping documents.

The position, therefore, is that property in the goods was intended to pass on 1.11.58, the date on which the defendant was notified to retire the shipping documents.

So far as the 350 bags of the first consignment is concerned, the intimation to take delivery being earlier than 10th November, 1958, the defendants are under an obligation to pay the price for the consignment. Their liability to pay the price for the 350 bags which arrived later as per contract did not arise because the defendant was informed to take delivery of the bill of lading on 21.11.58 which later than the date of notification of the price fixing regulation. But as the insurance and the freight charges were paid by the plaintiff on the defendant's account and the latter did not repudiate the contract before shipment on 16.10.58, the plaintiff respondents are entitled to receive payment 0f those sums.

In the result the defendant is to pay the plaintiff the amount of Rs. 10,922/14/6, the loss incurred on resale of

353 bags of rape-seeds. The decree in respect of the amount claimed by the plaintiff for the subsequent consignment is set aside, minus the sums on account of the insurance premium, etc. paid by the plaintiff on the defendant's account in respect of subsequent consignment of the 350 bags which the defendant must pay to the plaintiff.

CHAPTER 10

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

There are certain circumstances where due to the technicalities of laws the existence of any contract cannot be proved directly. Under these circumstances, law gives certain guidelines regarding those transactions declaring the status as of certain relations resembling those created by contract. Thus, following this device a minor is imposed quasi-contractual liability for necessaries supplied to him or his dependents.

Claim for necessaries supplied to person incapable of contracting, or on his account: Section 68 says—

> If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.
>
> *Illustrations*
>
> (a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.
>
> (b) A, supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

The rules enunciated in this section may be shown through the following Table:

Supplier	*Supplied to whom*	*What is supplied*	*Legal liability*
Any person	i. To a person incapable of entering into a contract (e.g. minor, lunatic); *or* ii. Any one whom he is legally bound to support (e.g., wife of the lunatic).	Necessaries suited to his condition in life	The supplier is entitled to be reimbursed from the property of such incapable person.

Thus, here the law presumes the existence of a quasi-contract, because of the legal barrier to constitute a valid contract with incompetent persons. At the same time the liability becomes different, as it is imposed against the property of such incapable person, so the liability is not of personal nature here. Such liability is again restricted only in case of supply of the 'necessaries', and what is 'necessaries; that is a question of fact, things which are required to lead the life reasonably according to the condition of one's life. More has been discussed about 'necessaries' in the chapter on 'capacity of parties'.

Reimbursement of person paying money due by another in payment of which he is interested: Section 69 says—

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

Illustration

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

Thus, if a person merely pays the debt of another person without any contract between them, then obviously he can not claim anything for that voluntary payment made for another. But if he is an interested party in that payment, then he will be reimbursed from his property though actually the debt was not of his own.

Obligation of person enjoying benefit of non-gratuitous act:
Section 70 says—

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

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

Thus the section lays down the following points:

i. A person lawfully does anything for another person, or delivers anything to him.

ii. That person did not intend to do it gratuitously.

iii. Such other person enjoys the benefit thereof.

iv. The later, i.e., the person who enjoyed the benefit, is bound to make compensation to the former in respect of the thing so done, or as the case may be,

v. The later is bound to restore to the former the thing so delivered and if the thing is not capable to be restored then he has to compensate for it.

Liability of person to whom money is paid or thing delivered, by mistake or under coercion: Section 72 says—

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

Illustrations

(a) A and B jointly owe 100 Taka to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 Taka over again to C. C, is bound to repay the amount to B.

(b) A railway company refused to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee

> pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

In the case of *Federation of Pakistan Vs. Dawood Corporation*[1] the import duty paid prior to the date on which a consignment was lifted cannot be said to have been by mistake and it was held that such voluntary payment cannot be asked to be refunded. But when any duty is paid under protest after it has ceased to be payable, the same is recoverable.[2]

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[1] (1958) 10 DLR 258.
[2] *Ibid.*

CHAPTER 11

CONSEQUENCES OF BREACH OF CONTRACT

Jurisprudentially speaking, one of the elements of law is that it cannot be violated with impunity. So, if anything is done in violation of any law, there must have certain remedies. Thus a contract since is enforceable by law, creates certain actionable claim. Generally, in case of civil wrong, compensation is awarded as remedy for the wrong done to any person. The Contract Act, 1872 also deals with this issue which includes the provisions regarding assessment of damage and the rules of payment, because even a wrong doer should not be made bound to pay for every loss suffered by the other party.

Compensation for loss or damage caused by breach of contract: Section 73 says—

> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

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

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

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price, to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Chalna, and there take on board on the first of January, a cargo which A is to provide and to bring it to Chittagong, the freight to be paid when earned. B's ship does not go to Chalna, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to

him. B is entitled to receive from A by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 Taka, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mymensingh for sale at that place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mymensingh is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mymensingh at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A Contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and on the first of January the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum

equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

(i) A delivers to B, a common carrier, a machine, to be conveyed without delay, to A's mill informing B that this mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 Taka a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 Taka a ton, telling C that he does so for the purpose of performing his contract with B fails to perform his contract with A, who cannot procure other iron, and B in consequence, rescinds the contract. C must pay to A 20,000 Taka, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day for a specified price a certain piece of machinery. A does not deliver the piece of machinery at the time

specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be rebuilt by B, who, in consequence, losses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is

not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship owner, contracts with B to convey him from Chittagong to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence,

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

Rules enunciated by section 73:

Thus the following rules have been enunciated by section 73 regarding compensation for loss or damage caused by breach of contract:

i. *For which compensation may be claimed:* Compensation may be claimed only for loss or damage which—

(a) *naturally arose in the usual course of things* from such breach, or

(b) which the *parties knew*, when they made the contract, to be likely to result from the breach of it.

Thus, the loss to be compensated must be one which either is the direct and natural consequence in the usual course of things from such breach or was within the knowledge of the parties that these may likely take place in consequence of such breach. So, a direct and natural casual connection must be established between the breach of contract and loss caused thereby for which compensation is claimed.

ii. *For which compensation cannot be claimed:* Compensation cannot be claimed for any loss or damage which is

remote. Second paragraph to section 73 makes it further clear that such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. In fact, this could be inferred from the first paragraph and even though it has been mentioned separately with clear words just for the reason that probably the legislature preferred to put emphasis on this point by expressing it in clear words. So that there will be no ambiguity in an important matter like payment of compensation for breach of contract.

Meaning of remoteness of damage: Remoteness of damage makes it non-actionable. What is the exact meaning of it? Obviously it must be considered on the basis of the circumstances of a case. The principal justification for the existence of this doctrine is that it would be unfair to impose liability upon a defendant for all losses, no matter how extreme or unforeseeable, which flow from his breach of contract.[1] The general test is that the claimant can only recover in respect of losses which were within the reasonable contemplation of the parties at the time of entry into the contract.[2] A claimant will be unable to recover damages in respect of the loss which he has suffered if he cannot establish a causal link between his loss and the defendant's breach of contract.[3] This rule of remoteness of damage was established in the famous case of *Hadely Vs. Baxendale*[4]. It was observed by *Alderson B* [5]—

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[1] Mackendrick, Ewan, *Contract Law*, 4th edition, 2004, Palgrave, p. 415.
[2] *Ibid.*
[3] *Ibid* , pp. 418-419.
[4] (1854) 9 Exch 341.
[5] *Ibid.*

> 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

iii. *Rule regarding assessment of damage:* Moreover this section adding the last paragraph to it incorporating an explanation laid down another important rule regarding the assessment of damage. This explanation says that in estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. Thus the party who is liable for breach of contract will not have to pay compensation for the whole loss, rather he will be discharged to the extent of the part of the loss which could be avoided by the strength of a person of ordinary prudence under the similar circumstance.

Duty to mitigate the loss: It appears from section 73 that the claimant also has a duty to mitigate the loss. This duty of mitigation of loss has been neatly explained by *Ewan Mckendrick* [1] in the following words:

> 'A claimant is under a 'duty' to mitigate his loss. It is, however, technically incorrect to state that the claimant is under a 'duty' to mitigate his loss because he does not incur any liability if he fails to mitigate the loss. The claimant is entirely free to act as he thinks fit but, if he

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1 Mackendrick, Ewan, *Contract Law*, 4th edition, 2004, Palgrave, pp. 413-414.

> fails to mitigate his loss, he will be unable to recover that portion of his loss which is attributable to his failure to mitigate. The aim of the doctrine of mitigation is to prevent the avoidable waste of resources. There are two aspects to the mitigation doctrine. The first is the injured party must take all reasonable steps to minimize his loss. The claimant is not required to 'take any step which a reasonable and prudent man would not ordinarily take in the course of his business' (*British Westinghouse Co Vs. Underground Electric Rly Co*, 1912 AC 673). The second aspect of the mitigation doctrine is that the claimant must not unreasonably incur expense subsequent to the breach of contract (*Banko de Portugal Vs. Waterlow & Sons Ltd*, 1932 AC 452).'

A share-holder in a company cannot sue the company for wrong or damage or for any loss suffered by the company and if any wrong is done or damage is done to a company, the company is the only person who can claim for damages against the person who has caused such damages.[2]

Cases from DLR on section 73:

- **Tarani Chowdhury Vs. Jaganath Rice Mills**[3]

> 'In assessing the measure of damages the principle is that the plaintiff ought to be as near as may be in the same position as if the contract has been performed.'

- **M/S. Trans Oceanic Steamship Co. Ltd. Vs. Abdul Rahman**[4]

> 'In estimating the loss or damage arising from a breach of contract to the plaintiff, the principle,

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[2] Trang Ice and Cold Storage Company Ltd Vs. Amin Fish Farm, (1994) 46 DLR 39.
[3] (1951) 3 DLR 23.
[4] (1961) 13 DLR 585.

having regard to the explanation to section 73 of the Contract Act, is that the plaintiff must mitigate the loss.'

- **Province of West Pakistan Vs. M/s. Saaz and Co.**[1]

'It is true that in the original contract "public" auction is not provided for, nevertheless it is said that the stocks would be "auctioned". It is difficult, therefore, to appreciate how sale by private negotiation after contacting 2 or 3 parties only can be treated as amounting to sale by auction.

Such sale by private treaty cannot be treated as sale by auction or as sufficient compliance with the terms of the forfeiture clause in the original contract of sale.

The method provided for in contract could not be deviated from unless it had become impracticable to adopt such a method of disposal of the goods.

The Government with whom the respondent entered into a contract to purchase the goods was clearly not entitled to delay the sale for nearly 2½ months by not disposing of the commodity concerned after the default to lift the goods had occurred. During the period subsequent to the default the goods must be deemed to have been lying at the risk of the Government. Any fall in the market price or deterioration in the quality which might have occurred during this period must be borne by the seller who did not take immediate and prompt steps

[1] (1964) 16 DLR (SC) 511.

to mitigate the loss by selling the goods on the date of the breach.

It is the undoubted law that the plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his neglect.

The damaged recoverable by the Government had to be computed on the basis of the difference between the contract rate and the market rate prevailing on the date of the breach.'

- **M/s. A. Z. Company Karachi Vs. M/s. S. Maula Buksh Muhammad Bashir, Karachi**[2]

'Sub-section 2 of section 61 of the Sale of Goods Act, 1930 (Act No. III of 1930) empowers the Court to award interest to seller for the price of his goods at such rate as it thinks fit. Under this section a party, however, cannot claim interest on damages for breach of a contract.

Generally in the absence of an express or implied contract to pay interest, or usage of trade, interest cannot be allowed on damages for breach of contract.

The right of the seller under the agreement is to have compensation assessed by the Arbitrators and until the amount had been so determined there is no sum certain payable to the seller upon which interest can run.'

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[2] (1965) 17 DLR (SC) 404.

'If a contract for purchase is not performed on the due date so that a breach is committed whatever damage was to result to the seller was resulted at the time when the breach is committed and section 73 allows compensation only for this damage. The further sum that the promisee demands as interest on damage cannot be claimed by virtue of section 73, but on account of the plea that compensation ought to have been paid when the promisee became entitled to it and has not been paid (*Per* Kaikus, J.).'

- Pakistan Mercantile Corporation Ltd. Vs. Madan Mohan Oil Mills[1]

'If the seller holds on to the goods after the breach of the contract the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer. In that case the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.'

- M/s. Amin Jute Mills Vs. M/s. A. R. A. G.[2]

'Party guilty of such contract liable to pay compensation, measure of which shall be assessed on the quantum of loss sustained on account of the breach or which the parties knew to be likely to flow from the breach.

Governing principle is that the party in breach shall equalize the injured party and measure of

[1] (1966) 18 DLR 437.
[2] (1976) 28 DLR (SC) 76.

equalization is to put that party in the position had the contract been performed.

The principle is that the defaulting party must pay the difference between contract price and the market price on the date of breach.

Measure of damages is to be ascertained between the difference of the contract rate and the market rate on the date of breach. This is the rule of law, but its proof rests on facts and circumstances of each case. If there is nom market rate on the due date or no direct evidence is forthcoming, the Court is not precluded from arriving at the real rate that can fairly be gathered from the evidence and circumstances of the case.'

- **M/s. Muhammad Amin Muhammad Bashir Ltd. Vs. M/s. Muhammad Amin Brothers Ltd.**[3]

'Measure of damage is the difference between contacted price and market price prevailing on the date of the breach. Failure of a party claiming damages to produce best evidence to show details of damages should be reckoned against him.'

- **Hutchison Telecom Bangladesh Ltd. Vs. Bangladesh Telegraph and Telephone Board and others**[4]

'In an appropriate case a Court of law can apply and imply warranty, as distinguished from an express contract or express warranty, on the presumed intention of the parties and upon reason.'

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[3] (1969) 21 DLR (WP) 238.
[4] (1996) 48 DLR (AD) 30.

- **Sadharan Bima Corporation Vs. Bengal Liner Ltd. and another**[1]

> 'The remedy under these provisions *(section 73 & 124)* of the Contract Act lies in the Civil Court, if at all, not under the Admiralty Jurisdiction on a marine Hull Policy.'

Compensation for breach of contract where penalty stipulated for: Section 74 says—

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> *Explanation.*- A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> *Exception.*- When any person enters into any bailbond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable,

[1] (1996) 48 DLR (AD) 143.

upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

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

Illustrations

(a) A contracts with B to pay B Taka 1,000 if he fails to pay B Taka 500 on a given day. A fails to pay B Taka 500 on that day. B is entitled to recover from A such compensation, not exceeding Taka 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Chittagong, he will pay B Taka 5,000. A practices as a surgeon in Chittagong B is entitled to such compensation, not exceeding Taka 5,000 as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty of Taka 500 to appear in court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

(d) A gives B a bond for the repayment of Taka 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that in case of default, interest shall be payable at the rate of 75 per cent, from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(f) A undertakes to repay B a loan of Taka 1,000 by five equal monthly installments, with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows Taka 100 from B and gives him a bond for Taka 200, payable by five yearly installments of Taka 40, with a stipulation that in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

Thus it appears that if the compensation payable for breach of contract or the penalty is stipulated in the contract, then irrespective of actual loss, due to the breach of contract, an amount that will be payable will not exceed that stipulated amount. Since the agreement between the parties for sale of the suit property was enforceable in law and the term of the agreement for depositing 25% of the total consideration money was violated, the defendant legally forfeited the earnest money given by the tenderer.[1]

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[1] James Fialay PLC Vs. Mesbahuddin Ahmed, (1994) 46 DLR 624..

It was observed in *Province of West Pakistan Vs. M/S. Mistri Patal & Co.*[2] that—

> Section 74 of the Act deals not only with the right to receive reasonable compensation but also with the right to forfeit deposits.
> The argument that section 74 of the Contract Act that deals only with the right to receive from the party who has broken a contract reasonable compensation and not the right to forfeit what has already been received by the aggrieved party cannot be accepted in view of the terms of the section. The cases in which such a view has been taken appear to have ignored the expression "the contract contains any other stipulation by way of penalty" in the section. This expression is comprehensive enough to include cases of forfeiture.
>
> Party not entitled to claim the whole amount of earnest money simply because there was a breach of the contract.
>
> It will be wrong to say that since a firm had deposited or agreed to deposit an amount as earnest money, the aggrieved party would be entitled to claim the whole amount simply because there was a breach of the contract. Such a contention does not even receive support from the cases where the view taken was that the forfeiture clause of a deposit in a contract does not come within the purview of section 74 of the Contract Act.

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[2] (1969) 21 DLR (SC) 132.

Party rightfully rescinding contract entitled to compensation: Section 75 says—

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

CHAPTER 12

INDEMNITY AND GUARANTEE

Indemnity and guarantee are two special types of contracts incorporated in the Contract Act, 1872. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee.[1]

Laws relating to contract of indemnity:

Definition of a contract of indemnity: Section 124 says—

> A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."
>
> *Illustration*
>
> A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 Taka. This is a contract of indemnity.

Elements of a contract of indemnity: Following are the two elements of a contract of indemnity—

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[1] Yeoman Credit Ltd Vs. Latter (1961) 1 WLR 828, Court of Appeal, Per Holroyd Pearce LJ.

i. *Nature of the transaction:* It is a contract. So, first of all it has fulfilled all requirements to constitute a contract.

ii. *Object:* This is the distinguishing constituent element of a contract of indemnity which says that this is a special type of contract the object of which is to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. Thus here the object is important, and a contract constituted for any other object except it will not be treated as a contract of indemnity.

Thus, suppose a luggage of a passenger is lost from Bangladesh Biman and when it was found by the airport security service no tag was attached with it. A and B both of them are claimants for the same luggage. Then Bangladesh Biman authority asked A to give an 'indemnity bond'. A entered into a contract of indemnity with Bangladesh Biman and gets the luggage in consequence of the contract of indemnity. Later on, B, the real owner of the luggage, sues Bangladesh Biman for damages and won the suit getting a decree against Bangladesh Biman. Now, Bangladesh Biman can claim compensation from A according to the contract of indemnity, because that was a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person.

Parties in contract of indemnity : Indemnifier and indemnity holder: Indemnifier and the indemnity holder, are the two parties in a contract of indemnity. The person who promises to save the other person from loss is called the 'indemnifier'. The person who is so saved by putting a claim for compensation against the indemnifier is called the 'indemnity holder'.

In the case of *Probodh Chandra Barman Vs. Abdul Rahman Abdul Gani* [1]—

> The bond was as follows: -
>
> > "In consideration of your selling merchandise to X on credit during the year 1949. I do hereby agree to keep you jointly and severally indemnified against all consequences for your so selling to X on credit and I hereby further undertake and guarantee to pay you all dues on demand payable in connection with any goods and merchandise which you have sold to X, should x fail to settle his dues within the time fixed by you."
>
> It was contended on behalf of the person executing the bond that this is not a bond of indemnity guaranteeing payment for the goods supplied to X, but it was really a contract of suretyship or guarantee. It was held that the terms of the document show that it was a promise of indemnity and not of guarantee or suretyship.

The contract of indemnity and contract of guarantee or suretyship have been distinguished in the same case[2] in the following words:

> There is a difference between a contract of guarantee and a contract of indemnity. For a contract of guarantee or suretyship there must be tripartite agreement between the creditor, the principal debtor and the surety. In the case of a contract of indemnity, it is not necessary for the indemnifier to act at the request of the debtor, whereas in the case of a contract of guarantee or surety it is necessary that surety or guarantor should give the guarantee at the

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[1] (1960) 12 DLR 459.
[2] *Ibid.*

request of the debtor. In the former case, it is the direct engagement between the two parties thereto, whereas, in the later, there are three parties, the creditor, the debtor, and the surety, who undertakes at the request of the debtor to answer the default or miscarriage of the debtor.

Rights of indemnity-holder when sued: Section 125 says—

> The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor:
>
> 1. all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
>
> 2. all Costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring and defend the suit.
>
> 3. all sums which he may have paid-under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Section 125, in fact, deals with the rights of the indemnity holder against the indemnifier. Thus the above section gives the promisee in a contract of indemnity (indemnity holder) to recover the following things from the promisor (indemnifier), as the case may be, provided the promisee acted within the scope of his authority:

1. *Damages:* The section says it clearly that he can claim all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies. An English authority is found on this particular point which makes it clear and tells about its justification where it has been observed[1]:

> "It is obvious that when a person has ... ... altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive."

2. *Costs of the suit:* The section lays down it clearly that he can claim all costs which he may be compelled to pay in any such suit, in bringing or defending it, provided that in doing so he satisfies the following conditions:

   i. He did not contravene the orders of the promisor.

   ii. He acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit.

A Kolkata case[2] explains the point very nicely as it has been observed:

> "In the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very

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[1] Parker Vs. Lewis (1873) L.R. 8 Ch. 1035, per Mellish, L.J.
[2] Bepin Vs. Chunder Seekur Mookherjee (1880) 5 Cal. 811

> moving cause of that contract; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered."

3. *Sums paid under the terms of any compromise:* Sub-section 3 to section 125 lays down it clearly that the indemnity holder can recover from the indemnifier all sums which he may have paid under the terms of any compromise of any such suit, subject to the satisfaction of the following two conditions:

   i. The compromise was not contrary to the orders of the promisor.

   ii. The compromise was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Justice Mellish observed[3]:

> "if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he (the defendant) may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity."

Laws relating to contract of guarantee:

Meaning of a contract of guarantee: Section 126 says that –

> A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

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[3] Parker Vs. Lewis (1873) L.R. 8 Ch. 1059.

Elements of a contract of guarantee: Following are the two elements of a contract of guarantee —

i. *Nature of the transaction:* It is a contract. So, first of all it has fulfilled all requirements to constitute a contract.

ii. *Nature and object of the contract:* This is another special type of contract by which a promise is made to perform the promise, or discharge the liability, of a third person in case of his default. Thus, in case of a contract of guarantee, the liability to perform the promise is conditional on the failure of any third person to perform his obligation. This third person is a 'stranger' in between the two parties of the contract of guarantee. So, this is a special type of contract by which a person undertakes to perform the liability of another person at the moment when that *another person* will fail to perform his obligation.

Modes of a contract of guarantee: Section 126 says that " a guarantee may be either oral or written." So, according to the Contract Act, 1872, even an oral contract of guarantee is as valid as a written one.

Parties to a contract of guarantee: There are three parties in a contract of guarantee, who have been defined in section 126, they are the following—

i. *Surety:* The person who gives the guarantee is called the "surety".

ii. *Principal debtor:* The person in respect of whose default the guarantee is given is called the "principal debtor"

iii. *Creditor:* The person to whom the guarantee is given is called the "creditor".

Consideration for guarantee: Since this guarantee is a contract, so it is obvious that it requires consideration for its construction, because of the general principle of law of contract that where there is no consideration there is no contract. What will suffice as consideration for the purpose of a contract of guarantee that has been mentioned in the following section 127 which says—

> Anything done or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.
>
> *Illustrations*
>
> (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
>
> (b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.
>
> (c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Surety's liability: Section 128 says—

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

Illustration

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

Thus, in the absence of any contract to the contrary the surety is liable to do everything which the principal debtor is obliged to do. It was held in *Sonali Bank Vs. Hare Krishna Das and others*[1] that—

'The liability of the principal debtor is co-extensive with that of the guarantor. A creditor is at liberty to pursue either the principal debtor or the guarantor according to his sweet will for realization of his dues or he can proceed against both of them simultaneously.'

Meaning of continuing guarantee: Section 129 says—

A guarantee which extends to a series of transactions is called a continuing guarantee.

Illustrations

(a) A in consideration that B will employ C in collecting the rent of B's *zamindari*, promises B to be responsible, to the amount of 5,000 Taka, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of Taka 100, for any tea he may from time to time supply to C B supplies C with tea to above the value of Taka 100, and C pays B for it. Afterwards B

[1] (1997) 49 DLR 282.

supplies C with tea to the value of Taka 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Taka 100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Revocation of continuing guarantee: A continuing guarantee may be revoked by notice or death.

Revocation of continuing guarantee by notice: Section 130 says—

> A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.
>
> *Illustrations*
>
> (a) A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 Taka. B discounts bills for C to the extent of 2,000 Taka. Afterwards, at the end of three months. A revokes the guarantee. This revocation discharges A three months. A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the Taka 2,000 on default of C.
>
> (b) A guarantees to B to the extent of 10,000 Taka, that C shall pay all the bills that B shall draw upon him. B

> draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Thus a continuing guarantee also may be terminated at any time provided the other party has been notified properly. It was observed in *Habibullah, Director of National Bank Limited and 11 others Vs. Bangladesh Bank and another*[1] that—

> 'A continuing guarantee may be revoked by the surety by giving notice as to future transaction under section 130 of the Contract Act. Such contention would be considered while considering the facts and circumstances of the concerned Rule in which the same has been raised unless the same is a disputed question of fact.'

Revocation of continuing guarantee by death: Section 131 says—

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

Thus, if there is no contract to the contrary, then the death of the surety will operate as a revocation of a continuing guarantee. But such revocation will be effective against the future transactions to be made after the death of the surety.

Joint debtors and suretyship: Section 132 says—

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

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[1] 2 BLC 520.

Illustration

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

Analysis of section 132: The rule enunciated in section 132 may be made clear by the following dissection of the section taking a hypothesis—

i. A and B, these two persons contract with C, a third person to undertake a certain liability.
ii. A and B enter into a second contract with each other that one of them shall be liable only on the default of the other.

iii. C, the third person is not a party to the second contract.
iv. The liability of each of such two persons *(A and B)* to the third person under the first contract is not affected by the existence of the second contract.

v. It is immaterial whether such third person *(C)* is aware of the existence of any such second contract or not.

Discharge of surety:

The rules regarding the discharge of sureties have been enumerated in sections 133—139, they are as follows:

Discharge of surety by variance in terms of contract: Section 133 says—

> Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor] and

the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for money received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money and that the payment shall be applied to the then existing

debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 Taka on the 1st March. A guarantees repayment. C pays the 5,000 Taka to B on the 1st January. A is discharged from his liability, as the contract has been varied inasmuch as C might sue B for the money before the 1st of March.

Thus, if any change is brought in the terms of the contract between the principal debtor and the creditor without the surety's consent, then the surety will be discharged on and from the next transaction after that change is brought. the Court observed in *Moqbul Brothers and another Vs. Rupali Bank and others*[1] that—

> 'It is contended on behalf of the appellants that letter of credit was amended providing shipping of unlimited consignments and the beneficiary under the letter of credit was also changed from Khandelwal Brothers to Universal Trading Syndicate and such amendment of the letter of credit has varied the contract in such way that the appellants were discharged from all liabilities under section 133 of the Contract Act. It is held that the beneficiary was not changed. The appellants submitted an indent in the respondent bank did not say a word by way of explanation as to why the letter of credit was not established against the said indent of the appellants when the PW 1 on behalf of the respondent admitted that the letter of credit was amended without any reference to the appellants. However, when the appellants are found not to be the guarantors to the letter of credit, the question of discharge under section 133 of the Contract Act becomes academic.'

[1] 5 BLC 565.

Discharge of surety by release or discharge of principal debtor:

The discharge of the principal debtor shall operate as a discharge of the surety. Section 134 says—

> The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.
>
> *Illustrations*
>
> (a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.
>
> (b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.
>
> (c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor: section 135 deals with three ways of discharge of surety which says—

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

Thus if the creditor enters into a contract with the principal debtor and the surety does not consent to it, then the principal debtor discharges the surety, if by the contract the creditor does any of the following three things:

i. Makes a composition ; or

ii. Promises to give time; or

iii. Promises not to sue.

Surety not discharged when agreement made with third person to give time to principal debtor: Section 136 serves as an exception to section 135 which says—

> Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.
>
> *Illustration*
>
> C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B, A is not discharged.

Creditor's forbearance to sue does not discharge surety: Section 137, deals with another circumstance when the surety will not be discharged, which says—

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

Illustration

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

Release of one co-surety does not discharge others: Section 138 says—

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

Thus section 138 says about the following two-fold impacts of the release of one of co-sureties by the creditor:

i. It does not discharge other surety.

ii. It does not discharge the surety so released from his responsibility to the other co-sureties in between them.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy: Section 139 says—

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

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

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

Thus, the surety will be discharged if the eventual remedy of the surety himself against the principal debtor is impaired by any of the following two things —

i. if the creditor does any act which is inconsistent with the rights of the surety; or

ii. omits to do any act which his duty to the surety requires him to do.

Rights of the sureties:

Sections 140 and 141 deal with the following two important rights of the surety:

Rights of surety on payment or performance: Section 140 says—

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

Thus the section lays down another right of the surety that he has all the rights which the creditor had against the principal debtor in either of the following two circumstances:

i. Where a guaranteed debt has become due; or

ii. default of the principal debtor to perform a guaranteed duty has taken place.

Surety's right to benefit of creditor's securities: Section 141 says—

> A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not, and, if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.
>
> *Illustrations*
>
> (a) C advances to B, his tenant, 2,000 Taka on the guarantee of A. C has also a further security for the 2,000 Taka by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.
>
> (b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.
>
> (c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from

> B a further security or the same debt. Subsequently, C gives up the further security. A is not discharged.

Thus the section lays down the following rules:

i. The surety will have the right to benefit of every security kept to the creditor by the principal debtor.

ii. The surety will have the above right irrespective of his knowledge about the existence of such security.

iii. If the creditor somehow disposes of the property kept as security, then the surety will be discharged to the extent of the value of that disposed of property.

In the case of *Central Exchange Bank Ltd. Vs. Zaitoon Begum*[1], it was held 'where, some fixed deposit receipts were deposited as additional security for certain overdraft accounts with the appellant bank and some of these fixed deposit receipts belonged to the respondent Zaitoon Begum, the Bank could not proceed against the fixed deposit receipts without exhausting Bank's remedies provided by the goods pledged with the Bank by the original debtors.'

Certain rules regarding the validity and invalidity of a contract of guarantee:

Guarantee obtained by misrepresentation invalid: Section 142 says—

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

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[1] (1968) 20 DLR (SC) 117.

Thus, the section deals with the invalidity of guarantee if that is obtained by means of misrepresentation made by the creditor, or with his knowledge and assent. The only condition to be satisfied to make a guarantee invalid on this ground is that it must concern a material part of the transaction, and so, if so happens with any tiny part of the transaction that will not amount to invalidation of the guarantee.

Guarantee obtained by concealment invalid: This is another ground of invalidation of the guarantee. Section 143 says—

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

Thus the guarantee will be invalid if—

i. The creditor has obtained it by means of keeping silence, and

ii. Such silence was involved as to material circumstances of the transaction.

Conditional guarantee on joining of another co-surety: Section 144 says—

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

Thus, if the guarantee is made subject to a condition that the creditor shall not be bound by it until another person joins him as co-surety, in that case the guarantee will not be valid if that other person does not join.

Implied promise to indemnify surety: Section 145 says—

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

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the

amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C to the extent of 2,000 Taka, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 Taka, but obtains from A payment of the sum of 2,000 Taka in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Thus the section makes it clear, whether there exists actually any promise by the principal debtor to indemnify the surety or not, the existence of an implied promise will be presumed in every case that the surety will have the right to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, and he will not have any such right against the sums paid wrongfully by him.

Liability of co-sureties:

Sections 146 and 147 deal with the following two important rules regarding the liability of co-sureties:

Co-sureties liability to contribute equally: Section 146 says—

> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.
>
> *Illustrations*
>
> (a) A, B and C are sureties to D for the sum of 3,000 Taka lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 Taka each.

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

The section says about the equal contribution to be made by the co-sureties. But obviously this is not the mandatory obligation *per se*, rather it will be mandatory only in the absence of any contract contrary to it. Thus if there is no mention regarding the portion of the liability of the co-sureties, the rule of equal contribution will come into operation.

Liability of co-sureties bound in different sums: Section 147 says—

> Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.
>
> *Illustrations*
>
> (a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 Taka. A, B and C are each liable to pay 10,000 Taka.
>
> (b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 Taka, B in that of 20,000 Taka, C in that of 40,000 Taka, conditioned for D's duly

accounting to E. D makes default to the extent of 40,000 Taka. A is liable to pay 10,000 Taka, and B and C 15,000 Taka each.

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