

Chapter I

Of the Communication, Acceptance and Revocation of Proposals

3. Communication, acceptance and revocation of proposal—The communication of proposals, the acceptance of proposals, and the revocation of proposals and or acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Case-Law

Communication, acceptance, etc—It is impracticable to consider what are the terms of a particular contract without considering precisely what steps constituted the offer and what constituted the acceptance and precisely what particular terms ought to be read into the contract (b). 3 *DLR 23*.

Sections 3 and 4—The tenderer acquired no vested right of a property merely because his tender for that property had not been rejected and his earnest money had not been refunded by the Corporation. As there was no definite communication of acceptance of tender by the Corporation no vested right was acquired by the plaintiff. *Sahana Chowdhury (Widow) and others vs Md Ibrahim Khan and another* 6 *BLC (AD) 67*

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

The communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

S. 4] Of the Communication, Acceptance & 9 Revocation of Proposals

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

The communication of a revocation is complete,

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

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A, when the letter is posted;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B, when B receives it.

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

Case-Law

Section 4—Acceptance through letter or telegram—As soon as the acceptance is posted or sent by telegram, the acceptance is complete against the proposer and the contract is concluded. A person posting a letter of acceptance is not answerable for casualties occurring at the post office. Consequently, the contract was complete and binding on the proposer immediately after the acceptance was posted and it was not revoked. It is rather the liability of the acceptor that would start only after the acceptance comes to the knowledge of the proposer. *PLD 1984 Lahore 430.*

—**Place of contract**—The contract is made at the time when and at the place where the letter of acceptance is posted *PLD 1984 Lahore 430.*

—**Revocation of contract**—A communication of revocation is effective when the letter of revocation is received by the addressee. Where before an acceptance sent by letter reaches the offer or a telegram revoking the acceptance reaches him, no concluded contract can come into existence. *PLD 1984 Lahore 430*.

—Executory contract ripens into a completed contract when the consignor in the foreign territory despatches the goods under CIF contract and the consignee becomes the owner thereof with transit risk. *S Sibtain Fazli vs Star Film Distributors 14 DLR 307*.

Sections 4 & 3—The tenderer acquired no vested right of a property merely because his tender for that property had not been rejected and his earnest money had not been refunded by the Corporation. As there was no definite communication of acceptance of tender by the Corporation no vested right was acquired by the plaintiff. *Sahana Chowdhury (Widow) and others vs Md Ibrahim Khan and another 6 BLC (AD) 67*.

5. Revocation of proposals and acceptances—A proposal may be revoked at any time before the communication of its acceptances is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

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

B accepts the proposal by a letter sent by post.

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

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

Case-Law

Section 5—Revocation of proposal—Under section 5 of Contract Act a proposal may be revoked at any time before the communication of

Ss. 5-6] Of the Communication, Acceptance 11 & Revocation of Proposals

its acceptance is complete as against the proposer, and under section 7 the acceptance of a proposal must be absolute and unqualified. The manner of revoking a proposal and of communicating acceptance might be controlled by the terms of agreement, yet it was necessary that the offer should have been accepted at least ultimately in an absolute and unqualified manner. *Trustees of the Port of Karachi vs Muhammad Baksh*, PLD 1959, (Kar) 658.

6. Revocation how made: A proposal is revoked—

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

Case-Law

Section 6(2) Reasonable time—What is reasonable time within the meaning of section 6(2) of the Contract Act is undoubtedly dependent upon the facts and circumstances of each case.

The question in this case is whether this delay of 1 year and 3 or 4 months will not be considered unreasonable in the facts and circumstances of the instant case. *Gladstone Wyllie & Co Ltd vs ABM Shayesta Khan* 28 DLR 344.

—Understanding given by the plaintiff to the defendant company for completion of the construction of bungalows for the defendant within 4 months time from 17-11-50 not fulfilled—defendant-company paid a large sum of money to the plaintiff for construction in advance—with the expiry of 4 months time defendant extended further time to the plaintiff to complete construction and also paid further sums of money—

Construction remained incomplete even till 7-3-52 when the defendant company took possession of the incomplete bungalows—Plaintiff failing to comply with the terms of the contract the defendant company served a notice on 27-12-55 in which 10 days time was given to complete the construction in default it was said it would amount to failure to fulfil the contract—The repudiation of contract on 27-12-55 by the defendant—company quite legitimate—No plea can be set up on that account. *Gladstone Wyllie & Co Ltd vs ABM Shayesta Khan* 28 DLR 344.

7. Acceptance must be absolute—In order to convert a proposal into a promise, the acceptance must—

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

Case-Law

—The communication of a counter offer does not amount to the acceptance of a proposal or an offer made by the other party. *Abdul Aziz vs The Rent Controller, PLD 1958 (Kar) 278.*

—**Absolute and unconditional acceptance**—Every transaction to be recognised as a contract must, in its ultimate analysis, resolve itself into a proposal and its absolute and unqualified acceptance. If it contains a material variation of the terms of the offer, there is no consensus ad idem or agreement upon which a contract can be founded. *PLD 1982 Karachi 76.*

—**Manner of acceptance**—Where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is necessary for the other person to whom such offer is made to follow the indicated mode

Acceptance & Revocation of Proposals

of acceptance. If acceptance is not made in such manner, there is no contract between the parties. *PLD 1978 Lahore 264.*

8. Acceptance by performing, conditions, or receiving consideration—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Case-Law

Section 8—The material question for consideration in a suit for specific performance of contract is that the agreement must be genuine and the consideration must have passed between the parties. *Syed Munsif Ali vs Shashanka Mohan Chowdhury & another 3 BLC (AD) 85*

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

Case-Law

Sections 2-9—Interpretation clause, what constitutes agreement.

—Price is the essence of sale of immovable property—No sale unless the price is fixed or mode of determining the price is shown. *M/s Chittagong Engineering & Electric Supply vs Income-tax Officer 22 DLR (SC) 443.*

Offer and acceptance—where a contract may be said 'concluded'.

Invitation for offer. *65 IC 282.*

—an advertisement for sale by public auction is not an offer. *1923 Mad 582; 72 IC 436.*

—quotation of price is not an offer. *1951 SC 184; 1951 (SC) J 257; 6 DLR (SC) 243.*

—in order to convert a proposal into a promise the acceptance must be absolute and until there is such an acceptance, the stage of negotiation has not passed and no legal obligation is imposed. *1931 (Lah) 160; 1930 (Lah) 374; 1922 (Pat) 24; 1939 (Cal) 500.*

—a mere reference to the preparation of a formal document does not prevent a contract otherwise binding being complete, 20 CWN 66; 32 IC 53; 60 C 1372; 1934 (Cal) 235, it is the intention of the parties which determines whether a formal document is absolutely necessary to conclude the contract. 47B 335; 1923 PC 47; 28 CWN 73; 60 C 980; 57 CLJ 264; 1933 PC 29; 1933 MWN 10; 1933 ALJ 611 RC; 1941 (Bom) 247.

—where the parties entered into an agreement of sale “subject to the approval of title by the purchaser’s Solicitor”, the contract is concluded. 25 B 110; 18 CWN 568; 1932 (Bom) 51.

—there may be contract by one executing document and the other accepting it. 20 CWN 408; 35 C 683; 12 CWN 628; 6 C 94, 4 CLJ 510.

—a contract to give an immovable property may be made by letter which is enforceable. 20 CWN 1054; 39, M 509.

—acceptance may be made otherwise than in words. 49A 674; 1927 (All) 407.

—an offer must be accepted within a reasonable time. 42 M 776.

—Insurance policy, when the proposal and acceptance is complete 1934 (All) 298; 1933 (Mad) 764; 1933 MWN 937; 1952 (Cal) 69; 56 CWN 418.

Construction—the court is not entitled to see what the parties might have intended. 85 IC 99; 1925 All 97.

—it is not proper that a contract in one case should be interpreted in the view taken with regard to another contract which is difficultly worded and is under consideration in another case. 42 CLJ 172; 1925 (Cal) 1248.

—a reasonable interpretation is *prima facie* to be adopted if words admit. Words cannot be added which would result in adding a new term not involved in the purpose of the contract though words can be added to give effect to obvious intention. 1934 PC 254; 152 IC 401 PC.

—principles of construction of a contract. 47 CLJ 327; 1927 PC 275 PC.

Consideration—the definition of the term “consideration” in section 2(d) is wider than under the English Law. It need not necessarily be a benefit received by the obligor, it may be for the benefit of the third person 61 C 841; 38 CWN 682 (Cal) 682; 1934 (All) 271.

Chapter II

Of Contracts, Voidable Contracts and Void Agreements

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

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

Case-Law

—Charter party agreement—Like ordinary contracts the terms of a charter party agreement can also be spelt from the correspondence exchanged between the parties. *Pan Islamic Steamship Co Ltd vs General Import and Exports Ltd* PLD 1959 (Kar) 750.

—No party can unilaterally add to the terms of a contract. *PLD 1976 Karachi 14*.

—Mutuality—So long as one of the parties to the transaction could back out of it at his choice there can be no concluded or binding contract between the parties although they may have agreed upon many of the material terms. *PLD 1985 Quetta 167*.

1. The word "Bangladesh" was substituted for the word "Pakistan" by Act VIII of 1973, 2nd Sch. (with effect from 26-3-71).

2. See e.g. section 25, *infra*; the Indian Copyright Act, 1914 (III of 1914), section 5 of the first Schedule; The Apprentices Act, 1850 (XIX of 1950), section 8; the conveyance of Land Act, 1854 (XXXI of 1854) sub-section 14 and 18; the Carriers Act, 1865 (III of 1865), sub-section 6 and 7; the Merchant Shipping Act, 1894 (57 and 58 vict. c. 60), section 24; the Companies Act, 1913 (Act VII of 1913), sub-section 5, 19, 35 and 88.

Proof of contract—Question whether there was a concluded contract was always question of fact and has to be inferred from evidence led and documents produced by parties. *PLD 1983 Karachi 387 (DB)*.

—Parties contemplating execution of document—If the documents or letter relied on as constituting a contract contemplate the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a question of term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract and reference to the more formal document may be ignored. In a contract for sale of immovable property, document acknowledging receipt of advance amount by defendant towards sale of suit property containing essential terms of a binding agreement and giving full descriptions of vendor and vendee and total sale consideration, mere absence of stipulations regarding time of payment of balance price and by whom other formalities in connection with completion of sale are to be performed cannot render the contract void or unenforceable. Mere fact that parties had agreed to execute another formal agreement setting forth manner and mechanism in which agreed terms of conditions were to be given effect to was not sufficient to detract the document from being considered as a concluded contract for sale of suit property. *PLD 1981 Karachi 398*.

Contract—Oral Contract is as valid as written contract—But in the matter of oral contract, once it is denied by one of the parties, a very heavy onus of proof lies on the other party in establishing its truth. *Rezaur Rahman & others vs Al-Haj Ahmed Hossain Khan (1986) BLD 14*.

—Oral contract. An oral contract by which itself the parties intended to be bound is valid and enforceable. *PLD 1981 Karachi 170*.

—Parties to contract—Where the partners of a firm decided to convert it into a company and new shareholders were brought in but before the actual incorporation of the company the firm decided to transfer the assets of the firm to the company of which they would also be shareholders. It was held that this did not bring about a contract between the firm and the company. It could at the most be an offer by the firm, which could be accepted by the company after its incorporation. *PLD 1980 Lahore 86 (DB)*.

—**Competence to contract**—A company can enter into a contract only after its incorporation. Where an agreement was entered into on behalf of the company before its incorporation. It was held that even if there was an agreement, it was between the partners inter se or partners and promoters but not with the company, which could not be a party to the contract and therefore the company could not after its incorporation enforce it. *PLD 1980 Lahore 86 (DB)*.

—**Successor of party**—Agreement for securing cash credit facility and memorandum of deposit of title deeds signed by predecessor would bind his successors on equitable mortgage of property. *PLD 1986 Karachi 107*.

—**Formalities in making contract**—Where the law has prescribed certain formalities those formalities should be complied with to create a contract capable of attaching liability. If the statutory requirement be that the contract should be executed in a particular manner and that requirement is also mandatory, there cannot be the slightest doubt that either the document should be executed in that manner or not at all. If the contract is executed in violation of such requirement it is invalid. *PLD 1976 Lahore 1192*.

—**Government contract**—Where no written agreement was concluded by the contractor with the Government. Some proposals were made and accepted but they required the final concurrence of the Financial Advisor, so that an outstanding issue might be settled once for all. It was held: that in the absence of a concluded agreement, the plaintiffs, claims on the basis of the decisions recorded in the minutes against both the Government of Pakistan as well as the Provincial Government cannot be sustained. *PLD 1976 Karachi 623*.

Ambiguous language—Where an ambiguous expression has been used in a document, it should be construed against the party using it. *PLD 1976 Karachi 458*.

Contract—Terms which may be implied —In other words a term which is necessary to give the transaction such efficacy as both parties must have in all reason intended it to have, can be considered to be implied in a written contract. *PLD 1975 Lahore 896*.

—Shipowner not liable (in the absence of a special contract) to notify the arrival of ship to the consignee—In case of contractual obligation, a letter addressed to the consignee is enough.

Two clauses in a bill of lading, one to the effect that notice is to be given to the consignee and the other saying that such directions are for the purpose of the ship's agent and not for creating any responsibility to the

consignee.—No obligation to notify the consignee is thereby created. *Messers Mackinnon Mackenzie & Co of Pakistan, Ltd vs Eastern Mercantile Co.* 10 DLR 228.

—Shipowner's liability to notify the charterer the arrival of goods. *Messers Mackinnon Mackenzie & Co of Pakistan, Ltd vs Eastern Mercantile Co.* 10 DLR 228.

—CIF—Cost, insurance and freight—CIF contract explained. *Syed & Co vs Messers MM Ispahani Ltd, Chittagong and another* 10 DLR 552.

—Of sale and hire-purchase agreement—different between the two. *Arabinda Poddar vs Shewram Das* 12 DLR 229.

—Contract of the sale of movable property—Presumption is that the purchaser has become the owner when the contract is made. *Shewram Das Agarwala vs Arobinda Poddar* 13 DLR (SC) 141.

Section 10—Alteration in an agreement does not necessarily amount to forgery—if an alteration changes the character of a document and alters the rights, liabilities and legal position of the parties in that case only it can be said that such an alteration is a material alteration which amounts to forgery and for such forgery the document may be treated as void. *Mohiuddin Ahmed vs Lutfur Rahman* 44 DLR 48.

Section 10—A stranger to a contract cannot sue the other party. Terms of the contract can be enforced only by the contracting parties and not by third party. *Trang Ice and Cold Storage Company Limited vs Amin Fish Farm* 46 DLR 39.

Section 10—Since it is a sale through tender notice, the contract for sale cannot be a concluded one unless and until all the terms and conditions of the tender notice are fulfilled. *United Commercial Bank Ltd vs Rahimafrooz Batteries Ltd and others* 52 DLR 625.

11. Who are competent to contract—Every person is competent to contract who is of the age of majority according to the law to which he is subject¹, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

1. See the Majority Act, 1875 (Act IX of 1875).

—a contract for purchase by minor is void. *39C 232. 16 CWN 74 PC*

—a contract for purchase by a minor when full consideration has been paid is enforceable. *5L 317; 1924 (Lah) 611.*

—an advance made during minority upon a promise to pay cannot be a consideration of a subsequent promise made after minor's majority. *1935 (Lah) 561 FB.*

—the power to set aside sale deed executed by a minor should not be exercised by the court in favour of an unscrupulous vendee. *45A. 644; 21 ALJ 596.*

—mortgage executed in favour of a minor is not void when the minor had nothing to perform. *1939 Pat 153; 22 CWN 130; (39 C 232; 16 CWN 74 PC; 30 C 539; 7 CWN 441 PC).*

—all transactions entered into by the minor are void, as he cannot execute a fresh bond on attaining majority in consideration of a bond executed by him during his minority. *49A 137; 1927 (All) 242; 100 IC 748; 25 ALJ 132 (16 MLJ 422; 37 M 38) Rel on 11 CWN 135 not fol., 161 A, 221 Distinguished there is not question of ratification. 1935 (Lah) 561 FB.*

—a lease by a minor is void and is incapable of ratification, express or implied, by the acceptance of rent by him on attaining majority. *1931 (Bom) 178; 33 (Bom) LR 111; 1931 (Lah) 40; 1935 (Lah) 561 FB.*

—a minor is not estopped from pledging his minority. *26C 381, 1918 (Lah) 609, 1928 PC 152; 32 CWN 874, 1929 (Nag) 156.*

—a minor is not estopped from repudiating a contract if he has not exercised fraud but only misrepresentation that he is sui juris. *20 CWN 418 (26 381; 3 CWN 468; 25 C 616; 2 CWN 330) Fol 15 CWN 339 Dist.*

—Where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, the infant is estopped from pleading infancy in an action founded on the contract *55B. 741; 1931 (Bom) 561; 30C 539 PC, 9 (Lah) 701 FB.*

—minor executing promissory note making fraudulent representation as to age, is not liable for the money *1934 Mad 560.*

—fraud depends upon the state of a person's mind and fraudulent intention cannot be imputed by reason of a presumption of knowledge of law, unless the person alleged to be fraudulent has such knowledge in fact, *58 C 224; 1931 Cal 393; 132 IC 84; 30 IA 114 PC Rel.*

Ss. 11-12] Of Contracts, Voidable Contracts and Void Agreements 21

—a minor is bound to restore the benefit received by him *1942 (Nag) 12, 1936 (Cal) 567; 41 CWN 115.*

—a minor cannot be allowed to profit by the deceitful act of his agent. *21 CWN 473 PC.*

—if contract is validly entered into on behalf of a minor by his guardian, and there is mutuality in the contract, it may be specifically enforced. *34 C 163 FB; 59 B 656; 1935 (Bom) 353.* But where the contract is not for the benefit of the minor, no specific performance should be allowed. *10 CWN 763; 26 B 326, 337, 27 C 276; 29 A 213; 11 B 551.*

—when there are two promisors one cannot take the plea of minority of the other in a claim against himself. *20 CWN 840; 24 CLJ 74 PC; 34 M 314, Fol.*

—a minor on whose behalf an ancestral trade is carried on, is not personally liable for the debts incurred in such business. *22 CWN 488.*

—**Contract by person of unsound mind**—A contract by a person of unsound mind is void ab initio and not merely voidable; *PLD 1976 (SC) 258.*

—**Contract by minor**—A contract by a minor is void ab initio and not merely voidable and hence cannot be sued upon; *PLD 1976 (SC) 258.*

—It is void ab initio and is incapable of rectification or confirmation Law forbids the enforcement of such a transaction even if the minor were to ratify it after attaining majority; *PLD 1976 (SC) 258.*

—Sale price not spent for benefit of minor—Where property of the minors was sold by their mother who was not their guardian and the sale was declared ab initio void the alienation cannot be compensated by making an order for refund of consideration even in cases where consideration amount was not spent for the benefit of the minor or minor's estate. *PLD 1981 AJ & K 33.*

12. What is a sound mind for the purposes of contracting—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Case-Law

—**Soundness of mind—Lunacy and unsoundness of mind**—contract by lunatic is void and he cannot be compelled to refund the consideration money. *20 CWN 59 n; 30 C 539; 7 CWN 441; 5 (Bom) LR 421 PC Fol.*

—mere weakness of mind is not sufficient. Party must prove total incapacity to understand business and forming rational judgment—*4 (Pat) LT 17; 1923 P 187; 68 IC 372; 1944 (Nag) 232.*

—mere loss of vigour and infirmity on account of old age is not sufficient to invalidate a contract. *104 IC 527; 1927 (Cal) 889.*

—in order to avoid a contract on the ground of one of the parties being of unsound mind the question to be decided is whether that person was of unsound mind when the contract was made. *104 IC 327; 1927 (Cal) 889; 55 C 285.*

—unsoundness of mind depends largely upon the inference to be drawn from the evidence. *104 IC 527; 1927 (Cal) 889; 55 C 285* and not on belief or nonbelief of witness. *1933 (Lah) 458.*

Unsound mind and the making of a contract—Insanity—Burden of proof when insanity is impleaded by one side and denied by the other. *Rohini Kumar vs Bhagaban Chandra 14 DLR 60.*

13. "Consent" defined—Two or more persons are said to consent when they agree upon the same thing in the same sense.

Case-Law

Sections 13, 14, 19—Free consent—When a person entrusts to his own man of business, a blank paper, duly stamped as a bond and signed and sealed by himself in order that an instrument may be drawn up and money raised, if it is duly drawn up and money obtained from a person acting bona fide, it is binding. *5 C 39.*

—if a person of competent capacity signs a deed it is to be presumed that he understood the instrument. The principles of pardanashin lady does not apply to a man because he is old and not in robust health. *10 CLJ 86; 74 IC 517.*

—where document was signed only on the first page and not on other pages as the executant discovered that it was not drawn up according to contract, document was a nullity. *30 C 433.*

—in a marriage of a girl verging majority, her consent is necessary—*17 CWN 429.*

See, also *45 CWN 259; 34A 455 (PC); 28 CLJ 306; 45C 697; 22 CWN 197; SWCN 1; 43 CLJ 479; 1939 (All) 348. 48 CLJ 412; 32 CWN 923; 55 CLJ 323; 40 CWN 45; 62 CLJ 99; 25 CWN 265; 45 CLJ 431; 28 C 546; 20 CWN 638; 31 IA 116; 24 CWN 977 (PC); 34 CWN 453; 19 CWN 1309; 22 CWN 697 and 1926 Cal 643.*

14. "Free consent" defined—Consent is said to be free when it is not caused by—

- (1) coercion, as defined in section 15, or
- (2) undue influence, as defined in section 16, or
- (3) fraud, as defined in section 17, or
- (4) misrepresentation, as defined in section 18, or
- (5) mistake, subject to the provisions of sections 20, 21 and 22.

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

"[See the cases under section 13 above at page 23]"

15. "Coercion" defined—"Coercion" is the committing, or threatening to commit, any act forbidden by the ¹[Penal Code (XLV of 1860)] or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation—It is immaterial whether ¹[Penal Code (XLV of 1860)] is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the ¹[Penal Code (XLV of 1860)].

A afterwards sues B for breach of contract at ²[Chittagong].

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the ¹[Penal Code (XLV of 1860)] was not in force at the time when or place where the act was done.

Case-Law

—To constitute coercion under section 15 there must be the committing or threatening to commit any act forbidden by the Penal Code or the unlawful detaining or threat to detain any property to the prejudice of another. *1927 MWN 761*.

—where the principal fearing that the stoppage of the business was likely to cause heavy loss executed a release deed as required by the agent who threatened him the release was obtained under coercion. *50 M 786; 105 IC 5; 1927 Mad 852*.

—there can be no legal plea of pressure which will not include coercion. *25 B 10*.

—the mere fact that an agreement to refer to arbitration was entered into during the pendency and in fear of criminal proceeding is not coercion. *22 A 224*.

1. The words within square brackets were substituted for the words "Pakistan Penal Code" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

2. Subs. by the Central Laws (Statute Reform) Ordinance, 1960 (Order XXI of 1960), section 3 and Second Schedule, for "Calcutta" (with effect from the 14th October, 1955).

Ss. 15-16] Of Contracts, Voidable Contracts and Void Agreements 25

—bond executed by J Dr in duress, for his release from custody in execution of a decree of court without jurisdiction, is not enforceable. 4 A 352.

—when property attached belongs to third person he may deposit under protest and then sue, such payment is made under coercion. 17 CWN 541; 17 CLJ 478 PC.

—specific allegation as regards coercion must be proved, suspicion will not suffice. 29 B 149.

—section 72 Contract Act, in laying down that a person to whom money has been paid by mistake or under coercion must repay it implies that the money was not really due to the payee. 43 A 272; 19 ALJ 41; 60 IC 881.

—the word “coercion” referred to in section 72 is used in its general and ordinary senses, its meaning not being controlled by the definition in section 15. 65 IC 517(c) 1941 (Mad) 635.

Coercion—Mere fear of criminal proceedings—Not sufficient to be called coercion—Contract not avoided. Noor Muhammad vs Abdul Sattar Jan, PLD 1959 (Kar) 348.

¹[16. “Undue influence” defined—(1) A contract is said to be induced by “undue influence” where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another.

- (a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

1. Subs. by the Indian Contract Act Amendment Act, 1899 (VI of 1899) section 2, for the original section 16.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Evidence Act (I of 1872)].

Illustrations

(a) A having advanced money to his son, B during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

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

Case-Law

—**Undue influence—onus of proof**—In order to determine the question of onus in a case attracted by section 16(3) of the Contract Act the first thing to be considered is the relationship between the parties, that is to say, whether one party was in a position to dominate over the other and then it must be proved that position was used to obtain an unfair advantage and even though the transaction may be unconscionable, relief cannot be granted until the initial fact of the position to dominate the will is established. *Srimati Bidhumukhi Bassaya vs Srimati Sarala Sundari Dassya & anr* 6 DLR 97.

—The burden of proof lies in the first instance on the party who raises the plea of undue influence. If that party proves that the other party was not only in a position to dominate his will, but that the transaction entered into was also unconscionable, then the burden of proof that he did not use his dominant position to obtain an unfair advantage over the other is shifted on to him. *Srimati Bidhumukhi Bassaya vs Srimati Sarala Sundari Dassya & anr* 6 DLR 97.

—When there is evidence of overpowering influence and the transaction is immoderate and irrational, proof of undue influence is complete. *Srimati Bidhumukhi Bassaya vs Srimati Sarala Sundari Dassya & anr* 6 DLR 97.

—Spiritual influence—Person impressing another by his deeply spiritual life—Impression not sufficient to be considered undue influence. *Aziz Ahmad vs Manzoor Ahmad, PLD 1961 (Kar)* 305.

—Pending criminal case under section 406 PPC at the time of entering contract is sufficient to prove coercion and undue influence.

The fact that since the agreement was entered when there was a case under section 406 PPC, we are of the view that this is sufficient ground for holding that there was coercion and undue influence exercised on the defendant. *Purnendu Kumar Das vs Hiran Kumar Das, 21 DLR 918.*

Undue influence—Mere relationship or position from which one's will can be dominated not sufficient—Urgent need of party, a criterion. *Abdul Aziz vs Multan Electric Supply Co Ltd. PLD 1958 (Lah)* 614.

—Transfer of property by a registered deed in lieu of dower—Not a fictitious transaction unless the deed executed under undue influence. *Nazir Ahmed Khan vs Mst Ismat Jehan Begum* 21 DLR (SC) 145.

—Transactions with pardanashin lady—Document allegedly executed by illiterate pardanashin lady—Suit for cancellation of document on ground of fraud.

Onus of proof regarding genuineness of deed lies on party taking advantage of transaction—Protection to pardanashin lady—Rule stated—Protection for pardanashin lady applicable in all cases whether such lady is plaintiff or defendant. *M/s Ithad Textile Mills vs Commissioner of Income-tax, 21 DLR (Karachi)* 325.

—Unless it is proved on record that a document which an illiterate and pardanashin woman is purported to have executed whereby she gives

away her right is some property, was read over and explained to her and that she executed the document on the clear understanding of what it is—such a document cannot be enforced against her.

Courts should be more careful in assessing evidence with regard to genuineness or otherwise of the document alleged to have been executed by such women—Poor and illiterate women are entitled to the same protection extended to pardanashin lady when evidence shows that they executed the document under undue influence. *Md Sheikh vs Maminuddin Sheikh*, 22 DLR 650.

—Undue influence—Scope of section 16-38 CWN 806; 59 CLJ 454; 36 (Bom) LR 652; 1934 PC 130; 1934 MWN 647 PC.

—to bring a case within the first clause of section 16, it is necessary to show that an unfair advantage has been obtained over him, while to bring the case within sub-section (3) it must be proved that the transaction is unconscionable; the mere fact that one of the parties is in position to dominate the will of the other will not do. 17 CLJ 227.

—the onus is on the party who seeks to avoid a contract to establish that the other party was “in a position to dominate” his will. Until it has been done the burden does not lie on the either party under sub-section (3) of section 16 of proving that the contract was not induced by undue influence. 34 (Bom) LR 1194; 36 CWN 994; 56 CLJ 55; 33 PLR 611; 1932 PC 202; 63 MLJ 54; 137 IC 893 15 ILJ 74; LR 1932 PC 228 PC; 1935 PC 146; 39 CWN 1130; 37 (Bom) LR 800.

—a finding that the promisee had obtained an unfair advantage over the promisor is not sufficient in the absence of a finding that the promisee was in a position to dominate the will of the promisor. 39 CWN 1130; 16 (Pat) LT 571; 37 (Bom) LR 800; 1935 MWN 1139; 1935 PC 146 PC.

—where a party to a contract is weak but has ample properties and independent advice and other party does not take any undue advantage of his weakness, the court will not exercise its equitable jurisdiction to protect him. 55 C 285; 1927 Cal 889.

—as to what constitutes undue influence, a useful guide is afforded by section 48 of the Indian Succession Act. 5 CWN 505.

—a deed of gift executed by son in favour of father or father's relative without independent advice does not create title. 30 M 160.

S. 16] Of Contracts, Voidable Contracts and Void Agreements 29

—where a husband cause his wife to execute a mortgage and the mortgagee knew all the facts, the transactions is not binding on her. *1945 PC 8; 49 CWN 55.*

—the relationship itself does not necessarily preclude the making of the gift, but the burden lies on the donee to show that there was no such influence as to the source of the gift. *103 IC 239; 1927 PC 148; 39 MLT 105 PC.*

—but the presumption of undue influence does not apply to a gift by a mother to her daughter. *33 C 773; 10 CWN 570; 3 CLJ 484, PC.*

—before the creditor can be called upon to prove that the transaction was not unconscionable and was not procured by undue influence, two elements must be established, first that the creditor was in a position to dominate the will of the borrower and secondly that the transaction is on the face of it unconscionable. *48 A 666; 24 ALJ 822, 3 Pat 279 PC 16 ALJ 905 PC Ref.*

—the mere fact that the borrower is in need of money does not put a creditor in a position to dominate the will of the borrower within sections 16-31 CWN 693; *8 Pat LT 480; 101 IC 29; 1927 PC 84; 25 ALJ 314 PC.*

Urgent need of money does not itself place the lender in a position to dominate the will of the borrower. *17 CLJ 221; 34 C 150; 34 IC 9 PC (Fol), 31 C 233 CWN 876, 90 IC 439.*

—but where the borrower was in debt to the creditor of his village and contracted a fresh loan on terms which appeared to be unconscionable, undue influence must be presumed. *1927 (Lah) 536; 102 IC 707.*

—Compound interest is common and may often be necessary and proper in India under the circumstances of the country. *1928 MWN 242; 32 CWN 657; 47 CLJ 403; 26 ALJ 384; 9 (PT 203; 39 (Bom) LR 793; 108 IC 337; 1928 PC, 64 PC.*

—where a contract is challenged as providing a high rate of interest it is necessary to prove that one party had undue advantage over the other in the settlement of the rate. *41 CLJ 453; 1925 Cal 722, 90 IC 727.*

—it is not enough to prove undue influence that a vendor of property was in a distressed state of mind and anxious to dispose of his property at the time of sale. *72 IC 1032; 68 IC 1032; 68 IC 372.*

—a stranger to a contract (here a mortgage bond) cannot avoid it on the ground of undue influence. *40 CLJ 67.*

—a deed of gift executed by an old illiterate Mohammedan lady in favour of her confidential managing agent was held to be void. *18 C 545 PC*.

—darpatni lease executed by a pardanashin lady in favour of husband's cousin on fair terms with full knowledge of its effect cannot be inferred to have been executed under undue influence. *60 CLJ 25*.

—when a person standing in fiduciary relation purchases property by means of mixed fund belonging to both, the other person is entitled to a charge on the property purchased for the amount of his money. *40 CLJ 393*.

—If one person, having a communion over another person's will, induces that other person to execute a document, whether it be in his favour or in favour of the third person, then the doctrine of undue influence applies, and the Court will not allow that document to stand. *40 CLJ 393*.

—in order to establish undue influence it must be proved that the person in a position to dominate the will of other has used that position to obtain an unfair advantage. Where the transaction was completed through an attorney and the borrower had also other advise, there was no undue influence. *51 CLJ 283; IR 1930 (Cal) 770; 126 IC 754; 1930 Cal 547*.

—a contract will be set aside if it is shown that the consideration was so inadequate as to lead to the inference of fraud or undue influence, but the inadequacy of consideration must be apparent on the face of the transaction and must not be left to be spelled out by dexterous argument as to value. *1926 Pat 539; 96 IC 468*.

—undue influence and fraud must be pleaded in the pleadings. *2 Pat LT 1115 Pat LJ 744 60 IC 282*.

—there is no presumption that landlord is in a position to dominate the will of the tenant; full particulars of undue influence must be given in the pleading. *8 CLJ 135*.

—a defendant is not precluded, by the law of limitation, to resist a claim by way of defence on the ground of fraud or undue influence. *28 B 639; 30 M 169*.

—Under the Contract Act, coercion, undue influence & c are separate and separable though they may overlap. *19 CWN 729 PC*.

—undue influence and incapacity to enter into contract are totally different things. *104 IC 527; 1927 (Cal) 889; 55 C 285; 22 C 324 PC (Fol)*.

—Pardanashin lady or a married woman acting under the undue influence of husband vitiates the transaction. *18 CWN 1133; 17 CWN 541 PC 6 CWN 809 PC.*

—wife does not fall under the class of “protected” person in respect of whom in certain relationships there is a presumption of undue influence though in some cases it is easy for the wife to discharge the onus. *1934 PC 210; 1934 ALJ 763 PC.*

—where the wife is younger than the husband there cannot be any legal presumption that she is in a position to dominate the will of her husband. *1930 (All) 169; 123 IC 369; 52A, 368.*

—**Hard and unconscionable**—The mere fact that a bargain appears to be unconscionable does not, under section 16C. Act raise the presumption of undue influence. *28 CWN 834; PC 1927 (All) 315; 1933 (Lah) 682.*

—but where the facts disclosed that there was a confidential relation between the parties and it further appeared on the fact of the deed itself that it was harsh and unconscionable, held that the promisee was to excuse himself from the necessary implication arising on the fact. *51 CLJ 414; 123 IC 175; 1930 PC 1939 PC.*

—strong motive for executing a document raises no presumption of undue influence. *1933 (Lah) 835.*

Pardanashin Ladies, Transaction by—The law gives to “pardanashin” ladies protection which is analogous to that always given by Courts to persons who are weak, ignorant and infirm and hence incapable of protecting themselves and presumes unlike in the case of others that they are incapable of protecting themselves. *PLD 1985 Karachi 431 (DB).*

—In their case the onus is always on the person who takes advantage of transaction to show that the transaction was actually conceived and put into practice by the disposer herself. Even in cases where a pardanashin lady had independent advice, the Court will scrutinise the transaction very closely to see that it is a fair one. Where the impugned document is not in her mother tongue, the law further requires that to uphold the impugned document it must be shown that she understood and not merely heard what was read. *PLD 1985 Karachi 431 (DB).*

—**Understanding of document**—The party taking advantage under the document must show to the Court that the deed was explained to and

understood by the executant and she adopted it with full knowledge and comprehension. The fact whether independent advice was available to a pardanashin lady at the time when she entered into a transaction can be taken into consideration in order to determine whether she thoroughly comprehended and deliberately of her own free will, carried out the transaction. If it is found that the document was conceived and executed by her free will, it shall be upheld. *PLD 1985 Karachi 431.*

—However, if subsequently the executant makes declaration that he or she had not understood what he or she was doing, that by itself is not conclusive. It must be a question whether, having regard to the proved personality of the executant, the nature of the transaction, the circumstances under which it was executed and the whole history of the parties, it was reasonably proved that the document was the free and intelligent act of the executant or not. If the answer was in the affirmative, the person relying on the document had discharged the onus resting upon him. *PLD 1985 Karachi 431 (DB).*

—**Woman who is not ‘pardanashin**—Protective cloak is available to Pardanashin lady more because of lack of understanding and appreciation on there part than for merely observing parda. It is quite possible that a woman belonging to a pardanashin class may possess sufficient intelligence to understand the contents of the document to which she is a party despite the restraints of parda. Conversely there can be an illiterate woman totally devoid of understanding but not observing parda. Therefore, the criterion cannot be the social status in the parda class but the liability to comprehend the contents of the document in question. The emphasis is on factual understanding of the document with reference to the individual concerned and not upon presumptive disability incidental to mere status. *PLD 1985 Karachi 431.*

—Where the ladies who executed a document were illiterate. They knew only how to sign but that too in Gujrati. The burden lay heavily on the appellant-Bank to prove that not only the ladies executed the documents in question but also fully understood their contents. *PLD 1985 Karachi 431.*

—A lady appearing in public: appearing before Court to give evidence and regularly collecting monthly rent of her property could not be regarded a pardanashin lady. *PLD 1985 Karachi 431.*

—**Pardanashin lady**—The defendant is a lady with certain amount of worldly knowledge. She manages her own affairs according to her own understanding and even appears in Court she is not a pardanashin lady. *Mr Chand Miah vs Khodeza Bibi; 42 DLR 344.*

—**Undue influence**—Whether relationship of daughter to mother lead to a presumption of undue influence or control by the daughter upon the mother—Whether in a transaction between the daughter and the mother the daughter is to discharge the onus of proving the bona fide of the transaction—Mere relationship of daughter to mother by itself does not lead to a presumption of undue influence or control by the daughters upon the mother—In the absence of any pleading of undue influence in obtaining the kabala from the executant and that the daughters were in active confidence of the mother Courts below did not commit any error of law in not considering these questions—The ground of undue influence in challenging the kabala ought to have been pleaded so that the other side was alive to the question and could meet the same in the trial—*Noab Chand vs Mst Hozzain Banu and ors (1986) BLD 173.*

Section 16—Onus of the plea that the lender (in the matter of lending money) was not only in a position to dominate over the borrower but actually did so is on the borrower. The principle underlying section 111 of the Evidence Act is not applicable between persons who hold the position of lender and borrower of money.

The word “dominate” is a strong word. Where there is a natural presumption of plaintiff occupying a position of a fiduciary relation ship, the principles enunciated in section 111 of the Evidence Act would be attracted. The relationship between a creditor and a borrower is not such a relationship which per se raises such a presumption. The borrower must establish that the lender is a person who, by virtue of proved facts and circumstances, is considered as a person who, in fact, is in a position, “to dominate” the will of the defendant. *Mohan Bashi Saha vs United Industrial Bank Ltd. 20 DLR 9.*

—Mortgage bond cannot be challenged except on the basis that there was no consideration for it.

Unless defendant is able to prove that the contract, namely the mortgage bond, is hit by the provisions of section 16 of the Contract Act the Court will enforce the terms of the contract without any further investigation as to the basis thereof because it is not the case of the defendant that there was no consideration for the bond. His contention is that the debt consists of a considerable lower figure. *Mohan Bashi Saha vs United Industrial Bank Ltd. 20 DLR 9.*

Section 16—When the defendant No.1 had a dominant position on account of close association with the Martial Law Authority and the bargain obtained by defendant No. 1 in the compromise petition was

clearly unconscionable because the plaintiff had to give up his rightful claim in the contractual land, the defendant No. 1 has to prove that the compromise was not attained by undue influence which he has miserably failed to discharge. *Abul Hossain vs Farooq Sobhan & ors* 4 BLC (AD) 241

17. **"Fraud" defined**—"Fraud" means and includes any of the following acts committed, by a party to a contract, or with his connivance, or by his agent¹, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

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

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

Illustrations

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound,

(c) B says to A—"If you do not deny it, I shall assume that the horse is sound". A says nothing. Here, A's silence is equivalent to speech.

1. Compare section 238, *infra*.

2. See section 143, *infra*.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

Case-Law

—Contract entered into through misrepresentatives by defendant's officer in collusion with the plaintiff not enforceable in law. The defendant in the circumstances of the case is entitled to repudiate the contract on the ground of its being affected by fraud. (The plaintiff is however, entitled to take back his goods supplied to the defendant for the price of which he instituted the suit). *Karnaphuli Paper Mills Ltd vs Amanullah*, 23 DLR 150.

—Sale of land—Seller hiding facts about title to property—Buyer may repudiate agreement. *Ebrahim Salah Mayet vs Ghulam Hussain*. PLD 1960 Kar 297.

—Fraud—precise and specific details of fraud must be stated. 1937 PC 146; 41 CWN 746; 39 (Bom) LR 963.

—inadequate consideration may give rise to the inference of fraud or undue influence. 96 IC 468; 1926 (Pat) 539.

—If a contract is obtained by fraud or cheating it is voidable at the instance of the party defrauded or cheated, but if the performance of the contract is obtained by fraud or cheating the contract cannot be avoided. 46 B 489; 1922 Bom 303; 26 CWN 479.

—It must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true, that they were made for the purpose of being acted upon. 45A 624; 1924 A 17; 21 ALJ 571.

—making promise without any intention of keeping it is fraud. 51 CLJ 283; 1920 Cal 547.

—but if he made same communication which, without the addition of certain other facts, would be necessarily misleading and he did so intentionally, that would be "fraud". Where there is an express representation, or anything calculated to deceive or to cast suspicion upon a particular point, equal means of knowledge is immaterial. 1931 Mad 603; 1930 MWN 973; 133 IC 372; IR 1931(Mad) 724.

—mere silence is not fraud. *60 C 262; 1933 (Cal) 366 (cr)* but silence is fraud when there is duty to speak. *32 C 357; CLJ 23.*

—if one party commits error and the other party knowing it taken advantage of the error he acts fraudulently. *61 C 548; 38 CWN 908; 1934 Cal 778.*

For other cases of fraud, see under the heading "Fraud".

—**Fraud, effect of**—Fraud renders a transaction voidable and not void. Where a contract was ab initio valid but subsequently the word "s" was added fraudulently in the text. It was held that the addition would not turn the same to be void or voidable. Such contract would remain enforceable in terms of its original conduction. *PLD 1977 Lahore 1377; PLD 1985 Karachi 215.*

—**False representation of facts**—clause (1). To constitute fraud there must be an intention to deceive or to induce a person by misrepresentation or active concealment of an existing fact, to do or omit to do anything which he would not have done but for that inducement. It is, therefore, necessary to prove that the act of omission was because of the inducement of account of the misrepresentation or concealment of fact and of not independent motives. There would be no cheating if the inducement had been subjected to scrutiny before the act or omission took place. *PLD 1977 Lahore 1377.*

—**Active concealment**—clause (2)—Where a party to a contract actively conceals certain facts from the other party and the other party in ignorance of those facts enters into the contract, it is a voidable contract. *PLD 1977 Lahore 1377.*

—**Proof of fraud**—Fraud involves firstly a finding in regard to facts. The burden of proof in such a case is on the party who alleges fraud. The Court have to be careful in coming to a finding of fraud and should normally satisfy themselves that the finding is based on reliable evidence. The Court or authority competent to re-open a case should therefore satisfy itself from the material before it that the necessary situation as discussed above prima facie prevails, before it decides to proceed with a complaint for fraud. *PLD 1977 Lahore 1377.*

Section 17—The signature of the defendant on the alleged deed of agreement is found by the hand-writing expert as forged and on comparison of the signature on the alleged agreement with the admitted signature of the defendant the High Court Division rightly found that

those were not in the hand of the defendant for which it calls for no interference. *Syed Munsif Ali vs Shashanka Mohan Chowdhury & another* 3 BLC (AD) 85.

18. "Misrepresentation" defined—"Misrepresentation" means and includes—

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

Case-Law

—Misrepresentation—the principal difference between fraud and misrepresentation is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, although in both the cases it is a mis-statement of fact misleading the opposite party. *53A 374; 129 IC 545; 1931 (All) 154; 1931 ALJ 153.*

—misrepresentation must where the truth can be discovered with ordinary diligence. *71 IC 161; 38 IC 500; 36 IC 34.*

—misrepresentation must be intentional. *19 ALJ 147; 61 IC 74; 19 ALJ 530; 63 IC 425.*

—Where a clause of re-entry contained in a Kabulyat was represented by Zamindar's agent as a mere penalty clause, the contract was vitiated by misrepresentation. *17 C 291; 17 IA 223 PC.*

—silence in some cases may amount to misrepresentation. *42 C 28; 24 IC 193.*

—mistake by innocent misrepresentation justifies repudiation of contract. *1932 (Bom) 151.*

19. Voidability of agreements without free consent—

When consent to an agreement is caused by coercion,^{1**} fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

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

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

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

1. The words "under influence" were repealed by the Indian Contract Act Amendment Act, 1899 (VI of 1899), section 3.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Case-Law

Read with section 13(2) Sale of Goods Act—Misrepresentation regarding the model of the car by the seller—If contract can be rescinded after the car had been seen by the buyer. In case of fraud and misrepresentation etc vitiating the contract unless there is a waiver on the part of the party affected, the right of recession would not be lost—*Eastern Automobile Ltd vs Tasadique Hussain, PLD 1959 (Lah) 681. DLR 1960 (2) (WP) 523.*

—Voidability of contract without free consent.

a stranger cannot impugn a registered document on the ground of misrepresentation, fraud or coercion. *36 B 47, 40 CLJ 67.*

—where the misrepresentation or fraud is of such a nature that it could not have affected the consent of the party—the contract is voidable and cannot be set aside. *1921 MWN 340; 13 LW 525; 62 IC 764.*

—in the case of an active misrepresentation knowing the thing to be false as distinct from mere silence or concealment, it is not incumbent upon the party defrauded to establish that he had no means of discovering the truth, with ordinary diligence. The words “fraudulent within the meaning of section 17” used in exception to section 19 apply exclusively to “silence” and not to misrepresentation”. Where a mortgage suit had abated and the mortgagee took a fresh mortgage without disclosing that the suit had abated, the non-disclosure did not amount to fraud. *53 AA 374; 1931 (All) 154.*

—a misrepresentation should in fact materially induce the contract in order to give a right of avoidance. *31 CLJ 151.*

—where certain sum was extorted from the plaintiff by placing him under a wrongful arrest, taking him to the and detaining him there, that sum could be recovered. *50 C 992; 38 CLJ 104; 28 CWN 110.*

[See also the cases under section 13 at page 23 supra]

—**Who may avoid contract**—Agreement entered into by fraud is voidable contract at the option of a party whose consent was obtained by fraud. Party so defrauded can insist on performance of contract. *PLD 1985 Karachi 481.*

—**Laches**—Person seeking to avoid contract on basis of fraudulent representation has to be prompt in seeking redress. If such person allows a long time to elapse, he disentitles himself from obtaining any relief. *PLD 1985 Karachi 481.*

Rescission of Contract—Where defendant made plaintiff (his wife) to believe that she was executing a power of attorney but in fact he made her sign a sale-deed by practising fraud on her. It was held that section 19 was not applicable to the case and appellant was not bound to seek cancellation of alleged sale-deed prior to seeking protection of her possession in form of injunction against the defendant. *PLD 1981 (SC) 165.*

Section 19—Plea in defence—A person whose consent has been brought about by fraud is entitled to resist the claim under the contract by pleading fraud even though he may not have himself sued to set aside the transaction, and is not precluded from urging the plea in defence by the lapse of time. *PLD 1981 (SC) 165.*

¹[19A. **Power to set aside contract induced by undue influence**—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

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

Illustrations

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

¹ Section 19A was inserted by the Indian Contract Act Amendment Act 1899 (VI of 1899) section 3.

Ss. 19A-20] Of Contracts, Voidable Contracts and Void Agreements 41

(b) A, a money-lender, advances ¹[Taka] 100.00 to B an agriculturist, and, by undue influence, induces B to execute a bond for ¹[Taka] 200.00 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the ¹[Taka] 100.00 with such interest as may seem just.]

Case-Law

Power to set aside contract induced by undue influence—where the executant of a document had no opportunity to have it cancelled on the ground of undue influence, his representative can raise the defence of undue influence. *59 CLJ 387; 1934 (Cal) 762.*

—where the mortgagor has not avoided the mortgage on the ground of undue influence, a transferee from him of a portion of the mortgaged property cannot avoid the contract. *40 CL 67; 1925 (Cal) 94.*

—under second clause the Court can impose terms and suggestions to the parties without their consent. *1925 (All) 783.*

20. Agreement void where both parties are under mistake as to matter of fact—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

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

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to ²[Chittagong]. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule, (with effect from 26-3-1971).

2. The word "Chittagong" was substituted for the word "Karachi" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Scheduled, (with effect from 26-3-1971).

(c) A, being entitled to an estate for the life to B, agrees to sell it to C. B was dead at the time of the agreement, but both the parties were ignorant of the fact. The agreement is void.

Case-Law

—Abandonment of right under misrepresentation—will not affect the original contract.

If there was no misrepresentation and both parties had been labouring under a misapprehension that the contract had been cancelled, the abandonment due to a mutual mistake, would not affect the plaintiff's rights. Under section 20 an agreement based on a mutual mistake is void and the same principle will apply to an abandonment of a right under a contract. *S Sibtain Fazli vs Star Film Distributor*. 16 DLR (SC) 198.

Contract—mistake of facts.

When a contract was entered into between the parties on a mistake of fact, that contract cannot be binding on the parties in view of provisions of section 20 of the Contract Act. 11 DLR 125.

Contract void under section 20—If compensation payable under section 56.

Section 56, Contract Act, requiring compensation to be paid to the promisee for the failure of performance of a contract, on account of its impossibility or unlawful nature, which impossibility or unlawful nature was known or might, with reasonable diligence have been known to the promisor applied only where an agreement otherwise valid was rendered void by such impossibility of performance. *Sheikh Brothers Ltd vs Arnold Julius Ochsner*. PLD 1957 PC 95.

Effect of mistake of fact—facts constituting mutual mistake must be pleaded. 1940 (Pat) 516.

—In case of mutual mistake of fact the agreement is void 50 C 615; 1923 (Cal) 641; 74 IC 996, 1937 (Pat) 65 SB 1935 (Mad) 287.

—money paid under a mistake of fact on the part of both the parties is recoverable as money paid and received. 1934 PC 171; 1934 ALJ 609 PC 1922 (Cal) 4; 21 CWN 404; 40 B 639; 110 IC 299; 1928 PC 261; 26 ALJ 753; 1928 (All) 500; 42 M 661 Ref., 22 ALJ 558 not fol.

—where a contract of sale is vitiated by mutual mistake the purchaser can claim refund of the purchase money under section 65 of the Contract Act, but he is not entitled to interest or damages. *1930 ALJ 327; 1930 (All) 252.*

—Contract Act deals with the case of a common mistake at the time of transaction “as to a matter of fact essential to the agreement”. *26 CWN 573.*

—in order to bring a case within section 20 the party taking up the plea must prove that there was a common mistake of fact with respect to a fact essential to the agreement in question. Where the inaccuracy as to the quantity of lands in lease was immaterial, in a suit to recover rent, the plea of mutual mistake was not sustainable. *33 CWN 626; 1926 (Cal) 547; 12 SLR 41; 33 C 713; 10 CWN 573*, and the mistake must be between the plaintiff and the defendant *3 (Rang) 477, 50 C 615; 74 IC 996; 29 CLJ 526.*

—a decree-holder of a consent decree cannot re-open a proceeding on the ground of mistake which must have been due to his own negligence or to the negligence of his own agents. *33 CWN 739; 1926 (Cal) 670.*

—unilateral (one-sided) mistake not amounting to fraud, legal or equitable, is not a ground for rectification. *1931 Mad 785.*

—When one party records an agreement erroneously the other party, if he knows at the time that there was an error, acts, fraudulently, and cannot be allowed to take advantage of it. *38 CWN 908; 61 C 548; 1934 Cal 778.*

—the party alleging mistake must establish that fact beyond doubt above case.

—When the vendor and the vendee did not know that the land had already become the subject of proceedings under the Calcutta Improvement Act and as such, might any day come under the Act, there is a mistake of fact essential to the agreement and the agreement is void. *50 C 615; 27 CWN 639.*

—Where the terms of the contract are understood by parties in two different senses, contract is void and unenforceable under this section. *95 IC 614.*

21. Effect of mistakes as to law—A contract is not voidable because it was caused by a mistake as to any law in force in ¹[Bangladesh], but a mistake as to a law not in force in ¹[Bangladesh] has the same effect as a mistake of fact.

²[* * * * *]

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the ¹[Bangladesh] Law of Limitation: the contract is not voidable.

³[* * * * *]

Case-Law

—Miscalculation of a legal right—Not a mistake contemplated under section 21. *Lal Din vs Sardar Bibi*; PLD 1959 (Lah) 616; PLR 1959-2 WP 1756.

Payments made under mistake of law—When section 21 deals only with mistakes of law which “cause a contract” or which gives birth to a contract, it has nothing to do with any other kind of mistake. If, therefore, a payment made under a mistake of law is not the origin of a contract such payment would be refundable under section 72. *Jagdish Prosad Pannal vs Produce Exchange Corporation*. AIR (33) 1946 Cal 245.

Effect of mistake of law—Mistake of law does not render the contract voidable. 1933 (Lah) 836; 4 ALJ 575; 11 B 174; 23 (Bom) LR 939.

1. The word “Bangladesh” was substituted for the word “Pakistan” by Act VIII of 1973, 2nd Sch. (with effect from 26-3-71).

2. Second paragraph of section 21 was omitted, *ibid*.

3. Second illustration to section 21 was repealed by the Repealing and Amending Act, 1917 (XXIV of 1917), section 3 and Scheduled II.

—mistake of law and due diligence saves limitation. *23 CWN 169 PC; 13 C 266; 13 M 269; 10 A 525; 19 A 348 FB*, but a bare mistake of law is not sufficient. *12 A 461, FB*.

—acceptance of rent from a trespasser, though under mistake of law, disentitles the owner from claiming mense profits. *29 CWN 533; 40 CLJ 468; 46 A 728; 82 IC 946; 26 (Bom) LR 1134 PC*.

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

Case-Law

—**Effect of mistake of one party**—When a party signs a contract written in language not known to him, he cannot plead ignorance of terms. *106 IC 565*.

—if one party commits error and the other party knowing it takes advantage of the error he acts fraudulently. *61 C 548; 38 CWN 908; 1934 Cal 778*.

23. What considerations and objects are lawful and what not—The consideration or object of an agreement is lawful, unless—it is forbidden by law¹ or

is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

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

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

Illustrations

(a) A agrees to sell his house to B for 10,000.00 ¹Taka. Here B's promise to pay the sum of 10,000.00 ¹Taka is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000.00 ¹Taka. These are lawful considerations.

(b) A promise to pay B 1,000.00 ¹Taka at the end of six months; if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promise to maintain B's child and B promises to pay 1,000.00 ¹taka yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000.00 ¹Taka to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

S. 23] Of Contracts, Voidable Contracts and Void Agreements

47

B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000.00 ¹Taka to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the ²[Penal Code (XLV of 1860)].

Case-Law

No suit to enforce an illegal promise—a suit for recovery of property transferred in consideration for an illegal promise would not lie. So also a suit for declaration that a sale-deed executed in consideration for an illegal promise will not lie. *Md Azam Khan vs Akhtarunnissa* 9 DLR (WP) 19.

—Divorce granted and other arrangements made with the party including withdrawal of Criminal Law—contract invalid, but divorce valid.

—When the parties to a contract are themselves in pari delicto neither of them is entitled to ask any relief from a Court of law. In a case where the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate. *Mahammad Azam Khan vs Akhtar Un Nisa Begum* 9 DLR (WP) 19.

—Section 65 not applicable where a contract is void ab initio under section 23 or section 25 of the Act. *PK Basak & Co vs Gossem & Co.* 9 DLR 1.

—Application of the principle underlying the section—"Public policy" and "morality" are by their nature variable things—principle underlying expounded.

Public policy and morality, referred to in section 23 of the Contract Act, are by their very nature variable things and always and unsafe and treacherous ground for legal decision. The determination of what is or is not contrary to public policy or morality must necessarily depend upon the merits in each case and upon the stage of development of public

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

2. The words "Penal Code" were substituted for the words "Pakistan Penal Code", *ibid*.

opinion and morality of the community concerned as a whole. *Hajee Seru Meah vs Jahanara* 8 DLR 616.

Stifling prosecution.—It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compromising an offence which is not compoundable in law and an agreement to that effect is wholly void. *Lal Mia vs Abdul Gani & Ors.* 5 DLR 338.

—In order to determine whether the consideration of a document is prohibited by section 23 of the Contract Act it is to be seen whether the facts are that this contract came into existence when a criminal prosecution was hanging on the head of the executant or the contract was entered into for the purpose of taking away the prosecution for a non-compoundable offence from the hands of the Crown Prosecution in their own hands. *Radha Ballav Basak vs Krishna Sunadri Basak* 5 DLR 114.

—**What considerations are lawful and what not—withdrawal of criminal proceedings**—If from the evidence and circumstances it can be inferred that the consideration is referable to the withdrawal of a criminal proceeding the agreement must be held to be void under section 23 of the Contract Act. *Lal Mia vs Abdul Gani* 5 DLR 338.

—If, however, there is a *bona fide* civil dispute which the parties have decided to settle and there happened to be subsidiary proceedings in a Criminal Court, it would be contrary to public policy and to justice and equity to allow any person to escape his proper legal liabilities on the mere technical ground that there was some understanding that those criminal proceedings too would not be pressed to a conclusion. *Lal Mia vs Abdul Gani* 5 DLR 338.

—**Contract lawful at the origin.**—If the contract of lease of a factory was lawful at the time when the lease was executed the fact that the operation of the factory was found as falling within mischief of a statute would not make the lease in its inception opposed to public policy. *Haji Abdul Karim vs Sh Ali Muhammad.* 11 DLR (SC) 313.

—**Objection can be raised against the decree passed in terms of the void compromise**—If a decree passed in terms of compromise is void, it can also be similarly attacked on that ground in a subsequent suit. *Hossain Ali Khan vs Firoza Begum,* 21 DLR 9.

—**Contract is hit by section 23 of the Contract Act when consideration of object of agreement is unlawful**—The plaintiff had initiated three criminal proceedings of which one was under section 460

PPC against his brother the defendant, and when these proceedings were pending before the Magistrate, the said Magistrate suggested a compromise between the brothers as a result of which the defendant after 4 days executed a bainapatra in favour of the plaintiff to sell to him the suit properties and on that very date proceedings under section 406 PPC was dismissed for non-prosecution. When a suit for specific performance of contract was filed by the plaintiff it was. Held—The contract is hit by section 23. *Purnendu Kumar Das vs Hiren Kumar Das*, 21 DLR 918.

—Contract void by statute when made—Cannot become valid by subsequent repeal of statute. *Hawa vs Mohd Yousuf*. 21 DLR Karachi 325.

—If the contract is void the arbitration clause referred to in the contract is also void.

If the principal contract is one which is ab initio void or comes within the mischief of section 23 of the Contract Act, then the arbitration clauses providing for settlement of dispute between the parties by arbitration will be unenforceable and the award thereon becomes a nullity. *Manzoor Hussain & others vs Wali Mohammad*, 17 DLR (SC) 369.

—The provisions of sections 21(2)(3) of the Foreign Exchange Regulations Act do not render a contract made in violation of these sections void and such a contract cannot be held to be contrary to section 23 of the Contract Act. *Manzoor Hussain vs Wali Mohammad*, 17 DLR (SC) 369.

—Contract in the present case does not violate any of the provisions of the Foreign Regulation Act. *Manzoor Hussain vs Wali Mohammad*, 17 DLR (SC) 369.

—Provisions of the section to be construed strictly. *Manzoor Hussain vs Wali Mohammad* 17 DLR (SC) 369.

—Person complaining of illegality himself guilty of committing illegality. Where a person invoking the aid of a Court to invalidate a contract on the ground of illegality is himself implicated in the illegality the Court will not, as a rule, assist him. *Manzoor Hossain vs Wali Mohammad*, 17 DLR (SC) 369.

—Statutory prohibition regarding sale of land without compliance with requirements of law and without sanction will not make a contract for sale of land illegal when compliance with the requirement of law contemplated. *Haji Abdullah Khan vs Nisar Mohammad Khan* 17 DLR (SC) 481.

—Document executed by the accused while criminal proceedings was pending against him in Court.

The execution of the document at a time when the suit was pending may amount to a strong piece of circumstantial evidence tending to show, that the criminal proceeding was compromised as a result thereof, but it is no more than a piece of evidence which may be rebutted. The Court would look to the other evidence and attending circumstances in order to arrive at a finding whether the execution of the document was the consideration for a compromise of the said criminal proceeding. If the document is merely executed during the pendency of such a criminal proceeding and if it is not the basis of compounding the criminal proceeding, it would be not hit by section 23 of the said Act. *Md Abdul Kasem vs Mofizuddin Shah, 17 DLR 435.*

—Question arose whether the suit land in possession of the defendant was held by him as a mere bargadar under the plaintiff—that being the plaintiff's case or as a tenant with tenancy rights under the plaintiff—as alleged by the defendant.

Even if this is held that the document in question was not a valid document being hit by the provisions of section 23, the findings arrived at by the Courts below to the effect that plaintiff has succeeded in proving barga settlement taken by defendant would be enough, apart from the impugned document, to decide the appeal in favour of the plaintiff. *Md Abdul Kasem vs Mofizuddin Shah 17 DLR 435.*

—Contract for lease executed before section 75A of the EB State Acquisition Tenancy Act was enacted. Sections 23 and 56 of the Contract Act render the contract void and unenforceable. *Al-Haj Kutubuddin Ahmed vs Abu Jafar Hridwanuddin, 14 DLR 128.*

—Responsibility for the pledge to take due care of the goods entrusted to his care does not disappear even though in terms of a special agreement the pledge is absolved from every loss by theft, etc, unless the pledge discharges the onus of showing that theft took place in spite of due care taken by it for the due safety of the goods lost by theft. *Central Bank of India Ltd vs Messers Jan Muhammad Haji Ismail 17 DLR 582.*

—Forfeiture clause—Contract between District Board and building contractor—Clause that if contractor tries to bribe the Engineer of the Board the price of work done will be forfeited—Allegation of bribery without loss to Board—Forfeiture clause void. *District Board Lyallpur vs Abdul Razzak, PLD 1960 (WP) (Lah) 166.*

—Jurisdiction—Contract ousting jurisdiction of one of the two Courts—
Not against public policy. *Musa Ji Lukman vs Durga Das*, AIR 1946 (Lah) 57.

—Lease of factory—Municipal Corporation holding that license
should be obtained for the factory—No proof that license was required
prior to the lease—Contract not void. *Abdul Karim vs Ali Muhammad*,
PLD 1959 Supreme Court 167.

Unlawful consideration and objects—Unlawful consideration.—
money due under an illegal or immoral contract cannot be recovered by a
charge in the form of action based on a subsequent agreement connected
with it. 1935 (Cal) 748.

—pecuniary assistance in litigation is good consideration. 1932 PC
278; 138 IC 900 PC.

—where the brother of a deceased person took over his liability and the
creditor sued to enforce the liability, held that the undertaking of the brother
was supported by consideration since there was discharge of the state of the
deceased from liability. 1932 (Lah) 135; IR 1932 (Lah) 193; 136 IC 17.

—where the son joined in the striking of the balance, the
consideration for the liability undertaken by the son was the creditor's
forbearance to sue. 32 PLR 632; 134 IC 1105.

—the execution of a sale-deed by Mohamedan mother-in-law in
satisfaction of the contemplated dower of her daughter-in-law is for a
valid and legal consideration. 1930 (All) 434; IR 1930 (All) 487; 124 IC
183; 32 (All) 410 (Rel) on.

—a promissory note executed by a minor though void is not unlawful
consideration for a bond executed by his son after his death. 1923 A 590;
21 ALJ 446; 73 IC 458.

—an executed and completed contract cannot be set aside merely
because the consideration is illegal, it must also be proved that the parties
are not in *pari delicto*. 1933 Oudh 24.

—Effect of part of the consideration being unlawful.

—if part of the single consideration is unlawful, the whole agreement
is void. 49 B 619; 89 IC 199; 27 (Bom) LR 682.

—if part of the consideration is illegal, it taints the whole. 20 CWN
760 at p 767.

—section 14 does not apply to alternative promises, the fact that one clause is void does not necessarily cause the other clauses to fail. *1931 (Bom) 264; 133 IC 254; 33 (Bom) LR 260 IR 1931 (Bom) 366.*

—in cases of contract only partly beyond the competence of the promisor there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. *1930 (All) 1; 122 IC 872; 1939 ALJ 45; IR 1930 (All) 328; 52 A 338 FB.*

—**Shifting prosecution**—if it be an implied term of reference to arbitration of civil disputes or an ekranama that the criminal case already started would not be proceeded with, then the consideration of the agreement is unlawful and the award is invalid quite irrespective of the fact whether any prosecution in law had been started or not. *57 C 1302; 34 CWN 489; 51 CLJ 400; 59 MLJ 82; 1930 PC 100; 32 (Bom) LR 639.*

—to refrain from criminal proceedings of a compoundable offence is a valid consideration of a contract. *3 CWN 5.*

—an agreement to stifle a prosecution is distinguishable from the contract compounding a compoundable offence. *29 CWN 855; 42 CLJ 90; 53 C 51; agreement to drop prosecution for breach of trust in consideration of a mortgage for a portion of the embezzled money and cash, is opposed to public policy, same case. 57 B 678; 1933 (Bom) 413.*

—to prove that the object of an agreement was to stifle a criminal prosecution it must be shown that there was an agreement between the parties express or implies, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of private individuals. *29 CWN 1029; 46 CWN 1; 44 (Bom) LR 1.*

—where there was good consideration for executing the bond sued upon, the mere fact that plaintiff on recovering the bond gave up a criminal prosecution against the defendant will not invalidate the bond. *1927 (Lah) 530; 718 rel on 94 IC 465.*

—where contract is made to discharge civil liability by referring dispute to arbitration and no reference to criminal prosecution is made and the criminal prosecution is subsequently withdrawn, the contract is not void. *1929 (Lah) 564; 1926 (Cal) 519.*

—where the withdrawal of the criminal case was not any part of the consideration of the bond, the contract was not illegal. *35 CWN 28; 1931 (Cal) 416; 131 IC 574; 44 CWN 304.*

—where there was pre-existing civil liability on adjustment of accounts and the withdrawal of the non-compoundable criminal case was merely the motive but not the consideration, the transaction was not hit at by sections 23-35 CWN 26; 1931 (Cal) 421; 49 A 540; 1927 (Lah) 465.

—a contract is not void if the motive was to drop the criminal prosecution. 1938 (Cal) 840; 43 CWN 147.

—the defendant who was interested in the accused executed a bond undertaking his liability and the complainant thereupon got the complaint dismissed, the bond was not enforceable. 53 A 130; 1931 (All) 128.

—if the person to whom the sum is due takes a security for the amount from the debtor, even though the debt arises out of a criminal offence, the agreement is enforceable in law. 1930 (All) 826; 129 IC 141; 1930 ALJ 1297; IR 1931 (All) 169; 1945 (Cal) 218.

—**Forbearance to sue is good consideration**—Forbearance to sue and forbearance to take definite steps to enforce legal rights have always been held to be adequate consideration to support an agreement. 47 A 637; 1925 (All) 503 (FB); 1931 (Lah) 756.

Settlement of dispute may be good consideration—In a partition suit between co-sharers, the dispute may be settled on terms though apparently without consideration. 39 CWN 716.

Stranger cannot question adequacy of price or passing of consideration—A stranger cannot question the assignment on the ground of inadequacy of price, or as being, unfair and inconsiderable, that being a matter between the assignor and the assignee. 18 CWN 450; 35 CWN 191; 27 CWN 524. Nor on the ground of non-payment of consideration. 27 A 271; 9 CWN 477; PC 47 CLJ 365; 107 IC 744; 1928 (Cal) 299.

—a stranger can challenge the transfer as benami. 1942 (Cal) 514; 46 CWN 798.

—sale deed cannot be challenged by a stranger, where apart from untrue recital in it as to consideration, there no other flaw. 9 CWN 477; 27 A 271; 32 IA 113 PC.

—the principle enumerated in 17 All 271 case, that a stranger to a deed cannot dispute the payment or non-payment of consideration, its adequacy or inadequacy, has no bearing in a case where a deed is challenged as a real deed or to affect transfer of title. 37 CLJ 122; 1923 (Cal) 521, this case has been distinguished and commented on in 47 CLJ 365; 1928 (Cal) 299

which has followed the 27 (*All*) 271 case and held that any question that may arise between a vendor and a vendee with reference to the transaction is outside the competence of a trespasser to challenge the validity of the sale on any such ground. But as regards the passing of consideration of *hiba-bil-ewaj*, see 17 *CLJ* 173 and 25 *CWN* 833; 49 *C* 161.

—a stranger to a contract (here a mortgage) cannot avoid it on the ground of undue influence. 49 *CLJ* 67.

—a decree may be purchased by less amount, still whole dues may be realised. 18 *CWN* 113 at p 115.

Consideration of mortgage debt.—mortgage is to prove denial of consideration but when stranger objects, mortgagee is to prove passing of consideration. 5 *CLJ* 653; 6 *CLJ* 659; 6 *C* 268; 17 *A* 428; 5 *CWN* 403; 5 *CLJ* 653.

—where part of the consideration is paid, mortgage bond is valid to that extent. 10 *CWN* 932.

—a consideration is legal even if it does not benefit the promisor; a mortgage is binding on all the mortgagors if some may not be benefit thereby. 22 *CWN* 138.

—Contract of separate maintenance of Hindu wife.

—where a Hindu husband, who was on bad terms with his wife but not such as to entitle her to claim separate maintenance or residence, promised to pay her separate residence of maintenance, it was not enforceable for want of consideration. 4 *CWN* 488.

Admission before ration—admission of receipt of consideration want of passing—Registered sale deed. 27 *CWN* 8; 20 *ALJ* 961; 30 *MLT* 232; 24 (*Bom*) *LR* 975; *PC* 2 (*Lah*) 249; 64 *IC* 901.

—Presumption as to passing of consideration.

—passing of consideration may be presumed from the recital in the document. 1923 *C* 139; 38 *CLJ* 114; 74 *IC* 178; 20 *CWN* 254.

—burden lies on the executant. 1923 (*Pat*) 20; 70 *IC* 804; 5 (*Lah*) *LJ* 198; 71 *IC* 783.

Consideration may be payable to third person.—consideration may be payable to third person and the transferor may sue for the sum if unpaid. 36 *M* 348; 18 *CLJ* 603; 17 *CWN* 1143; 14 *CWN* 805; 32 *A* 410 *PC* so also the third person can sue. 27 *CLJ* 483.

—it is sufficient if the promisee does some act from which a third person is benefited and which he would not have done but for the promise. 28 CLJ 152.

—acknowledgment of liability of other's debt may be legal consideration: urgent need of money does not itself place the lender in a position to dominate the borrower's will. 23 CWN 52n 34 C 150 fol.

—creditor may sue the transferee of a debtor. 22 CWN 279, 17 CWN 1143, fol.

Contract to pay barred debt is valid.—Contract to pay barred debt is valid. 18 CWN 329; 23 M 94; 20 MLJ 656 Diss, 6 (Pat) LJ 121; 2 (Pat) LT 308; 60 IC 514, 41 MLJ 567.

Immoral object—an agreement to pay for future illicit connection is against public policy. 28 M 413; 17 A 266; 1925 (All) 437, so also an agreement to pay for past cohabitation. 1924 (Bom) 135; 86 IC 240; 3 A 787; 25 (Bom) LR 252; 44 B 542. 1929 MWN 829; 27 A 260; 1933 (Bom) 209 contra it is a good consideration. 1931 MWN 224; 1930 (Mad) 956; 1943 (Mad) 253.

—**Acts prohibited by statute or when it defeats provisions of law**—a contract in contravention of a statutory provision is void. 1941 Nag 273.

—transfer of actionable claim in contravention of section 136 TP Act is void. 1936 Oudh 275.

—where the consideration defeats the provisions of any law such as the provision of section 6(a) of the TP Act, the transfer is invalid 1931 (All) 589; 132 IC 321.

—but alienation made in favour of a member of the founder's family standing in the line of succession is valid. 6 B 298, 23 C 645.

—a contract to alter the statutory period of limitation or the starting point of limitation is void. 1934 (All) 661.

—a charge created by a Mohammed on the uncertain and undefined share of property of one of his heirs is illegal. 1933 (All) 934.

—**Champerty**—in India agreements to finance litigation in consideration of having a share of the property in case of success are not *per se* opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits or gambling in litigation, or if their enforcement against

a party may be contrary to the principle of equity and good conscience as unconscionable and extortionate bargains. 35 CWN 633; 54 CLJ 183; 33 (Bom) LR 960; 131 IC 401; 1931 ALJ 544; 1931 PC 100; 61 MLJ 94 PC; 52 CLJ 492; 1931 (Cal) 417; 29 CWN 57 PC; 21 CWN 873; but champertous agreement, if extortionate and unconscionable, is contrary to public policy 1934 (All) 1023 (Bang) 418.

—considerations in deciding whether a champertous agreement is void or not 1940 PC 19; 42 (Bom) LR 307; 44 CWN 345.

—where a transaction is alleged to be champertous the general rule is to inquire whether it is merely the acquisition of an interest in litigation bonafide entered into or it is unfair and illegitimately got up merely to create unwholesome litigation with an improper motive 52 CLJ 492; 1931 (Cal) 144.

—an agreement by which a party agrees to pay Rs 60,000.00 in consideration of the other party supplying funds and otherwise assisting him in certain litigation is binding on the parties IR 1932 PC 278; 138 IC 900 PC.

—where a client agreed to pay his pleader Rs 500 in cash and further undertook to convey to him certain immovable properties for charitable purposes in the event of his carrying on the litigation to full success, such an agreement was contrary to public policy and unlawful under section 23. 49 B 619; 27 (Bom) LR 682.

Agreement opposed to public policy

—the law has already settled some definite rules and the Court should not invent some new heads of public policy, though with the development of public opinion and morality the doctrine must be applied with necessary variation. 61 C 80; 38 CWN 214; 58 CLJ 333; 1934 (Cal) 328.

—payment by the debtor of a commission to the agent of the creditor who facilitates heavy loan is not immoral. 1931 (Pat) 22; 12 (Pat) LT 614.

—a bargain to have a caveat discharged is not contrary to public policy. But such a bargain cannot be enforced in the sense that the Court in a probate suit will see that it is specifically preferred by not allowing the caveator in spite of this previous promise to contest the question whether the will is that of the testator or not. 58 C 699; 1931 (Cal) 587.

—a person standing bail for an accused in criminal case and forfeiting the bail bond is not entitled to recover the amount paid on any express or implied contract. 57 C 1093; 1930 (Cal) 596; 24 CWN 368.

—an agreement between several persons not to bid against each other and to purchase the property in partnership is not opposed to public policy and the party advancing money can sue for the same, *32 PLR 879; 134 IC 101*.

—agreement by bidders to share the profits from knock-out is void. *1943 (Lah) 100*.

—private agreement to be bound by the statement of a third party is valid, but it is open to a party to resile from the agreement before reference makes statement. *1931 (All) 557*.

—the Govt Servants' Conduct Rules is not based on any statutory prohibition but it is a rule of conduct only. So the acquisition of property by a Govt. Servant in the name of another in direct contravention of department rules is not illegal and he can sue for declaration of title and for possession. *1931 (Bom) 269; 133 IC 241 40 B 216; 39 A 51 FB; 22 A 220*.

—when a Kanungo, who is liable to be dismissed under departmental rules if he purchases property in his own district, purchases it in the name of third person he cannot recover it. *27 A 73*.

—the work done by a pleader appointed as commissioner in a suit is no work done for the party but for the Court, so any bond executed by the party in favour of such commissioner is not enforceable. *27 CWN 430; 37 CLJ 406; 1923 (Cal) 436*.

—it is contrary to public policy to induce public officers for money or other valuable consideration, to use their position and influence to procure benefit. *25 CWN 297; 32 CLJ 168; 48 C 427*.

—money paid to secure a job cannot be recovered. *1951 MB 113*.

—agreement to perform puja to exercise influence, unauthorised by law, on the mind of the Court with the object of bringing about the success of the other party in certain suit then pending is opposed to public policy. *49 A 705; 1927 (All) 406; 100 IC 1040*.

—contract for sale for the consideration that the purchaser would hush up a departmental enquiry against the vendor is void. *18 CWN 689*.

—an agreement to pay money to a public servant to retire making way for the appointment of the promisor is void. *30 M 530*.

—husband's promise to pay a certain sum of money for the personal expenses of his wife is opposed to public policy. *1929 (Lah) 660; 119 LC 486; 30 Punj LR 498*.

—an agreement by father binding himself to place his daughter at the disposal of another to give her in marriage to any one he likes is invalid and cannot be recognised by the Court of law. *1930 (Lah) 561; 125 IC 369; 11 (Lah) 598.*

—an agreement between A and B that B's daughter will marry A's son and if she fails to do that B shall pay a certain sum, is opposed to public policy. *37 M 393.*

—an agreement to give a son in adoption in consideration of certain allowance to the natural parents is void. *12 BLR App 42.*

—agreement between a Hindu husband and wife that on breach of certain condition the marriage would be void, is illegal. *11 BLR 129, 28 C 751.*

—and agreement between Mohamedan husband and wife that wife would be at liberty to live with her parents, is void. *6 (Bom) LR 728; 7 (Bom) LR 602, 18 CWN 693.*

—but agreement that a Mohamedan wife would be at liberty to divorce herself from her husband under certain specified valid conditions, is legal. *8C 327, 18 CWN 693.*

—a landlord cannot recover the rent of lodgings knowingly let to a prostitute, who carries on her vocation there. *9 BLR App 37.*

—agreement for attendance and manual labour is illegal. *19 CWN 1118.*

—agreements which seek to waive an illegality are void on grounds of public policy. *11 CWN 848.*

—agreements having the object to create monopolies are opposed to public policy *28 M 520.*

—contract in contravention of Government rules is opposed to public policy. *1923 MWN 335; 32 MLT 330; 1923 (Mad) 620.*

—an agreement to have any dispute decided by any one of the several Courts having jurisdiction is not void. *1937 (Nag) 334. 1946 (Lah) 57 FB.*

—an agreement between the panda and paviwal of a temple to share the offerings made by pilgrims is against public policy, *45 A 79; 1923 A 56.*

—an agreement which entitled the father of a Hindu bridegroom to receive on the marriage of his son certain amount from the father of the

bride inasmuch against public policy as where the payment is to be made to the father or guardian of a girl. *22 B 658; 7 (Pat) LT 821; 99 IC 782; 1926 (Pat) 582; 32 M 185; 1 CLJ 264; 1949 (Pat) 260; 27 P 287.*

—agreement to pay money to a stranger hired to procure a wife for him is void. *17 M 9.*

—an agreement to be bound by the statement of a witness including a party to the suit is not against public policy. *1933 (All) 861 FB.*

—Agreement to compromise a criminal case whether valid—Compromise of an offence which is not compoundable is against public policy—Such agreement is void—Where validity of an agreement is impeached on the ground that it is opposed to public policy the party taking the plea must prove the same—A party after securing his discharge in pursuance of a salish agreed by both the parties cannot disown the salishnama. *Md Joynal and ors vs Md Rustam Ali Mia and ors (1984) BLD 86.*

Payment of Municipal tax—Whether the agreement that such tax for the premises would be payable by the tenant is void—By mutual agreement payment of Municipal tax is payable either by the tenant or the landlord—Whatsoever is agreed to between the parties can be a term of the tenancy as to prohibition exists in the matter of payment of such tax. *Meherunnessa Khatun vs Abdul Latif (1986) BLD (AD) 279.*

Agreement to compromise a criminal case—validity—compromise of an offence which is not compoundable is against public policy—such agreement is void—whether validity of an agreement is impeached on the ground that it is opposed to public policy the party taking the plea must prove the same—a party after securing his discharge in pursuance of a salish agreed by both the parties cannot disown the salishnama. *Md Joynal & others vs Md Rustam Ali Mia & others 1984 BLD (AD) 86; BCR 1984 AD 29.*

—**Unlawful object**—A contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon the proof of intent at the time the contract was made, to break the law, if the intent is mutual, the contract is not enforceable at all, and, if unilateral, it is unenforceable on the suit of the party who is proved to have it. *PLD 1985 (SC) 86.*

—**Limitation Act**— An agreement to enhance the period of limitation or a promise by the defendant not to raise the plea of limitation

is in effect a covenant to defeat the provisions of the Limitation Act. It will be contracting oneself out of the statute of limitation and such agreement will be void. There is, however, a marked distinction between a condition which shortens or limits the time within which a suit may be brought. There is nothing in the above provisions to justify the inference that a stipulation allowing curtailment of period of limitation in an agreement is void. *PLD 1982 Karachi 627 (DB)*.

—Subsequent agreement between parties that the original arrangement would continue and that the purchaser of the tenancy or his heir should pay back the other party the share of the purchase money if he committed a breach of the agreement is not void. *PLD 1978 Lahore 421*.

—**Compounding of non-compoundable offence**—An agreement to compound a non-compoundable offence is forbidden by law and when such an agreement constitutes the consideration for or is the object of an agreement the latter will fail to develop into a contract. Such an agreement is illegal as opposed to public policy. *PLD 1987 Lahore 398*.

—**Executed contract**—When a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the '*particeps criminis*' to relieve him from the legal effects of the transaction. Therefore a plaintiff cannot recover under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. *PLD 1986 (SC) 86*.

—**Contract capable of performance legally and illegally**—If a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. *PLD 1985 (SC) 86*.

—When a criminal prosecution has been withdrawn on the accused undertaking to execute a certain bond with certain terms, the bond executed will be unlawful and the person in whose favour the bond has been executed will derive no benefit from it. *Probodh Chandra Barman, Managing Director, Tripura Modern Bank, Chittagong vs Messrs Abdul Rahman Abdul Goni. 12 DLR 459*.

—**A stifling prosecution**—Composition even of non-compoundable offences not unlawful when the compromise was an acknowledgment of existing civil liability. *Akbar Ali Khan vs Elahi Baksh Bepari. 12 DLR 854*.

Section 23—The alleged agreement between the parties is not a contract as all contracts are agreements, but all agreements are not contracts and such agreement cannot be enforced as it is an illegal agreement and its enforcement would tantamount to a sub-lease defeating the clause 10 of the lease deed. *Abdul Ghani Sheikh vs Jagadish Chandra Mridha and others* 2 BLC 141.

Section 23—The phrase "equity and good conscience" is not in Order VII rule 11 of the Code and as such the learned Single Judge wrongly imported this concept to that provision of the Code which he was not permitted to do and there is no reasonings as to how the agreement is void as opposed to Public Policy under section 23 of the Contract Act and as to why the suit ought to have been filed in the Family Court when there was no issue as to guardianship and custody of the child and as such, the judgment suffers from irrelevant and rambling exercises bereft of legal acumen and hence the same is set aside. *Irfan Sayed (Md) vs Rukshana Matin and others* 1 BLC (AD) 67.

Section 23—Admittedly the Government was not a party to the alleged contract and, as such, the same could not be enforced against the Government whether it came to contest the suit or not. *Bangladesh Railway and others vs Pranab Kumur Chakraborty and others* 50 DLR (AD) 150.

Section 23—The suit land being the property of the Government the Railway Administration could not make any contract with respect to the same. *Bangladesh Railway and others vs Pranab Kumur Chakraborty and others* 50 DLR (AD) 150.

Section 23—If for withdrawing and compromising a non-compoundable case an agreement is entered into between the parties then the same is against public policy and the bar of section 23 of the Contract Act is attracted. *Moti Mia vs Ayesha Khatun and another* 48 DLR (AD) 64.

Section 23—By an oblique and indirect reference the object of the agreement cannot be brought within the mischief of section 23 of the Contract act. *Moti Mia vs Ayesha Khatun and another* 48 DLR (AD) 64.

Section 23—If consideration is for compromising a non-compoundable offence then it is hit by section 23 of the Contract Act as opposed to public policy. *Moti Mia vs Ayesha Khatun and another* 48 DLR (AD) 64.

Section 23—Contract entered into between estranged husband and wife giving the visiting right to the plaintiff-husband by sending their

minor son to him is, by no stretch of imagination, void, *Irfan Sayed (Md) vs Mrs Rukshana Matin and others* 48 DLR (AD) 134.

Section 23—Scope and Application—Agreement when not hit by the section—Pre-existence of financial or civil liability execution of mortgage bond motive agreement executed on the basis of a pre-existing liability on the part of the executor, whether void even when the motive for the execution of the security is to stifle a criminal prosecution pending in respect of the same liability.

Respondent's predecessor filed a Mortgage suit for realizing taka 30,000.00 stating that defendants 1-4 entered into a contract to supply him jute on receipt of an advance of Taka 27,000 but they neither supplied jute nor repaid the money and that on repeated demands, they repaid taka 2,000 and executed a mortgage bond keeping their lands in the schedule to the bond as security. Defendants 3 & 4 filed a joint written statement and denied R's allegation and contended that to evade income-tax payment R entered into a partnership business with them on an agreement that he would pay in cash taka 50,000 and arrange finance from Bank and the defendants would supply him jute. R Advanced taka 25000 but did not pay the balance. He purchased jute but as the jute's market price fell, R refused to take their jute for which they incurred loss but R, refused to share the loss and to avoid his liability started a criminal case against them and they, being afraid of arrest and jail, executed the mortgage bond in R's favour without any consideration and as such the mortgage bond was invalid being hit by section 23 of the Contract Act. The trial Court dismissed the suit. On appeal, the High Court reversed the trial court's decision and held that the transaction entered into by the defendants by way of executing the mortgage bond was not unlawful or against public policy an as such the same was not hit by section 23 of the Contract Act.

The High Court's view that "an agreement on the basis of a pre-existing liability on the part of the executor is not void even though the motive for the execution of the security is to stifle the criminal prosecution pending in respect of the same liability" and that the mortgage bond in question "was not hit by section 23 of the Contract Act" was affirmed by the Appellate Division. *Badal Chandra Sinha & others vs Altaf Hossain Gulanda & others* 2 BSCD 67.

Section 23—Read with Premises Rent Control Ordinance, 1963, Sections 9 & 10—Payment of municipal Tax Agreement that such tax would be payable by the tenant, whether void—By mutual agreement payment of municipal tax is payable either by the tenant or the landlord—whatsoever is agreed to between the parties can be a term of the Tenancy as no prohibition exists in the matter of payment of such tax. *Meherunnessa Khatun vs A Latif & another* 38 DLR (AD) 196.

24. Agreements void, if considerations and objects unlawful in part—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000.00 ¹Taka a year. The agreement is void, the object of A's promise and the considerations of B's promise being in part unlawful.

Case-Law

—Agreement void of consideration or objects unlawful in part. Wherein the section does not apply—Section 24 does not apply to the transfer of immovable property. 1934 (All) 246, to which the Transfer of Property Act applies as there is clear distinction between agreements or contracts and transfers in pursuance of those contracts. 1935 (Oudh) 501.

—this section does not apply to promises which are opposed in the alternative. 1931 ALJ 295; 1931 (All) 589.

Divisible contract may not be wholly void—When the contract is divisible, illegal part of the contract does not make the whole contract void. 12 (Pat) 359; 1933 (Pat) 306; 35 CWN 26; 1931 (Cal) 421; 35 CWN 28; 1931(Cal) 416; 1933 (All) 468; 1931 (Bom) 264; 1935 (All) 862; 1932 (Nag) 32; 1953 SCJ 608; 1954 SC 26.

—but where the agreement is indivisible and the part of a single consideration or an object is unlawful, the whole agreement is void. 32 B 449; 57 B 278; 1933 (Bom) 132; 27 A 266; 56 CLJ 413; 1933 (Cal) 196; 1933 (All) 468.

—part cannot be rejected—without statutory authority a person, cannot hold to a part of a contract and reject the rest. 35 C 142; 32 CWN 53.

—Indivisible contract—Where void and voidable clauses in a contract are not separable the entire contract becomes unenforceable. PLD 1975 Lahore 1302.

¹ The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule, (with effect from 26-3-71).

Section 24—Minor's contract—want of mutuality—An agreement which is void ab initio cannot be validated by ratification. *Julhash Mollah (Md) and another vs Ramani Kanta Malo and another* 47 DLR (AD) 35.

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

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

In any of these cases, such an agreement is a contract.

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

Explanation 2—An agreement to which the consent of the promisor is freely given is not void merely because the

¹ The word within square brackets was substituted for the word "assurances" by the Amending Act, 1891 (XII of 1891).

consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B ¹Taka 1,000.00. This is a void agreement.

(b) A, for natural love and affection, promises to give his son B, ¹Taka 1,000.00. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A ¹Taka 50.00. This is a contract.

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B ¹Taka 1,000.00 but the debt is barred by the Limitation Act. A signs a written promise to pay B Taka 500.00 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth ¹Taka 1000.00 for ¹Taka 10.00. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth ¹Taka 1,000.00 for ¹Taka 10.00. A denies that his consent to the agreement was freely given.

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

Case-Law

Agreements without consideration—What is consideration—the definition of the term “consideration” in section 2(d) is wider than under the English Law. It need not necessarily be a benefit received by the obligor, it may be for the benefit of third person. 61 C 841; 38 CWN 682; 1934 (Cal) 682; 1934 (All) 271.

—**Agreement without consideration is void**—where the plaintiff asked the defendant to bring Thakur to his house on a particular day of a

1. The word “Taka” substituted for the word “rupees” by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), Second Schedule, (with effect from 26-3-71).

festival and made arrangements for Bhog and feeding of guests, and the defendant promised to bring the Thakur on that date but failed to do so, and consequently the guests did not partake of the food prepared by the plaintiff and the defendant for damages, held that there being absence of consideration the defendant was not liable for failure to keep promise. 49 *CLJ* 278; 1929 (*Cal*) 369.

—agreement to pay cess where no cess is payable by law is void. 1947 (*Cal*) 70.

—agreement for further enhancement of rent on measurement without consideration is not enforceable future independently of the agreement a suit for enhancement of rent lies. 57 *CLJ* 202; 1933 (*Cal*) 725.

—**Agreement without consideration when valid**—forbearance to sue is a valid consideration when the plaintiff acts in the bona fide belief that he has a true claim. 1929 (*Lah*) 689; 118 *IC* 646; 11 (*Lah*) *LJ* 99.

—dispute or doubtful claims to legal or equitable rights will support the consideration for compromise and forbearance to sue or release of a bona fide claim which is reasonably doubtful in fact or law. 1929 (*Lah*) 485; 116 *IC* 312.

—where a person settles an annuity upon his wife the settlement cannot be construed to be a contract for consideration of love and affection, but is a gift pure and simple and no consideration is necessary. 135 *IC* 753; 55 *CLJ* 66; 36 *CWN* 392; 62 *MLJ* 292; 1932 *ALJ* 703; 13 (*Pat*) *LT* 241.

Adequacy of consideration—adequacy of consideration is not under explanation 2 to section 25, Contract Act a matter of consideration in deciding the validity of an agreement. 45 *A* 590; 21 *ALJ* 446.

Section 25, Clause 3—Promise to pay time-barred debts is legal—a promise to pay an unascertained sum is not a promise to pay a debt. 30 *P* 1161; 1952 (*Pat*) 73.

—promise to pay barred debt is enforceable, debtor's knowledge of the debt having been barred, need not be proved. 18 *CWN* 329; 23 *M* 94; 18 *CLJ* 269; (*fol*); 2 *Pat* *LT* 308; 60 *IC* 514; 41 *MLJ* 567, 1951 (*Mad*) 903.

—the whole of the promise, whether free or clogged with a condition, gives the cause of action. 16 *CWN*.

—but it is not open to a guardian of an infant to make a promise to pay a barred debt. 1928 (*Cal*) 850, *nor the Court of Wards*. 19 *M* 255.

—section 25(3) Contract Act covers the case of a judgment-debt—50 C 974; 28 CWN 322; 1932 (All) 38; 1932 (Bom) 522.

—A writing can be said to be an acknowledgment within the meaning of section 25(3) even after the expiry of period of limitation. *Tripura Modern Bank Ltd vs Elahi Baksha*, 18 DLR 498.

Section 25 (Explanation 1)—Gift made without consideration—Conditions for such a gift.

When a gift was made for service rendered although they could not be measured in money.

Held : The recital in the deed of gift in respect of the services rendered by the donee to the donor is only a motive for making the gift and is not a consideration for the gift, and it does not alter the character of the gift unless such services are in fact rendered for consideration and in expectation of a return and could be reckoned as having a monetary value. *Mst Bhagni vs Manzur Hussain Shah*, PLD 1957 (Lah) 574.

Time-barred debt—promise to pay under duress—promise invalid. *Noor Muhammad vs Abdul Sattar Jan*, PLD 1959 (Kar) 384 (DB).

Section 25—Inadequacy of consideration—Explanation 2 Agreement to which consent of promisor was freely given would not be void merely because of inadequacy of consideration. Such inadequacy of consideration, could be taken into account by the Court in determining the question whether consent of promisor was freely given. PLD 1987 Pesh 65.

—Circumstances in which sale-deed was executed and that fact that same was not given effect in revenue record in the lifetime of vendor and till a further period of four years after death of vendor would lead to irresistible conclusion that sale-deed was not a genuine transaction and consent of seller was not freely given. PLD 1987 Pesh 65.

Section 25(3)—there is difference between an acknowledgment as understood under section 19 Legal Act and a promise to pay under section 25(3) Contract Act. Mere implication of a promise to pay will not bring an acknowledgment of debt under section 25 Contract Act though it would imply a promise to pay under section 19 Legal Act. *Mablagbandi* is not promise to pay under section 25 Contract Act so as to revive a barred debt. 33 CWN 965, 1929 (Cal) 444; 60 C 714; 37 CWN 326; 1933 (Cal) 658; 1931 (All) 375, 53 A 963; 54 A 506; 1930 (Lah) 985; 1933 (Lah) 209.

—there must be an express promise to pay and not a mere acknowledgment of debt which implies a promise to pay. 1949 Oudh 48, 1943 (All) 63.

—an account stated in the form of an acknowledgment of a debt amounts to a promise and implies the existence of a debt, but it may be rebutted by showing that there is no debt at all. 38 CWN 813; 59 CLJ 494; 1934 PC 14; 1934 MWN 702 PC.

—an unqualified acknowledgment of debt implies a promise to pay. 1929 (Lah) 591; (33 C 1047 PC; 1929 (Lah) 263) fol, 1933 (Lah) 47.

—a liberal interpretation should be put on Cl (3) 53. 53 A 374; 129 IC 545.

—when a Hindu son executed a bond in consideration of a time-barred debt owed by his father, the son is not personally liable but the liability is limited to the assets come to his hand. Section 25(3) covers a only the case of a person who would be liable to pay but for the limitation barring the suit. 1929 (All) 586, 51 A 983; this case has been relied on in 38 CWN 253; 1934 (Cal) 178.

Section 25(3)—Read with Article 49, Schedule I—An unconditional promise in writing and signed by the party to pay on demand a time-barred debt though not a fresh transaction comes under Article 49 Schedule I of the Stamp Act and hence will require requisite stamp. *Daulat Ltd vs Pubali Bank* 39 DLR 243.

—An unconditional promise to pay a time-barred debt in writing duly signed does not come under section 19 of Limitation Act, it being not made before the expiration of the period of limitation—It directly comes under section 25(3) of the Contract Act. *Daulat Ltd vs Pubali Bank* 39 DLR 243.

—Time-barred debt—Agreement to pay such debt—Whether is an enforceable contract—The suit is based on a promise to pay time barred debt made in writing—It is not only an unconditional acknowledgment of the debt but also unconditional promise to pay the time barred debt in writing under the signature of the defendant—There is no question of its being merely an acknowledgment of the debt as no acknowledgment of the liability to pay the amount due was made before the expiration of the period of limitation—Such a promise to pay time barred debt in writing signed by the debtor is enforceable contract. *Daulat Ltd vs Pubali Bank Ltd.* (1987) BLD 163 = 39 DLR 243.

—When a promise is expressed in writing with signature from which a contract to pay a barred debt can be spelled out, it amounts to contract with section 25(3) of the Contract Act. *Riasatulla vs Tripura Modern Bank.* 20 DLR 44.

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

Case-Law

Agreements in restraint of marriage—Sections 23, 26 and 27 do not exhaust the instances of agreements contrary to public policy. 80 IC 560.

—an agreement by a person who marries a girl *sui juris* to pay her relations a sum as bride's price is in restraint of marriage and is illegal. 1 (Lah) 157; 58 IC 167.

—a mutual agreement that girl's father should advance money for the boy's education and the boy's father would reimburse in case the boy took a second wife was void. 24 IC 777, but a kabinnama authorising the wife to divorce herself from the husband in the event of his marrying a second wife is valid. 19 CWN 1226.

27. Agreement in restraint of trade void—Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Exception 1—Saving or agreement not to carry on business of which good-will is sold.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein:

Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

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1. Exceptions 2 and 3 relating to agreements between partners upon, or in anticipation of, dissolution of partnership and during continuance of partnership, respectively, rep. by the partnership Act, 1932 (IX of 1932), section 73 and Scheduled. 11. see now sub-section 11(2) and 36 (2) of that Act.

Case-Law

Agreements in restraint of trade—bye-laws framed for regulating use of market may amount to restraint of trade. *1944 Nag 73*.

—a contract of service preventing the employee from working elsewhere during the term is not void. *1946 (Bom) 123; 49 (Bom) LR 90*.

—agreement between two manufacturers allocating different zones for purchase of raw materials for each and preventing each from purchasing from the other zone is void. *6 DLR (Cal) 75*.

—agreement is restraint of trade, profession or business is void. *21 CWN 1979, 16 CWN 354*, no question whether the restrain is general or partial, unqualified or qualified. *13 CWN 388; 9 CLJ 216; 1942 (Sind) 114*.

—agreement to supply goods prohibiting supply to others is illegal to the extent to which it restrains trade or business and not to its entirety. *1931 (All) 539*.

—but combination amongst the traders of a particular locality to do business only amongst their own members is not actionable *per se*, merely because it brings profits to them and indirectly hurts a rival in trade. *53 A 316; 1931 (All) 83*.

—when the claim is founded on tort sections 23 and 27 to do apply. *53 (All) 316; 1931 (All) 83*.

—a partnership is *prima facie* legal unless it is proved that the object of the same was illegal or that the object involved something illegal or contrary to public policy. *1930 (Mad) 361; 1934 (Lah) 110*.

—**Contract ultra vires, if illegal**—where the memorandum of association of a Bank prohibited the Bank from lending on mortgage but the Bank lent money on mortgage to the defendant, held that the bank could sue to enforce the contract. *53 M 771. 1930 (Mad) 512; 25 B 52*.

—a covenant in restraint of trade is not justifiable, unless (1) it is reasonable between the parties (2) it is consistent with the interest of the public. *1934 PC 101; 1934 ALJ 457; 66 MLJ 510 PC*.

28. Agreements in restraint of legal proceedings void—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of

any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

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

Suits barred by such contracts —¹When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2—Saving of contract to refer questions that have already arisen—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arise, or affect any provision of any law in force for the time being as to references to arbitration²

Case-Law

Agreements in retain of legal proceedings—Section 28 of the Contract Act makes void only that agreement which absolutely restricts a party to a contract from enforcing his right under the contract in ordinary tribunals but has no application when a party agrees not to restrict his right in the ordinary tribunal but only agrees to the selection of a particular tribunal in which the suit is to be tried. 5 DLR 394.

1. The second clause of exception 1 to Rule 28 repealed by the Specific Relief Act, 1877 (I of 1877). The clause is however, printed here in italics-because the Contract Act is in force in certain Scheduled Districts to which the Specific Relief Act does not apply.

2. Cf. The Arbitration Act, 1940 (X of 1940) and the Companies Act, 1913 (VII of 1913), section 152.

—In agreeing to bring a suit in one out of the two Courts belonging to two foreign countries, both of which would be competent to try the suit the parties cannot be said to have contracted out of the jurisdiction, which it otherwise possessed. Therefore, if two parties one being a national of Pakistan and another of Denmark agreed by their contract to have their disputes settled under the contract by a Court in Denmark according to Danish Law, it cannot be said that they have contravened the provisions of section 28 of the Contract Act. *5 DLR 394.*

—What the section means is that a party to a contract cannot be prevented from enforcing his right thereunder or in respect thereof, by the usual legal proceedings in the ordinary Tribunals, either absolutely or by way of limiting the time within which he may do so, any agreement which restricts, in either of the two ways, the remedy by the usual legal proceedings in the ordinary Tribunals is void. The section does not affect any agreement to waive or forfeit a right. An agreement that a right under or in respect of a contract shall be forfeited or extinguished in certain contingencies or after the lapse of a certain time is beyond its scope. *4 PLR (Dac) 595.*

—Mutual consent cannot confer jurisdiction upon any Court which that Court might not possess under the general law nor individuals by agreement amongst themselves can divest any Court of its jurisdiction which it might possess under the General Law. *9 DLR197 = 8 PLR (Dac) 109.*

Burden as to who should satisfy the Court as to the justification for staying the case. It now remains only to consider the question of burden namely, as to on whom should be the burden to satisfy the Court as to the justification for staying its proceedings. In such circumstances, the party who seeks to involve the foreign jurisdiction clause, should ordinarily satisfy the Court that it is just and equitable to bind the parties to their bargain. If there had been a provision similar to that of section 28 of the Contract Act in the law of Great Britain, there too the same view would have been taken. The Courts in Great Britain have taken a different view because of their willingness to recognise, the rights of the parties to contract in almost any way they please. If there was by law any clog in such freedom the result might have been different. *MA Chowdhury vs Murri Mitsui OSK Lines Ltd. 22 DLR (SC) 334.*

—**Contract which adversely affects lawful interests of a third party both in status and in respect of right to property is void**—The wife brought a suit for setting aside a compromise decree on the ground

that it was obtained by fraud and the solenama was filed without her knowledge. The defendant-husband's case was that the compromise was signed by the plaintiff after having been aware of its contents and that she received a sum of Rs 2,300.00 in consideration of the compromise.

It was stated in the solenama that the plaintiff had admitted that the son born to her was not of the defendant and the said son was not entitled to any monthly maintenance from the defendant.

Held : Every agreement unlawful in nature is void. Consequence of the admission by the plaintiff in the present solenama which forms part of the decree is that the son will be reduced to the status of an illegitimate son. If clearly involves injury to his status, right to maintenance and also inheritance. That being so, the terms of the contract would come within ambit of section 28. Such an agreement is unlawful and is void. *Hossain Ali Khan vs Firoza Begum, 21 DLR 9.*

—The language of section 28 of the Contract Act is clear by itself, and can only mean that a contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the usual legal proceedings "in the ordinary tribunals" of the country, will to that extent, be void unless legal projected by the exception to the said section. In case of competition between two Courts within the county, there will, of course, be no absolute bar but it cannot be said that where the jurisdiction of all Courts within the country is taken away and exclusive jurisdiction is given to a foreign Court by a contract, it will not come within the mischief of that section.

Extensive jurisdiction clause in a bill of lading whereby jurisdiction of a country's Court is ousted is to be treated no more than the exception to section 28 of the Contract Act and does not take away the Court's jurisdiction. *MA Chowdhury vs Murri Mitsui OSK Lines Ltd., 22 DLR (SC) 334.*

—**Contract prescribing limitation period for institution of legal proceeding contrary to provisions of Limitation Act, 1908**—Terms of contract prescribing limitation to sue within three months of breach of contract—Such term in contract, held, void and statutory period of limitation, in the circumstances, is 3 years as provided by section 3 of the Limitation Act, 1908. *Islamic Republic of Pakistan vs Nazar Din Khattak, 21 DLR (Peshawar) 313.*

—**Jurisdiction of the Court fixed by contract**—Parties bound by it. The clause in the bill of lading runs as follows:

"The contract evidenced by this bill of lading shall be governed by English law and disputes determined in England according to English law to the exclusion of the jurisdiction of the Courts of any other country."

Held : The parties to the contract agreed that the Court in England which has also jurisdiction to try the suit, in case of a dispute between the parties, would be the only Court which should try the suit. *British India Steam Navigation Co vs AR Chowdhury*, 19 DLR 54.

—Agreement under which the place of suing is restricted to a foreign Court is not hit by the section. *Osaka Shosen Kaisha OSK Line vs Prov of East Pakistan*, 17 DLR 659.

—**Clause in a contract by which disputes are to be referred to a foreign Court**—Such clause must be construed as a submission clause for arbitration purpose. It does not really oust jurisdiction of the local Courts. *Ali Akbar vs MG Mayer*, PLD 1952 (Lah) 244.

—**Agreement ousting the jurisdiction of one of two Courts**—Where a clause in a contract stated that any legal action arising out of the contract would be taken at Court, though normally Court at C and D would both have jurisdiction, the effect of the agreement is to prevent the parties absolutely from filing a suit in the Court at D and as such it falls under section 28. Even if the agreement is not void, it is putting the matter rather too high to say that it has taken away the jurisdiction from the Court at D. The fact that a party willingly made the agreement may, however, afford a ground for transfer. *Chittaranjan Guha vs Parul Rani Nandi*, AIR (33) 1946 (Cal) 112.

—An agreement between parties to a contract to the effect that a suit concerning disputes arising between them on the basis of that contract should be instituted in one only out of two competent Courts having territorial jurisdiction over the subject-matter of that suit is valid and enforceable and is not void under section 28. *Mussa Ji Lukman Ji vs Durga Dass*, AIR 1946 (Lah) 57.

—an agreement that legal action should be taken in one of the competent Courts falls under section 28. 1946 (Cal) 112; 50 CWN 281.

—an agreement selecting one Court of two competent tribunals is valid. 57 C 252; 1931 (Cal) 279, 1935 (Bom) 198. 122 IC 488; 1930 (Lah) 611; 1946 (Lah) 57, 1944 (Mad) 47, but agreement ousting the ordinary jurisdiction of Court is illegal 1930 (Lah) 611.

—in a grant for monthly maintenance by a mashohara party, condition restraining the grantee's right to sue for more than one year's arrears is void. 36 CWN 555; 1932 (Cal) 720; 55 CLJ 377.

—an agreement not to appeal against a decree is not illegal. 1934 (Pat) 644.

—an agreement to refer dispute to arbitration is not illegal. 1937 (All) 650.

—but where both a civil suit and a criminal case under section 408 IPC are pending an agreement to refer to arbitration is illegal 37 CWN 749; 1933 (Cal) 817.

—a Barrister-at-law practising as an advocate in the HC is not disentitled to sue his client for fees due. 55 A 570; 1933 (All) 417 FB.

—special contract by a legal practitioner with his client that the latter would not be sued for fees is void. (Above case).

—It is quite clear that cause of action to recover the loss finally accrues only when the arbitrator, arbitrators or umpire have finally settled the award as to the quantum of loss or damage, but not before that. This principle of common law has now found statutory recognition in section 28 of the Contract Act. So, condition No.18 of the policies has the full backing of explanation (1) of section 28 of the Contract Act.

If would be a clear violation of the law of contract and terms and conditions of the policy to saddle the insures with the liability to pay the loss though they never acknowledged liability and had a right to postpone a decision on liability until the arbitrator has fixed the amount of loss or damage.

Insured party's claim—Arbitrator's award on the amount of loss or damage—The insurers will have no right to challenge the amount awarded by the arbitrator after the award is made the Rule of the Court—The insurers will still have the option to repudiate the liability on the ground of breach of warranties or condition—Cause of action of the insured against the insurers is complete only when there is repudiation of liability to pay after the arbitrator has made his award or the award has been made a Rule of the Court. *Daulatpur Traders & Co vs The Eastern Federal Union Insurance Co Ltd.* 42 DLR 125.

—Exclusive jurisdiction clause in bill of lading ousting jurisdiction of Bangladesh Courts is void. *Norway and Asia Lines vs Adamjee Jute Mills Ltd.* (1981) BLD 152.

—**Agreement to oust Jurisdiction of Courts**—A suit may be held by the local Courts to be determinable by them notwithstanding an agreement to the contrary, where it can be justly decided only in Pakistan. Thus where the balance is overwhelmingly in favour of trial in Pakistan as where the evidence of the facts needed to determine the issues involved is available in Pakistan and would not be available in the Foreign Court, the Courts in Pakistan would be justified in trying the suit, notwithstanding the agreement between the parties. *PLD 1978 Karachi 273.*

—**Agreement to refer disputes of foreign arbitration.**—Where there was a clause in a contract by which a dispute between the parties was to be referred to Bombay Chamber of Commerce for arbitration at the option of one of the parties. The question before the Court was whether such a clause ousted the jurisdiction of the local Courts, and as such a suit before a local Court could be stayed for reference to arbitration to the foreign tribunal. It was held that the jurisdiction of the local Courts is by no means ousted and it is only a question for consideration whether a suit brought before a local tribunal should be stayed or not, in the face of such an arbitration clause which would clearly fall within section 34 of the Arbitration Act. Under this section it is not incumbent to stay proceedings but the Court has a discretion in the matter. *PLD 1978 Karachi 273.*

—**Condition imposing loss of right after certain period**—A condition in a fire insurance policy that the Insurance Company would not be liable for loss or damage after the expiration of twelve months from the happening of the loss or damage, unless claim was the subject of a pending action or arbitration. *PLD 1982 Karachi 627. (DB).*

—**Redemption of mortgage**—Section 28, Contract Act and Article 148 of Limitation Act, cannot be interpreted to mean that a property cannot be mortgaged for more than 60 years. Article 148 of the Limitation Act, only prescribes the period within which a suit for redemption of mortgage should be filed. The starting point of limitation, under Article 148 of the Limitation Act is, when right of redemption accrues. It is evident that in case of mortgage for a certain period, the right to redeem the mortgage, would accrue after the expiry of the term, unless there is any stipulation, to the contrary, in the mortgage deed. Section 28 does not in any way restrict right to redeem such mortgage. *PLD 1982 AJ & K 17.*

Forfeiture of insurance claim—The arbitration agreement contained in the insurance policy in question provided that if a claim be made and

rejected and an action be not commenced within 3 months after such rejection all benefits under the policy shall be forfeited. The Insurance Company having informed the plaintiff that their claims under policy were not payable and as such rejected the same as per condition No.13 of the policy and the plaintiff having not commenced any action within 3 months, have forfeited all their rights under the policy. *Sadharan Bima Corporation vs Dhaka Dyeing & Manufacturing Co Ltd.* 43 DLR 286.

Goods shipped at a foreign port—Provisions of the Carriage of Goods by Sea Act (which is a local Act) will not apply in such a case—But the bill of lading incorporating the provisions of Article 3, clause 6 of the Schedule to the Carriage of Goods by Sea Act will govern a suit and section 28 of the Contract Act and section 29 of the Limitation Act will not apply. *Holland Bengal Burmah Line vs Dawood Corporation Ltd.* 12 DLR 418.

—Section 28 of the Contract Act does not hit the contract as embodied in the Bill of lading nor does it come within the meaning of local or special law referred to in section 29 of the Limitation Act. *Holland Bengal Burmah Line vs Dawood Corporation Ltd.* 12 DLR 418.

—Jurisdiction clause, ousting the jurisdiction of the local Court by agreement between the parties concerned valid. *British India Steam Navigation vs MA Wadud & Co.* 20 DLR 367.

Section 28—Limitation—Waiver—Special period of limitation referred to in insurance policy agreement will not be hit by section 28 of the Contract Act inasmuch as this limitation was created by consent of parties and that will amount to waiver of the right given under Limitation Act. *Sadharan Bima Corporation vs Sanjib Kumar Das* 46 DLR 566.

Section 28, Exception I—There is nothing in Exception 1 to section 28 of the Contract Act prohibiting the parties to a contract from choosing a foreign forum under the supervision of a foreign court for arbitrating its disputes. Such contract does not offend the main provision of section 28, because the local Courts still retain the jurisdiction to decide the lis between the parties. *Bangladesh Air Service (Pvt) Ltd vs British Airways* BLC 49 DLR (AD) 187.

Section 28, Exception I—The plea of sovereignty and interest of the country and its citizens, if accepted, will render foreign arbitral jurisdiction absolutely nugatory. *Bangladesh Air Service (Pvt) Ltd vs British Airways* BLC 49 DLR (AD) 187.

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

Illustrations

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B "one hundred tons of oil" of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) A agrees to sell to B "all the grain in my granary at ¹[Rangpur]", There is no uncertainty, here to make the agreement void.

(e) A agrees to sell to B "one thousand of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty, here to make the agreement void.

(f) A agrees to sell to B "my white horse for ²taka five hundred or taka one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

Case-Law

Contract—Contract for permanent lease not void for uncertainty, even though it depends upon payment in future of salami when the amount of salami is ascertainable by Court. *Ashutosh Basak vs SM Rahmatullah*, 18 DLR 578.

—**Agreements void for uncertainty**—an agreement not to take usual legal proceeding is void. 1934 (*Sind*)1.

—a contract of betrothal made in regard to a girl not born at the time of contract is null and void both for uncertainty and being contrary to

¹ The word "Rangpur" was substituted for the word "Rahimyarkhan" by Act VIII of 1973, 2nd Sch. (with effect from 26-3-71).

² The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule. (with effect from 26-3-71).

public policy and cannot form a basis for damages. *1930 Lah 561; 1930 Lahore 609; 60 PR 1866 fol.*

—an executant of a bond charging "all his property" as security is void for uncertainty. *1 A 275; M M 35.*

—an agreement to sell at a moderate or a fair price or at a proper rate may be valid but at favourable or concession rate is void for uncertainty. *52 M 300; 121 IC 753.*

—a contract for sale of land without fixing the price and the time for execution of kabala is not void. *ILR (1949) Cut 593.*

—a contract appointing a mode for determining price or stipulating for a fair price is not invalid. *1927 (Cal) 889; 55 C 285.*

—a contract to execute kabala containing necessary stipulation is not vague or indefinite, *104 IC 527*, but a covenant that after the expiration of the terms of a lease there will be a fresh settlement is vague and uncertain. *32 IC 448.*

—an agreement to pay rent in cash without fixing the rate is uncertain, *55 IC 482*, but a contract not specifying the time for performance is not void. *85 IC 482.*

—when a document is capable of two contrary interpretations and practically incapable of interpretation, it is void for uncertainty. *63 IC 48.*

Construction of contract—An ambiguous expression must be interpreted against the party which has used it. *PLD 1976 Karachi 458 (DB).*

—**Contracts uncertain or vague**—Section 29 of the Contract Act is based upon the principle that the contracting parties must be shown to be at *ad idem* with reference to the essential terms of the contract and, therefore, if there is any vagueness or uncertainty incapable of being made certain, the contract fails for vagueness. For, in that case the parties cannot be said to agree to the same thing in the sense. *PLD 1986 Karachi 464.*

—Merely because the terms of the arbitration agreement are capable of different and various interpretations, it cannot *ipso facto* be liable to be struck down as void. It may be acted upon if its terms are capable of being made certain. *PLD 1977 Karachi 21.*

—**Contract capable of being made certain**—A contract can only be regarded as void for uncertainty if its meaning is not certain or capable of being made certain as provided by section 29 of the Contract Act. *PLD 1977 Karachi 21.*

Section 29 read with section 23—whether the contract for specific performance is enforceable when it appears that the land to be sold under an agreement has not been specifically defined with reference to boundaries.

Though the land contracted to be sold has not been described with reference to any boundaries, but it leaves ample scope for manipulation and decision as to which portion of the land will be sold to the seller, that is, the appellant. Respondent appears to have no objection and is willing to take his 8 gand as 1 kara from any side of the plot in question, namely, Block No. 5. No vagueness or uncertainty about the land agreed to be sold, nor any impossibility in giving effect to the agreement.

Looking at the description of the land agreed to be sold under the contract, which has found to be genuine and also considering its background history and basis the High Court Division came to the conclusion that the contract, in question, is free from any kind of uncertainty and indefiniteness. The contract was accordingly held to be enforceable in law. When there is no vagueness regarding the essential terms of the contract, that is, the location and area of the land, its price and payment of consideration money, either in part or full, and moreover when the agreement has been found to be genuine there can be no difficulty in enforcing the contract. Both parties understood what is the area of the land and its exact location and there being also no objection on the part of the buyer as to the portion of the plot in question which the seller was willing to dispose of under the terms of the contract, the contention of the appellant's counsel has apparently no substance. *Haji Abdul Latif Sheristader Wakf Estate vs Haji Abdul Malek Sowdager & others 5 BSCD 120.*

30. Agreements by way of wager void—Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five

hundred ¹taka or upwards, to be awarded to the winner or winners of any horse race²

Section 294A of the penal code not affected: Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the ³[Penal Code (XLV of 1960)] apply.

Case-Law

Section 30—Agreements by way of wager—to constitute a contract by way of wager a common intention of parties as to delivery not being taken and to deal only in differences is essential and speculation does not necessarily involve a contract by way of wager. 33 CLJ 533, 22 CWN 625, 1928 (Lah) 420; 60 C 856; 1933 (Cal) 759; 20 C 461; 5 CWN 714 PC 51 M 96; 47 CLJ 144; 26 ALJ 484; 30 (Bom) LR 238 107 IC 29; 1928 PC 30 PC 1932 (Lah) 273; 1938 (Bom) 44, 1950 (All) 352; 1952 Trav Co 435.

—the distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is a narrow one and difficult of determination even after the examination of the parties, the course of the business and the nature of the contracts, so it is not a question which can safely be left to the decision of a local Commissioner. 1931 MWN 733; 35 CWN 841; 53 CLJ 561; IR 1931 PC 197; 53 A 190, 1931 ALJ 458; 132 IC 613; 1931 PC 136 PC.

—where there is a perfectly lawful contest in a game of skill between two persons the prize for success in that contest should be recoverable if it is subscribed by outside persons, but not recoverable if it was subscribed by the competitors themselves. 1931 (Bom) 264; 133 IC 254; 33 (Bom) LR 260.

—neither in India nor in England has the legislation gone so far as to enact in express terms that betting transactions are illegal, but it regards

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

2. Cf. the Gaming Act (8 and 9 vict. c. 109), section 18.

3. The words "Penal Code" were substituted for the words "Pakistan Penal Code" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

it as undesirable in the public interest that any assistance should be afforded by Courts of law to enforce obligations created by betting or wagering transactions *52 C 677; 1925 (Cal) 1007; 90 IC 59.*

—contracts by way of wagering and gaming are void, but not illegal. *27 CWN 422; 1923 (Cal) 445.*

—a suit for damages for breach of wagering contract cannot be brought. *86 IC 299; 1925 (Mad) 971; 1930 (All) 525.*

—where the suit relates to a wagering contract but the defendant confesses Judgment, the Court is still competent to dismiss the suit. *30 Punj LR 596.*

—lottery defined. *48 M 661; 1925 MWN 655; 90 IC 420.*

—chit fund with arrangement for payment of price every month by casting lots was held to be illegal. *50 M 696; 1927 (Mad) 583; 1927 MWN 545; 103 IC 318 FB.*

—where both parties are members of stock exchange, onus of proving transaction to be wagering one is on defendant. *1925 (Mad) 330; 85 IC 410.*

—Teji Mandi contract are not presumed to be wagering contracts. *1926 MWN 830; 51 MLJ 809; 98 IC 338; 28 (Bom) LR 1376; 1926 PC 119; 51 B 1; 44 CLJ 509 PC.*

—forward contracts for purchase and sale when wagering *1941 (Cal) 341; 45 CWN 478.*

—contract to supply goods at a future date at fixed prices, though speculative, is not a wager and a suit for damages for breach would be maintainable. *1923 A 273; 21 ALJ 153.*

—if there is nothing to show that according to the contract as between the principal and agent either party stood to win from or lose to the other according to the fluctuation of price or any other event, the contract between the principal and agent is not necessarily a wagering *25 ALJ 736; 103 IC 218, 1927 (All) 238 Ref.*

—section 30 does not prevent a principal from recovering money from the agent deposited as security in connection with the wager *49 A 438; 100 IC 774; 1927 (All) 288; 25 ALJ 223; 25 A 639; Rel on, 18 ALJ 513; Disapproved 9 B 358, Dist.*

Ss. 30-30A] Of Contracts, Voidable Contracts and Void Agreements 83

—similarly the agent can recover from the principal any money that he had to pay to the vendors in consequences of a breach of the contract committed by the principal is not delivering the goods on the due date. *102 IC 606; 25 ALJ 693; 1926 PC 119; 1923 (All) 585; 1926 (All) 238; 1932 (Lah) 356.*

—Wagering contract. Section 30 makes wagering contract void ab initio and to such a class of contracts section 65 has no application. *PLD 1975 Karachi 661.*

—No action can be brought by the winner on a wager, either against the loser or the stakeholder to recover what is alleged to be won. *PLD 1975 Karachi 661.*

—**What is wagering contracts**—A wagering contract is one by which two persons mutually agree that on determination of a future uncertain event one shall win from the other and the other shall pay a sum of money, there being no other real consideration for the making of such contract. *PLD 1975 Karachi 661.*

—**Intention to deliver goods**—A test for distinguishing contracts of a wagering nature from ordinary commercial transactions is by ascertaining whether either of the parties intended actual transfer of the goods. To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation" and neither must look to anything but the payment of money on the determination of an uncertainty. *PLD 1975 Karachi 661.*

Section 30—Speculative damage can be treated as remote damage for which a court cannot pass any decree. *Trang Ice and Cold Storage Company Ltd vs Amin Fish Farm 46 DLR 39.*

¹30A. Agreements collateral to wagering agreements void—All agreements knowingly made to further or assist the entering into, effecting or carrying out, or to secure or guarantee the performance, of any agreement void under section 30, are void.

1. Sections 30A, 30B and 30C were inserted by the Contract Act (Amendment) 1960, Ordinance (XLVII of 1960), section 2.

¹30B. No suit for recovery of money, commission, etc., in respect of void agreements—No suit or other proceeding shall lie for the recovery of—

- (a) any sum of money paid or payable in respect of any agreement void under section 30A, or
- (b) any commission, brokerage, fee or reward in respect of knowingly, effecting or carrying out, or aiding in effecting or carrying out, of any such agreement or of any sum of money otherwise claimed or claimable in respect thereof, or
- (c) any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee, reward or other claim in respect of any such agreement.

¹30C. Payment by guardian, executor etc., in respect of void agreements not to be allowed credit—No guardian, executor, administrator, heir or personal representative of any minor or deceased person, as the case may be, shall be entitled to or allowed any credit in his account for or in respect of any payment made by him on behalf of such minor or deceased person in respect of any such agreement, or any such commission, brokerage, fee, reward or claim as is referred to in sections 30A and 30B.

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1. Sections 30A, 30B and 30C were inserted by the Contract Act (Amendment) 1960, Ordinance (XLVII of 1960), section 2.

Chapter III

Of Contingent Contracts

31. "Contingent contract" defined—A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay B ¹Taka 10,000 if B's house is burnt. This is a contingent contract.

Case-Law

Contingent contract—when a condition is a part of the contract it cannot be said to be a contingent contract.

The agreement that the particular document for sale of land will be executed and registered after securing permission from the Collector regarding the sale of the land, cannot be said to be a contingent contract as defined in section 31 of the Contract Act, inasmuch as the condition to take permission of the Collector is not collateral to the agreement but forms part of the consideration of the contract. *Md Sama Mondal vs Md Ahmed Sheikh*, 14 DLR 709.

Sections 31-36—Contingent contracts—in case of contingent contract; it cannot be specifically enforced, unless the contingency happens. 20 CWN 929, 12 C 152, 14 CWN 151; 11 CLJ 346.

—a contingent contract to bequeath a village may be specifically enforced. 24 CLJ 279 PC.

—contingent appointment. 89 IC 438; 23 ALJ 608.

—if the future contingent event becomes impossible, the contract fails through. 12 NLR 19; 34 IC 461.

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

32. Enforcement of contracts contingent on an event happening—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Case-Law

Existence of an arbitration clause could be challenged otherwise than by a separate suit.

There was no bar in deciding the question challenged by way of defence to the acceptance of the award by the Court. *M/s Badri Narayan Agarwala vs M/s Pakistan Jute Balers Ltd.* 22 DLR (SC) 45.

—**Frustration of contract**—If an exporter is required to fulfil certain legal requirements before exporting the goods to a foreign country and if those restrictions/requirements were in force at the time of the conclusion, a contract which does not provide that the contract is subject to the condition of the fulfilment of the above requirements, in such a case the vendor cannot plead frustration of the contract on the ground that the authority declined to grant the requisite permission or that the vendor could not comply with the legal requirements without his fault. Even where a contract is made subject to obtaining of a licence or subject to quota or subject to any other similar term, it is obligatory on the part of a vendor to prove that as a reasonable person he has acted diligently and has taken all possible steps to fulfil his obligation, in order to plead successfully the above condition in defence in an action for the breach of the contract. *PLD 1979 Karachi 762.*

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

Illustration

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

Case-Law

Section 33 no doubt lays down that any question raised under that section shall be decided on affidavits but that does not mean if the application is not supported by an affidavit it cannot be entertained. *M/s Badri Narayan Agarwala vs M/s Pak Jute Balers Ltd.* 22 DLR (SC) 45.

—**Contingent contract—When should be performed**—One term of the contract was "this offer is subject to our getting necessary licence and permission from the Government of Pakistan for which we do not anticipate any difficulty."

The defendants contended that this offer is subject to our getting necessary licence and permission from the Government of Pakistan.

Held—The moment of the proposals were accepted it became a complete contract but it was contingent and could be enforced unless rendered impossible. *Pan Islamic Steamship Co Ltd vs Messers General Imports and Exports Ltd.* PLD 1959 (WP) (Kar) 750.

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

Illustration

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. When contracts become void which are contingent on happening of specified event within fixed time—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

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

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year or is burnt within the year.

Case-Law

Frustration of contract—plea of, when not available—When a party is entitled to treat a contract as null and void if certain step is not taken by the other party within a certain period—there is no frustration of contract, if the party does not treat the contract as null and void but treats it as subsisting. *S Sibtain Fazli vs Star Film Distributors. 14 DLR 307*

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

Illustrations

(a) A agrees to pay B 1,000 ¹Taka if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 ¹Taka if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

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1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

Chapter IV

Of the Performance of Contracts

Contracts which must be performed

37. Obligation of parties to contracts—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the 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 performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on a certain day on payment of ¹Taka 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 ¹Taka 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.

Case-Law

Unilateral repudiation—A mere unilateral repudiation is paid by the plaintiff cannot constitute an effective rescission of a deed and such effectual rescission must be made by decree of Court declaring that the deed is void and setting it aside. 6 DLR 254.

—**Contract between Government and a private party**—Where there is clear absence of words connoting an undertaking by the Government to allow a factory to be worked so long as the war lasted, the

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

contract is not, in the absence of clear words to that effect, to be construed as incorporating any such binding agreement.

Where there might have been an intention on the part of the contracting parties that the plaintiff firm should be allowed to run the factory for the duration of the war, but the Government avoided the use of any words—the existence of a possible intention is wholly insufficient to constitute a contract enforceable against the Government. *7 DLR (FC) 179*.

—Obligation under a contract to transfer property whatever be the mode by which the vendor came to own the property.

One of the clauses in the agreement runs as follows:

"That vendors hereby do transfer upto and the purchaser hereby do accept transfer of the exclusive distribution and exploitation rights of the film Chandranath to be imported under the licence along with dupe negative print and inclusive of the permission of duplication for the territory of East Pakistan for Taka 5,750.00 payable in the manner hereinafter written.

Held : By the above clause the vendors transferred the distribution rights as well as the dupe negative.

When a person agrees to transfer a particular property to another he is bound to transfer that property whatever the way in which he becomes owner of it unless there be a provision to the contrary in the agreement for sale. *S Sibtain Fazli vs Star Films Distributors (1964) 16 DLR (SC) 198*.

—**Obligation of parties to contract**—promises bind the representatives of the promisors before performance. *91 IC 390, 106 IC 831*;

—third party getting benefit must pay the money due under the contract. *41 M 488*.

—Terms of the contract must be settled.

—unless all the terms are settled it cannot be specifically enforced but when terms are settled specific performance of it may be enforced. *20 CWN 66*.

—where the contract was to execute a kabala containing "necessary stipulations" held that the expression evidently meant the stipulation for sale implied under the law and contained in the TP Act and that there was

no vagueness or indefiniteness in the contract. *1927 (Cal) 889; 104 IC 527 (13 WR 979 and 20 CWN 66) Dist 1923 PC 47 (Cal).*

—payment of earnest money is itself proof of concluded contract. *20 CWN 66.*

—rate of payment for work done under a contract should be according to the contract, no extrinsic evidence is to be allowed. *23 CLJ 177.*

—terms should be ascertained by oral evidence. *23 CLJ 515.*

—**Pressure of work or avoidable accident**—when a carrier receives goods under a contract of carriage he cannot shake off his statutory liability under section 151, Contract Act by pleading pressure of work or avoidable accidents. *1925 (Cal) 737; 85 IC 786.*

—**Assignment of contractual right**—the interest of a buyer of goods in a contract for forward delivery is an actionable claim within the meaning of the TP Act and can be assigned as such. *34 C 289; 9 (Bom) LR 838.*

—When a contract is based upon personal consideration it cannot be assigned without the consent of other party. *17 M 168.* So also an executory contract for the future delivery of goods cannot be assigned. *16 B 441; 5 (Bom) LR 373.*

—but contract containing certain buyers' option as to quality does not preclude the assignment of contract. *34 C 289.*

—**When performance can be enforced and when not**—a vendor may enforce his right under a contract not to castrate the calf sold. *24 IC 81.*

—to enable a party to be relieved from the future performance of a contract by the conduct of the other, the conduct must amount to renunciation or absolute refusal to perform the contract such as would amount to rescission if he had the power to rescind. *83 IC 260; 1924 (Cal) 427.*

—a contract for sale for the consideration that the purchaser would hush up a departmental enquiry cannot be specifically enforced on equitable grounds though not illegal. *18 CWN 689.*

—a person who contracts for an undisclosed principal where no such principal exists, cannot enforce performance. *18 CWN 263.*

—contracts by way of wagering and gaming are void but not illegal. *27 CWN 442; 1923 (Cal) 445.*

—if part of the consideration is illegal, it taints the whole contract. 20 CWN 767.

—**Manner of performance**—it is not sufficient performance of contract of sale of immovable property for the vendor merely to execute a conveyance, as a conveyance is inoperative in law until it is registered. 95 IC 187;7 (Pat) LT 730;1926 (Pat) 89.

—where a contract stipulated a shipment per steamers in certain months, promisor could exercise an option of shipping them in reasonable instalments in any number of steamers. 9 C 473.

—**Performance of contract**—Where an insurance company undertook to compensate respondents, a transport company, in event of goods stored in respondent's godown being destroyed by fire. Fire broke out in respondent's godown and goods stored were burnt down. Respondents examined consignees of goods, who produced vouchers and receipts showing goods and value of goods transported by them to respondents, delivery of which had been not taken when fire broke out. On proof of loss of goods by fire in the godown of the insured, the insurance company could not turn round and refuse to pay this claim in accordance with insurance cover. PLD 1982 Karachi 549.

—Between Government and a private party to run a firm—While war going on—In this absence of express terms to allow the plaintiff to run the firm till the end of war, no enforceable contract to be inferred, *Firm Babu Munir Golam Sadiq vs North-West Frontier Province Government* 7 DLR (FC) 179.

—**Contract and Public Servant**—Suit against Crown for arrears of pay, even if based on contractual obligation, not maintainable. *Federation of Pak vs AA Hussain Shah* 7 DLR (FC) 279 (281).

Sections 37 & 53—Contract which remains executory contract becomes executed contract when the assignor on receipt of consideration falsely represents that the goods were there for the assignee to take and the assignee bona fide believes it. *Sibtain Fazli vs Star Film Distributors* 14 DLR 307.

38. Effect of refusal to accept offer of performance—Where a promisor has made an offer of performance to the promisee, 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 fulfil the following conditions:

- (1) it must 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.

Illustrations

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 a 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.

Case-Law

Effect of refusal to accept performance—in case of principal and agent this section is not applicable. *1923 (Pat) 464; 4 (Pat) LT 531.*

—**Tender and payment of money**—a creditor is not bound to accept a smaller sum than is due and a tender of such sum does not stop interest running. *3 C 468; 16 B 141. nor* he is bound to accept payment by instalment. *24 A 461.*

—a tender of debt before due date is not valid and it does not stop the running of interest. *31 C 183*.

—in making demand for the fulfilment of contract on the defendant the plaintiff is not required to make an actual tender of money, it enough if he has made preparations with the object of having the money ready in hand in case the contract is fulfilled. *30 C 865 PC*.

—in case of ordinary money claim a tender of the amount due before suit must be followed by payment into Court in order to stop the running of interest. But in case of mortgage a tender alone stops running of interest under section 84 *TP Act*. *1931 MWN 1226; 38 M 959 16 B 141, 34 C 305*.

—plea of tender is good only if it is accompanied by deposit in Court. *32 CWN 1082*.

—a plea of tender need not be followed by deposit in Court. *25 P 451; 1947 (pat) 208*.

—valid tender amounts to paying actually. *55 C 624*.

—valid tender stops interest. *34 C 305; 5 CLJ 270*, but interest will not cease to run for the want of formal tender where it appears that the tender would have been a mere form and the party to whom it would be made would refuse the tender. *46 M 108; 28 CWN 25. 38 CLJ 34; 1923 PC 26; 25 (Bom) LR 541 PC*.

—a tender to be valid must be made in the current coin of the realm; a tender by a cheque is not a valid tender; but it is waived by the creditor when he rejects the tender on some other ground. *34 C 305; 5 CLJ 270*.

—a tender is not vitiated because a receipt is asked for. *34 C 305, 5 CLJ 270*.

—a tender to be valid must be unconditional *27 CWN 299; 37 CLJ 457; 1922 PC 347; 44 MLJ 728 PC CLJ 27 222, 1923 (Pat) 418, 1936 (Lah) 168*.

—in the absence of fraud payment to one mortgagee operates as discharge. *1924 (Lah) 33, 44 IC 62, contra, 31 CWN 374; 1927 (Cal) 425*.

—acceptance by one of joint creditors when money is sent to both, absolves the debtor. *1923 (All) 465*.

—a payment to one of the two joint mortgages does not necessarily operate as a discharge of the debt, in so far as the other mortgagee is concerned. *13 CLJ 3, 63 IC 745, 38 C 342, 1921 (Pat) 86; 5 (Pat) LJ 376*,

56 IC 403 (20 M 461; 21 M 544 FB) not (fol) 3 (Lah) LJ 502, 4 (Lah) LJ 23; 1923 (Lah) 64 contra. 73 IC 682, 48 M 693; 1925 (Mad) 261.

—tender to one of the heirs of promisee is valid. 43 CWN 423.

—payment to one of the mortgagee discharges the mortgage debt as to all. 20 M 461.

—but the payment to one of several heirs of mortgagee does not so discharge. 27 B 292.

—payment to one of the several persons who are entitled to receive money is not good against other. 17 CLJ 371.

—payment to one of several creditors is good but payment to one of several *D Hrs is bad*. 1917 (Pat) 258.

—when a joint right to sue arises out of a tort, some cannot give a full discharge, unless authorised. 6 CLJ 38.

—a tender which has been validly made and improperly refused is kept good if the person who has made the tender has always kept the money ready to be paid as demanded. If the tender be kept good it will stop interest and no deposit under section 61 BT Act is necessary. 35 C 34; 11 CWN 983; 6 CLT 273 FB.

—payment of rent to one of the several co-sharers does not give a valid charge to a tenant. 1937 (All) 527.

—rent which is properly tendered but improperly refused is not 'arrear' see above case.

—in order to prove that a buyer is ready and willing to perform his part of the agreement it is not necessary to show that he actually made a tender. 28 Punj LR 351; 99 IC 812; 1927 (Lah) 176; 8 (Lah) 198.

Tender of performance—generally the vendor is under no obligation to see that the purchaser takes delivery within time, he is simply to offer delivery within time. 32 IC 720, but the offer or performance must be made at the proper time and place and at the place stipulated. 46 IC 497.

—natural place of inspection is the place of delivery. 1932 (Cal) 879, 59, 928, 1927 (Mad) 62.

39. Effect of refusal of party to perform promise wholly—When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the 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 ¹Taka for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 ¹Taka for each night. On the sixth night A wilfully absents herself. With the assent to 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.

Case-Law

Effect of refusal to perform promise wholly—the section does not apply to executed contract. 1944 (*Pat*) 3;22 P 306.

—where a person has by his conduct made it impossible for himself to perform the contract in its entirety within a stipulated time, the other side is entitled to put an end to the contract and no question of damages arises. 1929 (*All*) 62.

—in the case of an anticipatory breach, if the party who suffers by the default does not put an end of the contract but prefers to keep it open, he does so for the benefit of both the parties to the contract and remains subject to the obligation and liabilities under the contract. 1930 (*Lah*) 979.

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—the vendor is to make out marketable title, failing that, is not entitled to enforce a provision in the nature to a penalty, on the ground that the purchaser did not complete the transaction as stipulated 27 *CWN* 77; 31 *MLT* 159; 1922 *PC* 339.

—what constitutes refusal—mere non-payment for goods delivered or delay in fulfilling the obligation to pay would not generally entitle the other party to rescind, because such nonpayment or delay might be with or without cause. What amounts to refusal discussed. 33 *C* 477; 3 *CLJ* 249.

—to enable a party to be relieved from its future performance by the conduct of the other, the conduct must amount to a renunciation or absolute refusal to perform. Protesting against the other party's right to put an end to the contract cannot amount to refusal to perform. 28 *CWN* 104.

Rescission of contract.—When a contract may be rescinded—inadequacy of consideration is not of itself sufficient ground for rescission. 3 *C* 192, *PC*.

—contracts which are voidable for want of free consent may be rescinded. 26*C* 381; 3 *CWN* 468.

—to entitle one to rescind a contract on the ground of misrepresentation there must be a false representation made on some material point as to statement of fact either by words or by conduct. 1928 (*Pat*) 600; 9 (*Pat*) *LT* 523.

—when a party to a contract refuses to perform or is disabled from performing his part of the contract, the other side may rescind. 4 *C* 252.

—a mortgagor may rescind a contract not fully performed by the mortgagee. 18 *M* 126.

—on failure of the promisor to perform his part of the contract if the promisee can rescind the whole contract. 30 *CWN* 145; 23 *ALJ* 806-90 *IC* 52; 1925 *PC* 188, *PC*.

—when time is the essence of the contract, the seller may rescind it on the failure of the buyer to perform it timely. 6 *C* 64; 6 *CLR* 582.

—to enable a party to a contract to be relieved from the future performance by the conduct of the other, the conduct must amount to a rescission or absolute refusal to perform the contract. 83 *IC* 260; 1924 (*Cal*) 427.

—the repudiation must be total, absolute and clear. 47 B 924, what amounts to repudiation. 1927 (Lah) 693. 1922 (Mad) 28, 46 B. 489; 1922 (Bom) 303.

—the expression terms accepted please remit down cash 25 thousand by 5th February otherwise acceptance subject to withdrawal please wire meant only that if the promisor did not receive the money he would consider himself at liberty to treat the contract as broken. 39 CWN 174.

Effect of rescission of contract—rescission of the substituted agreement for breach does not revive the original contract. 1953 (Cal) 642.

—where the plaintiffs lawfully rescinds a contract he is entitled to the return of his advance and to such further damages as were within the contemplation of both the parties. 1923 M 103.

—where the plaintiffs in pursuance of a contract to purchase certain properties paid off a prior mortgage and subsequently the sale did not take place owing to their default, they were entitled to a refund of the money but not to a charge on the properties. 1927 (Mad) 204 (21 M 443, 26 M 686, 31 M 439, 36 M 426) Dist. (43 C 69, 60 M 114) *rel. on.*

—measure of damages is to be assessed at current rate on date of repudiation. 1931 (Bom) 386.

—**Wrongful repudiation**—Where a party to a contract decides to repudiate its obligations under the contract. The Contract was not to be entirely abrogated by such repudiation but only injured party may be relieved of duty of further fulfilling obligations undertaken by it in favour of repudiation party. A wrongful repudiation in the absence of election by the other party leaves both of them with their rights and liabilities as if no repudiation has taken place. This applies in cases of anticipatory breach. Therefore, if the other party still insists on performance of the contract, the repudiation is what is called 'brutum fulmen' that is the parties are left with their rights and liabilities as before. PLD 1986 (SC) 698.

—**Insurance contract**—The insurer, if it thinks fit, may waive the breach of any condition. A waiver can be in writing or oral. It can also be spelt out from the conduct of the insurer. PLD 1983 Karachi 263.

—**Contract of service**—The Court cannot order specific performance of a contract of personal service. PLD 1976 Karachi 1121.

—**Rescission of contract**—A person who is guilty of breach of the contract cannot rescind it. The right to rescind or keep alive a contract vests in the other party. *PLD 1977 Karachi 480*.

Section 39—A contract of exchange does not become complete unless the parties to the contract performed their part of obligation in its entirety. The plaintiffs and pro-defendant performed their part of the contract as per terms of agreement but the defendant No.1 by executing Ext. G has violated the terms of agreement and as such, the plaintiffs are entitled to rescind the exchange deed. *Nasimuddin Mia vs Monindra Kumar Maloo and others 2 BLC 83*.

By whom contracts must be performed

~~40.~~ **Person by whom promise is to be performed**—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise 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.

Case-Law

By whom promise is to be performed—Benefits of a contract assignable—As a general rule, benefits of a contract are assignable subject to any contrary intention exhibited in the contract or the document itself.

A contrary intention may either be express 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. *10 DLR 165*.

—where an assignee of seller of goods made the tender within due date but the buyer refused to take delivery, the assignee may sue for damages. *1947 (Mad) 258; 1946 MWN 754.*

Section 40—"A contract for the exclusive purpose of the Dominion of Pakistan", covers contracts which had been entered into before the date Pakistan came into being (i.e., on 15-8-47) but liabilities under which were subsisting after that date.

A contract which places mutual obligations on the contracting parties cannot be treated as wholly executed, until the respective obligations have been discharged. *Federation of Pakistan now Islamic Republic of Pakistan vs Waliullah Sufyant. 13 DLR (FB) 74.*

Section 40—In case of sale of immovable property accompanied by an Ekramama, for the reconveyance of the same property to the vendor, a subsequent purchaser of the vendors' right, he being the successor-in-interest, is entitled to enforce the right of reconveyance against the original vendee. *Jalal Ahmed vs Thoraish Mia 20 DLR 80.*

41. Effect of accepting performance from third person

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

Case-Law

—when promisee accepts performance from third person he cannot enforce it against promisor. *25 CLJ 316; 39 A 178 PC*, such acceptance of performance by stranger produces the same result of discharging the promisor, although the satter has neither authorised nor ratified the act of the third party. *1928 (mad) 974.*

—where the adopted son renews a pro-note executed by the adoptive father but his adoption is set aside, the creditor can fall back on the original note and the adopted son cannot be regarded a "third person" within this section. *1982 (Mad) 972.*

When stranger to a contract can claim benefit thereunder.

—stranger to a contract can, in certain circumstances, i.e. when it is for his benefit, claim a benefit thereunder. *35 CLJ 493; 32A 410; 41 C 737; 46 C 160; 11 CLJ 68; 37 C 449; 3(Pat) LJ 394; 17 CLJ 70 (Ref); 62*

CLJ 55; 61 C 841; 38 CWN 682; 1934 (Cal) 682 Rule and exception on the point. *60 C 767; 37 CWN 447; 1933 (Cal) 407.*

—intention to constitute the trust must be affirmatively proved, liability regarding third party risk under motor insurance policy discussed. *1933 PC 11; 64 MLJ 133 PC.*

—when a stranger to a contract has by subsequent dealings been brought into privity with the parties, it is open to the Court to grant relief to him on the contract. *44A 702, 41 C137, Ref.1926 (Mad) 1065.*

—vendee from mortgagor undertaking to pay mortgage debt and communicating the fact to the mortgagee is personally liable to pay the amount. *1935 (Mad) 115, 62 CLJ 55,* it is so even when the mortgagee undertakes to pay the prior debt of the mortgagor. *1934 (Lah) 616.*

—where a vendee was asked by the vendor to pay off the mortgage debt binding on the property, the mortgagee had no right to enforce the payment of the mortgage money by proceeding against the vendee. *7 (Pat) LT 724; 1926 (Pat) 474; 961C 287.*

—a mere contract between the parties that one of them shall pay a certain sum to a third person will not necessarily make that third person cestui que trust so as to entitle him to sue the obligor for money. *30 CWN 812; 1926 (Cal) 1009; 55 C 922.*

—where a person is not a party to a contract he cannot take advantage of it or enforce it, unless there is an equitable trust created in his favour. *1927 (Mad) 179; contra,* where a contract is made between two persons for the benefit of another person, the latter can sue the defaulting person. *101 IC 386, 1935 (Mad) 141.*

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

Case-Law

—section 42—Devolution of joint liability.

—rule of survivorship among joint tenants is modified by section 42 and 45. 122 IC 404, 1935 (All) 975.

—on misappropriation of public trust by manner other members are jointly and severally liable to repay the amount used in family business. 85 IC 2.

Sections 42 & 45—When a person or two or more persons made a joint promise to two or more persons they are jointly liable for the performance of the same and the right to claim performance rests as between him and them during their lifetime and if any of them died their representative must be brought on record to enable them to perform the contract. Admittedly defendant Nos. 2 to 4 and 6 partners of firm, died during pendency of the suit and no step was taken for their substitution. Therefore, the suit must fail as it cannot proceed against dead persons. *Pubali Bank Ltd vs Sultana Oil Mills and Soap Factory and others* 51 DLR 323.

43. Any one of joint promisors may be compelled to perform—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any ¹[one or more] of such joint promisors to perform the whole of the promise.

Eash promisor may compel contribution—Each of two 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.

1. The words within square brackets were substituted for the word "one" by the Amending Act, 1891 (XII of 1891).

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 ¹Taka. D may compel either A or B or C to pay him 3,000 ¹Taka.

(b) A, B and C jointly promise to pay D the sum of 3,000 ¹Taka. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 Taka from A's estate, and 1,250 ¹Taka from B.

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

(d) A, B and C are under a joint promise to pay D 3,000 ¹Taka, 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.

Case-Law

Performance of joint contracts—Partner contracting on behalf of the firm—If partner alone can be sued on the contract.

Held : Under section 43 of the Contract Act in a suit upon a contract made by a partner on behalf of a partnership, the promisee can compel all or any of the partners to perform the whole of the promise. *Chand Mills vs Muhammad Zakaria and Co. Ltd., PLD 1958 (WP)(Kar) 510.*

—all joint contracts are joint and several. *17B 611; 3 C 353; 22 A 307; 25 B 378; 6 B 700; 24 B 77*, but a suit against some of the joint promisors bars a subsequent suit against others. *3 C 353, 5 M 37 contra, 22A 307.*

—under sections, 43 and 44 the liability under a joint contract is joint and not joint and several and gives rise to only one cause of action. But in terms of sections 43 and 233 (when the agent is liable) the liability is

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joint and several and as such a decree against agent is no bar to a suit against principal. *62 C 612; 39 CWN 461.*

—whether a contract is joint or several or joint and several is a question of intention *97 IC 124, 12 CWN 84 fol.*

—all joint promisees must be joined in suit, if one refuses he must be added as defendant *12, CWN 84; 25 M 26.*

—one of several mortgagees cannot sue unless the mortgagee's interest has been severed with the consent of the mortgagor. *31 CWN 374; 101 IC 530; 1927 (Cal) 425; 1928 (Mad) 933*, but when the mortgagor's interest vests in some of the mortgagees the other mortgagees may sue making him defendant. *47 IC 175; 24 CWN 297 PC.*

—payment to one of the mortgagees does not operate as a valid discharge above cases, contra. *1924 (Lah) 33; 44 IC 62*, but that may separate as valid discharge if the person to whom the payment was made was the manager and agent of all. *1928 (Cal) 125; 105 IC 751.*

—one of several partners may sue for the recovery of a debt joining others as defendants when the partnership has been dissolved. *29 (Bom) LR 147; 1927 (Bom) 125.*

—Judgment against one partner is no bar to subsequent suit against other partners so long as the debt is not extinguished. *1933 (Bom) 407; 1933 (Nag) 324*; so also a judgment against one joint debtor is no bar to an action against the other. *1934 (Pat) 52.*

—representative of a deceased partner is not necessary party for the recovery of debt accrued due in the lifetime of deceased. *9A 486, 17 B6; 17M 108, 20A. 305, contra, 18 C 86.*

—representative of a deceased partner may sue making the survivors defendants if they refuse to join. *21 B 412, 25 M 385.*

—where a contract is entered into by a partner on behalf of the partnership, the promisee can compel all or any of the partners to perform the whole of the contract and there is no question of joinder. *104 IC 700.*

—a suit to recover the balance on an account can be maintained against some of the partners, their liability being joint and several. *53 B 652; 31 (Bom) LR 1187.*

—where a plaintiff omits to implead all the heirs of his debtor as defendant he is only entitled to decree proportionate to the shares of defendants in the assets of the debtor. *63 IC 87.*

—joint promisors are bound to contribute towards debt kept alive by some of the promisors and the cause of action arises from the date of actual payment and not from the date of renewal. *1929 (Mad) 309, 116 IC 129.*

—a joint tort-feasor is not entitled to contribution. *1932 (Mad) 1; 1932 (All) 334.*

—contribution as between partners is conditioned by the special law of partnership. *1939 (Mad) 228.*

—contribution for costs. *1938 (Lah) 579; 1937 (All) 227; 1950 (Pat) 212.*

—Section 43 is not applicable when parties are jointly interested in a contract by a single person. *24 CLJ 371; 35 IC 563.*

44. Effect of release of one joint promisor—Where two or more persons have made a joint promise 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 promisors so released from responsibility to the other joint promisor or joint promisors¹.

Case-Law

Effect of release of one joint promisor—this section applies after as well as before breach. *4C 336.*

—a release of one of the mortgagors without even expressly reserving the remedies against other, does not release the rest. *25 CLJ 24 at P 32; 21 CWN 740; 44 C 162.*

—the promisee cannot absolve a joint promisor from his liability to contribution. *1949 (Cal) 242.*

—the position as regards joint It. Drs. is the same in principle as regards joint promisors, hence a release granted to one of them without the consent of others does not absolve the latter from liability. *1933 (Lah) 505; 1944 (Cal) 328.*

—but release by the creditory of some partners operates as absolute release of others. *1931 (Bom) 123, but see, 1927 (All) 830.*

1. See section 198 infra.

45. Devolution of joint right—When a person has made a promise to who 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.¹

Illustration

A, in consideration of 5,000²Taka lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

Case-Law

Devolution of joint right—this section gives a right to every joint promisee to claim performance of the promise, so a mortgage debt cannot be discharged by some of the co-mortgagees without the consent of others. 1928 (*Mad*) 933; 1930 (*All*) 98; 25 *A* 155; 32*A* 164; 1925 (*Mad*) 261; 81 *IC* 416.

—but the payment to one of several mortgagees operates as valid discharge of entire mortgage, if the person to whom the payment is made was the manager and agent of all the other mortgagees. 1928 (*Cal*) 125; 195 *IC* 751; 19 *ALJ* 852.

—when debt is due to joint promisees, suit by one to recover his share is not maintainable. 1927 (*Mad*) 84; 24 *CWN* 297; 37 *MLJ* 483; 17 *ALJ* 997; 53 *IC* 131 *PC* the defendant can take such plea 156 *PR* (1889) *FB*.

—one of several co-mortgagees cannot sue. 1950 (*All*) 598 *FB*.

—one of the heirs of the promisee cannot sue for his share. 1939 (*Sind*) 173.

1. For an exception to section 45 in case of Government securities, see the Securities Act, 1920 (X of 1920), section 4.

2. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

—a suit by some of the joint promisees for their share of money is maintainable. *1941 (Cal) 595.*

—where a lessee collusively and not bona fide pays rent to one of the co-lessors, other co-lessors may sue the lessee for their share of rent. *1945 (All) 311.*

Sections 45 & 42—When a person or two or more persons made a joint promise to two or more persons they are jointly liable for the performance of the same and the right to claim performance rests as between him and them during their lifetime and if any of them died their representative must be brought on record to enable them to perform the contract. Admittedly defendant Nos. 2 to 4 and 6 partners of firm, died during pendency of the suit and no step was taken for their substitution. Therefore, the suit must fail as it cannot proceed against dead persons. *Pubali Bank Ltd vs Sultana Oil Mills and Soap Factory and others 51 DLR 323.*

Time and Place for Performance

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

[For cases under sections 46-50. See cases under section 50, infra]

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

Illustrations

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.

[For cases under sections 46-50. See cases under section 50, infra]

48. Application for performance on certain day to be at proper time and place—When a promise is to be performed on a certain day, and the 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.

[For cases under sections 46-50. See cases under section 50, infra]

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

Illustrations

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.

[For cases under sections 46-50. See cases under section 50, infra]

50. Performance in manner or at time prescribed or sanctioned by promisee—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 ¹Taka. 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 ¹Taka. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A desires B, who owes him ¹Taka 100, to send him a note for ¹Taka 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Case-Law

Sections 46-50—Ordinarily time is not of the essence of the contract in an agreement for sale of land. *Haji Abdullah Khan vs Nisar Mohammad Khan 17 DLR (SC) 481.*

—Breach of contract—Party not bound to allow other party time to perform the contract even when time is not the essence of the Contract—Damages.

The maps printed by the defendant under the contract were not according to specification and were rejected by the plaintiff. The plaintiff did not allow the defendant to print fresh maps, and claimed damages.

Held : of goods are not according to specification, the buyer can reject them and that with his rejection the contract comes to an end. *Civil and Military Gazette vs Ghulam Rasul PLD 1956 (WP) (Lah) 365.*

—When time is essence of contract—Three requisites for this are (a) express stipulation between parties (b) nature of property and (c) surrounding circumstances. *Purnendu Kumar Das vs Hiran Kumar Das. 21 DLR 918.*

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

Unless the terms of contract provides otherwise, the principle is that it is the duty of the debtor to find out the creditor and make payment at a place where the creditor resides. *Mozahedul Islam vs Roushan Ara Begum* 22 DLR 677.

—**Negotiable Instrument**—Court at the place of residence of payee has no jurisdiction.

Where no place of payment was specified in the negotiable instrument and the payee brought a suit in the Court at his own place of residence on he ground that the debtor must seek the creditor, and not the place where the instrument was executed.

Held : The principle of debtor seeking the creditor could not be applied to such a case and that section 49 of the contract Act too cannot be invoked in cases relating to negotiable instruments. *Imam Ali vs Muhammad Sharif* PLD 1956 (Lah) 341; PLR 1956 (Lah) 292.

Place of payment of debt—It is the duty of the debtor to find out the creditor, and where the parties have not stipulated the place of the discharge of the debt it will be presumed that the amount will be paid at the place of the creditor. *Noor Muhammad vs Abdul Sattar* PLD 1959 (WP)(Kar) 348.

—**Time and place of performance**—If no time is fixed for performance it must be done within a reasonable time. 1930 PC 165; 34 CWN 681 PC.

—Where time for performance is fixed but time is not made the essence of contract either party can give notice to the other fixing reasonable period for performance. 48 B 368; 26 (Bom) 105; 1924 (Bom) 357, 1926 (Cal) 339; 1924 (Bom) 119.

—in a contract for sale of immovable property time is not ordinarily an essence of the contract. 40 B 289; 1915 PC 83; 20 CWN 744; 1950 EP 278; 1953 (All) 529.

—in commercial contracts time is prima facie essential, 1940 Oudh 443.

—except in commercial contracts, the ordinary presumption is that time is not of the essence. 1947 (Nag) 193.

—in a contract of re-purchase time is essence, 1923 (Rang) 42; 49 A 405; 1927 (All) 321; 1947 (Nag) 208; 1952 (Cal) 32; 56 CWN 557.

—time is essence of the contract by express condition and such condition may be inferred by circumstances of particular case. *36 CWN 285; 1932 (Cal) 493; 1931 (Lah) 996, 57B 292; 1933 (Bom) 71; 1931 (Lah) 205; 1950 (Cal) 582; 54 CWN 690.*

—where time is not the essence of the contract. *1925(Cal) 324;*

—where in a suit for specific performance a consent decree directed the plaintiff to execute a conveyance within a week from the date thereof and the defendant, to pay the price within four months therefrom, the term did not make time the essence of the contract and the defendant was bound to pay even if the deed was executed only two weeks later. *1930 (Pat) 234; 125 IC 123; IR 1930 (Pat) 475; 40 B 289 PC Ref.*

—where time is the essence of the contract it is the business of the contracting party to see that money reaches the other party in time before due date. It is not open to him to send money by registered post with a possibility of payment being delayed when payment by telegram without any possible delay is possible. *1931 (Lah) 205; 11 (Lah) 699; 131 IC 371.*

—the terms "during August, September" in an agreement do not mean that the seller has an optional period of two separate months in which he can perform; it means whether it is to be by instalments or otherwise. *30 C 477; 7 CWN 431.*

—date of performance being Sunday the contract may be performed on the next day according to trade usage. *26 CWN 354.*

—promisee cannot extend the time of performance without the consent of the promisor. *37 M 412.*

—in a contract to supply wagons, the price was to be paid in 3 instalments, the last being on delivery. There was default of second instalment, still a number of wagons were delivered, so time was not the essence of the contract. *1924 (Cal) 427.*

—when the vendor contracts to show the title deed within certain time and does not do that, he does not fulfil his part of the contract. *19 CWN 89.*

—in suits for specific performance of contract relating to immovable property time is not the essence of the contract if there is no express stipulation. *50 C 700; 27 CWN 693; 29 MLT 67; 61 IC 457; 33 CLJ 244; 25 (Bom) LR 1141; 1037; 98 IC 890.*

—in a contract for sale of immovable property time can be made the essence by express stipulation in the agreement or by one party giving

reasonable notice to the other party or if the nature of the property indented to be sold require it. *40 CWN 659; 1936 (Cal) 51.*

—Delay in bringing suit which amounts to laches, waiver, abandonment or acquiescence should be considered *10 C 1061; 27A 678, 29* whether time was the essence of the contract, *11 CWN 946; 6 CLJ 682 17 MLJ 454; 4A LJ 740 PC; 20 CWN 744; 23 CLJ 358; 40 B 219 PC; 30 C 265; 7 CWN 229. 1925 (Mad) 211; 46 M 148; 48 IC 214; 63 IC 914 PC.*

—when delay is a ground for refusing specific performance *48 M 148; 44 MLJ 107; 1923 (Mad) 284.*

—burden of cause of delay in performance is on the defendant. *20 CWN 159.*

—mere non-payment of delay in payment for goods delivered does not amount to refusal of entitle the other party to rescind. *33 C 477; 3 CLJ 249.*

—when time is the essence of the contract vendor may rescind it if vendee takes part-delivery on part-payment. *6 C 64.*

Place of performance—where there is no stipulation as to place of payment, debtor is to make the payment where the creditor is *30 B 167; 31 CWN 998; 25 ALJ 690; 1927 PC 156 PC; 1933 (All) 147; 1934 (Mad) 581; 1935 (Bom) 283 (Sind) 62.* and it decides the jurisdiction of the Court, *1934 (Mad) 581.*

—rule that debtor must seek the creditor does not apply to a bank. *1944 (Nag) 330.*

—section 49 does not apply to negotiable instruments. *1942 (Bom) 251.*

—promisee has he right to name the place of performance. *24 C 8 PC.*

—section 49 has no application when by manifest implication or necessary import, a place is fixed by the contract to make the payment. *45 CLJ 633; 31 CWN 998; 29 (Bom) 1027; 1927 MWN 520; 25 ALJ 690; 5 (Rang) 27; 1927 PC 156 PP.*

Section 46—If time is not made the essence of contract, subsequently it cannot be made so, barring certain circumstances. *Eskandar Ali vs Musammat Ahamar Begum 19 DLR 791.*

—**Contract—Time, when is essence of contract—The stipulation of the agreement is as follows :**

"If after establishment of our good title you do not within the stipulated period pay the balance of consideration money and get the kabāla executed by us, then only the earnest money paid to day will be forfeited and the bainapatra will be null and void."

Held : As the time specified in the agreement for sale was subject to more than one condition, it cannot be said that the parties thereto intended the time mentioned therein to be the essence of the contract. At any rate the defendants not having discharged their contractual obligation within the given time-limit, cannot turn round and say that the time was of the essence of the contract. *Esandar Ali vs Musammat Alhamar Begum*. 19 DLR 191.

Section 50—Contract—Breach of contract—Plaintiff to prove mutuality of agreement.

The plaintiff should succeed in an action for breach of contract if he proves that an agreement has been reached under which the defendant has made him a definite promise; that the parties thereby intended to effect their legal relations and that the defendant has broken his promise though it was supported by the presence of consideration. *HN Fabrics Ltd. vs Mallick Textile Industries*. 37 DLR (AD) 126.

—**Contract—Specific performance of contract**—No decree can be granted where terms of contract are uncertain. *H N Fabrics Ltd vs Mallick Textile Industries*, 37 DLR (AD) 126.

—**Contract loan—Contract with Bank—Liability of the debtors** to pay the creditor cannot be by-passed or ignored on the plea that the security on the basis of which the loan was taken has ceased to exist or been destroyed. *M/s MM Ispahani vs Sonali Bank* 37 DLR (AD) 1.

—**Loan contract—Guarantors' liability**—Guarantors personal liability for repayment of a loan, even though the principal debtor remains liable for the same—Creditor can sue the guarantors in preference to the principal. *MM Ispahani vs Sonali Bank*. 37 DLR (AD) 1.

—**Contract—Specific performance of contract**: Grant of decree for specific performance of, is discretionary with the Court. *Ram Chandra Das vs Md Khalilur Rahman*. 37 DLR (AD) 21.

Section 48—When time is essence of contract—Three requisites for this are (a) express stipulation between parties (b) nature of property and (c) surrounding circumstances. *Purnendu Kumar Das vs Hiran Kumar Das* 21 DLR 918.

Section 49—Unless the terms of contract provides otherwise the principle is that it is the duty of the debtor to find out the creditor and make payment at a place, where he creditor resides. *Mozahedul Islam vs Roushan Jan Begum* 22 DLR 677.

Section 50—Effect of non-performance of a contract for sale of property within a specified time—A contract for sale of property cannot be trifled—Contract once entered into must be fulfilled.

The plaintiff-respondent instituted a suit against appellants for specific performance of contract to sell the suit lands. It was alleged in the plaint that the defendant had entered into a contract to sell the suit lands. It was alleged in the plaint that the defendant had entered into a contract with him to sell the suit land on accepting earnest money and it was stipulated in the contract that the plaintiff would offer the balance of consideration money to the defendants appellants within one month upon which they would execute and register the sale deed and that if the defendants refused to accept the balance amount and failed to execute and register the sale deed within the said time, plaintiff would be entitled to specific performance of contract through Court. The defendants contested the suit which was decreed by the trial Court and the decision of the trial Court was affirmed by the High Court Division.

Held : Where in any contract time is intended to be the essence of the contract, it is not sufficient to find whether there was such intention or not, but it is necessary to find whose unwillingness to perform his part of the obligation under the contract eventually led to the non-performance of the contract. In a suit for specific performance of the contract which makes time the essence of the contract, the plaintiff must succeed if his readiness and willingness to perform the obligations is undertaken by him and proved.

The intention of the parties to a contract cannot be nullified by holding to the contrary, because the sanctity of the contract would then vanish. All formal transactions like a contract of sale of property are solemnly entered and cannot therefore, be trifled with. *Ram Chandra Das & others vs Md Khalilur Rahman & another* 37 DLR (AD) 21.

Performance of Reciprocal Promises

51. Promisor no bound to perform, unless reciprocal promises ready and willing to perform—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 instalments, the first instalment to be paid on delivery.

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

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

Case-Law

—**Promisor not bound to perform unless reciprocal promise ready and willing to perform.**

Suit for specific performance of contract—Failure of the plaintiff to assert that he is ready and willing to perform his part the contract will render the suit itself defective. *Maksud Ali vs Eskandar Ali 16 DLR (SC) 138.*

—Plaintiff asserting that he has performed his part of the contract—Further averment that he is ready and willing to perform his part of the contract unnecessary. *Maksud Ali vs Eskandar Ali 16 DLR (SC) 138.*

Wrongful refusal : A wrongful refusal by one party bound by the contract discharges the other from the performance of condition which he would otherwise have to fulfil, and the latter is thereupon exonerated from the necessity of proving his readiness and willingness to perform them. *3 DLR 23.*

—Willingness to perform one's contract in respect of purchase of property implies the capacity of the purchaser to pay the requisite sale consideration within a reasonable time. Further, even if a purchaser had the capacity to pay the requisite sale consideration, the question still remains whether he had the intention to purchase the property.

The capacity to pay the balance of sale consideration cannot be considered apart from the time when the sale consideration was payable. *Abdul Hamid vs Abbas Bhai Abdul Hussain*, PLD 1959 (Kar) 629.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

—to make a demand for fulfilment of promise it is not required to make an actual tender of money, it is sufficient if preparation has been made to pay in case the contract is fulfilled. 30 C 865; 8 CWN 25 PC 1923 (Sind) 50, 94, IC 304; 1927 (Lah) 176.

—Purchaser must prove that he was ready with the money or had made proper arrangements for securing the purchase money. 1940 (Rang) 284.

—if the person who agreed to supply the goods first breaks the contract, the other party is not to pay anything, 1931 (All) 539, but a party is absolved from delivering the goods if the other party absconds. 1932 (Sind) 9.

—in a suit for damages for non-performance the plaintiff whether buyer or seller must show his readiness to perform. 1925 (Mad) 971, 1928 (Lah) 20, 834, 1926 (Lah) 318, 86 IC 299 (M); 1923 (All) 220.

—where the reciprocal promises were not inherently capable of simultaneous performance, the case did not fall under section 32, 38 CWN 145; 1933 MWN 1452: 1933 PC 233 PC.

52. Order of performance of reciprocal promises—

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the 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 the 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.

Case-Law

Order of performance of reciprocal promises—case filling under this section and not under section 51, see the last PC case under section 51.

For other case see "Rescission of contract" under section 39.

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

Illustration

A and B contract that B shall execute certain work for A for a thousand 14Taka. 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.

Case-Law

Liability of party preventing performance—If a person makes the performance of a contract impossible he cannot claim damages. 80 IC 949.

1. See section 73, *infra*.

—a wrongful repudiation cannot, except by the election of the other party so to treat it, put an end the obligation if he still insists on performance. The repudiation is what is called "brutum-fulmen" (an ineffectual thunderbolt). 38 CWN 145: 1933 MWN 1252: 1933 PC 233 PC.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises—When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the 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 ¹[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 builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work, B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price certain merchandise on board a ship which cannot arrive for 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.

1. The word "Chittagong" was substituted for the word "Karachi" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Scheduled, (with effect from 26-3-71).

(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.

Case-Law

Effect of default of promise to be first performed—on failure of the promisor to perform his part of contract, if the promisee can rescind the whole contract. *30 CWN 145; 23 ALJ 806, 1925 PC 188 PC.*

—If the provision as to the delivery telegram is a condition of the contract and if it is broken, the buyer is entitled to rescind the contract and to sue for damages. *43 CLJ 199.*

—breach of essential terms of contract by one party entitles the other to repudiate contract, but breach of non-essential term entitled only to damages. *1924 (Sind) 105.*

—**Failure to perform contract**—Expression "Failure to perform" means such conduct as amounts to renunciation, i.e. to an absolute refusal to perform contract so that other party may accept it as a reason for not performing his part. *PLD 1981 Karachi 143.*

—**Delay in filing suit**—Mere for clearance on part of respondents from suing appellants at an earlier date or giving a formal notice in that behalf could not amount to keeping contracts alive for performance by either party. *PLD 1981 Karachi 143.*

—**Compensation payable by party not performing contract**—Where contracts for sale were subject to condition of supply of "bardana" and deputation of representative of appellants at time of weighment of goods. Appellants failed to depute their representative to enable respondents to start weighment and offer delivery of goods. Breach having been committed by appellants, respondents were entitled to claim damages. *PLD 1981 Karachi 143.*

55. Effect of failure to perform at fixed time, in contract in which time is essential—When a party to 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 so¹.

Case-Law

Relating to immovable property—time generally is not the essence of the contract:—When agreement as regards time for transfer of immovable property is not the essence of the contract, the contract can be fulfilled in a reasonable time. 8 DLR 616-8 PLR (Dac) 326.

—Relating to sale of immovable property 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. 8 DLR 616-8 PLR (Dac) 326.

—The tendency of Courts in cases of contracts 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. 8 DLR 616-8 PLR (Dac) 326.

1. Compare sub-section 62 and 63, *infra*.

—**Time when essence of the contract—conveyance and reconveyance**—In the 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 resale of the same, the time is the essence of the contract. *11 DLR 169.*

—Performance of contract when due to default of vendor, the latter's right to make time of the essence of contract, if valid in law.

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 not entitled afterwards, by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party. *Abdul Hamid vs Abbas Bhai Abdul Hussain Sodawaterwala. 14 DLR (SC) 24.*

Land, sale of—Time not essence of contract—Sale of running factory—Time is essence of contract. *Ebrahim Salek Mayet vs Ghulam Hussain. PLD 1960 (WP)(Kar) 207.*

—Sale of plot of land on condition that if the vendor did not build on it by certain time the vendor would resume it—Time not essence of contract—No penalty can be imposed for not building within the stipulated time. *Muhammad Shafi vs Lahore Improvement Trust. PLD 1959 (Lah) 1.*

Time essence of contract—"When Contract including condition that buyer would send instructions to seller for despatch of goods on a certain date—Time not essence of contract. *Robert Cotton Association Ltd. vs. PLD 1959 WP 178.*

—Seller not satisfying purchaser about his title to property in time—If time can be extended by seller.

The seller was bound to produce the income-tax clearance certificate and Custodian's certificate within the stipulated period and as these certificates were essential for the completion of the contract. The defendant, by not obtaining them in time, committed breach of the contract and must suffer the consequences arising from such breach, by extending the time for the performance of the contract but it is of no avail as the plaintiffs refused to extend it. *Munawar Begum vs Bapai Kailkushro—Contractor PLD 1960 (Kar) 122.*

Effect of failure to perform at fixed time, when time is essential and when not.—For case as to whether time is the essence of the contract, see cases under Section 46 to 50.

—para 3 of the section means that the promisee cannot claim damages for non-performance at the original agreed time, not that he cannot claim damages for non-performance at the extended time. *43 A 257; 24 (Bom) LR 687; 1922 PC 178 PC.*

—unreasonable postponement of performance by vendee entitles the vendor to terminate the contract, although time is not the essence of contract. *1921 (Mad) 141; 1934 (Lah) 51.*

—this section protects the promisee. *22 MLJ 413* if time is stipulated to be the essence of the contract, the vendor is entitled to retain the earnest money. *15 (Bom) LR 405; 20 IC 469.*

—Mere absence of specification of time in fulfilment of contract, does not rob contract of its basic characteristics. *PLD 1983 Karachi 387 (DB).*

—**Intention of parties**—The question whether the stipulation as to time is of the essence of the contract or not depend on the terms of the contract and the intention of the parties to it. The intention of the parties is a question of fact. It is to be gathered from the facts and circumstances of the case and can be best gathered from the contract itself and all surrounding circumstances. *PLD 1983 (SC) 344.*

—**Sale of immovable property**—In the case of contracts for sale of immovable property, the presumption is that time is not of the essence of the contract. *PLD 1983 (SC) 344.*

—The principle that time is generally not essence of the contract is not an absolute rule but one which is rebuttable. It is a question of fact to be determined in the circumstances of each case from the intention of the parties to be gathered from the agreement itself and subsequent conduct of the parties. *PLD 1987 Lahore 607.*

—**How time may be made essence of contract by parties**—Time cannot be made essence of contract by unilateral action. A party can make time essence of the contract, but only by giving a notice to other side, in case that other side is guilty of undue delay in performance of contract in a reasonable time. Whenever time was made essence of the contract, Court, has to look into circumstances to see if time proposed by one or other party was reasonable, a particularly high duty devolves on the Court where subject-matter is substantial and very valuable. *PLD 1983 Karachi 387 (DB).*

—**Intention of parties**—Question whether time was of essence of contract is a question of intention of parties. Its determination depends

upon terms of contract, conduct of parties before executing contract and surrounding circumstances. Mere mention of time in contract for its performance does not necessarily mean that time was of the essence of the contract. *PLD 1983 (SC) 344.*

—**Rising Price of Land**—Time spent on account of vendor's litigation could not be utilized by him to his own advantage to contend for being relieved of obligation to sell because of a sudden rise in prices. *PLD 1987 Lahore 166(2).*

—**Penalty provided for non-performance within stipulated time**—In absence of any provision in agreement making time for payment in essence of contract and in presence of provision for payment of penalty the case of non-payment, it could be inferred that occupation of property by party in part pre-performance of agreement continued to be lawful. Recovery of penalty (if any) depended upon proof of actual loss suffered. Delay in payment of balance of sale consideration did not make agreement for sale liable to cancellation. *PLD 1984 Karachi 401.*

—**Onus of proof**—The question that time was of the essence of the contract could not be allowed to be raised in second appeal especially when the question was neither set up in pleadings nor canvassed before lower appellate Court, and the ground had not been specially taken in the memo of second appeal. The question being one of fact has to be specifically set up in pleadings and appropriately and effectually adjudicated upon by the parties after giving opportunity to produce evidence. *PLD 1987 Lahore 607.*

—Time for specific performance of contract—Whether time was the essence of the contract—The parties by their conduct having extended the time it could not be said that time was the essence of the contract. *Osmanuddin vs Subal Chandra Mondal (1983) BLD 226.*

—**Contract for sale when time is the essence of**—In a contract for sale of immovable property time is not generally considered to be essence of the contract, unless the contract itself by clear and unambiguous terms expressly indicate that time is intended to be essence of the contract. *ICI Bangladesh Ltd. vs M/s Brothers (1984) BLD 207.*

—**Contract (Agreement)**—Relating to immovable Property—time generally is not the essence of the contract.

In contracts relating to immovable property, equity presumes that time is not of the essence of the contract unless expressly made so.

When agreement as regards time for transfer of immovable property is not the essence of the contract, the contract can be fulfilled in a reasonable time. *Hajee Saru Meah Sowdagar vs Jahanara Begum*. 8 DLR 616.

—Relating to sale of immovable property—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. *Hajee Saru Meah Sowdagar vs Jahanara Begum*. 8 DLR 616.

—Construction of, where time is sought to be made the essence of the contract. *Hajee Saru Meah Sowdagar vs Jahanara Begum*. 8 DLR 616.

—**Contract—Time when essence of contract**—Where time is the essence of the contract, and if, no action is taken within the stipulated time, subsequent action taken beyond the stipulated time, would be beyond the reach of the arbitration clause. *Chittagong Port Authority vs M/s Crete Construction Co. Ltd*. 31 DLR (AD) 138.

Section 55—Where in a deed of agreement no time is mentioned for registration of sale deed and the plaintiff is already put in possession of the suit land in pursuance of the agreement duly executed by the defendant upon receipt of the bulk of the consideration money, time is not an essence of the contract. It is true that a contract implies two parties, but a contract, in writing in this country does not necessarily imply that the document must be signed by both the parties thereto. *Abdul Samad Gazi vs Abdul Khalil Gazi and others* 53 DLR 262.

56. Agreement to do impossible act—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful¹.

1. See section 65 infra. And see the Specific Relief Act, 1877, section 13.

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

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the nonperformance of this promise.
- (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.

Case-Law

Contract for lease executed before section 75-A of the EB State Acquisition and Tenancy Act was enacted. Section 23 and 56 of the Contract Act render the contract void and unenforceable *Al-Haj Kutubuddin Ahmed vs Abu Jafar*; 14 DLR 128.

—Frustration of contract—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 circumstances beyond the control of the parties, has taken place.

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. 12 DLR 25.

—Effect of appointment of a liquidator on subsisting contract between the company in liquidation and a third party.

Where the liquidator retains the premises, belonging to the 3rd party (the petitioner Company) for storing the assets of the Company under liquidation 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 3rd party is entitled to recover arrears of rent from the liquidator which have accrued from the commencement of the winding up to the period of time that the liquidator retained the said premises for the purpose of the winding up. *12 DLR 25.*

—Where a contracting party by his own act brings about a state of affairs which renders the performance of a contract impossible, the contract will not be held unenforceable. If for certain acts on the part of the company and on information received by the police, the police takes the Managing Director and other persons of the company into custody and seals and locks up the godown, there is no frustration of contract within the meaning of section 56. *8 PLR (Dac.) 409.*

The doctrine of frustration, as embodied in section 56, is applicable only to executory contract where under performance or further performance of a promise is outstanding. *Abdul Mutalib vs Musammat Rezia Begum 22 DLR (SC) 134.*

Contract to do act which becomes impossible or unlawful.

—a clear line to distinction can be drawn between a physical impossibility and a mere difficulty in carrying out a contract. In this case plea of impossibility was not made out. *1931 (Lah) 347.*

—mere difficulty in the performance of a contract or the need to pay exorbitant prices in order to perform it does not amount to impossibility with section 56 Contract Act. *62 IC 915; 17 (Bom) 1087; 57 IC 636.*

—impossibility must be physical or legal impossibility but not economic unprofitableness. *63 IC 267; 21 CWN 573*, nor impossibility with reference to ability and circumstances, *33 CLJ 151; 1921 (Cal) 305.*

—where the lands held under a lease are silted by floods but it is possible to put them right by incurring some expenses, the lessee cannot refuse to pay rent. *1929 (Mad) 575; 11 IC 79.*

—doctrine of frustration applies to leases. *1950 (Cal) 441; 1952 (Cal) 567; 56 CWN 174.*

—where sale becomes impossible for want of sanction of the Cantonment authorities, the contract for sale becomes void. *1929 (All) 837; 27 ALJ 1122.*

—the essence of "frustration" is that it should be without any default of other party. *1935 PC 128 PC.*

—section 56 is not exhaustive and the principle of frustration applies India. *1951 Simla 189.*

—If the occurrence which rendered the contract incapable of performance was not within the contemplation of the parties, there is frustration. *1934 (Mad) 85.*

—Frustration of commercial contract. *1954 (Mad) 119.*

—doctrine of frustration does not apply when non-performance is due to default. *7 DLR SC 151; 1952 ALJ 393.*

—when the whole basis of the contract is frustrated by an occurrence of an unexpected event or change of circumstances there is dissolution of contract. *1954 SCA 187; 9 DLR SC 113; 1954 SCJ 1; 1954 SC 44.*

—contracts between subjects of countries at peace remain in abeyance during the continuance of hostilities and can be enforce when peace is established. *42 B 473; 37 IC 644*, but contract enduring the aid to the enemy or incapable of suspension is dissolved by the outbreak of war. *45 C 88; 21 CWN 670; 26 CLJ 62, 11 (Bur) LT 84, 41 M 225; 40 IC 851.*

—Where goods could not be delivered owing to the Government having requisitioned all the ships.

—available, the contract became impossible of performance and there was no liability for damages. *105 IC 319.*

—a contract may be cancelled for subsequent impossibility to perform in part. *7 C 474; 8 CLR 501, 40 B 570.*

—in a suit for damages for breach of contract against a Hindu father to give his minor daughter in marriage, performance of the contract does not become impossible simply because the girl declares here unwillingness to marry. *21 B 23.*

—this real question that must be considered under this section is not whether the contract was or became void but whether the promisor has to make compensation for non-performance. *105 IC 319.*

—Doctrine of frustration of contract is applicable to leases of immovable property in case where provision of section 108(e) TP Act cannot be attracted. *Azizur Rahman vs Abdus Sakur* 36 DLR (AD) 195.

—When it is improper if a person to disown his act after having taken some advantage.

A person in *pari delicto* cannot seek any relief before any Court of law. The complainant having secured his discharge in pursuance of the *salish* which was accepted by both the parties had thought it fit to disown the *salish-nama* Law does not encourage a person to take advantage of his own wrong. *Md Joynal vs Md Rustam Ali*. 36 DLR (AD) 240.

—**Contract becoming impossible by change of circumstances**—Where a contract is made with reference to certain anticipated circumstances, and it becomes wholly inapplicable or impossible of application to any such circumstances, without any fault on the part of plaintiff, it ceases to have any application. It cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made. *PLD 1978 Karachi 585*.

—**Onerous or burdensome contract**—The Court has no power or discretion to qualify the contract and depart from the express terms thereof in order to apply it to the charged circumstances on the ground that it seems just and reasonable to do so, because the change of circumstances was unforeseen by the parties at the time they entered into the contract or because the performance of the contract has become more onerous. *PLD 1978 Karachi 585*.

—**Contract capable of performance in substance**—To attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the supervening event legislative or otherwise. Where in spite of intervention of events subsequent to the making of the agreement which were not in contemplation of the parties and which could not be foreseen with reasonable diligence, the contract could still be performed in substance, it cannot be said that the contract has become impossible of performance within the meaning of section 26 of the Act. *PLD 1978 Karachi 585*.

—**Contract capable of performance in Substance**—To attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the supervening event legislative or otherwise. Where in spite of intervention of events subsequent to the

making of the agreement which were not in contemplation of the parties and which could not be foreseen with reasonable diligence, the contract could still be performed in substance, it cannot be said that the contract has become impossible of performance within the meaning of section 26 of the Act. *PLD 1978 Karachi 585.*

—**Frustration of contract**—In the case of an executory contract, where an unanticipated turn of events has occurred which makes further performance impossible or unlawful, the contract becomes frustrated at that point and, the parties are absolved from further performance under it. *PLD 1978 Karachi 585.*

—**Event not affecting essentials of contract**—To attract the doctrine of frustration of contract the performance of the contract must become absolutely impossible due to the supervening event, legislative or otherwise. Where in spite of intervention of events subsequent to the making of the agreement which were not in contemplation of the parties and which could not be foreseen with reasonable diligence. The contract could still be performed in substance, it cannot be said that the contract has become impossible of performance within the meaning of section 56. 18—Where a contract has been performed in part, 21 or fully the doctrine of frustration would not apply to it. *PLD 1978 Karachi 585.*

—Where it has not become impossible for a party to perform his obligation under a contract, but such performance has become merely burdensome to him, the doctrine of frustration can have no application. *PLD 1978 Karachi 585.*

—The Court has no power or discretion to qualify the contract and depart from the express terms thereof in order to apply it to the changed circumstances on the ground that it seems just and reasonable to do so, because the change of circumstances was unforeseen by the parties at the time they entered into the contract or because the performance of the contract has become more onerous. *PLD 1978 Karachi 585.*

—**Effect of frustration**—When there is frustration the dissolution of the contract occurs automatically. It does not depend on the choice or election of either party. The doctrine of frustration is not really an exception to the rule that a man must pay damages if he breaks the contract for there can be no default in not doing that which the law prohibits. *PLD 1980 (SC) 122.*

—**Price Control**—Where in view of a Martial Law Regulation prices were fixed under which the price at which the parties had agreed to supply

the goods has become illegal and unlawful, the contract for the supply of goods was frustrated because in law it was not possible to perform it on the terms agreed upon between the parties. Since the contract had become impossible to perform no responsibility for non-performance of the contract could be placed on any party to it. *PLD 1980 (SC) 122.*

—**Restriction on performance of contract**—Where the Government ban the movement out of a district of the goods which are the subject-matter of a contract of sale, the contract would be frustrated under this section. *PLD 1979 Karachi 88.*

—**Arbitration clause in frustrated contract**—Where a contract containing an arbitration clause is frustrated, the arbitration clause remains enforceable and therefore the parties may go to arbitration on all matters connected with the contract including the question whether the contract had become void, and for those matters and that question to be decided by the arbitrators. *PLD 1975 Karachi 861.*

—Applicability of the doctrine of frustration of contract is applicable to leases of immovable property in those cases whether provision of section 108(e) Transfer of Property Act are not attracted.

Held : This doctrine of frustration as embodied in section 56 of the Contract Act is applicable to leases of immovable property. Frustration in the present case is apparent from the facts proved that is, there has been a complete destruction of the subject-matter of the tenancy and therefore provisions of section 108(e) are not applicable. *Azizur Rahman & others vs Abdus Sakur & others 36 DLR (AD) 195; 14 DLR (AD) 123.*

—**Doctrine of frustration**—Whether it applies to contracts only or to leases also—Whether provision of section 108(e) of the Transfer of Property Act or doctrine of frustration as contained in section 56 of the Contract Act will apply in case where the entire structures of the tenancy was destroyed—Where only a material part of the tenancy is destroyed or otherwise rendered substantially and permanently unfit for the purpose for which it was let at the option of the tenant the lease will come to an end—But where the entire subject matter of the tenancy is destroyed the provision of section 108(e) Transfer of Property Act will not be applicable—The doctrine of frustration as embodied in section 56 of the Contract Act will apply in case of destruction of entire subject matter of the tenancy—*Azizur Rahman and others vs Abdus Sakur and others (1984) BLD (AD) 287.*

—Contract for sale entered into before 25-3-1971—Impossibility of performing such contract on the property of a party becoming abandoned property—On the coming into force of PO 16 of 1972 the agreement entered into before 25th March, 1971 is binding upon the Government in the same way as upon the original owner—Government merely stepped into the shoes of the original owner. *ICI Bangladesh Ltd vs GK Brothers (1984) BLD 207.*

Section 56—The advantage of doctrine of frustration cannot be taken by the appellant as he continued to occupy even after constructing a pucca two-storied stall on the suit land as a tenant of the respondent. The frustration of a contract of lease is a mixed question of law and fact and no issue on frustration was framed by the SCC Court as the appellant failed to allege it at the earliest opportunity and he cannot say that he is not a tenant and cannot claim title either, and there is no misinterpretation of section 108(e) of the Transfer of Property Act and section 56 of the Contract Act. *Mokbul Hossain Khandker (Md) vs Jaheda Khatun 2 BLC (AD) 43.*

Section 56—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. *Mokbul Hossain Khondker vs Jaheda Khatoon 47 DLR 430.*

Section 56—Contract—Performance—Frustration—Lease of fishery—whether doctrine of frustration of lease can arise where both the state acquisition department and the irrigation department are the component of the state government.

The appellants held some fisheries as lessee under the Respondent, Bangladesh. The Irrigation Department of the Government put up bounds on the adjoining areas of the fisheries resulting in water logging and over flooding the areas, which made the appellants' fishing operation impossible. The appellant suffered heavy losses and filed suit for proper premium compensation. The Trial Court held that the appellant was entitled to get back the premium only. Their appeal before the High Court also failed.

Held : (i) When a contract to do an act, afterwards becomes impossible, then the compensation for loss on account of non-performance of the Contract is not permissible.

(ii) The performance of the contract has been rendered impossible on the happening of the event which was due to the action of the Respondent, Bangladesh.

(iii) Refusal of compensation cannot be justified on the doctrine of frustration because it cannot be said that the respondent Bangladesh had no control over the action of Irrigation Department in the matter of giving opportunity to the appellants to get the benefit of the lease.

(iv) It cannot be said that the respondent, State Organ never contemplated that the action of its Irrigation Department could not affect the interest of the appellants.

It must be shown that the occurrence which rendered the contract incapable of execution was of a kind not with the contemplating of the parties when the contract was signed and for which they would have made provisions if its possibility could not be foreseen. *Mariam & others, vs Bangladesh, 20 DLR (SC) 247.*

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

Illustrations

A and B agree that A shall sell B a house for 10,000 ¹Taka, but that, if B uses it as a gambling house, he shall pay A 50,000 ¹Taka for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 ¹Taka 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.

Case-Law

—**Indivisible legal and illegal contract**—Where the parties treat the legal as well as illegal parts as forming one indivisible contract, the whole contract becomes void. Thus where a grantee of State land enters into agreement with another person stipulating to transfer his tenancy rights in State land to him and also to transfer proprietary rights after acquisition of

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

the same. Stipulation with regard to transfer of proprietary rights is not separately enforceable. Such agreement as a whole, was in violation of section 19, Colonization of Government Lands (Punjab) Act, *PLD 1978 Lahore 421*.

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

Illustrations

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

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

Case-Law

Alternative promise, one branch being illegal—Agreement to execute sale deed within one year of succession to a reversion and in default to execute sale deed of one's own property was a case of alternative promise and the promisee was bound to wait till the reversion opened. *1931 (All) 589, 1931 (All) 113*.

Scope—When you cannot sever the illegal from the legal part of a covenant, the contract is altogether void, but when you can sever them, whether the illegality be created by statute of common law, you may reject the bad part and retain the good. *PLD 1978 Lahore 421*.

—Where in reality there is only one covenant the Court will not rewrite it to make it into two covenants. *PLD 1978 Lahore 421*.

Appropriation of Payments

59. Application of Payment Where Debt to be Discharged is Indicated—Where a debtor, owing several distinct debts to one person, makes a payment to him, either

with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

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

[For cases under sections 59-61. See cases under section 61, infra.]

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

Case-Law

—**Single debt**, section does not apply. Sections 59 to 61 apply only where the debtor owes several debts to a person and voluntarily makes payment and not to a case where principal and interest are due on a single debt, or a decree has been passed carrying interest on the sum adjudged to be due. *PLD 1987 Karachi 612.*

—**Appropriation by creditor**—Where the debtor omits to indicate to which of the several debts, a payment is to be appropriated, the creditor

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

has the right to appropriate it to any debt actually due and payable to him by the debtor. *PLD 1987 Karachi 612*.

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

Case-Law

Sections 59-61—Appropriation of payments—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. *6 DLR 93*.

Sub-headings of Notes.

- (A) Appropriation as interest.
- (B) Appropriation in case of several debts.
- (C) Appropriation of rents and revenues.
- (D) Appropriation towards time-barred debts.
- (E) Appropriation when can be altered.
- (A) Appropriation as interest.

—Sections 59 to 61 of the Contract Act do not expressly deal with interest, but the principle underlying these sections can well apply to interest as well. *1922 P 66; 1922 P 369; 671C 606*.

—the creditor to whom principal and interest are owed, is not entitled to appropriate against the interest any sum which the debtor pays stipulating that it is to be appropriated against the principal. If the debtor on paying a sum stipulates that it should go in discharge of principal, the creditor can refuse to accept it on that condition, but if he accepts it he is bound by the stipulation. *48 C 839; 26 CWN 153; 30 MLT 39; 1922 PC 26 PC 23 CWN 534; 29 CLJ 305; 21 CWN 1055*.

—where money paid is not appropriated on either side the payment must first be applied in payment of interest and then in payment of

principal. *44 M 570; 26 CWN 33:23 (Bom) LR 644; 40 MLJ 549; 33 CLJ 447 PC; 21 CWN 1055; 28 A 25.*

—in the absence of any appropriation by the debtor at the time of payment, the payment should be attributed in the first instance to interest. *1946 PC 145.*

—creditor may appropriate for interest, if no otherwise directed by the debtor. *21 CWN 1055; 33 CLJ 447 PC 13 CLJ 139; 50 M 614; 1927 (Mad) 620; 1938 (Lah) 289.*

—where amount due to account of interest largely exceeds the amount paid, the creditor may properly appropriate such payments towards interest. *23 CWN 534; 29 CLJ 305.*

—Where payments are made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payment was made. *44 C 667*, and circumstances may be proved to show the intention. *13 CLJ 139.*

—debtor to satisfy whether the payment was made for principal or interest. *8 BLR 110 P 112.*

—where the creditor has not appropriated, in taking accounts, a debt which did not carry interest should rank last. *17 CWN 25; 18 IC 535 PC.*

—a creditor cannot appropriate a payment against interest awarded by way of damages: *61 C 711.*

—acceptance of an overdue instalment amounts to waiver of the right to charge interest, provided the payment is made in discharge of the specific instalment in arrears. *43 A 38; 18 ALJ 774.*

—in case of floating account contemplating a maximum, any payment subsequent to the reaching of the maximum is only ascribable to keep down the interest and make the amount available for being drawn out again. *1928 (Mad) 566.*

—rent does not necessarily include interest, so a sum paid as rent cannot be appropriated as interest. *11 CWN 1105 CLJ 69; 25 C 571, 575.*

(B) Appropriation in case of several debts.

—the rule in Clayton's case embodied in section 59 is that if a man owes another two debts, upon two distinct causes and pay him a sum of money, he has a right to say to which account the money so paid is to be

appropriated. So it is necessary, for the application of the section, that here are two debts and it is not applicable where there are several instalments of the same debt. *104 IC 673; 29 (Bom) LR 950; 1927 (Bom) 479.*

—a payment of the exact amount of one of several debts would be irrefragable evidence to show that the payment was intended for that debt. *32 CWN 359 P 362; 55 C 624; 47 CLJ 12.*

—appropriation must be made at the time of payment. *37 A 649*, and to the debt specified by the debtor. *59 IC 121.*

—creditor's right of appropriation under section 60 in the absence of a direction by the debtor lasts until he intimates the appropriation to the debtor. *5 (Pat) 336; 7 (Pat) LT 577; 1926 (Pat) 330*, and the creditor need not declare his intimation in express terms *60C 1265*, and before intimation the creditor can alter appropriation. *53 M 826; 1930 (Mad) 874.*

—but the intimation need not be made along with the payment. The words "with an intimation" in section 59 are not inconsistent with an intimation after a reasonable interval.*** The essence of an appropriation is that it should be known to both parties and hence an uncommunicated appropriation is not complete as between them. Where the first communication of appropriation was made by the debtor three or four months after the payment and the creditor did not communicate his own appropriation till more than a year after payment, the latter's concealed appropriation is ineffective as against the intimation of the debtor. *50 MLJ 242; 94 IC 384; 1926 (Mad) 792.*

—debtor's intimation must synchronise with the payment but creditor is entitled to make the appropriation at all times up to the time of trial. *1926 (Lah) 183; 27 (Punj) LR 9; 1937 (All) 1.*

—rule as to appropriation, all sections discussed. *57 A 605; 1935 (All) 221 FB.*

—in case of running account there is no question of appropriation. *1933 (Pat) 267.*

—where debtor omits to indicate and there are no circumstances indicating to which of the several debts a payment is to be applied, the creditor may apply it to any debt actually due. *26 C 39; 25 IA 179; 2 CWN 633; PC 1 PLJ 474.*

—appropriation by the plaintiff towards the single money decree and not to the mortgage debt is right and cannot be questioned. *37 MLJ 367; 52 IC 950.*

—in the absence of any appropriation either by the debtor or the creditor, the payment must be applied to the earliest debt. *61 C 711; 37 A 649; 24 (Bom) LR 410; 1927 (Bom) 479, 1 (Pat) LJ 474; 35 IC 375; 1947 (Pat) 273.*

—Where there are two bills and the amount paid by the debtor does not even cover the first bill, nevertheless the creditor is in law entitled to credit payment to both bills so as to save, if necessary, limitation in respect of each, unless an appropriation has been made by the person making the payment. *29 CWN 496; 87 IC 508; 1925 (Cal) 937.*

—to invoke section 60 the creditor must establish that there was a "lawful debt" actually due and payable to him. *1928 (Cal) 229; 37 MLJ 397 (Fol)*, where a decree is reversed in appeal but no provision is made as to costs of defendant such costs do not constitute a lawful debt." *104 IC 799; 1927 (Cal) 906.*

—a surety has no right to control the appropriation by customer or banker of moneys paid in the absence of special agreement. *20 CWN 562; 23 CLJ 256; 33 IC 34; 25 MLT 257; 49 IC 273; 1919 MWN 23.*

—Section 59 of the Contract Act applies to payment of Govt. revenue. When there is a direction for payment of one kist, the Collector cannot appropriate the payment to another kist. *30 CWN 618; 43 CLJ 468; 1926 (Cal) 866; 53 C 886, 35 C 636; 12 CWN 646; 8 CLJ 41; 33 C 1193; 10 CW 6; 948 Dist. 32 CWN 359; 55 C 624; 47 CLJ 12.*

—acceptance of money paid as rent cannot be appropriated as damages. *4 DLR FC 98.*

—landlord is to prove the existence of arrears towards which he credited the payment. *1922 (Pat) 446.*

(D) Appropriation towards time-barred debts.

—when there are several debts, the inference is that the payment should be attributed to those not barred *13 CLJ 139 at p 145; 19 IC 6(C) Contra. 41 IC 421 (C) 1926 (Nag) 75.*

—amount paid by tenant to the landlord to be applied to rent of the last year may be appropriated by landlord for the rent of the year which is barred by limitation 1930 (*Mad*) 594.

(E) Appropriation when can be altered.

—when money is paid to satisfy the kist and received and acknowledged on that account it is not in the power of one of the parties to alter the appropriation. 38 C 537; 15 CWN 443; 13 CLJ 525; 9 MLJ 436; 8 ALJ 480; PC.

"Notation of contract"—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.

In the circumstances of the present case, there is no novation of the contract inasmuch as there is no substitution of a new contract for the old one. *Noor Ahmad vs Md Shafi*, 22 DLR (WP) 39.

Unappropriated payments.

—May be applied to satisfaction of debts in order of time.

Where payments made by a debtor were not appropriated towards any particular agreement, section 61 of the Contract Act would apply and the payment must be deemed to apply in discharge of the debts in order of time. *P and T Co-operative Housing Society Ltd. vs Manzoor Ahmad*, PLD 1961 (*Kar*) 53.

Contract Which Need Not be Performed

62. Effect of novation, rescission and alteration of contract—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

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

(b) A owes B 10,000 ¹Taka. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 ¹Taka in place of the debt of 10,000 ¹Taka. This is a new contract and extinguishes the old.

(c) A owes B 1,000 ¹⁴Taka under a contract. B owes C 1,000 ¹Taka. B orders A to credit C with 1,000 ¹Taka in his books, but C does not assent to the arrangement. B still owes C 1,000 ¹Taka, and no new contract has been entered into.

Case-Law

Novation of contract—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, 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. *9 DLR 661*.

—**Novation, rescission or alteration of contract, or contracts which need not be performed.**

—**Effect of novation, rescission or alteration of a contract.**—the section will not apply where the agreement to substitute a new contract is made after breach of the original contract. *1942 (Cal) 87; 45 CWN 830; 1953 (Cal) 642*.

—there must be present substitution and not a mere agreement to substitute in future. *1936 (Lah) 476*.

—previous contract may be rescinded by new contract. *20 CWN 371; 23 CLJ 26*.

—Parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency. *1923 (Bom) 75*.

—contract does not absorb a prior contract, unless it is itself a valid one. *4 UP LR 37*.

—whether the parties agreed to substitute one contract for the other under section 62 Contract Act, is a question of fact and intention. Where

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

a mortgage was executed for the purpose of securing the amount lent on a hathchitta, held that the original debt had not become merged in the mortgage deed. *30 CWN 58:31; CWN 703; 1927 (Cal) 538; 102 IC 871: 1935 (Cal) 347.*

—departure from the original contract by consent must be proved by the person who asserts it. *1935 (Cal) 347; 68 MLJ 530; 1935 PC 93 PC.*

—where the mortgagee not only gives further time to the heirs of the mortgagor but enters into a new contract for the transfer of the property section 62 applies and not section 63 which would be applicable only if it were a case of an extension of time *1931 (All) 589.*

—when a bond is executed in lieu of arrears of rent, there is a novation. *1945 Oudh 29.*

—where the rates agreed upon were abandoned with the consent of both parties, the contractor can recover on the basis of fair and reasonable rates. *1938 PC 67; 1938 ALJ 169; 42 CWN 985; 40 (Bom) LR 746.*

—where the debtor agreed to repay by conveying certain property and pay the balance, the original contract does not revive on failure to perform the new contract. *63 C 194; 40 CWN 808.*

—if the new contract is not enforceable there is no novation. *1946 (Nag) 260.*

—where a suit on a later bond executed in place of the former is dismissed on the ground of interpolation, a suit for the original bond is not sustainable. There is distinction between cases where the latter contract is void ab initio and cases where it is declared void on account of latter events. *1931 (All) 325; 15 ALJ 223 PC Construed.*

—where the renewed promissory note was insufficiently stamped and therefore inadmissible in evidence, suit on the earlier note was maintainable because the latter note did not amount to a new contract such as is contemplated by section 62. *1931 (All) 560; 1935 (Cal) 102; 1935 (Mad) 23; 206 But see. 1929 (All) 980.*

—to validate a substituted contract in place of the old no further consideration is necessary, *1931 (Mad) 200; 131 IC 124.*

—by mere extension of time of performance no new contract is made,

but where new term is introduced, subsequently for the inspection of goods and after the time of delivery has expired defendant takes delivery of goods which are much less in quantity than the original contract, it is a new contract and nothing under the old contract is enforceable *17 CWN 1098*.

—What is material alteration. *1940 PC 160; 45 CWN 29; Bom LR 1156*.

—burden of proof of the liability of original party in case of alteration in the name. *1935 PC 93; 68 MLJ 530 PC*.

Right to recover earnest money, see, cases under section 65.

—**Agreement of parties**—One party to a contract cannot unilaterally alter the terms of the contract. *PLD 1976 Karachi 14*.

—No novation—Mere crediting of some amount into account of debtor by creditor, made on behalf of such debtor by strangers would not amount to variation of contract. *PLD 1986 Karachi 107*.

—**Effect of novation**—When a contract is novated, a fresh contract comes into existence, directly, or by implication, in place of the original contract. A contract would be rescinded by another contract between same parties where new contract, was inconsistent with, or rendered impossible the performance of the former contract. Where legal effect of both contracts, i.e. new and the former one, was the same though they differed in terms, even then it would be mere ratification of the former and both must be construed together. After the novation, if the subsequent contract is enforceable, that will govern the relationship of the parties and the obligor will stand relieved of his prior obligation. *PLD 1987 Karachi 132*.

—**Subsequent contract not enforceable**—Where new contract suffered from legal flaw such as want of registration, stamps, etc. on account of which the same became unenforceable, original contract would not be extinguished and rights and liabilities of parties would be determined on that basis. *PLD 1987 Karachi 132*.

—When the parties to a contract agree on substituting a new contract for it, it is known as novatio or novation. *Abul Hashem Khan vs Md. Shamsuddin Khan 41 DLR 415*.

—Specific performance of contract—The plaintiffs not having disclosed the material facts such as time, place and names of witnesses are guilty of laches. *Abul Hashem Khan vs Shamsuddin Khan 41 DLR 415*.

—Substitution of a new contract for the original contract, such as the reconstitution or the firm between the defendant Nos.1 and 2, is not a novation within the meaning of section 62 of the Contract Act. *Abul Hashem Khan vs Shamsuddin Khan* 41 DLR 415.

—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 of modification of the term of contract. 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. *Abdul Momen Bhuiyan vs Hazi Payez Ali Mia*; 43 DLR 97.

Section 62—Novation—No novation of contract where the original agreement is to sell "homestead and its attached land" and the subsequent deed for extension of time, in the recital portion, mentions it to be an "agreement to sell my own possessed land" but in the operative portion mentions that all other terms and conditions except the extension of date will hold good". *Maksud Ali vs Eskandar Ali* 16 DLR (SC) 138.

Section 62 and 63—Novation of contract—Extention of time for performance of a contract does not result in novation—New term must be introduced. *Central Bank of India Ltd vs Islam Khan*. 14 DLR (SC) 86.

Section 62 and 70—Novation of contract and compensation—Assurance to Contractor for enhanced rate of remuneration amounted to novation of contract or caused entitlement to fair compensation. *Bazlur Rahman vs Bangladesh* 1990 BLD (AD) 144.

63. Promisee may dispense with or remit performance of promise—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 performance¹, 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.

1. But see section 135, infra.

(b) A owes B 5,000 ¹Taka. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 ¹Taka paid at the time and place at which the 5,000 ¹Taka were payable. the whole debt is discharged.

(c) A owes B 5,000 ¹Taka C pays to B 1,000 ¹Taka. and B accepts it is satisfaction of his claim on A. This payment is a discharge of the whole claim².

(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 ¹Taka. This is a discharge of the whole debt, whatever may be its amount.

(e) A owes B 2,000 ¹Taka and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a ³[composition] of eight annas in the Ta. upon their respective demands. Payment to be of 1,000 ¹Taka is a discharge of B's demand.

Case-Law

Effect of dispensation with or remission of extension of time of contract.—The section is intended to apply not to cases where the whole contract has been supplanted by a new one but to cases where the old contract subsists but there is a voluntary remission of performance of some promise in it. *54 M 889; 1931 (Mad) 636.*

—Of the Contract Act has nothing to do with the meaning of section 92 of the Evidence Act. *1930 (All) 721; 127 IC 443; 1930 ALJ 1193 FB.* When section 92 Evidence Act stands in the way. *54 M 889; 132 IC 292; 1931 (Mad) 636.*

—a creditor can extend the time under section 63 even after the expiry of the time fixed for payment. *1931 (All) 589; 132 IC 321* a letter may be sufficient *49 A 599; 45 M 180, 398.*

—omission or negligence to assert rights does not amount to dispensation. *1946 (Bom) 469.*

—a discharge extinguishing a debt though in receipt of a smaller sum than that strictly due. *1929 (Mad) 794.*

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

2. See section 41 supra.

3. The word "composition" was substituted for the word "compensation" by the amending Act, 1891 (XII of 1891), section 2 and Schedule.

—Time can be extended. Suit for damages for non-delivery to be filed within one year of the date when the goods would be delivered—what the words really mean has to be determined in accordance with provisions of Contract Act—Time for performance of contract can be extended under section 63 of the Contract Act. *Abdul Jalil Chowdhury vs Muhammad. Steamship Co Ltd.* 13 DLR (SC) 214.

—if debt is released at third person's instance, still promisor or his assignee can take advantage of release. 1931(Bom) 123.

—in a case falling under section 63 no fresh consideration is necessary. 1931 (All) 589; 1934(pat) 149; 1935 (Lah) 40; 1946 (Bom) 469; 1947 (Mad) 414; 1953 (Cal) 642.

—for an agreement to remit consideration is necessary. 1939 (Mad) 688; 1935(Rang) 188; 1951 (Nag) 392.

—under the English Law a third person for whose benefit a contract is entered into cannot enforce it, but in India section 63 confers a right on the third person to take advantage of release made for his benefit 1931(Bom) 123.

—the contention that the promise mentioned in section 63 can only do the acts he is empowered to do by that section if there be an agreement as defined by section 2(e) to that effect, cannot be accepted. The language of the section does not refer to any such agreement. 1928 PC 99; 55 MLJ 1; CLJ 503; 32 CWN 738; 26 ALJ 603; 108 IC 678; 180IC 678; 29 Punj LR 353 PC.

—**Extension of time**—There must be mutual agreement between the buyer and the seller for extension of time. A unilateral act to extend time by the promise of his own accord and for his own benefit is of no consequence. An agreement to extend time need not necessarily be reduced into writing. PLD 1986 (SC) 698.

Limitation—Time for delivery of goods can be extended by agreement. *Karachi Steam Navigation Co vs M/s Abdul Rahman*, 14 DLR (SC) 66.

64. Consequences of rescission of voidable contract—When a person at whose option a contract is voidable rescinds it, 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 received¹.

Case-Law

Rescission of voidable contract—a party putting an end to a voidable contract under section 39 is liable to restore benefit received from the other party. *1943 PC 34; 47 CWN 497; 1943 ALJ 387; 46 (Bom) LR 178.*

—"voidable contracts" seem to refer to such contracts as are spoken of as voidable in section 19 of the Act. *3 CWN 468; 26 C 381.*

—the term "benefits under the contract" extends only to the money paid as consideration and not to the improvements which a usufructuary mortgagee has effected. *1931 (All) 201; 52A 831.*

—when the sale of a minor's property by his guardian is set aside the minor must return the amount which he has received. *1928 (Lah) 250; 10 (Lah) LJ 183; 1938(All) 369.*

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

1. See Section 75, *infra*.

Illustrations

(a) A pays B 1,000 ¹Taka 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 ¹Taka.

(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 wilfully 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 ¹Taka, which is 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 ¹Taka paid in advance.

Case-Law

Section not applicable where a contract is void ab initio under section 23 or section 25 of the Act. *PK Bask vs Hossain Co.* 9 DLR 1; PLD 1957 Dac 233.

—If the contract is not yet performed or is merely an executory contract, then one of the parties may rescind from his agreement subsequently, and may in such circumstances, recover money paid in consideration thereof upon the repudiation of the contract as upon a failure of consideration. But if the illegal purpose or any material part of it had been performed, then the money paid cannot be recovered for the parties in such cases must be held to be equally at fault, and the rule is that, in cases where the parties are in *pari delicto*, the position of the defendant is always better.

Section 65, 70—Lease invalid—Benefit derived from lease must be restored to the lessor. *Fazal Din vs Municipal Committee Lyallpur*, PLD 1956 Lah 916.

1. The word "Taka" substituted for the word "rupees" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule, (with effect from 26-3-71).

Section 65—Minor entering into mortgage by fraudulently representing him as major and subsequently instituted a suit as plaintiff for restitution of mortgaged property; held, 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 he minor must refund the consideration. *Shah Pasant Khan vs Ihsan*, 21 DLR (WP) 362..

—Void agreement—any persons receiving advantage under a void agreement is bound to restore the good obtained under the agreement or to make compensation for it. *Amanullah vs M/s Karnaphuli Paper Mills Ltd.* 23 DLR 207.

—The appellant for the first time in the Supreme Court urged, that the Court might order an enquiry so as to determine what benefit had been derived by the respondents from the contract with a view to compelling them to refund it to the Committee, on the principle of quantum merit embodied in section 65 of the Contract Act.

Held : This point involves an investigation into the facts and therefore ought to have been raised in the High Court. No attempt seems to have been made to do so in that Court.

The appellant had realised more than the money it would have normally realized in such a transaction.

Further held; in the circumstances, no equities exist, compelling us to order an enquiry for the benefit of the appellant Committee on the question of quantum meruit. *Small Town Committee Ram Nagger vs Muhammad Sadiq* (1960) 12 DLR (SC) 296; PLD 1960 Supreme Court (Pak) 394 (1960) 12.

Obligation of parties under void contract—this section does not apply to contracts which have become barred by limitation. 1945(Mad) 171; 1948 (Nag) 382.

—this section does not apply to contracts which are illegal. 1944(Mad) 415; 1941(Pat) 510; 1938(Nag) 335 FB 1949(Mad) 252; 1951 (Pat) 463.

—the words "when a contract becomes void" are sufficient to cover the case of a voidable contract which had been avoided. *1932 MWN 502 ; 55 CLJ 255 ; 36 CWN 461 ; 1932 ALJ 297; 1932 MWN 502; 34(Bom) LR 771; 1932 PC 89 PC.*

—section 65 covers the case of a contract void from its inception as much as one subsequently discovered to be void. *33 B 411 ; 1932 Oudh 193 ; 137 IC 574 FB; 1938 (Nag) 335 FB*

—where contract is void for non-compliance with the provisions of law as to formalities to be observed by a statutory body. *46 CWN 393 ; 6 DLR (All) 258; 1951 (All)736.*

—lender is entitled to relief when the mortgage is discovered to be void. *1943 PC 29 ; 47 CWN 509; 46 (Bom) LR 170; (1943) 1 MLJ 508*

—time at which agreement is discovered to be void is the date of the agreement for the purpose of limitation. *37 CWN 379; 57 CLJ 166; 1933 PC 63 ; 1933 MWN 190; 54 A. 1067 PC 50 C; 929 Rel on.*

Where a contract of sale is vitiated by mutual mistake when the parties acted bona fide, in a case of restitution the plaintiff is not entitled to claim interest on the purchase money or to any damages. *1930 (All) 252; ALJ 327.*

—this section does not apply to advantage received after the agreement ceased to be enforceable. *1946 (Cal) 245.*

—when a minor fraudulently representing himself as major induces an innocent person to purchase a property from him and then sues for the recovery of the property on the ground that the contract of sale is void *ab into*, under section 65, the minor should refund the purchase money. *1930 (Mad) 945 ; 54 M 112 ; 1933 (All) 371 ; 30 C 539 PC Ref (1928) (Lah) 609 ; 1921 (All) 326 fol 1928 (Cal) 537, Dist.*

—but where there is no fraudulent misrepresentation by the minor who executed a bond the plaintiff cannot claim any restitution under section 65, nor any compensation under section 41 *SP. R Act 61 C 1075 1935 (Cal) 198; 1937 (All) 610; 1937 Oudh. 521.*

—where a contract is held to be void the party is not entitled to claim the penalty under the contract, but can claim relief on the *quantum meruit basis*. *1934 (Mad) 335.*

—in the absence of any contract there is no liability to pay interest. *1939 (Mad) 957.*

Right to recover earnest money.—when a contract is found to be invalid, advance money may be recovered. *1933(Mad) 145 ; 43 C 790 ; 54 C 189 ; 53 M 309 ; 352 ; 45 (All) 179 PC Ref.*

—Sections 64 and 65 are inapplicable to case of earnest money. *1952 (Cal) 93 CWN 765.*

—earnest money is part of the purchase money, but when a contract of sale falls through due to the default of the vendee he is not entitled to recover the earnest money. *39 CWN 174 ; 1935 (Lah) 192 ; 1926 PC 1 ; 50 CLJ 629*, although the vendor cannot establish that he has suffered any loss. *55 C 638 ; 1927 (Cal) 964.*

—a vendee who has repudiated the contract without justifiable reason can recover the advance purchase money if he can show that the vendor has regarded the contract at an end. *1935 (Mad) 903.*

—a buyer who has paid earnest money may recover it back when the seller has failed to deliver goods. *50A 82 ; 1927 (All) 621.*

—when money is paid voluntarily with full knowledge of all the facts it cannot be recovered on the ground that it was paid under a mistake of law. *39 CWN 174*, but money paid under a mistake of fact material for the contract is recoverable, as any agreement concluded under mistake is void in law. *1934 PC 171 ; 1934 ALJ 609 PC.*

—when a contract is a result of a mistake on either side the party who has advanced money is entitled to get refund. *1935 (Mud) 287.*

66. Mode of communicating or revoking of rescission of voidable contract—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 proposal¹

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance—If any promisee

1. See Sections 3 and 5, *supra*.

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.

Illustrations

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 as it is caused by such neglect or refusal.

Case-Law

Sale of land—Time essence of contract—Income-tax certificate not procured—Failure fatal to seller—When in a case of sale of land the time was the essence of the contract but the seller did not procure income-tax and other certificates within the stipulated time.

Held : The seller was bound to obtain all permissions and certificates within three months of the agreement. *Ebrahim Saleh Moyet vs Ghulam Hussain Pakseema, PLD 1960 (Kar) 197.*

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