Chapter V

Of Certain Relations Resembling those Created by Contract

68. Claim for necessaries supplied to person incapable of contracting, or on his account—If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Case-Law

—Claim for necessaries supplied—section 68 (claim for necessaries supplied to person incapable of contract, applies to minors as well as to persons of unsound mind. *30 C 539 ; 30 IA 214 PC.*

—nature of proof required from the lender. *1938 (Nag) 68.*

—when guardian borrows for necessaries minor's estate is liable. *1932 (Mad) 696 ; 1933 (Mad) 285.*

—marriage expenses of a minor Mohammedan girl may be recovered. *1947 (Mad) 155.*

—sister's marriage constitutes "necessaries". *145 IC 350 ; 16 NLJ 58 ; 1933 (Nag) 285.*

—"necessaries" includes money urgently needed for the requirements of a minor such as for the payment of revenue, and cannot be such as food and clothing. *52 A 381 ; 1930 (All) 128 (32 A 325, 7 C 140, 21 C 872) Ref.*

—money lent to effect necessary repairs of minor's house can be recovered. *1936 (Nag) 12.*

—interest on money advanced may be allowed. *1940 (Mad) 106.*

—costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy or cost incurred in defending him in prosecution for dacoity, are necessaries within section 68. *7 C 140, contra, 17M 257 ; 22 M 314.*

—supplying means to the promisor and endeavouring to find employment for him without thinking of any consideration at all will not constitute any enforceable contract. *39 CWN 563.*

69. Reimbursement of person paying money due by another in payment of which he is interested—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in [1][Bangladesh], on a lease granted by A, the Zaminder. The revenue payable by A to the Government being in arrears, his land is advertised for sale by the Government. Under the law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

Case-Law

—Reimbursement of person interested in the payment—section 69, 70 deal with entirely different conditions and they cannot both apply to the same set of facts, if one applies the other cannot. *Sudhangshu Umer Roy vs Bonamali Roy, AIR 1946 (Cal) 63.*

—"Bound by law to pay"—Meaning of the words "Bound by law to pay" extend to any obligation which is an effective bond in law. The Common Law of England afforded a right of indemnity to one who had paid "under compulsion of law" against the true obligor without limiting

4. The word "Bangladesh" was substituted for the word "East Pakistan" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), Second Schedule.

the circumstances in which the latter's liability had arisen. There is authority in the Courts of India also for the proposition that "bound by law" covers obligations of contract or tort. *Govindram vs State of Gondul, PLD 1949 Privy Council 179.*

—Person making payment—It must have proprietary interest in the property to which it relates.

Section 69, does not require that a person to be interested in a payment should at t he same time have a legal proprietary interest in the property in respect of which the payment is made.

The general purport of the section is reasonably clear, to afford to a person who pays money in furtherance of some existing interest an indemnity in respect of the payment against any other person who, rather than he, could have made liable at law to make the payment. *Govindram vs State of Gondul, PLD 1949(PC) 279.*

—the liability to contribution is not entirely constrained in sections 69 and 70 of the Act, although generally speaking a large number of such cases do come within the purview of those two sections. *30 CWN 366 ; (Cal) 657 ; 32 CWN 221 ; 14 CWN 699 ; 34 C 92; 9 CWN 670,* the liability may be based on equitable consideration *33 CWN 221; 1929 1926 (Cal)315.*

—in a suit under section 69 it is essential that there should be firstly, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person *41 CLJ 571 ; 42 C 914 ; 90 IC 851.*

—the right of contribution is a right in an individual to be re-couped, by those who have not parted with the full share, the quantum of money or goods provided by him in excess of his share of a common liability. *131 IC 404 ; ID 1931 PC, 132 PC.*

—the right to contribution though an equitable right arises out of an implied contract of indemnity between the parties liable for the same debt. The right is not confined to sections 69 and 70 of the Contract Act, but may be based upon the equitable consideration. *33 CWN 221 ;1929 (Cal) 315.*

—the words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss

or inconvenience or at any rate any detriment capable of being assessed in money. *41 CLJ 671 ; 52 C 914 ; 32 CWN 1087 ; 1928 (Cal) 389 ; 54 A 140 ; 1932 (All) 332 ; 1925 (Pat) 201 ; 18 CWN 779 ; 26 CLJ 607. 22 CWN 347 ; 1940 (All) 416.*

—a person making the payment need not have legal proprietary interest. *1950 PC 99; 54 CWN 419 ; 1950 ALJ 270 ; 52 (Bom) LR 450.*

—but to entitle a person to reimbursement it must be shown that he acted bona fide which means not only his good faith in making the payments in the interests of the estates he represents but also his belief in his own title to the estate. *53 M 952 ; 1931 (Mad) 207 ; 1932 (Mad) 71.*

—Section 69 is extended to include cases not only of personal liability but all liabilities to payment for which owners of lands are indirectly liable when such liabilities are imposed on lands held by them. *43 CLJ 142 ; 1926 (Cal) 765 ; 61 C 864 ; 38 CWN 758 ; 59 CLJ 423 ; 1934 (Cal) 709 ; 1944 (Cal) 272 ; 48 CWN 454.*

—a co-sharer who is also liable to pay the rent amount along with the other co-sharers is a person interested in the payment of the money. *30 CWN 366 : 94 IC 159 ; 1926 (Cal) 657.*

—a sale of the right, title and interest of the Jt. Dr in execution of decree for rent obtained by co-sharer landlord, may, in certain circumstances pass the entire tenancy, so as it is a matter of controversy and there is apprehension of injury, a person making a payment under such apprehension is entitled to contribution. *18 CWN 1308 : 20 CLJ 196 (12 CLJ 566 ; 14 CWN 945 ; 18 CWN 327 ; 19 CLJ 525 ; 21 IC 102) Ref see also, 20 CLJ 205 ; 19 CWN 458 ; 30 CLJ 34.*

—a purchaser from a co-sharer is a person 'bound to pay' the money although he was not a party to the decree for rent and the period for which the rent was claimed was previous to his purchase. *30 CWN 366 ; 94 IC 159, 1926 (Cal) 657.*

—when one of the judgment-debtors deposits the decretal amount under Order 21, rule 89, CPC he is not entitled to contribution in respect of the damages paid by him. *1931 (Pat) 394.*

—mortgagee paying rent or revenue is entitled to recover. *1940 (Nag) 285, 1937 (Nag) 225.*

—contribution for costs of suit. *1934(Cal) 709 ; 38 CWN 758.*

—in a suit for contribution interest may be allowed. *1939 (Mad) 531.*

—a co-sharer tenant paying of rent decree is not entitled to interest *48 CWN 845.*

—Another is bound by law to pay—where the estate of a deceased person was assessed to super-tax and the firm of which the deceased was a member made the payment, held that the assessment being invalid and the payment being voluntary the firm could not be reimbursed *31 CWN 630 ; 103 IC 120 ; 1927 (Cal) 518.*

—where after the valid transfer of an estate but before mutation of name of the transferee there is a payment of arrears of revenue by another person interested, the latter cannot claim contribution from the transferor but should proceed against the transferee. *35 CWN 1136.*

—When the suit is triable by Small Cause Court—contribution signifies payment by each of the parties interested of his share in any common liability. Mutuality is the test of contribution. So where the plaintiff denies joint liability his suit will not be for contribution but for money paid and will be triable by SC Court. *18 CWN 1308; 20 CLJ 196 (16 CLJ 148, 16 CLJ 156), relied.*

Proprietary interest not necessary: The words of section 69 do not require that a person to be interested in a payment should at the same time have legal proprietary interest in the property in respect of which the payment is made. A person having only a handling contract may take payment of terminal tax on goods behalf of the owner of those goods and then make a claim for reimbursement under this section. *PLD 1978 Karachi 244 (DB).*

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

Illustrations

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

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

Case-Law

Section 70—Liability to contribution.

—where a judgment debtor brought a suit for contribution from the other co-judgment-debtors in respect of joint decree for costs.

Held : Where a party is merely a formal defendant and not personally interested in the result of the suit he cannot be made liable to contribute, *1 PLR(Dac) 620.*

—Obligation of person enjoying benefit of non-gratuitous act.

Application of the section—in order to apply section 70 three things are necessary:—(1) The act must be lawfully done for another, (2) It must be voluntary one, (3) the person for whose benefit it is ostensibly done enjoys the benefit therefrom. When one co-tenant pays the amount of the rent sued for on compromise with the landlord he can sue his co-tenant for contribution. *34 CWN 41 ; 1930 (Cal) 344 ; 29 CWN 1052; 1925 (Cal) 1097, 43 CLJ 83 ; 1925 (Pat) 201.*

—section 70 is very wide and applied with discretion it enables the Court to do substantial justice. *32 CWN 1487 ; 108 IC 46 ; 1926 (Cal) 389.*

—divergent opinion as to whether section 70 applies in case where there is an express contract *62 C 612; 39 CWN 461.*

—section 70 does not apply to the case of a minor. *1931 (Lah) 344 ; 30 C 539 ; L 1940 (pat) 324; 19 P 739 FB.*

—"Lawfully"—the word "lawfully" means merely 'bona fide", *1928 (Mad) 317; 28 MLJ 384; 1919 MWN 244.*

—the word 'lawfully' in section 70 means some interest in making payment. It is not every case in which a man is benefited by the money of another that an obligation to repay that money arises; their must be an obligation, express or implied to repay, *25 CLJ 325: 21 CWN 394 ; 2 CLJ 311 ; 2 AI 131 ; 15 BLR 208 PC 31 P 303; 1953 (Pat) 145.*

—there is no obligation in case of a voluntary payment. *1945 PC 23; 49 CWN 195 ; 1945 ALJ 51 ; 47 (Bom) LR 250; 1945 MWN 33.*

—where there was a rent decree against the tenure-holder a raiyat under the tenure making payment of decretal amount and setting aside sale is entitled to contribution *38 CWN 554; 1934 (Cal) 667*

—when a deposit is made with the approval of the Court, it should be held that it is a deposit made "lawfully." The existence of an interest is not always a test establishing the lawful character of the payment. *32 CWN 1087; 1928 (Cal) 389 ; 108 IC 46.*

—a payment made by the purchaser of certain property to redeem an antecedent mortgage which was not disclosed to him at the time of his purchase is a lawful" payment. *1931 B 39 ; 32 (Bom) LR 1376 ; 45 C 691 fol, 30A 167 Dist.*

—where a co-sharer paid a certain sum of money to the landlord in fraud of others to induce the landlord to re-settle the tenure with him but the payment was appropriated towards arrears of rent due, it was not "lawfully" made within section 70 and no suit for contribution was maintainable. *44 CLJ 263; 1927 (Cal) 56.*

—"Another person"—"another person' does not suggest that the person making the payment must be under no liability to make it. *1926 (Cal) 1031; 95 IC 545; 6 CWN 903 (18 CWN 327) (Fol) 32 C 643 Dist.*

—"Enjoys the benefit—the word "enjoys" should not be construed as meaning "accepts enjoys". It is not necessary that the person from whom contribution is sought should have had an opportunity of declining the benefit. *1931 (Pat) 394; 134 IC 139; 10(Pat) 528 ; 16 CLJ 156; 8 ALJ 622 ; 38 M 235 ; 28 IC 309 ; 14 CWN 945 ; 12 CLJ 566; 309 ; 33 M 15* not fol contra. It must be shown that the person benefited has had an opportunity to accept or reject the benefit. *1931 (Mad) 51, 33M 15; 1933 (Lah) 95.*

—where a person does a thing which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim contribution from the latter. *43 MLJ 271; 1922 MWN 608 ; 33M 15 ; 45 IC 786, 21 C 496 ; 16 MLT 375, ref.*

—one of the ingredients of the section is that the work must have been done in part at least for the benefit of the deft. *1931 MWN 1231; 1930 (Mad) 644 ; 126 IC 733 (38 C1: 24 CWN 1068 : 1928 (Mad) 320; 38 M 235) ref.*

—where a co-sharer sold his right to a stranger and in execution of a rent decree for the period prior to the sale entire property was put up to sale and was purchased by the vendee and then another co-sharer deposited the entire amount and got the sale set aside and brought a suit for contribution against all the co-sharers including the vendee, held that the vendee was a person "benefited by the payment, although as a result of the deposit he lost the benefit of the purchase of the entire property. *30 CWN 366; 1926 (Cal) 657; 94 IC 159.*

—where a Railway Company has got the benefit of the work done by a contractor who did not do it gratuitously, in the absence of settlement of rates, reasonable or market rates should be allowed. *1935 (Cal) 347.*

—Compensation for service rendered depends upon the intention of the person rendering service. *1937 PC 50; 41 CWN 677 ; 1937 ALJ 575; 39 (Bom) LR 720; (1937) 1 MLJ 719; 167 IC 5 PC.*

—Suit for reimbursement or contribution, when lies—when purchaser can claim contribution—purchaser in execution of rent decree paying back rent is not entitled to contribution. *6 CWN 794.*

—a purchaser of tenure is liable for the arrears before his purchase and he cannot recover it from his vendor. *20 CWN 40 n 23 CLJ 125 I CWN 458 Fol 3 CWN 384 and 4 CWN 590. Dist.*

—purchaser at a sale in execution of mortgage decree acquires the property subject to pre-existing rent charges and when he discharges that he cannot sue the Jt. Dr for contribution. 1 *CWN 458; 9 CWN 670 Contra 29 C 813.*

—section 69 contemplates a case where the person who makes the payment is under no legal liability to make it and pays the money for another person who is bound by law to pay. So, a mortgagee purchaser who is liable to pay the arrears of rent cannot sue the mortgagor for contribution under this section *32 C 643 ; 9 CWN 670 ; 1923 (Pat) 353.*

—vendee paying encumbrance but afterwards his title failing, his right to be reimbursed.*1923 (Mad) 242: 17 LW 394; 74 IC 416.*

—the purchaser from an unauthorised person satisfying decree cannot claim to be re-couped *1923 (All) 404.*

—When mortgagee can claim contribution—an usufructuary mortgagee making a payment under Order 21 rule 89 CPC to set aside a

sale in execution of a decree against the mortgagor is entitled to be reimbursed. *1923 (All) 127.*

—where a puisne mortgagee pays off the amount due under the prior mortgage to avoid a sale, he is entitled to recover the sum then paid under section 69 apart from section 74 of the *TP Act. 54 C 424; 45 CLJ 191 ; 1927 (Cal) 393,* and a mortgagee from a co-sharer, who has paid the entire revenue payable by all, is entitled to recover from other co-sharers. *1930 (All) 516; 1930 ALJ 1109; IR 1930 All 317.*

—where a mortgagee paid the amount of the decree for rent under Order, 21, rule 89, CPC and the mortgagor sold the property to a third person who redeemed the mortgage, the mortgagee was entitled to recover the amount from the purchaser although by the terms of the deed for purchase he was not liable for the back rents. *43 CLJ 142 ; 94 IC 811 ; 1926 (Cal) 765.*

—a mortgagee paying the Govt revenue is entitled to sue the proprietors jointly for contribution. *16 CLJ 148, 156.*

—a mortgagee, whose deed was found to be forged, cannot take the benefit of section *69 or 70, 25 CLJ 325; 21 CWN 394.*

—when a reversioner can claim contribution—a reversioner expectant is not person "lawfully interested" within section 70 and cannot be reimbursed. *25 CWN 1029.*

—a reversioner who has no right to redeem can deposit money to save the property from sale and can sue for contribution. *36 M 426.*

Darputindar can claim contribution—darputindar paying decretal amount of the putni is entitled to contribution from all the putnidars whether Jt. Drs. or not and is also entitled to possess the taluk under section *171 BT Act. 21 CWN 628.*

Surety for one of many Jt. Drs—a surety for one of many Jt. Drs. can sue all for contribution. *40 MLJ 529; 1921 MWN 334 ; 62 IC 706.*

—Executor paying debt—an executor paying a debt cannot recover it after the probate is revoked. *59 IC 128.*

—claim by co-sharer—a co-sharer is entitled to contribution for repairs if the other co-sharers are benefited. *1943 (Mad) 85; 1947 (Mad) 117.*

—a co-owner defending a suit brought against all co-owners is not entitled to be reimbursed. *1933 (Lah) 95.*

—when one co-sharer dispossesses other, the former cannot claim contribution of rent paid by him. *6 CWN 903 ; 110 IC 435(c).*

—the basis of the right of a co-sharer to be reimbursed in respect of money realised by creditor by coercive process. 26 CWN 340.

—Co-judgment-debtors should contribute—joint decree for cost against several co-plaintiffs, is a subject of contribution. *43 A 77; 18 ALJ 872; 58 IC 324 ; 32 A 585 ; 5 C 120, 24 OC 148; 63 IC 276, 1934 (Cal) 709; 38 CWN 758.*

—a co-judgment-debtor purchasing the decree may sue for contribution. *18 CWN 113; 17 CWN 271 n.*

—release of one of the debtors by the creditor does not prevent contribution against the released debtor. *40 M 968 FB; 1942 PC 50; 47 CWN 1; 45(Bom) LR 1. 48 CWN 454.*

—when a third person pays up a joint decree and realises the whole amount from one Jt Dr. the latter may sue for contribution. (Limitation is 6 years, Article 120 Limitation Act applies) *18 CWN 410.*

—when assignee for rent decree realises the decretal amount from one tenant, the latter is entitled to contribution, though under the law assignee cannot execute such decree. *19 CWN 458.*

—when a creditor obtains a decree against one partner for debt appertaining to firm, all partners are to contribute, *19 CWN 68,* they must contribute according to promise *19 CWN 193 PC.*

—where a tank was filled up at the requisition of the Municipal Corporation by a joint owner and tenants were settled on the filled up tank to the benefit of all, it was a case under section 70 of Contract Act, and Article 120 of the Limitation Act applied, time running from the date of completion of the work. *25 CWN 813.*

—the vendor of non-transferable occupancy holding is liable to contribute the rent paid by his co-sharer, when his sale is not recognised by the landlord. *18 CWN 327. (4 C 369 ; 6 CWN 903 ; 8 C 113).*

—Amount of claim against each party must be distinctly stated—claim for contribution must distinctly set forth the amount due by each of the parties. *14 WR 373; IA 455, 12 A 110, 5 NWPH CR 215; 5 WR 112, 21 WR 255.*

—Contribution amongst wrong-doers.—where tort is not wilful, there may be contribution amongst tort feasors. *18 CWN 622; 6 CWN 88 ; 1923 (Nag) 255.*

—where the tort-feasors act under a bona-fide claim of right, they have the right of contribution inter se, otherwise not. *5 CWN 393 ; 5 C 720 13 C 300 Ref 9 A 221 ; 17M 78; 25 M 599.*

—Set-off in claim for contribution—when several tenants make payments for several decrees they may claim set off against one another. *20 CLJ 205.*

—where one co-tenant by paying off a rent decree saves the holding from an impending auction sale, he can sue the others for contribution but in such case they can claim as set-off payment made by them to the landlord in respect of rent for previous years on behalf of the plaintiff though a claim regarding that against the plaintiff might be time barred. *1925 (Cal) 1164; 88 IC 696.*

—in a suit for contribution of rent, defendant may claim set off of the rents he has paid for previous years, though that claim is time-barred. *12 CWN 60:*

—time-barred debt may be set off by way of equitable set-off. *19 CWN 1180; 32 C 576; 40 B 60.*

—Compensation for non-gratuitous acts done for others who derived benefit—Where payable to an auction purchaser who under order of the Court allowed to a Company under liquidation to use his godown after auction purchase—Since the Company has derived benefit from the storage of the bonded articles in the godown of the respondent justice demands that the respondent should be indemnified by way of compensation for the use and occupation of the godown of the auction purchaser by the Company in liquidation. *Tofazzal Ali vs Johurul Huq Khan (1984) BLD 196*

—Novation of Contract—Whether terms of contract with the government can be modified by an officer who is not authorised to enter into or modify the contract—As for conclusion of a contract a consensus *ad idem* is necessary, similarly for modification of a contract consensus *ad idem* of both the parties is necessary—Novation of contract can only be made on behalf of the Government by the person duly authorised by the Government—If any person not authorised by the Government enters

into a contract or modifies terms of the contract such contract is incapable of binding the Government—An oral agreement cannot be enforced against the Government. *The Chairman BT & T Board & ors vs Bazlur Rahman and another (1986) BLD 336.*

—Express contract relating to a matter—Where an act is done with the express request of a party or where there is an express contract, section 70, Contract Act, has no application. *PLD 1976 Karachi 458 (DB).*

—Where there is a statutory provision regarding rate of payment for the services rendered or work done, no claim can be made under this section for payment of a reasonable amount. Payment can be claimed as fixed by the statute. *PLD 1976 Karachi 623.*

Section 70—In the suit the plaintiff ST International challenged the order dated 20-6-99 of the government terminating the lease directing to pay one crore and odd as dues for Meghna-Gomati bridge on the ground of hartal, flood and transport strikes for which it could not enjoy the benefit of lease and considering the sufferings of the plaintiff was allowed to collect tolls of the said bridge for a further period of 50 days upto 9-6-99, after the expiry of the lease on 19-4-99, without making any payment to the government and thereafter plaintiff prayed for a further remission of revenue and its prayer was under the active consideration of the Hon'ble Minister for Communications but defendant No. 1 in violation of the recommendations of the Minister of Communications cancelled the plaintiff's lease by his order dated 20-6-99 and illegally terminated the lease directing to pay the dues aforesaid.

Since the plaintiff continued to enjoy the privilege of collecting of tolls even after 9-6-99, defendant No. 1 committed no illegality in claiming government dues from the plaintiff by the impugned notice. In a democratic society the government functionaries are under constitutional and moral obligations to mete out equal treatment to all citizens irrespective of social standing and political affiliations. Granting of revenue holiday to the plaintiff involving crore of takas without any justifiable reason is a classic example of wanton discrimination and misuse of discretion in managing the affairs of the State. The public functionaries must be cautious in doling out charities by way of granting revenue holiday to individuals or establishments against public interest.

Accordingly, the Deputy Commissioner, Munshiganj was directed to take prompt legal steps against the plaintiff for realising damages under the provisions of PDR Act from 9-6-99 till the plaintiff vacates and makes over possession of the Meghna-Gomati Bridges to the Government. *ST*

International vs Executive Engineer, Roads & Highways, Road Division & ors 6 BLC 396.

Section 70—This section is not founded on written Contract—It embodies the equitable principle of restitution and prevention of unjust enrichment.

Held : Where a party (the appellant in the instant case) spent a certain sum for bringing a discussed mill into running condition and the work was done voluntarily and accepted by the other party (the respondent in the instant case), the party expending the money is entitled to get back the amount so spent by him. *Kalayan Proshad Agarwala vs Government of Bangladesh & others 3 BSCR 504.*

71. Responsibility of finder of goods—A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as bailee[1].

72. Liability of person to whom money is paid or thing delivered by mistake or under coercion—A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it .

Illustrations

(a) A and B jointly owe 100 [2]Taka to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 [2]Taka over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Case-Law

—Contract by mistake of Law—Contract caused by a mistake of law—Money paid under mistake of law—payment "by mistake" refers to

1. See sections 151 & 152, infra.

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).

payment not legally due—Money paid under mistake of law—Money not due by contract or otherwise—Money must be repaid.

Where, therefore, according to the terms of a mining lease after certain date, the lessee was only bound to pay royalties at a lower rate but continued to pay them at a higher rate and so overpaid the lessor and it is clear that there was no intention to make a present to the lessors, of money which was not due and the money was paid under the mistaken belief that it was legally due—Such money must be repaid. *2 DLR 166.*

—Money when paid voluntarily and when paid under protest— Import duty paid prior to the date on which a consignment was lifted cannot be said to have been made by mistake—such voluntary payment cannot be asked to be refunded. But when any duty is plaid under protest after it has ceased to be payable, the same is recoverable. *10 DLR 258.*

Recovery of money paid by mistake or under coercion—the word "coercion" is used in its general and ordinary sense and is not controlled by the definition in section *15.40 C 598: 17 CWN 541; 15(Bom) LR 472; 25 MLJ 104; 1949 (Nag) 215.*

—where money is paid under a mistake of fact common to the plaintiff and defendant it can be recovered as money had and received to the use of the plaintiff. *1928 PC 261; 110 IC 299 PC ;1922 (Cal) 1 ; 50 A 818 ; 1921 (Bom) 93; 48 M 925 ; 1925 (Mad)125 ; 56 B 501; 1932 (Bom) 386 ; 40 C 508 PC; 1933 (All) 953.*

—payment made by judgment-debtor under a time barred decree to set aside a sale can be recovered. *1943 (All) 267.*

—money paid under a mistake of law is recoverable. *28 P 913; 1949 PC 297; 52 (Bom) LR 17; 1949 ALJ 464 ; 54 CWN 1; (1949) 2 MLJ 657.*

—an action for money had and received does not lie to recover money paid under the legal process which is afterwards discovered not to have been due. *56 B 501; 1932 (Bom) 386.*

—if an owner of property in order to save it from sale pays the amount to the D. Hr. he can recover back the money under this section on the ground that the payment was involuntary or obtained by coerction. But if money is deposited under Order 21 rule 89, the payment is voluntary and cannot be recovered back under section 72. *57 B 601; 1933 (Bom 239. contra 1941 (Mad) 635.*

Compensation for loss or damage caused by breach—section 73 does not apply to a breach of warranty, it applies to a breach of contract. *1930 (Lah) 843; 127 IC 353.*

—the date of breach is the date when the contract ought to have been fulfilled and not the date of refusal of liability or repudiation. *36 CWN 1024; 56 CLJ 135; 13 (Pat) LT 639; 138 IC 658; 63 MLJ 270; 1932 PC 196 PC.*

—a breach of contract takes place not on the date on which one party writes a letter to the other, but on the date on which the other party receives the letter and elects to consider the contract as cancelled. *1934 (All) 740.*

—if an employer prevents completion of work after it is partially completed the contractor may sue for damages, that is, for the contract price minus the cost of completing the work or alternatively, for the value of the work done and materials supplied. *56 CWN 285.*

—where the purchaser of certain goods failed to pay the unpaid price held that seller could recover interest by way of damages and 12 PC per annum was not an unreasonable one. *1929 (All) 801; 119 IC 853; 27 ALJ 674.*

—interest cannot be awarded on damages. *1952 (Nag) 32.*

—difference in prices represents the full amount of compensation to be given under section 73 on account of loss sustained by fall of market prices and decree for interest on such amount should not be given. But the plaintiff is entitled to interest on account of delay in payment of amount due to him for loss. *1930 (All) 132; 130 ALJ 297; 121 IC 828; 52 A 238.*

—interest may be awarded by way of damages, if usage, contract, or law allows it. *1943 (Pat) 327.*

—Court may award interest by way of damages. *28 P 974; 1951 (Pat) 348.*

—Mistake of fact—A payment under a mistake of fact cannot be regarded as a voluntary payment and is recoverable under section 72. *PLD 1976 Karachi 877.*

—Where money is paid by the plaintiff in the account of the KDA as a result of a fraud played on him by a third person who also took money from him, the KDA was bound to refund the amount when it was found that deposit was made by mistake by a person other than the allottee of the plot for which deposit was made. *PLD 1976 Karachi 877.*

—Sales tax paid by mistake—When sales tax was collected by the vendor and paid to the Government; but he later on brought a suit for refund of the account on the ground that the sales were not subject to the incidence of Sales Tax. Held: That the assessee who collected the amount in question, did so from the very beginning, as an agent of the Government and became *functus officio*, as soon as he paid the same to the exchequer. He was not entitled to its refund under section 72. *PLD 1977 Lahore 75 (DB).*

—Increase in rates by monopoly holder—Where it was urged that though the consumer had agreed to incorporate in the contract a term that the gas supply company may increase the rate in certain circumstances yet he was not bound by such agreement and subsequent increase in rates because the gas supply company being a monopoly holder would coerce him into agreeing to increase in rates, it was held that the doctrine of coercion embodied in section 72 is not available in this case for the reason that the plaintiffs were fully aware of the respective circumstances of the parties, when they entered into negotiations for the conversions of their furnaces from oil to natural gas. It was known right from the start, that the Gas Company had the monopoly in the field and in the circumstances the doctrine of coercion cannot be invoked. *PLD 1975 (SC) 193.*

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Chapter VI

Of the Consequences of Breach of Contract

73. Compensation for loss or damage caused by breach of contract—When a contract has been broken the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

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

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

Illustrations

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

(b) A hires B's ship to go to [1][Chalna, and there take on board, on the first of January, a cargo which A is to provide and to bring it to [1][Chittagong], the freight to be paid when earned. B's ship does not go to [2][Chalna, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself on those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 [3]Taka, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

(e) A, the owner of a boat, contracts with B to take a cargo of jute to [4][Mymensingh], for sale at the place, starting on a specified day. The boat owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at [4][Mymensingh] is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute fails. The measure of the compensation payable to B by A is the difference between, the price which B could have obtained for the cargo at [4][Mymensingh] at the time when it would it have arrived if forwarded in due course, and its market price at time when it actually arrived.

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

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

3. 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).

4. The word "Mymensingh" was substituted for the word "Mirzapur" (with effect from the 14th October, 1955) by Order XXI of 1960, Second Schedule.

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

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

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

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

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

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for another, but not the sum paid by B to the third person by way of compensation.

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

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

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

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

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

(q) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the

difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from [1][Chittagong] to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in [1][Chittagong] for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in [1][Chittagong], and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

Case-Law

—Damages—measure of—In assessing the measure of damages the principle is that the plaintiff ought to be as near as may be in the same position as if the contract has been performed. *3 DLR 23.*

—The principle by which Courts are guided in awarding damages is *restitutio in integram.* This means that the Court will try to place the injured person in the same situation as if the contract had been performed. *(1954) PLR (Lah) 704.*

—While assessing damages, the profits had to be ascertained and the rent stipulated need not be awarded in full. *(1954) PLR (Lah) 704.*

—Damages for breach of contract—Measure of damages is the difference between contracted price and market price prevailing on the date of the breach—Failure of a party claiming damages to produce best evidence to show details of damages should be reckoned against him. *M/s Muhammad Amin Muhammad Bashir Ltd. vs M/s Muhammad Amin Brothers Ltd. 21 DLR (WP)238.*

—Contractor's liability over risk purchases—Extent of such liability explained. [Breach of contract—Contract stipulating that in the event of failure to supply required item of goods, Officer operating

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contract shall be at liberty to procure them from any quarter and excess cost so incurred over contract price shall be recoverable from contractor.

Contractor failing to supply goods of specified quality—Risk purchases made by operating officer at fancy rates without calling tenders—No evidence to show that efforts were made to procure goods at controlled or reasonable rates—Recovery of excess cost thus incurred by making risk purchases over and above control rates, in circumstances, held, not justified. *Islamic Republic of Pakistan vs Nazar Din Khattak. 21 DLR (WP) 367.*

—Earnest money—Though ordinarily means a tangible thing including a deposit, it also includes Bank guarantee—Bank Guarantee amounts of actual deposit of earnest money. [We are, therefore, unable to agree with the view taken by the High Court that as there was no deposit the question of forfeiture of the earnest money did not arise. The contract clearly gave the Government the right to forfeit the earnest money in case of failure and it would be wrong to hold that the right could not be exercised against the guarantee. *Province of West Pakistan vs M/s Mistri Patal & Co. 21 DLR (SC) 132.*

Section 73—Explanation—Plaintiff's own responsibility when he claims damage for goods lost—[In estimating the loss or damage arising from a breach of contract to the plaintiff, the principle having regard to the explanation to section 73 of the Contract Act, is that the plaintiff must mitigate loss. *M/s Trans Oceanic Steamship Co. Ltd. vs Abdul Rahman, 13 DLR 585.*

—Suit for recovery of damages for breach of contract to purchase the goods in terms of contract—Contract provided that in default of purchase, the goods will be auction-sold and selling by private negotiation does not amount to auction-sale.

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

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

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

the goods. *Province of West Pakistan vs M/s Saaz and Co. 16 DLR (SC) 511.*

After the breach to purchase has occurred the detention of goods without selling them in market at once is at the risk of the seller and not of the purchaser who shall be liable for the price which obtained on the date of breach. *Province of West Pakistan vs M/s Saaz and Co. 16 DLR (SC) 511.*

Awarding of interest to a seller—No interest payable on damage for breach of contract—Sub-section (2) of section 61 of the Sale of Goods Act empowers the Court to award interest to seller for the price of his goods at such rate as it thinks fit. Under this section a party, however cannot claim interest on damages for breach of a contract. *M/s AZ Company Karachi vs M/s S Maula Bakhsh Muhammad Bashir, Karachi. 17 DLR (SC) 404.*

Interest generally not payable for damages for breach of contract.

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

The right of the seller under the agreement is to have compensation assessed by the Arbitrators and until the amount had been so determined there is no sum certain payable to the seller upon which interest can run. *M/s AZ Company Karachi vs M/s S Maula Bakhsh Muhammad Bashir, Karachi, 17 DLR (SC) 404.*

—Award of interest on damages cannot fall under section 73 of the Contract Act. *M/s AZ Company Karachi vs M/s S Maula Bakhsh Muhammad Bashir, Karachi 17 DLR (SC) 404.*

—Measure of damages for breach of contract—The next question is as regards the determination of the compensation occasioned by breach of the contract.

If the seller holds on to the goods after the breach of the contract the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer. In that case the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises. *Pakistan Mercantile Corporation Ltd. vs Madan Mohan Oil Mills. 18 DLR 437.*

—Breach of contract, starting point of—The question is when the breach of contract took place—The contract was entered into on 24-4-52 and was ratified and acted upon by the parties by taking delivery of the goods by the defendant with effect from 28-4-52. So, according to the agreement if days 15 are calculated from 28-4-52 then the last date would have been 2-5-52 and the breach of contract was on the date. *Pakistan Mercantile Corporation Ltd. vs Madan Mohan Oil Mills, 18 DLR 437.*

Damages for breach of contract—Interest when payable on the sum payable as damages.

Interest can be allowed only if it was payable under the terms of the contract. As that was not a clause of the contract interest was not paid on it. *Gopal Das Jethmal vs The Municipality Hyderabad (Sind) PLD 1949 (Sind) 1.*

—Lease—Breach of contract—When the other party might sue for damages—Waiting after repudiation—effect.

The repudiation of the contract by one party does not of itself discharge the contract. The other party has the option of treating the contract as at an end, or of waiting until the time for performance has arrived, before making any claim for breach of contract. *Mehtab Din vs Fazal Hussain PLD 1954(Lah)451.*

—Contract of sale of goods—How damages are determined—The quantum of damages is to be determined by comparing the market prices of the goods prevailing on the date on which the goods had to be supplied with the contract prices and not the contract prices with those prevailing on the date of the renunciation of the contract. *Michael Assely vs Abdul Sattar & Bros. PLD 960 Kar.346.*

—Damages for breach of contract—Interest when payable on the sum payable as damages—Interest can be allowed only if it was payable under the terms of the contract. As that was not a clause of the contract, interest was not paid on it. *Gopal Das Jethmal vs The Municipality Hyderabad (Sind). PLD 1949 Sind 1.*

Breach of contract by defendant—Duty of plaintiff in the matter.

It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues. He cannot claim as damages any sum which is due to his own neglect, but he is under no obligation to inquire himself, into his character, his business or his property, to reduce the damage payable by

the wrongdoer. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case the burden of proof being on the defendant. *Mehtab Din vs Fazal Hussain, PLD 1954(Lah) 451.*

—interest is allowed in case of money obtained or retained by fraud. *1953 SC 235; 1953 SCJ; 1953 SCR 789.*

—in the case of goods specially made to order, a distinction has to be drawn between goods which are marketable and which are not marketable and in the latter case the price of the goods is the measure of damages. *1931 (Lah) 742.*

—even when there is no clause in the contract as to forfeiture of deposit if the purchaser repudiates the contract he cannot get back the money when the contract goes off through his default. *1922(Cal) 104; 671 IC 714; 1953 (Lah) 192; 1947(Nag) 193.*

—vendor is liable for damages for his inability to make out a good title. *1933(Nag) 263.*

—money paid not as earnest but merely as part payment of price is not liable to forfeiture. *1931 (Lah) 205.*

—there is nothing in section 73 which can suggest that interest can be claimed merely for withholding money that was due. *1933 (Pat) 196: 12 (Pat) 216; 1933 (Mad) 729; 1938 PC 67; 42 CWN 985; 40 (Bom) LR 746; (1938) MLR 640; 1943(pat) 327.*

—if the purchaser, by his default in completion after he has accepted the title, gives the vendor the right to rescind the contract and retain the deposit as forfeited and such right has been exercised, the forfeiture is final. Subsequent discovery of any defect in the vendor's title does not enter on the purchaser right to recover the deposit. *1926 (Cal) 339.*

in case of an anticipatory breach of a contract involving deliveries in several months, the true measure of damages is the sum total of the difference between the market rates at the appointed times for delivery and the contract price. *20 CWN 240.*

—the measure of damages in case of breach is the difference between the contract price and the higher price of the subject-matter on the last day of performance. *30 C 477; 7 CWN 431; 1937(Nag) 345.*

—damages for breach of contract between seller and buyer how to be ascertained. *3 CLJ 137 PC.*

—plaintiff is not entitled to damages if he could avoid the loss. *19 CWN 1311.*

—where lessee is to pay the rent of the superior landlord under the contract and makes default and the property is sold in execution of decree the lessee is not liable for the loss of the property. *35 C 683; 12 CWN 628; 1940(Pat) 88.*

—a tailor to make large profits on the occasion of a festival delivers a sewing machine and cloth bundles to a Railway Company to be conveyed and through the fault of the company's servant they are not timely delivered, the company, having no notice of the social purpose, was not liable for compensation. *21 M 172.*

—the seller of goods cannot sue the buyer who has failed to take delivery, for the price of the goods; his remedy is to have the goods sold first and then to seek to recover the loss, if any. *10(Bom)LR 1113.*

— buyer is entitled to damages although he has not proved any purchaser. *ILR(1951) 1(Cal) 420.*

—a plaintiff who brings a suit for damages for breach of contract is absolved from showing that he was ready and willing to perform his part of the contract when the defendant has repudiated the contract before suit. *88 IC 737.*

—under a CIF contract it is the duty of the vendor to tender the document; in case of vendor's failure to tender the document the vendee is entitled to compensation. *41 CLJ 500; 1925 (Cal) 941; 89 IC 836.*

—Where defendant failed to prove that any breach of agreement was committed by plaintiff justifying stoppage of payment to him, while admitting liability to pay claimed amount, plaintiff was entitled to decree of his suit. *PLD 1987 Karachi 76.*

—Breach by conduct. A party may be guilty of an express or an implied breach of contract, such as a breach by conduct. Thus where a party did not in spite of the permission granted by the Government and notices sent by the opposite party increase the spindles in the mill although such increase was clearly stipulated in the contract; it was held that the party was guilty of breach of contract by his conduct. *PLD 1976 Karachi 149 (DB).*

—Similarly, a contractor, when granted, a contract took up the plea that he had neither filled the tender forms nor made the call deposits and that it had been done by someone in his name as a conspiracy to harm him. It was

held that as neither a conspiracy had been proved, nor was there any other proof of the allegations, the contractor was guilty of breach of contract by conduct and was liable to pay damages. *PLD 1979 Pesh 43 (DB).*

—Party guilty of breach is liable to pay damages. Breach of contract has to be proved before any enquiry can be conducted into the quantum of damages. Where the defendant is found guilty of a breach, he is liable to pay damages. *PLD 1979 Karachi 694.*

—Where a party is ready and willing to perform the contract but he cannot do so in view of a stay order obtained from the Court by a third party, the former is not guilty of a breach of contract and cannot be burdened with damages. *PLD 1975 Karachi 522.*

—Arbitration clause in contract. In case of breach of contract, the Arbitration Clause in the contract does not become unenforceable. *PLD 1975 Karachi 861.*

—Every injury, although without loss or damage, would entitle the plaintiff to judgment. It is not always necessary that actual damage should be proved in order that damages may be awarded and in actions for breach of contract nominal damages are recoverable although no actual damage can be proved. *PLD 1983 Karachi 63.*

—Actual damages suffered—Compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach of the contract. The section does not create any cause of action unless and until the damage is actually suffered. *PLD 1986 (SC) 265.*

—Damages payable in foreign currency—Calculation of—Any change in the value of the goods or in the exchange value of the currency after the date of the breach must be disregarded. *PLD 1976 Karachi 23.*

—Date on which damages are calculated—The damages under this section are calculated as on the date of the breach of a contract, which is the date on which the contract had to be performed. *PLD 1986 (SC) 265.*

—Sale of goods—damages for breach of contract. Section 73 covers cases of breach of contract where no amount of compensation was stipulated in agreement itself and compensation had to be assessed strictly on basis of loss accrued to either of contracting parties in usual course of things on account of such breach or which parties knew when they made an agreement to be likely result of the breach. *PLD 1985 (SC) 69.*

—The principles for assessment of damages in cases of breach of contract of sale of goods indicate that an aggrieved party is entitled to actual damage or loss suffered by him and generally speaking in such cases if the aggrieved party establishes the market rate on the date of breach or on the date of delivery according to the contract, the law presumes that the difference between the contract price and the market price on the date of breach or on the date of delivery according to the contract is the actual loss or damage suffered by the claimant. *PLD 1983 Karachi 63.*

—If the plaintiff claims a lesser amount than would be due to him under this rule, the Court would grant him that amount only. *PLD 1979 Karachi 694.*

—Agreement between parties as to damages. At the time when the contract was made, if the parties knew as to what would be the loss or damage, which was likely to result from the breach of the contract, the guilty party in such a case is liable for such loss. *PLD 1983 Karachi 63.*

—Intermediate contracts. In an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account, in estimating damages, anything that is accidental as between the plaintiff and the defendant; as for instance an intermediate contract entered into with a third party for the purchase or sale of goods. *PLD 1979 Karachi 694.*

—Deviation in quantity. When word 'about' or 'thereabouts' or 'approximate' is used in connection with quantity, the consensus of judicial opinion is that the deviation from the contracted quantity should not be more than three to five per cent. *PLD 1977 Karachi 369.*

—Earnest money, forfeiture of, for breach of contract. If the respondent who was the seller is guilty of breach of contract, obviously the appellant who was the buyer would be entitled to recover the money paid to the seller as purchase price on account of the failure of consideration. Similarly, if the seller failed to deliver the goods the buyer may recover the deposit he paid to the seller. But in that case the buyer must terminate the contract. On the other hand, even if the buyer was in default, he may, in certain circumstances, be able to claim restitution of the advance payment made to the seller, even if the seller justifiably terminates the contract. Where the seller terminated the contract by the buyer and thereafter forfeited the earnest money it was held that the

respondent could forfeit the earnest money or advance payment only on proof of loss sustained by him. It would only be permissible, in the facts and circumstances of the case, to award reasonable compensation subject to the limit of the amount paid under the contract by way of advance. But as in this case the seller had not brought on the record any evidence as to the loss suffered by him, the Court refused to grant him any compensation or damages and directed him to refund the earnest money deposited by the buyer. *PLD 1976 Karachi 277(DB).*

—Breach of contract by buyer—damages. The rule applicable to the computation of damages, where the buyer wrongfully neglects or refuses to accept and pay for the goods, is now well established. It is that where there is an available market for the goods in question, the measure of damages, in general, is the difference between the contract price and the market price prevailing on the date of breach of the contract. *PLD 1975 Karachi 707.*

—Foreign buyer, payment of damages in. If damages are claimed, for breach of a contract to deliver goods in a foreign country, they have to be assessed in the currency of that country and any change in the value of the goods or in the exchange value of the currency after the date of the breach must be disregarded. *PLD 1976 Karachi 23.*

—Conditions of re-sale should not be prejudicial to buyer. Where on refusal of buyer to take delivery, the seller sold the defaulted goods through bulk sale thus price offered by purchaser was not the same as in respect of any smaller quantity. Defaulting party had suffered on account of method of sale by seller and a definite prejudice was caused to defaulting party in awarding damages on account of difference in contracted and re-sale prices. *PLD 1985(SC) 69.*

—In such cases stipulation for damages not mentioned in default clause could not be implied merely because Court thought it is reasonable to imply it. Such implication could only be made if on a consideration of terms of contract in a reasonable and business manner, Court was satisfied that it should necessarily have been intended by parties when contract was made. Principle of exclusion on basis of Maxim: *expressio unius est exclusis alterius* was not attracted in such case. Where clause of agreement permitted imposition of penalty of forfeiture of amount deposited with seller to meet storage, supervision, service and "other charges" as well as termination of contract. No stipulation for award of

damages either on resale of goods or otherwise was provided in the said clause. Seller claimed damages on bases of clause of agreement under head "other charges". It was held, clause of agreement was exhaustive of all contingencies following breach of agreement and no provision with regard to damages was made in the agreement. Damages under head of "other charges", therefore, could not legally be awarded. *PLD 1985 (SC) 69.*

—Defect in vendors' title—Under section 55. TP Act every sale for consideration carries with it a covenant for title. Such a covenant is implied. If the purchaser did not contract to take a defective title, he cannot in principle be denied the right to rescind the conveyance or claim compensation for loss occasioned to him, merely because the seller was innocent, for the law will not be found wanting in giving relief to an equally if not more, innocent purchaser. *PLD 1975 Karachi 900.*

—Breach of warranty—A purchaser who has taken conveyance of property on basis of warranties contained in section 55(2), TP Act, he must be compensated for any breach of the warranties. If the purchaser did not contract to take a defective title, he cannot in principle be denied the right to rescind the conveyance or claim compensation for loss occasioned to him, merely because the seller was innocent, for the law will not be found wanting in giving relief to an equally if not more, innocent purchaser. *PLD 1975 Karachi 900.*

Actual damages not proved—Where damages is proved but it is not possible to calculate accurately or in a reasonable manner the actual amount of loss incurred or even when the plaintiff had not been able to prove the actual loss incurred, the plaintiff is *prima facie* entitled on a breach of contract to recover nominal damages. *PLD 1985 Karachi 251(DB).*

—Breach of conditions of service—Where plaintiff was taken abroad by defendant establishment in the category of mechanic. But subsequently his category of employment was changed to 'menial' in breach of terms of contract and his salary reduced. Plaintiff left employment and on return to Pakistan filed suit for damages for breach of contract. He would be entitled to a decree in absence of evidence to the contrary. Where letter of resignation was procured by defendants after violating original contract of employment of plaintiff by pressing him to do a job other than the one and inferior in status to the job for which he was employed. It was held that defendant had broken the contract and refusal of plaintiff to work whether through resignation or otherwise could not be said to be unjustified. *PLD 1987 Karachi 552.*

Measure of damages—Where employee was taken abroad on certain terms and conditions as to his employment but terms of his employment were changed to his disadvantage which made him resign the job, it cannot be said that the employer has a right to terminate contract in lieu of one month's salary as per terms of contract. Defendant was liable to pay to plaintiff salary for the entire unexpired period which was to be calculated as per terms of contract per month minus average earning of plaintiff. Suit of plaintiff was decreed accordingly. *PLD 1987 Karachi 552.*

—Claim for overtime and leave salary being too remote and anticipatory as it would depend on chance and uncertain opportunities. *PLD 1987 Karachi 552.*

—Government to keep property in repair. To term "tenantable repair" or cognate expressions used in a covenant for repairs in a lease creating obligation upon lessee to maintain premises in tenantable repairs irrespective of whether or not premises were in tenantable repair at the time of commencement of tenancy. If he does not do that he is guilty of breach of the covenant. The lessor is entitled to damages from the lessee and the measure of damages would be the cost of repair to restore property to tenantable and habitable condition and for that purpose the cost of new material at the current market price has to be taken into account. The landlord is further entitled to the rent for the premises for the period during which repairs are to be conducted. In this case the period was estimated to be three months. *PLD 1978 Karachi 316.*

—Delay in delivery. The carrier can always extend the time for the performance of the contract of affreightment, and similarly the parties can also enter into a fresh contract for the delivery of the cargo shipped, but this is possible only as long as delivery had not been completed. *PLD 1975 Karachi 819.*

—Where there is no agreement as to charges for repair, the contractor is entitled to reasonable charges. *PLD 1978 Karachi 1052.*

—Loss or injury must naturally arise from breach of contract— The principles for assessment of damages, are, where a party sustains a loss by reason of a breach, he is, so far as money can do it, to be placed in the same situation as if the contract had been performed. This leads to two rules, (1) the damages must be such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things from the breach and (2) the damages must fairly be such as could

have been in contemplation of both parties at the time when they made the contract and cannot include compensation for remote or indirect loss or damage. *PLD 1979 Karachi 694.*

—Section 73 makes it compulsory for the plaintiff to prove that he has suffered damages, and the extent to which he has suffered, before a Court can award him damages for breach of contract, and if he does not give the best evidence, every presumption should be made against him, but this does not relieve the Court altogether of the duty of assessing the damages, as best as it can on the evidence and materials actually before it. *PLD 1979 Karachi 694.*

No damage proved—Where the amount of damages had not satisfactorily been proved or established, the plaintiffs are not entitled to any damages and even nominal damages cannot be allowed to them. *PLD 1979 Karachi 694.*

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

The section therefore contemplates that a plaintiff may recover for the breach of contract compensation for only such loss or damages as flows in consequence of the breach in the usual course of events, or the parties knew to be likely to flow from breach. *M/s Amin Jute Mills Ltd. vs M/s Arag Ltd. 28 DLR (AD) 76.*

—Government principle is, the party in breach shall equalise the injured party and measure of equalisation is to put that party in the position had the contract been performed.

The governing idea is that the party in breach must equalise the injured party for the loss, and the measure of equalisation is to put the injured party in the position had the contract been performed. While compensating the injured party, it should not be remote or indirect, and in all cases the means available for remedying the inconveniences occasioned by the breach must be taken into account.

Consequence must be proximate and natural, Natural in this connection means usual. Remoteness in space and time and the number of intervening events have obvious bearing on foreseeability but neither any particular degree of remoteness, nor any maximum number of events can be established to set a limit in the law of contract. In other words, these factors are governing circumstances but not absolute rulings. *M/s Amin Jute Mils Ltd. vs M/s Arag Ltd. 28 DLR (AD)76.*

The principle is that the defaulting party must pay the difference between contract price and the market price on the date of breach. *M/s Amin Jute Mills Ltd. vs M/s ARAG Ltd. 28 DLR (AD) 76.*

Measure of damages to be ascertained—Criterion to be kept in view.

—Measure of damages is to be ascertained between the difference of the contract rate and the market rate on the date of breach. This is the rule of law, but its proof rests on facts and circumstances of each case. If there its no market rule on the due date, or no direct evidence is forthcoming, the Court is not precluded from arriving at the real rate that can fairly be gathered from the evidence and circumstances of the case. *M/s Amin Jute Mills Ltd. vs M/s ARAG Ltd. 28 DLR (AD) 76.*

Shipping law—Carriage of goods—Deviation—Liberty given to carrier to call at any port in any order—The ports called must be ports substantially on the course of the voyage—Ship instead of proceeding from North Yemen port to Bangladesh proceeded to the opposite direction to Dar-e-Salam—Violation of the bill of lading and the deviation is unauthorised—Carrier liable for delay caused by deviation. Al-Sayer *Navigation Company vs Detta International (1982) BLD (AD) 69.*

Shipping law—Delay in carriage—Remoteness of damage—Loss of profit—Loss of profit recoverable as damages for breach of the contract of carriage by deviation involving delay—Loss of market will be found to be within the contemplation of the parties in carriage of goods by sea—When ship was incapable of performing the voyage within the stipulated period due to any fault in the ship, the carrier must face the consequence—Carrier must be saddled with liability—*Al-Sayer Navigation Company vs Delta International (1982) BLD (AD) 69.*

—Quantum of damages. Where a party has claimed a certain amount as damages before filing the suit, the Court cannot on that item grant damages in excess of that claim. *PLD 1978 Karachi 316.*

Limitation—The period of limitation cannot be extended by agreement. *PLD 1975 Karachi 819.*

—Repudiation of liability of carrier. Time for bringing a suit for damages is not extended by the repudiation of liability by the carrier. *PLD 1975 Karachi 819.*

—Plaintiffs duty to mitigate loss —Where a lessee claims damages from lessor for his not having kept the premises in proper repair, it is his duty to mitigate damages by accepting possession and carrying out repair himself to be claimed from lessee. The lessor cannot refuse to take

possession on termination of lease until repairs are carried out and continue to charge rent until premises are restored to proper state of repair. *PLD 1978 Karachi 316.*

Section 73—In an appropriate case a Court of Law can apply and imply warranty, as distinguished from an express contract or express warranty, on the presumed intention of the parties and upon reason. *Hutchison Telecom Bangladesh Ltd vs Bangladesh Telegraph and Telephone Board and others 48 DLR (AD) 30.*

Section 73—When there are materials for ascertaining damages the trial Court illegally refused to award damages in terms of the agreement for selling medicine and earn profits. *Islami Bank Bangladesh Ltd vs Shohag Medicine Supply and others 52 DLR 571.*

Section 73 & 124—The remedy under these provisions of the Contract Act lies in the Civil Court, if at all, not under the Admiralty Jurisdiction on a Marine Hull Policy. *Sadharan Bima Corporation vs Bengal Liner Ltd and another 48 DLR (AD) 143.*

74. Compensation for breach of contract where penalty stipulated for—[1][When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the [2][Government] gives any bond for the performance of any

1. Subs. by section 4 of the Indian Contract Act Amdt. Act, 1899 (VI of 1899) for the first para of section 74.

2. The word "Government" was substituted for the words "Central Government or of any Provincial Government" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (VIII of 1973), second Schedule, (with effect from 126-3-71).

public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

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

Illustrations

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

(b) A contract with B that, if A practices as a surgeon within [2][Chittagong], he will pay B [1]Taka 5,000. A practices as a surgeon in [2][Chittagong].B is entitled to such compensation, not exceeding [1]Taka 5,000, as the Court considers reasonable.

(c) A gives a recognizance binding him in a penalty to [1]Taka 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

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

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

(f) A undertakes to repay B a loan of [1]Taka 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment,

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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).

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 26-3-71).

3. Illustration (d), (e), (f) and (g) were inserted by section 4(2) of the Indian Contract Act Amendment Act, 1899 (VI of 1899).

the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrows [1]Taka 100 from B and gives him a bond for [1]Taka 200 payable by five yearly instalments of [1]Taka 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

Case-Law

Compensation for breach where penalty stipulated for—Section 74 of the Act deals not only with the right to receive reasonable compensation but also with the right to forfeit deposits. *Province of West Pakistan vs M/s Mistri Patal & Co. 21 DLR (SC) 132.*

—Party not entitled to claim the whole amount of earnest money simply because there was a breach of the contract. *Province of W. Pak vs M/s Mistri Patal & Co. 21 DLR (SC) 132.*

—Applicability—Not applicable to void contracts—deals with cases where there is breach of void contract and not an agreement void *ab intitio. District Board Lyallpur vs Abdur Razzaq PLD 1960 WP (Lah) 166.*

—Compensation for breach of contract—How may be calculated—Stipulated damages may or may not be awarded. *Aziz Ahmad vs Manzoor Ahmad PLD 1961 (Kar) 305.*

—Applicability—Not applicable to void contracts— Compensation for breach of contract—Penalty not recoverable—The buyer of a motor car covenanted with the dealer that he will not during the space of two years after the delivery of the vehicle to him transfer the same by sale, mortgage etc. to third person, in case of breach of which covenanted, he was to pay to the dealer "as and by way of liquidated damages and not as a penalty the sum of Taka 1,000.

Held : that the amount stipulated was a penalty and was not recoverable. *John Neil Moualt vs Betts Motors Ltd. PLD 1959 PC 55.*

—Compensation—How calculated—Court should award reasonable compensation—Sum named in contract as compensation for breach may be taken into consideration. *Cantonment Board Sialkot vs Nazir Ahmed PLD 1953 Lah. 400.*

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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 74—Earnest money—Liable to forfeiture for breach of contract by purchaser. *Ahmad vs Abdul Habib, PLD 1957(WP) (Kar) 819.*

—Employment contract—Clause giving three years salary to the employee in case of removal—Twelve months salary. *Aziz Ahmad vs Manzoor Ahmad PLD 1961(Kar) 305.*

Compensation for breach where penalty stipulated for—the section does not apply to deposit for the performance of contract or earnest money. *1952(Bom) 310, 1952 (Cal) 93; 55 CWN 765.*

—the effect of section 74 is to disentitle the plaintiffs to recover a sum fixed in the contract, whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. *31 (Bom) LR 909; 1929 PC 179; 117 IC 485; 1929 MWN 558; 33 CWN 949 PC.*

—a party complaining of the breach is entitled to compensation even where no actual damages or loss is proved. *1937 ALJ 1385; 1940 Sind 1.*

—executing Court can give relief against penalty in a decree on an award. *1938 Sind 185.*

—this section applies to compromise, decree also and the executing Court can question the stipulation being penal. *55 A 334; 1933 (All) 252 FB; 1943 Sind 247; 1937 (Mad) 234; 1953 Trav Co. 464.*

—if the agreement is to pay a larger sum in case of default it is penal but if the agreement is to pay a particular sum followed by a condition allowing to the debtor a concession to pay a lesser sum it is not penal. *58 B 610; 1934 (Bom) 37; 1929 (All) 558; 1931 (Lah) 696; 1943 (Pat) 403; 1937 (Pat) 542.*

—the plaintiff was allowed the damages stipulated for breach of guarantee. *60 PC 1379; 1934 (Cal) 285.*

—a deposit in the nature of a guarantee is liable to forfeiture on default if the amount is not unreasonable *1942 (Cal) 382; 46 CWN 522.*

—Court can relieve against forfeiture of earnest money if the amount is high. *1933 (Nag) 223.*

—a stipulation in a Kabulyat that if paddy rent is not paid by certain time, half as much again would be required to discharge dues, is a stipulation by way of penalty, and the landlord will only get reasonable compensation. *58 C 84; 1931 (Cal) 111; 130 IC 274; 34 CWN 905.*

—where the hire-purchase agreement provides for the forfeiture of the part payments in case of failure to pay the instalments, the stipulation amounts to a penalty. *54 B 381; 1930(Bom) 306, contra 1930 (Rang) 193.*

—stipulation for payment of compound interest at an enhanced rate was one by way of penalty which should be relieved against. *1933 MWN 597 FB—1932 (Nag) 169.*

—Court cannot give relief against compound interest unless it is proved that the lender had unduly taken advantage of his position. *1935 (Lah) 38.*

—stipulation for payment of compound interest on default is penal. *1953 SC 370; 1953 SCJ 539; 1953 SCR 894.*

—stipulation to pay interest at 75 per cent per annum on arrears of rent is not penal or un-conscionable. *38 CWN 182; 1934 (Cal) 511.*

for when interest is penal, see, "interest".

Suit for damages for non-performance of contract—in a suit for damages for delivery of the goods it is the duty of the plaintiffs to satisfy the Court that they were ready with the money or that they had capacity to pay or that they had made proper and reasonable preparation and arrangements for securing the purchase money and that they demanded the goods from the defendants on the due date. *1928 (Lah) 20; 9 (Lah) 148.*

—a manager of a Hindu family is personally liable in damages for failure to perform the contract of sale of immovable property when the sale is found to be not binding on the minor coparcener. *100 IC 422; 9 (Lah) LJ 199; 1927 (Lah) 252; 28 Punj LR 620.*

—an intending purchaser is entitled to a refund of the earnest money when the contract is not performed for no fault of the purchaser. *51 B 247;1927 (Bom) 195.*

—but such right being merely a right to sue cannot be transferred. *102 IC 766; 1927 (All) 621; 25 ALJ 811; 50 A 82.*

—in a suit for damages for breach of contract the plaintiff can claim damages as on the date when the defendant failed to take delivery of the goods. *54 C 97; 99 IC 244; 44 CLJ 364; 1927 (Cal) 291.*

—Specified damages—Where the parties name, in a contract reduced to writing, a sum of money to be paid as liquidated damages, they must

be deemed to exclude the right to claim an unascertained sum of money as damages. The right to claim liquidated damages is enforceable under section 74 of the Contract Act and where such a right is found to exist no question of ascertaining damages really arises. Where the parties have deliberately specified the amount of liquidated damages there can be no presumption they at the same time, intended to allow the party who has suffered by the breach to give a go-by to the sum specified and claim instead a sum of money which was not ascertained or ascertainable on the date of the breach. *PLD 1985 Karachi 71.*

—Party must have suffered loss—Even if a contract provides a sum as liquidated damages in case of breach, an aggrieved party will not be entitled to recover the same without proving that he has suffered loss. The Court in a fit case may grant nominal damages in case of breach of a contract against the defaulting party even in absence of any proof of loss. *PLD 1985 Karachi 71.*

—Liquidated damages and penalty—Section 74 of the Contract Act is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damaged as binding between the parties: a stipulation in a contract *in terrorem* is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty. *PLD 1985 (SC) 69.*

—As a consequence the distinction between penalty and liquidated damages has been abolished by the Contract Act and now in every case (except bail bonds or where the bond is given for the performance of any public duty or act in which the public are interested, in which a sum is named as damages to be paid in case of breach of contract), the Court, which tries the suit, is not bound to award more than "reasonable compensation" not exceeding the amount so named. *PLD 1985 (SC) 69.*

—Before decreeing a suit for liquidated damages the Court has to hold that such amount would normally arise as damages to such party in case of breach by the other. Party complaining of breach in fact suffering

no damages at all and on the contrary gaining some advantage in spite of the breach, or Court finding sum mentioned as damages in agreement was not likely to reasonably arise from such breach. The Court could refuse to grant the same. *PLD 1982 Karachi 590.*

—Penalty is not recoverable—A penal stipulation cannot be enforced. Liquidated damages must be the result of a "genuine pre-estimate of damages". They do not include a sum fixed *in terrorem. PLD 1975 Karachi 385.*

—Where in an agreement of sale of a truck on instalments it was provided(i) that if the plaintiff failed to make payment of instalments, the defendant would be entitled to take back the possession of the truck, and (ii) to forfeit all the payments which might have been made by the plaintiff to the defendant. Under this second provision it was contended on behalf of the defendant that the whole amount of Rs. 45,000 had been forfeited by the defendant. This provision is in the nature of a penalty clause and is unenforceable. *PLD 1975 Karachi 385.*

—Enhanced rate of interest—A clause providing payment of higher rate of interest than the agreed rate of interest in case of default in payment within the stipulated time, is enforceable if the higher rate of interest is reasonable and not penal. *PLD 1985 Karachi 71.*

—Advance price paid—An advance paid in respect of a contract of sale is not liable to forfeit on default like earnest money. *PLD 1986 Karachi 277 DB.*

—Refund of earnest money—Despite a breach on the part of a contracting party, the Court on equitable principles can relieve a defaulting party from the forfeiture of earnest money if the circumstances of the case justify such a course. *PLD 1985 Karachi 71.*

—Security deposit—Where the tenant has deposited a certain amount as security by the tenant to be forfeited if any damages is done to the premises within the period of lease. If no damage is alleged to have been caused to the premises during that period, the amount of security may be adjusted against rent due from the tenant to the landlord when considering whether the tenant has defaulted in the payment of rent. *PLD 1980 (SC) 298.*

Section 74—Since the agreement between the parties for sale of the suit property was enforeeable in law and the term of the agreement for depositing 25% of the total consideration money was violated, the defendant legally forfeited the earnest money given by the tenderer. *James Fialay PLC vs Meshbahuddin Ahmed 46 DLR 624.*

75. Party rightfully rescinding contract entitled to compensation—A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 [1]Taka for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

Case-Law

Section 75—Party rightfully rescinding is entitled to compensation. See "Rescission of contract" under section 39.

—Plea of rescission, forum for—A plea that a contract has been rightly rescinded can only be raised and determined by the Civil Court. No other forum has any right to determine it. *PLD 1976 Karachi 14.*

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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 VII

[Sale of Goods] Rep. by the Sale of Goods Act, 1930 (III of 1930), section 65

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Chapter VIII

Of Indemnity and Guarantee

124. "Contract of indemnity" defined—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."

Illustration

A contracts to idemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 [1]Taka. This is a contract of indemnity.

Case-Law

Sections 124, 126—Contract of indemnity and guarantee—Distinguished—There is a difference between a contract of guarantee and a contract of indemnity. For a contract of guarantee of suretyship there must be tripartite agreement between the creditor, the principal debtor and the surety. In the case of a contract of indemnity it is not necessary for the indemnifier to act at the request of the debtor, whereas, in the case of a contract of guarantee or surety it is necessary that surety or guarantor should give the guarantee at the request of the debtor. *Probadh Chandra vs Abdul Rahman Abdul Gani 12 DLR 459; PLD 1960 Dacca 983.*

—contract of indemnity and guarantee

—in a contract of guarantee there must be three parties collaborating. *5 ILR (All) 188.*

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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).

—a contract of guarantee need not necessarily be in writing: it may be expressed by word of mouth or it may be tacit or implied and may be inferred from the course of conduct of the partners concerned. *1930(All) 848; IR 1931 (All) 70; 128 IC 598; 1930 ALJ 1217.*

—a contract of guarantee and the consideration thereof must be strictly proved. *1935 (Pat) 376.*

—the contract of guarantee defined in section 126 is confined to cases of suretyship strictly so called. *55 M 959; 63 MLJ 615; IR 1932(Mad) 747; 932 MWN 969; 139 IC 562.*

—a guarantee like every other contract must be construed by the words used and also with regard to the surrounding circumstances. *57 C 764; CLJ 303; 126 IC 138; 1930(Cal) 17.*

—difference between a contract of suretyship and that of indemnity. *1918 (Pat) 628; 1940 (Bom) 315; 42 (Bom) LR 550.*

—Contract of indemnity. A contract of indemnity is one by which one party promises to save the other from loss caused to him by the conduct of the promiser himself, or by the conduct of any other person. *PLD 1980 Karachi 30.*

125. Rights of indemnity-holder when sued—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnity applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the

absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Case-Law

—Compensation by Railway—Insurer cannot step into the shoes of the consignor in case of loss of goods—Only consignor can sue for loss, damages etc. *Federation of Pakistan vs Co-operative Insurance Society of Pak Ltd. Lahore PLD 1956(Lah) 878—PLR 1957(1) (Lah)273 (DB).*

Rights of indemnity holder when sued—when an act which is not manifestly tortuous is done by one at the request of another, the former is entitled to an indemnity from the latter, for the loss caused to a third party. *1938 PC 191; 42 CWN 957; 40 (Bom) LR 868; 1946(Mad) 472.*

—vendee undertaking to pay the consideration to a creditor of the vendor is a contract of indemnity. *1935 (Nag) 147.*

—section 125 is not exhaustive. *1946 (Cal) 159; 1942(Bom) 302.*

—indemnity holder can sue when the injury becomes imminent *1946(Cal) 159.*

—when purchaser agrees to release the property from mortgage and further agrees to indemnify the vendor in case the latter is made liable, a suit by the vendor when he has not paid anything is premature *60 C 761;1933(Cal) 641; 1935 (Rang) 205.*

—actual loss or damages need not be proved to get compensation *35 A 946; 1931 (All) 754.*

126. "Contract of guarantee", "surety", "principal debtor" and "creditor"—A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety": the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Case-Law

—Bank Guarantee—The fact that a blank document was given to plaintiff-Bank unless otherwise proved, presumption would be that guarantor had given implied authority to fill in the blank in accordance with agreement and understanding between the parties. *PLD 1986 Karachi 464.*

—Banking—Bank guarantee—Bank undertaking to pay on the failure of performance of contract—No temporary injunction restraining the enforcement of the guarantee. *Uttara Bank vs Kilburn Ltd BLD 1981 (AD) 231*

—Bank guarantee—Bank undertaking to pay on the failure of performance of contract—No temporary injunction restraining the enforcement of the guarantee—Courts are very reluctant to interfere with commercial transaction. *Uttara Bank vs Macneill and Kilburn Ltd BLD 1981 (AD) 231; 33 DLR (AD) 298; (1983) 3 BCR (AD)148.*

—Notice for suit not given—Where in terms of guarantee cause against defendant was to have arisen two days after notice and as no notice was served on defendant filing of suit would be deemed to be notice to defendant. Suit was not barred by time. *PLD 1986 Karachi 464.*

Sections 126 & 128—Banking—Bank guaranteeing satisfactory performance of contract by seller—Seller defaulted in delivering goods within stipulated time—Purchaser called upon the bank to credit the guaranteed amount to its account—Bank refusing to comply contending that the contract failed due to circumstances beyond the seller's control—Whether bank liable to encash the guarantee.

The bank has agreed to make an unconditional payment on demand without any further question and without reference to the contract. The words "without any further question and without reference to the contractor" make it clear that the bank is not to be an arbitrator in a dispute between the purchaser and the supplier whether in respect of the performance of the contract or otherwise. On an allegation made by the purchaser that there has been a failure of performance on the part of the supplier, the bank is bound unconditionally to pay the amount on demand. The only condition of the bank guarantee is that the purchaser should make a demand on the bank and when this has been done, the condition of the guarantee has been fulfilled and the bank is bound to make the payment without any further question and without reference to the

contractor. As to what the purchaser is entitled to recover from the supplier as liquidated damage and/or penalty for the default of the supplier is a question between the purchaser and the supplier. The bank cannot raise this plea. The question as to what part has not been performed is not also relevant. *Pubali Bank vs BADC 1982 BLD 17.*

127. Consideration for guarantee—Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) B request A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

128. Surety's liability—The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

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

Case-Law

—Surety's liability—When the surety bond provides that surety is to be proceeded against if the debt could not be realised from the debtor,

the debtor must be first proceeded against. *55 C 91; 1928 (Cal) 177; 109 IC 538.* But on the construction of a document it was held that there was nothing to suggest that the sureties were liable only in the event of a deficiency remaining. *35 CWN 985; 54 CLJ 269; 61 MLJ 191; 1931 PC 224; 1931 ALJ 793 PC.*

—where a surety joins in the execution of mortgage deed and the sale proceeds of the mortgage property prove to be insufficient, a personal decree may be passed against him under Order 34, rule 6, as his liability is co-extensive with that of the principal debtor. *1931 (All) 631.*

—enforcement of surety bond. *57 M 688; 1934 (Mad) 186, and liability of surety 1934. (All) 525.*

—when under a decree surety is ordered to pay the deficiency after the sale of the property of the Jt. Dr. but the D. Hr. in order to increase interest omits to sell the property for a long time, the surety is not liable for the interest. *4 C 331 PC.*

—when the surety bond provides that surety is to be proceeded against if the debt could not be realised from the debtor, then before proceeding against the surety the debtor must be proceeded against first. *55 C 91; 109 IC 538; 1928 (Cal) 177.*

—when a suit is brought against deceased principal debtor and surety, and it becomes barred against legal representatives of the principal debtor, it can be decreed against surety alone. *12 C 330; 5 B 146; Contra 11A 310; 24 A 504; 8A 259; 50 A 211.*

—in a suit against surety for any loss by the misconduct of agent, the loss must be shown to have arisen from misconduct of the agent. *12 C 143; 12 IA 142, PC.*

—a surety for a guardian of property is liable only to the amount of the bond for any defalcation found to have accrued only during the period of guardianship. *1929 (Pat)626.*

—when there is contract to indemnify, the correctness of a decree so to indemnify cannot be questioned by the indemnifier. *37 M 270.*

—a surety bond can be assigned. *17 CWN 695.*

—Banking—Bank guaranteeing satisfactory performance of contract by seller—Seller defaulted in delivering goods within stipulated time—

Purchaser called upon the bank to credit the guaranteed amount to its account—Bank refusing to comply contending that the contract failed due to circumstances beyond the seller's control—Whether bank liable to encash the guarantee.

The bank has agreed to make an unconditional payment on demand without any further question and without reference to the contractor. The words "without any further question and without reference to the contractor make it clear that the bank is not to be an arbitrator in a dispute between the purchaser and the supplier whether in respect of the performance of the contract or otherwise. On an allegation made by the purchaser that there has been a failure of performance on the part of the supplier, the bank is bound unconditionally to pay the amount on demand. The only condition of the bank guarantee is that the purchaser should make a demand on the bank and when this has been done, the condition of the guarantee has been fulfilled and the bank is bound to make the payment without any further question and without reference to the contractor. As to what the purchaser is entitled to recover from the supplier as liquidated damages and/or penalty for the default of the supplier is a question between the purchaser and the supplier. The bank cannot raise this plea. The question as to what part has not been performed is not also relevant. *Pubali Bank vs BADC (1982) BLD 17.*

—Guarantor's liability as regards repayment of loan—The guarantor is not only responsible for repayment of the loan, his liability to repay need not even be postponed till the principal debtor fails to repay the loan—He may be compelled before even compelling the principal debtor to repay—The choice lies with the creditor. *MM Ispahani Ltd vs Sonali Bank & ors (1984) BLD (AD) 242*

—Surety's liability is co-extensive with that of principal—A surety's liability is co-extensive with that of the principal debtor, unless otherwise provided by contract. *PLD 1983 Azad Kashmir 28 DB.*

—Liability of surety and principal debtor is distinct—The liability of the principal and his surety though arising under the same transaction are distinct. *PLD 1982 Karachi 577.*

—Suit against Surety—Even a suit against a surety only, without impleading the principal debtor, is maintainable. *PLD 1982 Karachi 577.*

—Liability of surety based on letter of guarantee is distinct from liability of principal debtor. Suit against surety was maintainable without impleading the principal debtor. *PLD 1982 Karachi 577.*

—Limitation—Against a surety limitation commences to run from the date of his own contract, i.e. the date of execution of guarantee. The date of subsequent demand is immaterial. *PLD 1975 Karachi 671.*

Section 128—No order refusing or granting injunction was passed by the trial Court and only time was allowed to file written objection which made the appeal a premature one and the machines, equipment, etc. so far supplied to the defendant No. 1 by the plaintiff under a letter of credit were found not according to the specification as admitted by the plaintiff in the Fax message sent abroad, the plaintiff has not been able to make out a *prima facie* case for granting an order of ad-interim injunction restraining the defendants from encashing the performance bank guarantee. *Magnat Associated Ltd vs GR Textile Mills Ltd 3 BLC 270.*

Section 128—Guarantor's or Surety's liability—The liability of the principal debtor is co-extensive with that of the guarantor. A creditor is at liberty to pursue either the principal debtor or the guarantor according to his sweet will for realisation of his dues or he can proceed against both of them simultaneously. *Sonali Bank vs Hare Krishna Das and others 49 DLR 282.*

129. "Contining guarantee"—A guarantee which extends to a series of transactions is called a "continuing guarantee".

Illustrations

(a) A, in consideration that B will employ C in collecting the rent at B's zamindari, promises B to be responsible, to the amount of 5,000 [1]Taka, for the due, collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £ 100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £ 100, and C pays B for it. Afterwards B supplied C with tea to the value of £ 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to

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).

C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly, he is not liable for the price of the four sacks.

130. Revocation of continuing guarantee—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000.[1]Taka, B discounts bills for C to the extent of 2,000 [1]Taka. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 [1]Taka, on default of C.

(b) A guarantees to B, to the extent of 10,000 [1]Taka, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Case-Law

Section 130—A continuing guarantee may be revoked by the surety by giving notice as to future transaction under section 130 of the Contract Act. Such contention would be considered while considering the facts and circumstances of the concerned Rule in which the same has been raised unless the same is a disputed question of fact. *Habibullah, Director of National Bank Limited and 11 others vs Bangladesh Bank and another 2 BLC 520.*

131. Revocation of continuing guarantee by surety's death—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

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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).

Case-Law

Sections 129, 130—Bond executed in favour of Court—Not covered by the sections—Principal of sections applicable—Surety may be discharged by Court when he prays for it and produces the judgment debtor in Court.

—The provisions of sections 129 and 130 of the Contract Act do not apply to the surety bond executed in favour of the Court in the same way as they apply to a guarantee given in favour of a private party because the creditor in the case of surety bond executed in pursuance of section 55 in the Court and the obligation of the surety cannot come to an end merely by giving a notice of revocation as contemplated in section 130 of the Contract Act. *Amanullah Khan vs Masood Ali Naqvi PLD 1958 (Kar) 393.*

Sections 129-131—Continuing guarantee—stipulation that heirs and legal representatives would be bound is a continuing guarantee. *55C 158; 1928 (Cal) 204.* Where the guarantee is given for performance of definite arrangement and is not contingent and the consideration is variable as a result of future dealings, the contract is not one of continuing guarantee. *1930 (All) 730.*

—a surety can by notice be released as regards future transaction. 29 C 68, but mere denial of liability by the surety in a previous suit does not operate as notice. 27 B 418 and it is not competent to the surety for a Receiver who has been appointed an officer of the Court, to discharge himself merely by such notice to the decree-holder or other person at whose, instance or for whose benefit the Receiver was appointed. *30 CWN 266; MWN 493; 1926 PC 32 PC.*

—surety for the appearance of judgment-debtor may produce the Jt. Dr. and be absolved from future liability. *1934 (Lah) 962.*

132. Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the

existence of the second contract, although such third person may have been aware of its existence.

Illustration

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

Case-Law

Third person not affected by private arrangement—with regard to contract of guarantee for advances made by bank to the principal debtor, an arrangement between the principal debtor and the surety without the bank knowing anything about it, cannot possibly affect the right of the bank, even if it has been arrived at by the consent and advice of the solicitors for the bank if the latter are not acting for the bank. *1930 PC 272; 128 IC 657; IR 1931 PC 33 PC.*

—contract as between principal debtors that one would be surety for the other cannot afect their laibility to the creditor *1942 (Mad) 134; (1941) 2 MLJ 340.*

133. Discharge of surety by variance in terms of contract— Any variance, made without the surety's consent, in the terms of the contract between the principal [1][debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

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

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1. Ins. by Repealing and Amending Act, 1917 (XXIV of 1917) Section 2 and Schedule 1.

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

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

(d) A gives to C a continuing guarantee to the extent of 3,000 [1]Taka for any oil supplied by C to B on credit. Afterwards B become embarrassed, and, without the knowledge, of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

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

Case-Law

[For cases under sections 133-139, see cases under section 139, infra]

Section 133—The principal of the law of discharge of sureties is that the surety, like any other contracting party, cannot be held bound to something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. *PLD 1984 Karachi 211.*

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).

—Increase in rate of interest. Where loan was granted by one respondent to another respondent on surety of appellant. Interest was charged by creditor later on at higher rate than settled before, with consent of debtor but without knowledge of surety. That would amount to variance in terms of contract between creditor and principal debtor and if it was without consent of surety section 113, will be attracted. Any increase in rate of interest correspondingly increases principal debtor's liability and likewise liability of guarantor is also effected. *PLD 1984 Karachi 211.*

—Fresh security given. Earlier guarantors stood discharged of liability on release of their property in view of another guarantor mortgaging his property in place of earlier guarantors. *PLD 1986 Karachi 107.*

Section 133—It is contended on behalf of the appellants that letter of credit was amended providing shipping of unlimited consignments and the beneficiary under the letter of credit was also changed from Khandelwal Brothers to Universal Trading Syndicate and such amendment of the letter of credit has varied the contract in such way that the appellants were discharged from all liabilities under section 133 of the Contract Act. It is held that the beneficiary was not changed. The appellants submitted an indent in the respondent bank but the respondent bank did not say a word by way of explanation as to why the letter of credit was not established against the said indent of the appellants when the PW 1 on behalf of the respondent admitted that the letter of credit was amended without any reference to the appellants. However, when the appellants are found not to be the guarantors to the letter of credit, the question of discharge under section 133 of the Contract Act becomes academic. *Moqbul Brothers and another vs Rupali Bank and others 5 BLC 565.*

134. Discharge of surety by release or discharge of principal debtor—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time. B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor— A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor discharges the surety, unless the surety assents to such contract.

136. Surety nor discharged when agreement made with third person to give time to principal debtor—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

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

Illustration

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

138. Release of one co-surety does not discharge others—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties[1]

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

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

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to sell the

1. See section 44 Supra.

furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but owing to his misconduct and wilful negligence, only a small price is realised. A is discharged from liability on the note.

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

Case-Law

Sections 133 & 139: Discharge of surety—The provision of sections 133-139 do not apply to the bond given by a surety to the Court under the *CPC. 1935 (Nag) 258*, but the principal will apply. *1939 (Bom) 23.*

—where the contracting parties subsequently vary their contract, surety is discharged, unless the surety has assented to the new terms. *59 B 180; 39 CWN 440; 61 CLJ 42; 1935 MWN 97; 1935 ALJ 242; 1935 PC 21 PC* and this applies to the case where the surety is under no personal liability but has merely deposited documents. *55 B 677; 1921 Bom 337,* but surety is not discharged where he consents to the subsequent contract. *23 A 137; 27 IA 168 PC.*

—the mere falling beyond time by the creditor of an application for restoration of his suit against the principal debtor, which had been dismissed for default, will not legally absolve the surety from liability. *1935 (Lah) 729; 161 L 757.*

—where in a suit against principal debtor and surety, the name of original debtor is struck our upon creditor's application, the surety is not discharged. *1939 PC 110; 43 CWN 641; 41 (Bom) LR 741; (1939) MLJ 253.*

—time given to the principal debtor to enable him to raise money by private sale amounts to forbearance to sue. *5 DLR All 188; 1950 ALJ 253.*

—giving time to principal debtor discharges the surety. *9 BLR 261; 6 C. 241; 6 CLR 591; PC 15 BLR 331 (contra) 17 CWN 669.*

—compromise by creditor with debtor allowing time behind the back of the surety discharges the surety. *120 IC 552;* Similar case. *1930 (Lah) 896; 1933 (Mad) 756; 1929 (All) 664.*

—mere forbearance to sue does not discharge the surety, *22 A 351,* but where forbearance continues until the claim against principal is

barred it discharges the surety. *11 A 310; 24 A. 504; 1928 All 46; 50 A. 211; 8 A 259; 1932 All 610.* The same principle applies to a case where the suit of the creditor brought against the debtor and the surety abates as against the principal debtor, *1932 Lah. 419; 1928 Lah. (5 B. 647; 7 B. 146 12 C. 330; 33 M. 308; 1927 (Lah 396) applied, 24 A. 504* not approved.

—omission to sue the principal debtor within the period of limitation does not discharge the surety, *41 CWN 1361.*

—a creditor may sue the surety without exhausting his remedy against the debtor. *1935 (Mad) 748.*

—a creditor may sue the surety without making the principal debtor a party. *51 CWN. 257*

—a consent decree passed without the knowledge and consent of the surety discharges him. *30 CWN 540; 1926 Cal 818; 55 C 91; 1928 Cal, 177,* but where a suit was bona fide compromised the surety's a liability was not discharged. *55 B 97; 32 (Bom) LR 11394; 128 IC 903, 43 M 272; 41 CWN 1099.*

—if there had been a variation of the terms of the contract of which the guarantee undertook the due performance, the surety could not be held liable. *59 CLJ 503; 1934 (Cal) 699.*

—a guarantee for overdraft upto a certain limit is not discharged by advances in excess of the limit. *91 CLJ16*

—an arrangement made with the creditor on behalf of the surety by an agent in that behalf previously authorised or whose authority is afterwards ratified is binding on the surety, and it is so even when surety's representative in the arrangement is the principal debtor himself. No notice of the arrangement need be directly given to the surety by the creditor. *1929 PC 273; 30 LW 456 PC.*

—when a balance was struck in the account book but the surety did not sign the same and the creditor sued both the principal debtor and the surety, held that the striking of the balance though extended the time and the privileges to the creditor did not confer any benefit upon the principal debtor and the conditions of section 135 not being fulfilled the surety was not discharged from liability for the debt. *1931 (Lah) 627.*

—where the eventual remedy of the surety against the principal debtor is impaired by any act or omission of the latter, the surety is

discharged. *1939. PC. 110; 43 CWN 641; 41 (Bom) LR 742; (1939) 2 MLJ 253.*

—surety for appearance is discharged when the Jt. Dr. appears in Court and makes payment of the decretal amount in instalments. *56 CLJ 586, 1933 (Cal) 337.*

—release of debtor followed by a reservation of rights against surety does not discharge the surety. *1933 (Mad) 309; 56 M 625.*

—in case of continuing guarantee obligation is discharged with the discharge of the existing debt. *1934 PC 210; 1934 ALJ 763 PC.*

Sections 139 and 141—Some fixed deposit receipts were deposited as additional security for certain overdraft accounts with the appellant bank and some of these fixed deposit receipts belonged to the respondent Zaitoon Begum,—Without exhausting Bank's remedies provided by the goods pledged with the Bank by the original debtors, the Bank could not proceed against the fixed deposit receipts. *Central Exchange Bank Ltd. vs Mst Zaitoon Begum. 20 DLR(SC) 117.*

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

Case-Law

Rights of surety on performance—where the surety does not pay the whole of the indebtedness that exists between the creditor and the principal debtor but only a part, he cannot claim all the rights of the creditor under section 140 of the Contract Act. *49 A 640; 101 IC 513; 1927 (All) 538.*

—a surety is not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. *15 B 48.*

141. Surety's right to benefit of creditor's securities—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with security, the such surety is discharged to the extent of the value of the security.

Illustrations

(a) C advances to B, his tenant 2,000 [1]Taka on the guarantee of A. C has also, a further security for the 2,000 [1]Taka by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt, Subsequently, C gives up the further security. A is not discharged.

Case-Law

Surety's right to creditor's securities—section 141 does not cover the case where the creditor and debtor agree between themselves to vary their original contract by reducing the amount to be advanced and the number of properties to be given in security. *1932 (Bom) 168; 56 B 101.*

—case under III(b) to section 141—whether there was absolute discharge under section 139. *1934(All) 616.*

Section 141—Repayment of loan—Denying the liability on the ground that the security has been taken away—When a person contracts a loan from a banking institution by offering valuable security but

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).

retaining its possession with itself, it cannot possibly lie in its mouth to deny the liability on the ground that the security has been lost or it has parted with its possession under compulsion—For such loss or taking away of the security persons or bodies who are responsible for it may be liable but such plea is not sufficient to absolve the person or body contracting the loan from his or its obligation to repay the loan. *M M Ispahani Ltd vs Sonali Bank & ors (1984) BLD (AD)242.*

Sections 141 and 139—Some fixed deposit receipts were deposited as additional security for certain overdraft accounts with the appellant bank and some of these fixed deposit receipts belonged to the respondent Zaitoon Begum,—Without exhausting Bank's remedies provided by the goods pledged with the Bank by the original debtors, the Bank could not proceed against the fixed deposit receipts. *Central Exchange Bank Ltd. vs Mst. Zaitoon Begum. 20 DLR (SC) 117.*

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

143. Guarantee obtained by concealment invalid—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five Taka per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Case-Law

Sections 142-143—Guarantee obtained by misrepresentation or concealment—A continuing guarantee for honesty of servant without disclosing past misconduct is invalid. *1944 (Lah) 424.*

—banker is not bound to volunteer to the guarantor information as to state of principal's debtor's account in the bank. *8 DLR (Cal) 78.*

—a contract of guarantee obtained by material misrepresentation is invalid and not merely voidable. *1934 PC 210; 1934 ALJ 763 PC.*

—a surety is not less bound though he may have acted on some misrepresentation made by the order. *33 C 713, 756.*

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

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

Illustrations

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

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay; sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 [1]Taka payment for rice to be supplied by C to B. C supplies to rice to a less amount than 2,000 [1]Taka, but obtains from A payment of the sum of 2,000 Taka in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Case-Law

Implied promise to indemnify surety—independently of section 140 the surety has a right under section 145 to recover whatever sum he has rightfully paid for the principal debtor, but no sum which he has paid wrongfully, and the right of the surety under section 145 is not limited to the rights of the creditor against the principal debtor. *1932 (All) 610.*

—remedy of a co-surety paying in excess of his share. *1938(Cal) 405: 42 CWN 1258.*

146. Co-sureties liable to contribute equally—Where two or more persons are co-sureties from the same debt or duty, either jointly or severally, and whether under the same or different contracts and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt. or of that part of it which remains unpaid by the principal debtor[2]

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 [1]Taka lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 [1]Taka each.

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

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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).

2. See Section 43 Supra.

147. Liability of co-sureties bound in different sums—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 [1]Taka, B in that of 20,000 Taka, C in that of 40,000 [1]Taka, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 [1]Taka. A, B and C are each liable to pay 10,000 [1]Taka.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 [1]Taka, B in that of 20,000 Taka, C in that of 40,000 [1]Taka, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 [1]Taka A, B and C are each liable to pay 10,000 [1]Taka.

(c) A, B and C, as sureties for D enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 [1]Taka, B in that of 20,000 [1]Taka, C in that of 40,000 [1]Taka, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 [1]Taka. A, B and C have to pay each the full penalty of his bond.

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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 IX

Of Bailment

148. "Bailment", "bailor", and "bailee" defined—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "baillor". The person to whom they are delivered is called the "bailee".

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

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

150. Bailor's duty to disclose faults in goods bailed—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

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

Illustrations

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

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

[All the cases under 'Of Bailment' have been given after section 171, infral.

151. Care to be taken by bailee—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed[1].

Case-Law

Railway—Liability while carrying goods—Similar to that of a bailee.

Held : The railway carries goods delivered to it by a party as a bailee under a contract and is bound to take such care of the goods as that taken by a man of ordinary prudence. It is only when it wants to limit its liability that it can enter into special contracts with the parties concerned. *Messers Jamiuddin vs Federation of Pakistan, 9 DLR 99(DB).*

—Short delivery of goods—Goods carried on shipper's risk—Company liable for short delivery under the sections. *Trans Oceanic Steamship C. Ltd vs Abdul Razzak Abdul Kader, 11 DLR 465 (DB)=PLD 1960 Dacca 147.*

—Buyer rejecting goods—If can sell them to recover warehouse charges for storing them—The buyer rejected the goods and then disposed them of in order to recover the warehouse charges for having stored them. He contended that he as a bailee had the right to do so.

Held : The buyer of the goods having rejected them and thereafter selling them as the goods belonging to him, stands on a different footing than the bailee contemplated under sections 151 and 170 of the Contract Act. *Yousaf and Razzak vs Abdullah, PLD 1957 (Kar) 747.*

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1. As to railway Contracts, see the Railways Act, 1890 (XI of 1890), section 72. As to teh liability of Common Carriers, see the Carriers Act, 1865 (III of 1865), section 8.

—Due care—If onus lies on the bailee—How should the onus be discharged—Duty of the plaintiff in case of loss of goods—Section 151 of the Contract Act subjects a bailee to the duty of taking as much care of the goods entrusted to him as a prudent man would take of his own goods of similar quality and bulk.

The onus, therefor to prove what steps had been taken by the bailee in discharge of the duty imposed upon him by law would initially lie on him and not on the bailor. *Federation of Pakistan vs Muhammad Ismail, PLD 1956(Lah) 222=PLR 1956 (Lah) 536 (DB).*

—Responsibility of the pledgee to take due care of the goods entrusted to its care does not disappear even though in terms of a special agreement the pledgee is absolved from every loss by theft, etc, unless the pledgee discharges the onus of showing that theft 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.*

—Care which a bailee is bound to take is co-extensive with that of a man of ordinary prudence. *7 DLR 134.*

—The liability of a railway while carrying goods entrusted to it is similar to the liability of a bailee. *9 DLR 99.*

—Consignor is ordinarily entitled to sue the carrier (Railway) for any loss or damage sustained by him due to negligence or default of the carrier but in certain circumstances a consignee who acquired title to the property by virtue of endorsement or otherwise of any document or is a party to the contract of consignment is also entitled to sue the carrier. *Pakistan vs Messers Adamjee Jute Mills Ltd. 22 DLR 741.*

—Rights and duties of bailee—The bailee has no right to dispose of or sell the property unless specifically authorised to do so. He has only a right to retain the goods bailed with him until he receives due remuneration for the services rendered in respect of the goods. He is responsible for the safe delivery of the goods bailed with him and in default is responsible to the bailor for any loss of the goods. *Butt Engineering Stores vs Thomas Cook and Sons, PLD 1958 (Kar) 492.*

—Good carried by railway by route other than the usual route—Goods damaged or deteriorated—Railway liable—Risk note is no protection. *Abdul Karim vs Federation of Pakistan, 11 DLR 393=PLD 1960 Dacca 42.*

—Loss of goods during transit—Railway liable—Absence of brake—Negligence of railway. *Pakistan vs Abdul Karim, PLD 1960 Dacca 472=12 DLR 134 (DB).*

—Equity can only come into play as and when it is found that the party is subject to some hardship for no fault of his. *Abdur Razzak Bhuiya vs M/s Lloyds Bank Ltd. 22 DLR 158.*

Section 151—Contract of Carriage of Goods by Sea—Ship-owner as Bailee not absolved from liability till goods handed over to consignee—Negligence on part of ship owner resulting in damage and loss to goods—claim for damages, sustainable. *Abdur Rahman, Abdul Gani vs East and West Steamship Co. & another 30 DLR (SC) 130.*

Sections 151, 152 & 161—The Railway carries goods delivered to it as a bailee and is bound to take such care of the goods as that of a man of ordinary prudence. It is only when it wants to limit its liability that it can enter into special contract with the parties concerned.

It appears from the records that the booking clerk, one Mr. Ismail Howlader, was in the employment of the appellant and while discharging his official duties in the capacity of booking clerk delivered the goods in question to a third party. In view of the facts, circumstance, evidence and decision referred to above we are of the opinion, that the defendant-appellant is absolutely liable for the act done by the booking clerk under his employment. *Chairman Rly Board vs Commerce Bank Ltd 46 DLR 254.*

Sections 151, 152 and 161—Port Authority is not liable for any loss in this case as they informed the owner of goods to locate the same.

In this case as the owner of the drums did not remove the same from the jetty premises, without any fault on the part of the Jetty Administration, within clear 7 working days from the time of landing of the drums in question the Jetty Administration is not liable for any loss as in this case the Port Authority informed owners of the drums to find out the same and there was no fault on the part of the Port Authority to locate the goods. *Chittagong Port Authority vs Hong Kong Shipping Lines. 41 DLR 332.*

—Chittagong Port Authority acts as a bailee so long the goods remain in their possession. Section 50A of the Port Act will not operate if the necessary procedure is not followed.

It is true under section 50A of the Chittagong Port Act the Port Authority is responsible for the loss of goods landed and remained in its possession or control as a bailee in view of the provisions of sections 151, 152 and 161 of the Contract Act, 1872. But section 50A will not operate in a case where the goods landed under nil mark and the consignee fails to follow the nil mark procedure to locate the goods by reason of sub-rules (f) and (g) of Rule 64 of General Rules and the Schedules for Working of the Chittagong Port (Railway)Jetties. *Chittagong Port Authority vs Hong Kong Shipping Lines, 41 DLR 332.*

—Liability of the Port Authority to pay compensation for non-delivery of goods—When the shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee—The liability of the Port Authority is that of a bailee—They would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstances take—A suit based on non-delivery is really based on a breach of the duty—*The Chittagong Port Authority vs Md Ishaque (1983) BLD (AD) 338.*

—Payment of compensation for non-delivery of goods and liability of the Port Authority—when shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee. Liability of the Port Authority in respect of goods in its possession or under its control either in connection with export or import is that of a bailee—the Port Authority would be liable in the absence of proof that it took as much care of the goods as a man of ordinary prudence would in similar circumstances take—a suit based on non-delivery is actually based on a breach of the duty.

The respondent's suit for recovery of compensation for goods imported by them but not delivered to them by the Chittagong Port Authority was dismissed by the trial Court. The High Court Division, however, allowed the appeal preferred by the respondent, set aside the judgment and order of the trial Court and decreed the suit.

Held : Goods, either for export or import, when remain in the possession or under the control of the Port Authority the liability of the Port Authority is that of a bailee under sections 151. 152 & 161 of the

Contract Act and they would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstances take. Once this liability is fixed by law, there is no scope for contending that the authority is not responsible as the consignee did not clear the goods within 5 days. *The Chittagong Port Authority vs Md Ishaque & others 1983 BLD (AD) 338=35 DLR (AD) 364.*

—Goods (for import or export) when remain in possession of the bailee (here the Chittagong Port Authority), the latter is liable as a bailee under the Contract Act (vide 151, 161). Chittagong Port Authority vs Md Ishaque *35 DLR (AD)364.*

—The Port Authority when receives the goods from the ship, it receives them (as an agent), for delivery to the consignee and in this process it acts as bailee and therefore is liable to the consignee as provided in sections 151, 152 & 161 of the Contract Act. *Chittagong Port Authority vs Md Ishaque 35 DLR (AD) 364.*

—Responsibility of Chittagong Port Authority as a bailee if by its default goods are not duly delivered. *Chittagong Port Authority vs Md Ishaque 35 DLR (AD) 364.*

—Railway is in the position of a bailee. Under section 72 of the Railway Act the railway is in the position of bailee under section 151 of the Contract Act. Under section 151 of the Contract Act a bailee is to act as a prudent man. *Pakistan Eastern Railways vs Matiur Rahman 20 DLR 315.*

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

Case-Law

Sections 150, 151 and 161—Port Authority is not liable for any loss in this case as they informed the owner of goods to locate the same.

In this case as the owner of the drums did not remove the same from the jetty premises, without any fault on the part of the Jetty Administration, within clear 7 working days from the time of landing of the drums in question the Jetty Administration is not liable for any loss as in this case the Port Authority informed the owners of the drums to find out the same, and there was no fault on the part of the Port Authority to locate the goods. *Chittagong Port Authority vs Hong Kong Shipping Lines 41 DLR 332.*

—Chittagong Port Authority acts as a bailee so long the goods remain in their possession. Section 50A of the Port Act will not operate if the necessary procedure is not followed.

It is true that under section 50A of the Chittagong Port Act the Pot Authority is responsible for the loss of goods landed and remained in its possession or control as a bailee in view of the provisions of sections 151, 152 and 161 of the Contract Act, 1872. But section 50A will not operate in a case where the goods landed under nil mark and the consignee fails to follow the nil mark procedure to locate the goods by reason of sub-rules(f) and(g) of Rule 64, of General Rules and the Schedules for Working of the Chittagong Port (Railway) Jetties. *Chittagong Port Authority vs Hong Kong Shipping Lines 41 DLR 332.*

—Liability of the Port Authority to pay compensation for non-delivery of goods—When the shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee—The liability of the Port Authority is that of a bailee—They would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstance take—A suit based on non-delivery is really based on a breach of the duty—*The Chittagong Port Authority vs Md Ishaque & ors (1983) BLD (AD) 338 = 35 DLR (AD) 364.*

—Payment of compensation for non-delivery of goods and liability of the Port Authority—when shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee. Liability of the Port Authority in respect of goods in its possession or under its control either in connection with export or import is that of a bailee—the Port Authority would be liable in the absence of proof that it took as much care of the goods as a man of ordinary prudence would in similar circumstances take—a suit based on non-delivery is actually based on a breach of the duty.

The respondent's suit for recover of compensation for goods imported by them but not delivered to them by the Chittagong Port Authority was dismissed by the trial Court. The High Court Division, however, allowed the appeal preferred by the respondent, set aside the judgment and order of the trial Court and decreed the suit.

Held : Goods, either for export or import, when remain in the possession or under the control of the Port Authority the liability of the Port Authority is that of a bailee under sections 151, 152 & 161 of the Contract Act and they would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstances take. Once this liability is fixed by law, there is no scope for contending that the authority is not responsible as the consignee did not clear the goods within 5 days. The Chittagong Port Authority vs *Md Ishaque & others 13 BLD(AD) 338=35 DLR (AD) 364.*

Sections 151 and 161—Goods (for import or export) when remain in possession of the bailee (here the Chittagong Port Authority), the latter is liable as bailee under the Contract Act (vide sections 151, 161). *Chittagong Port Authority vs Md Ishaque 35 DLR (AD) 364.*

—The Port Authority when receives the goods from the ship, it receives them (as an agent) for delivery to the consignee and in this process it acts as bailee and therefore is liable to the consignee as provided in sections 151, 152 & 161 of the Contract Act. *Chittagong Port Authority vs Md Ishaque 35 DLR (AD) 364.*

—Responsibility of Chittagong Port Authority as a bailee if by its default goods are not duly delivered. *Chittagong Port Authority vs Md Ishaque 35 DLR (AD) 364.*

—Section 152 of the Contract Act days down that in the absence of a special contract a bailee is not responsible for loss, destruction or deterioration of the goods bailed if he had taken the amount of care mentioned in section 151. It follows therefor that if there is special contract to the contrary, the bailee may be held responsible for the loss, etc even though he has taken such care of things bailed to him as was required of him by law. In Chittagong Port Act the expression "in the absence of any special contract" in section 152 has been omitted but the position remains the same because section 161 is referred to in section 50A and section 161 of the Contract Act is in the following terms:

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

A suit based on non-delivery is really based on a breach of the duty laid down in that section, Reliance may be placed on East India, Rly. vs Piare Lal *AIR 1928 Lah 774.* The present suit is such a suit. There is no escape from the liability which is saddled by law. Such statutory liability is based on common law and reliance may be placed on *Barbant vs King 1895 AC 632* where the Government being bailee under contract was held liable for non-feasance. *Chittagong Port Authority vs Md Ishaque. 35 DLR (AD) 364.*

—Common Carriers by Sea—Section 152—The provisions of the rule to the Carriage of Goods by Sea Act, 1925 do not apply in relation to carriage of goods by sea in a ship carrying goods from a foreign port to a port in Pakistan. Therefore, the rights and liabilities of the parties have to be ascertained by reference to the proper law of contract which in this case, is the Pakistan Law. *PLD 1977 Karachi 264.*

—Liability to deliver goods to consignee—Where the MD of the consignee firm noticed damage to the goods but the first intimation of the damage was sent to the carrier some ten months later. it was held in the absence of notice of survey, the carrier is not bound by the Survey Report. Therefore the carrier is not liable to pay damages. *PLD 1977 Karachi 264.*

—Liability as bailee—The liability of the railway for the goods delivered to them for transmission is that of bailee under sections 151 and 152. *PLD 1981 Pesh 92.*

—Proof of loss or damage—Section 76 of the Railways Act lays down that in a suit against Railway administration for the loss, destruction or deterioration of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused. *PLD 1981 Pesh 92.*

—Theft; loss by—The bailee cannot protect himself by any special agreement by which he is not responsible for loss or damage to the goods. Thus where the goods pledged to a Bank were stolen. The Bank took up the plea that it was not liable for the loss of goods in view of a term of agreement with the party by which the Bank was not to be held responsible for loss or damage to the goods. It was held that the defendant Bank when seeking to rely on the terms of the agreement from

being excused from any liability for the pledged goods lost by theft, must first prove satisfactorily that the theft was committed by a person or persons other than the agent or employees of the Bank and that the theft was committed in spite of the pledgee Bank having taken proper protection with regard to the safety of the goods. This, the pledgee Bank must do, as even when a special agreement of this nature is entered into between the parties, the failure of the party seeking cover under special term must attract the provisions of the sections 151 and 152 of the Contract *Act. PLD 1981 Karachi 540.*

—Negligence of bailee, proof of—Where the bailor sues the bailee for damage to goods due to bailee's negligence. The onus of placing all the materials in his possession or knowledge is on the bailee while the onus of establishing negligence is on the plaintiff. *PLD 1976 Karachi 238.*

—Where nothing is brought on the record to show that the bailee was in any way negligent, the bailee cannot be called upon to prove want of negligence by him. *PLD 1976 Karachi 238.*

153. Termination of bailment by bailee's act inconsistent with conditions—A contract of bailment is avoidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

154. Liability of bailee making unauthorised use of goods bailed—If the bailee makes any use of the goods bailed, which is not according to the conditions to the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse

accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in [1][Dacca], from B expressly to march to [2][Tangail]. A rides with due care, but marches to [3][Narayanganj] instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

155. Effect of mixture, with bailor's consent, of his goods with bailee's—If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. Effect of mixture, without bailor's consent, when the goods can be separated—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively, but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

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

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1. The word "Dhaka" was substituted for the word "Karachi" by Act VIII of 1973, second Schedule.

2. The word "Tangail" was substituted for the word "Hyderabad", Ibid.

3. The word "Narayanganj" was substituted for the word "Khairpur", Ibid.

157. Effect of mixture, without bailor consent, when the goods cannot be separated—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Illustration

A bails a barrel of the Cape flour worth [1]Taka 45, to B. B without A's consent, mixes the flour with country flour of his own, worth only [1]Taka 25 a barrel. B must compensate A for the loss of his flour.

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

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

160. Return of goods bailed on expiration of time of accomplishment of purpose—It is the duty of the bailee to return, or deliver according to the bailor's directions, 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).

goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. Bailee's responsibility when goods are not duly returned—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time[1].

Case-Law

Sections 161, 151 and 152—Port Authority is not liable for any loss in this case as they informed the owner of goods to locate the same.

In this case as the owner of the drums did not remove the same from the jetty premises, without any fault on the part of the Jetty Administration, within clear 7 working days from the time of landing of the drums in question the Jetty Administration is not liable for any loss as in this case the Port Authority informed the owners of the drums to find out the same and there was no fault on the part of the Port Authority to locate the goods. *Chittagong Port Authority vs Hong Kong Shipping Line. 41 DLR 332.*

—Chittagong Port Authority acts as a bailee so long the goods remain in their possession. Section 50A of the Port Act will not operate if the necessary procedure is not followed.

It is true that under section 50A of the Chittagong Port Act the Port Authority is responsible for the loss of goods landed and remained in its possession or control as a bailee in view of the provisions of sections 151, 152 and 161 of the Contract Act, 1872. But section 50A will not operate in a case where the goods landed under nil mark and the consignee fails to follow the nil mark procedure to locate the goods by reason of sub-rules (f) and (g) of Rule 64, of General Rules and the Schedules for Working of the Chittagong Port (Railway) Jetties *Chittagong Port Authority vs Hong Kong Shipping Lines. 41 DLR 332.*

—Liability of the Port Authority to pay compensation for non-delivery of goods—When the Shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee—

1. As to railway contracts, See the Railways Act, 1890 (IX of 1890) section 72.

The liability of the Port Authority is that of a bailee—They would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstances take—A suit based on non-delivery is really based on a breach of the duty. *Chittagong Port Authority vs Md Ishaque or ors (1983) BLD (AD) 338.*

—Payment of compensation for non-delivery of goods and liability of the Port Authority—when shipping company had delivered the goods the Port Authority must be deemed to be the agent for the consignee. Liability of the Port Authority in respect of goods in its possession or under its control either in connection with export or import is that of a bailee—the Port Authority would be liable in the absence of proof that it took as much care of the goods as a man of ordinary prudence would in similar circumstances take—a suit based on non-delivery is actually based on a breach of the duty.

The respondent's suit for recovery of compensation for goods imported by them but not delivered to them by the Chittagong Port. Authority was dismissed by the trial Court. The High Court Division, however, allowed the appeal preferred by the respondent, set aside the judgment and order of the trial Court and decreed the suit.

Held : Goods, either for export or import, when remain in the possession or under the control of the Port Authority the liability of the Port Authority is that of a bailee under sections 151, 152 & 161 of the Contract Act and they would be liable in the absence of proof that they took as much care of the goods as a man of ordinary prudence would in similar circumstances take. Once this liability is fixed by law, there is no scope for contending that the authority is not responsible as the consignee did not clear the goods within 5 days. *The Chittagong Port Authority vs Md Ishaque & others 35 DLR (AD) 364.*

Sections 151 and 161—Goods (for import or export) when remain in possession of the bailee (here the Chittagong Port Authority), the latter is liable as a bailee under the Contract Act (vide sections 151, 161). *Chittagong Port Authority vs Md Ishaque. 35 DLR (AD) 364.*

—The Port Authority when receives the goods from the ship, it receives them (as an agent) for delivery to the consignee and in this process it acts as bailee and therefore is liable to the consignee as provided in sections 151, 152 & 161 of the Contract Act. *Chittagong Port Authority vs Md Ishaque. 35 DLR (AD) 364.*

—Responsibility of Chittagong Port as a bailee if by its default goods are not duly delivered. *Chittagong Port Authority vs Md Ishaque. 35 DLR(AD) 364.*

162. Termination of gratuitous bailment by death—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

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

Illustration

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

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

165. Bailment by several joint owners—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

166. Bailee not responsible on re-delivery to bailor without title—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to

the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery[1].

167. Right of third person claiming goods bailed—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and decide the title to the goods.

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

169. When finder of thing commonly on sale may sell it — When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

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

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

170. Bailee's particular lien—Where the bailee has in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due

1. See section 117 of the Evidence Act, 1872 (I of 1872).

remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

Case-Law

—**Scope**—Once a lien has been created, the fact that the value of goods is disproportionate to the claim of the bailee or the bailee has made an exaggerated claim does not affect the validity and enforceability of the lien. *PLD 1975 Karachi 781.*

—**Delivery in different consignments**—When under one contract goods are delivered at recurring periods, and in different consignments, the bailee has a lien on all the goods for charges in respect of any goods comprised in the contract. *PLD 1975 Karachi 781.*

—**Right to possession must vest in bailee**—The established practice is that without the right of continuing possession there can be no right of a lien. If the owner has a right to assert his possession and to interrupt the possession of the party claiming the lien such a right of the owner would be inconsistent with a lien. *PLD 1975 Karachi 781.*

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

In this case the plaintiff could have exercised his right under section 170 of the Contract Act if he had possession over the scheduled materials. The High Court Division's finding on the basis of the documents on record and the evidence adduced in the matter that the Bank had althrough been in possession of the attached goods does not suffer from any infirmity. In fact, the plaintiff did not make out any case that he was entitled under section 170 of the Contract Act to retain the scraps as a bailee till he received due remuneration for the services rendered by him. In the application for attachment the plaintiff did not mention the word

"lien' nor did he do so in his written objection to the application for vacating that order. *Mohammad Meah vs Pubali Bank. 41 DLR (AD) 14.*

—(Minority view) *Per BH Chowdhury—*

Section 170 says lien exists in the absence of a contract to the contrary. This question has agitated the minds of the English Judges and the law was surveyed in *Tappenden vs Antus (1964) 2 QBD 185=1963 ALL ER 213. Mohammad Meah vs Pubali Bank & ors 41 DLR (AD)14.*

—Lien cannot be a ground for action, it can be taken as defence.

Lien cannot be a ground for action, it can be taken as defence. Precisely that was done here in Misc Judicial Case No.1 which was brought to the bank. Here the plaintiff can raise the point of lien in the face of the application for releasing the attached properties. And that has happened in this case. *Muhammad Meah vs Pubali Bank & ors 41 DLR (AD)14.*

—Under section 170 of the Contract Act a ship breaker can retain goods for his remuneration. (Minority view)

The bank granted the loan for buying the ship and the ship is to be scrapped and the scrap is to be sold in the market and the sale proceeds is to be deposited into case credit account for liquidating the debt. Unless the ship is broken how the debt is to be liquidated? Therefore, the question comes what about the remuneration of the ship breaker and the law says in section 170 of the Contract Act that he can retain such goods. *Mohammed Meah vs Pubali Bank & ors 41 DLR (AD)14.*

—(Minority Judgment) *Per BH Chowdhury, J;*

Execution of decree when all the properties are mortgaged to the Bank—Application of section 170 of the Contract Act—Plaintiff's claim on lien—Remuneration of the breaker—Omission to mention the word "lien" by the plaintiff—Effect of—Rule of pleading does not warrant it.

The crux of the problem as to how he could execute the decree when all the properties of Janapad Enterprise are mortgaged to the bank. The only available property was the scheduled property which was valued for only eight lac. The question was whether the plaintiff could retain this property. Plaintiffs claim for his remuneration is grounded on lien and section 170 says that he has a right to retain such goods until he receives due remuneration for the services in the absence of the contract to the contrary. Is there any contract to the contrary in this case between the

Bank and the borrower that the remuneration of the breaker must not be given out of the sale proceeds of the ships? The answer is in the negative. If so then why the ship breaker will be deprived of his remuneration. It was contended by the learned Counsel appearing for the respondent that in the application for attachment the plaintiff did not mention the word 'lien' nor did he do so in his written objection to the application filed by the Bank for vacating that order. To say the least rule of pleading does not warrant it. *Mohammad Meah vs Pubali Bank & ors 41 DLR (AD)14.*

Sections 170 & 171—Equity can only come to play as and when it is found that the party is subject to some hardship for no fault of his. *Abdur Razzak Bhuiya vs Lloyds Bank Ltd 22 DLR 158.*

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers—Bankers, factors, wharfingers, [1][Advocate of the Supreme Court] and policy-brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect][2]

Case-Law

Sections 148-171: Bailment—entrusting a person with goods for safe custody is bailment. *1937 (All) 255, 1942 (Mad) 299.*

—where there is no obligation to return the subject-matter either in original or altered form, there is no bailment. *1943 (Nag) 168.*

—in the absence of risk note the Railway is bailee. *1944 (Cal) 50.*

—a bailee has no right to sell the goods bailed, unless such right is conferred upon him by agreement of the parties or by any special statute. *1930 (Sind) 36: IR 1930 (Sin) 68.*

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1. The words "Advocate of the Supreme Court" were substituted for the words "attorneys of a High Court" by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act, VIII of 1973), Second Schedule, (with effect from 26-3-71).

2. A to lien of an agent, See section 221 , infra. As to lien of a Railway Administration. See the Railways Act, 1890 (Act IX of 1890), section 55.

—the rights of the creditor, who accommodates his customers by storing goods for the purchase of which he was advanced money, are higher than those of an ordinary bailee who has a general lien under section 171. *1930 (Lah) 567;125 IC 376.*

—it is an essential element of sections 148 and 149 that there must be the putting into possession of the bailee or his agent of the goods in question, delivery of documents of title does not constitute bailment of goods *1934 (All) 568.*

—Lien—Right to lien not exhaustive in the section—Other liens also possible—section 171 of the Contract Act limits the right to a general lien and not to liens which arise by common law or by express or implied contract. In my opinion, the provisions of section 171 are not exhaustive at all.

Therefore the lien of a party may be covered by any other principle or ground. *Umar vs SA Rana, PLD 1957 (Kar) 760=PLR 1958 (1) (Kar) 133.*

—where moneys are advanced to importers for the purpose of trade and the goods are placed in the godown of the lenders, it would be an exceedingly likely course of business that the goods should be regarded as security for the advance and that the lenders should take charge of or at any rate keep control over the realisation of the goods and should reduce the advances out of the proceeds when received. *1928 PC 219;32 CWN 1146;111 IC 240; 48 CLJ 415 PC.*

—a bailee is liable for negligence on the part of his agent or servant committed in the course of their employment. *37 CWN 1109; 58 CLJ 98;1934 (Cal) 151.*

—a bailee is not responsible for any loss due to unprecedented flood. *1938 (All) 158.*

—a bailee is not the agent of the bailor and can recover full damage from third party for loss due to his negligence. *1933 (Bom) 465.*

—lien is a right of defence and not right of action. *1946 (Nag) 114.*

—kinds of attorney's lien—he has lien on dress, papers, etc., but not on moneys recovered for the client except for costs incurred in respect of the funds, but he has the ordinary right of set off which one creditor has against another. *60 C 1442;1934 (Cal) 341.*

—The Courts will not decide a point especially in the interlocutory matter which will not advance the cause of justice. It will merely delay the process of coming to a conclusion as to claim and counter-claim

which can only be thrashed out in the pending suit. *The Dhaka Dyeing and Manufacturing Co Ltd vs Agrani Bank 42 DLR (AD) 60.*

—In the present case concerning adjustment of loan by share certificates, the provisions of Banking Companies Ordinance shall be read and construed in addition to section 171 of the Contract Act. From the provision of the Sale of Goods Act it appears that the shares of a company are also goods and as such moveable property. Money is a species of goods over which lien may be exercised. Where a banker has advanced money to another, he has a lien on all securities which come within his hand for the amount of his general balance unless there is an express contract to the contrary. *Sonali Bank vs Bengal Liner Ltd (Admiralty Jurisdiction) 42 DLR 487.*

—Banker's lien. Under the provisions of this section a banker amongst others named therein, in the absence of a contract to the contrary, has a right to retain as security for a general balance of account goods bailed to him. There can be no lien merely because the Bank had given a guarantee on behalf of a client to a third party. *PLD 1980 Karachi 115.*

—Banker's right of lien arises only in respect of such properties which come to his hands in his capacity as banker and in course of banking business. *PLD 1982 Karachi 200.*

—Where security is delivered to a banker for a specific purpose it is inconsistent with right of lien and impliedly there is an agreement to the contrary and therefore a banker cannot exercise lien over such property. Before lien is exercised by a banker he has to establish that he has taken possession of security as a banker and secondly there is no contract to the contrary. *PLD 1982 Karachi 200.*

—Money held in different accounts—Where father of appellants opened separate fixed deposit accounts with respondent-Bank in names of his two sons and two daughters (all minors at relevant time) with different amounts and himself operated the same under arrangement with the Bank. High Court came to conclusion that deposited amount belonged to the father of appellants and that appellants were mere benamidars. No gift of amount deposited in favour of appellants or Fixed Deposit Receipt holders was found made out. Principles contained in section 171 were attracted. *PLD 1987 (SC) 53.*

—Banker's right of lien—Whether a bank can retain depositor's money in exercise of its right of general lien—Depositor's money with

the bank is not in the nature of any goods bailed to the bank—Money deposited by the plaintiff in his account cannot be retained by the bank for the simple reason that by the said deposit a relationship of debtor and creditor is established between the bank and its customer and the bank can use the money in any manner it likes as the ownership in such deposit vests in the bank and there is no question of exercising lien on the money over which the bank has absolute right of ownership and possession—The bank could not withhold the money deposited by the plaintiff with the defendant No.1 in exercise of its right of general lien. *Rupali Bank vs Haji Ahmed Sabur 43 DLR 464.*

Sections 171 & 170—Equity can only come into play as and when it is found that the party is subject to some hardship for no fault of his. *Abdur Razzak Bhuiya vs Lloyds Bank Ltd 22 DLR 158.*

Section 171—Interlocutory matter arising out of an application for mandatory injunction involving the question whether mandatory injunction should be issued for return of import pass book deposited with the defendant bank—It is well settled that the Court will not decide a point specifically in the interlocutory matter which will not advance the cause of justice. It will merely delay the process of coming to the conclusion as to claim and counter claim which can only be threshed out in the pending suits. *Dhaka Dying Manufacturing Co. Ltd vs Agrani Bank 42 DLR (AD) 60.*

Section 171—Claim and counter claim—Court will not dicide a point especially in interlocutory matter which will not advance cause of justice—It will thereby delay the process of coming to a conclusion as to their and counter claim which can be threshed out in pending suit. *Dhaka Dying Manufacturing Co. Ltd vs Agrani Bank 42 DLR (AD) 60.*

Bailments of Pledges

172. "Pledge", "pawnor" and "pawnee" defined—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

[Case under sections172 to 181 under heading 'Bailments of Pledges' are given under section 181, infra]

173. Pawnee's right of retainer—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

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

175. Pawnee's right as to extraordinary expenses incurred—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. Pawnee's right where pawnor makes default—If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Case-Law

Pledged goods—Notice should be given to pledger before sale of goods—Clause to the contrary in the agreement has no effect. *Usman Malik vs Bank of Bahawalpur Ltd PLD 1959 (Kar), 725.*

Sale of goods pledged—Notice to pawner—Conditions of such notice—If the pawnee elects to exercise his power of sale under section 176 of the Contract Act, the sale must be made after giving reasonable notice to the pawner. *Umar Malik vs Bank of Bahawalpur Ltd PLD 1959 (WP) 175.*

—Where goods pledged with bank suffered loss in price every year. There was no evidence to prove that pawner ever asked pawnee (Bank) to sell the goods or sought permission to find customer therefor. It was held that pawnee-Bank was not obliged to sell pledged goods and after adjusting proceeds thereof sue for balance amount. *PLD 1983 Pesh 31.*

—Pledgee responsible for loss—Where goods were pledged with the bank. There was default on part of respondent-Bank responsible for non-payment of amount of Bill of Exchange as well as late clearance of goods and their ultimate destruction on account of their being found to be inedible. Respondent Bank on such account being unable to realise any amount out of sale of pledged goods could not turn round and claim payment of their debts by recourse to section 176. *PLD 1982 Karachi 902.*

—Conditional right of sale—Pledgee of chattel with power of sale exercisable under certain conditions sold chattel without performing conditions was guilty of wrongful conversion. Measure of damages in such case is value of chattel at time of conversion less amount for which it was pledged. Therefore where value of goods sold had increased during the years of litigation a decree was passed in accordance with the enhanced value of goods. *PLD 1987 Lahore 529 (DB).*

—Where the pawnee does not repay the debt and security is not sufficient for repayment, the pledgee may sue for recovery of the amount of the debt. *PLD 1975 Karachi 410.*

—Right of sale which has been conferred upon the pawnee by section 170 of the Contract Act arises on default of the pawnor in payment of the debt at the stipulated time of the promise, and after the accrual of the right to sell, the pawnee shall have to give a reasonable notice of the sale and not merely an intention to sell. Language of section 176 is sufficiently required under this provision to give a reasonable notice of

the sale and not a notice of the mere intention to sell. To read intention to sell in place of the sale is reading something in the statute which is not there, and, according to the well-established canon of interpretation of statutes such a manner of reading is very much disapproved. *Md Obaidul Akbar vs EP Co-operative Bank. 27 DLR 523.*

—Pawnee does not get an unfettered right to sell the pawned property—his obligation before putting the property to sale.

Pawnee or the pledgee does not acquire any absolute right to sell the pawned or pledged property for his own personal benefit, but the right of sale which is created in his favour by such transaction is to be exercised for the benefit of both the pawnor or the pledger and the pledgee or the pawnee. The pledgee will no doubt exercise his right to sell the pledged property for realising his dues, but he is to act on behalf of the debtor as well, as the debtor retains the title to the property till the last moment before the actual sale and has also the right to redeem the property at any moment upto the time of the actual sale. Since the consequence of such a sale vitally affects the interest of the owner of the property namely, the debtor, there does not appear to be any good reason for keeping him in darkness about the actual state of affairs relating to the sale of his property. *Obaidul Akbar vs EP Co-operative Bank. 27 DLR 523.*

—Expression, 'reasonable notice about the sale' as used in section 176 of the Contract Act, includes information about the time and place of the actual sale of the pawned goods, and any sale of such goods held without serving a notice containing the particulars as to the time and place of the sale is not a valid sale binding upon the pawnor. *Obaidul Akbar vs EP Co-operative Bank. 27 DLR 523.*

—The section requires a notice of "the sale"; in this section "intention to sell" can not be read without deviating from the ordinary rule of interpretation which is that when the language of a statute is explicit, clear and unambiguous its words give its intention; to find out the intent nothing can be added to or subtracted from it. *Bangladesh Jatiya Samabaya Bank. Ltd vs Md Obaidul Akbar (1980) 4 BSCR 308; 1982 2 BCR AD 18.*

—Interpretation—Intention to sell—notice or publicity "for sale"—Intention behind the section—pawnee's right to put into sale a pledged property on pawnee's failure to redeem the pledged property—proper notice of sale has to be given to the pawnee—non-compliance with the

requirement of the section renders the auction of a pledged property invalid.

In the instant case, the notice is a mere demand for paying dues with a warning that if the dues are not paid the goods will be sold. The sale is hypothetical and not the actual sale. Section 176 requires a notice of the sale. In this section intention of sale cannot be read without deviating from the ordinary rule of interpretation which is that when the language of statute is explicit, clear and unambiguous its words give its intention; to find out the intent nothing can be added to or subtracted from it.

Again, the place of sale given in the notice was French Road, but it was shifted to Farashgonj without further intention to the plaintiff. No proper steps were also taken for giving publicity of the sale on the date and place fixed to attract sufficient number of bidders to the public auction. For these reasons the sale was rightly declard invalid. *Bangladesh Jatiya Samabaya Bank Ltd vs Md Obaidul Akbar (1980) 4 BSCR 308; (1982) 2 BCR (AD) 18.*

Section 176—For realisation of payment of debt or pawn there is no bar to institute a proper suit by the pawnee and at the same time to retain the pledged goods, if any, in his custody as a collateral security. But the two relief's though concurrent, are yet alternative and both cannot be resorted to at a time. *Bengal Metro Engineering Co. vs Agrani Bank 46 DLR 168.*

Section 176 & 177— Where the pawnee is not in possession of the property pledged to him as security for the payment of the loan nor did he prove that it had been damaged or destroyed at the risk of the defendant (pawnee) the pawnee is not entitled to recover the debt because the pawnor had the right conferred by section 177 to redeem his property at any time befoe the actual sale prior to filing of the suit. *Pubali Bank Ltd vs Sultana Oil Mills and Soap Factory and others 51 DLR 323*

Sections 176 and 177—Pawner and Pawnee—pawnee's right to sell pledged property on failure of pawner to redeem the pledged property is subject to the reasonable notice to be given to the pawner—Non-compliance of the requirements of reasonable notice renders the auction sale invalid. *Bangladesh Jatiya Samabaya Bank vs Md Obaidul Akbar (1980) 4 BSCR 308; (1982) 2 BCR (AD) 18.*

-Notice cannot be merely a notice of intention to sell—Pawnor must be apprised of the actual sale of his property.

It is in the fitness of things and consistent with the principle of natural justice that pawnor should be notified and informed of all the necessary

proceedings which may be taken for bringing his property to sale for realisation of the amount of the debt incurred by him. The use of the word "reasonable" before the word 'notice' as used in section 176 clearly points out, in our opinion, that such a notice cannot mean merely a notice of the creditor's intention to sell the debtor's property without giving the owner an opportunity to watch over the proceeding of the sale in order to safeguard his own interest.

The pawnor having had the right conferred by section 177 to redeem his property at any time before the actual sale, it seems to us that the Legislature intended that the pawnor should be apprised of the actual sale of his property. *Obaidul Akbar vs EP Co-operative Bank 27 DLR 523.*

177. Defaulting pawnor's right to redeem—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods at any subsequent time before the actual sale of them[1], but he must, in addition, any expenses which have arisen from his default.

Case-Law

Sections 177 and 176—Pawnor and Pawnee—pawnee's right to sell pledged property on failure of pawnor to redeem the pledged property is subject to the reasonable notice to be given to the pawnor—Non-compliance of the requirements of reasonable notice renders the auction sale invalid. *Bangladesh Jatiya Samabaya Bank vs Md Obaidul Akbar (1980) 4 BSCR 308; (1982) 2 BCR AD 18*

—Notice cannot be merely a notice of intention to sell—Pawnor must be apprised of the actual sale of his property.

It is in the fitness of things and consistent with the principle of natural justice that pawnor should be notified and informed of all the necessary proceedings which may be taken for bringing his property to sale for realisation of the amount of the debt incurred by him. The use of the word

1. For Limitation, *see* the Limitation Act, 1908 (IX of 1908), Sch. I, No. 145.

"reasonable" before the word 'notice' as used in section 176 clearly points out, in our opinion, that such a notice cannot mean merely a notice of the creditor's intention to sell the debtor's property without giving the owner an opportunity to watch over the proceeding of the sale in order to safeguard his own interest.

The pawnor having had the right conferred by section 177 to redeem his property at any time before the actual sale, it seems to us that the Legislature intended that the pawnor should be apprised of the actual sale of his property. *Obaidul Akbar vs EP Co-operative Bank 27 DLR 523.*

Section 177 & 176— Where the pawnee is not in possession of the property pledged to him as security for the payment of the loan nor did he prove that it had been damaged or destroyed at the risk of the defendant (pawnee) the pawnee is not entitled to recover the debt because the pawnor had the right conferred by section 177 to redeem his property at any time befoe the actual sale prior to filing of the suit. *Pubali Bank Ltd vs Sultana Oil Mills and Soap Factory and others 51 DLR 323*

[1][178. **Pledge by mercantile agent**—Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorisedd by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation—In this section, the expressions 'mercantile agent' and 'documents of title' shall have the meanings assigned to them in the Sale of Goods Act, 1930 (III of 1930).

178A. Pledge by person in possession under voidable contract—When the pawnor has obtained possession of the goods pledged by him under contract voidable under

1. Sections 178 and 178A were substituted for the original section 178 by the Indian Contract (Amendment) Act, 1930 (IV of 1930), section 2.

section 19 or section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

179. Pledge where pawnor has only a limited interest — Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Suits by bailees or bailors against wrong-doers

180. Suit by bailor or bailee against wrong-doer—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

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

Case-Law

Sections 171-181: Pledges—A hypothecation not merely of movables existing on the premises at the time but also in respect of movables which might be subsequently acquired is valid though it is not governed by the TP Act or by the Contract Act. *59 C 1372.*

—a valid pledge may be created by mere deposit of a share certificate. *1943 (Mad) 74; 89 CLg 183.*

—a mere deposit of a share certificate does not constitute a valid pledge. *1941 (Mad) 394.*

—remedy of the pawnor for an improper sale of the goods pawned is damages. *1937 (Bom) 26.*

—when no date for redemption is fixed the debtor is not in default until the date fixed for repayment in the notice by the pledgee expires. *1944 (Pat) 135.*

—when parties state specifically in writing that certain articles are to be security for a particular sum and certain other articles are to be a pledge for another sum, the Court cannot treat both lots of articles as security for both the debts, nor any pledge of articles for a particular sum should be taken to include also a pledge for subsequent advances. *1928 (Bom) 507.*

—mortgage of movables, that is good-will and stock in-trade of a business, with power of sale, but the power of sale not exercised by the mortgagee—subsequent pledge with possession will take priority. 59 C *667; 36 CWN 1932 (Cal) 524.*

—the delivery which is necessary for a pledge need not be simultaneous with the lending of the money. It may be actual, or manual, symbolical or constructive, simultaneous or subsequent and as such, may be enforced against bona fide purchaser without notice. *59 C 667; 1932 (Cal) 524; 36 CWN 263.*

—section 176 does not contain a saving in respect of special contracts contrary to its express terms. So notice under this section must be given notwithstanding any contract to the contrary and the notice should be "reasonable" and should contain particulars. A notice saying "failing which (payment by 7th) we shall arrange for sale of the hypothecated stock" is merely an intimation that arrangement will be made for a sale but is not a notice of the sale to be held. But once a proper notice of the sale is given no fresh notice is to be given even if the contemplated sale is adjourned to a further date. *59 C 667; 37 CWN 263; 1932 (Cal) 524.*

—the pawnee is not bound to sell the pledged goods within a reasonable time after expiry of the period mentioned in the notice. *1928 (Mad) 1022; 5 DLR (Nag) 129.*

—a notice under section 176 is not necessary for a debt to be due and recoverable. The section requires notice before the pledged goods are sold. *1935 (Lah) 536; 1944 (Pat) 135; 1937 (Bom) 26.*

—sale by pledgee of pledged goods to himself is void. *1944 (Pat) 135.*

—sale without notice is invalid, *1947 (Bom) 216; 47 (Bom) LR 828; 1950 FC 21; 4 DLR FC 182.*

—a pledger cannot compel the pledgee to exercise the power of sale as a means of satisfying or discharging a decree, which the latter has obtained against him. *1930 (Mad) 364.*

—the word "possession" means "unqualified possession", when the alleged pledgee is asked by the owner to retain possession for a specified and limited purpose he cannot validly pledge. *1935 (Cal) 769; 23 CWN No.907 (fol), 58 M 181 PC Distinguished.*

—the fact that the pledger was also a member of the local advisory committee of the pledgee Bank does not fix the pledges with constructive or implied notice of the fraud of the pledgor-firm. *56 C 367; 1929 (Cal) 497; 119 IC 23.*

—the word "person, etc" is not restricted to a mercantile agent, it includes the owner. *1933 (Mad) 207; 56 M 177, upheld by the PC in 1934 PC, 246 PC.*

—property pledged before creation of trust, after the creation of trust the settler pledging against the same property representing it to be unincumbered, subsequent pawnee is entitled to step into settlr's shoes and to compel the trustee to redeem the prior pledge. *1928 (Mad) 1201; 52 M 465; 116 IC 827.*

—where there was a conflict of sale of goods on credit and the property in goods and rights to possession passed to the vendee but vendor retained possession and pledged the goods to a third party without notice of the vendee's interest in them, the pledgee obtained no right or interest under section *179. 56 C 367; 1929 (Cal) 497; 119 IC 23; 42 B 205 not fol.*

—a pledge of the railway receipts amounts to a pledge of the goods. *1934 PC 246; 68 MLJ 260 PC; 1938 PC 52; 42 CWN 321; (1938) 1 MLJ 268; 40 (Bom) LR 713.*

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Chapter X
Agency

Appointment and Authority of Agents

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

Case-Law

Agent—Dealer of petrol company is not an agent—The dealer of the petrol company paid for the petrol he brought from the company and had deposited a sum as deposit for the equipment and construction of the pump. It was contended that he was an agent of the company.

Held: According to section 182 of the Contract Act "an agent is a person employed to do any act for another or to represent another in dealings with third person". In selling the petrol the plaintiff would have done an act principally for, and on behalf of himself because he would have been selling his own goods which he has purchased from the defendant and not merely acting as an agent or intermediary between the customers of petrol and the company. *Caltex Oil (Pak) Ltd vs Kehanuddin, PLD 1958 (Lah) 63=PLR 1958(2) WP 333 (DB).*

Agent—Negligence by agent—Agent responsible for the loss occasioned to the principal—In order to determine whether a party stands in the relation of agent or principal in reference to the other contracting party, the nature of the agreement and the course of business have to be taken into account. Under section 182 of the Contract Act an agent is a person employed to do any act for another or to represent him in dealing with third persons. *Muhammad Akram vs Habib Bank Ltd (Kar); PLD 1960 (Kar) 484=PLR 1960 (2) WP 1100.*

Sections 182-189: Agent and principal—creation of agency sections 182-184—the question of agency is a mixed question of fact and law largely depending on the evidence. *128 IC 455 (M).*

—an agency need not be created expressly by any written document and can be inferred from the circumstance and the conduct of the parties. *1931 (All) 372; 132 IC 43.*

—an Advocate is a special kind of agent. *1934 (Bom) 299.*

—a managing director is an agent of the company. *1951 EP 99.*

—a man does not become an agent merely because he gives advice in matter of business. *12 CWN 28.*

—the word "person" used in section 182 and other cogent sections include a joint Hindu family and therefore an agent can be employed on behalf of such family. *1934 (All) 553.*

Section 182—Agent and principal—Section 162 provides that an agent is a person employed to do any act for another or to represent another in dealings with a third person, and that the person for whom such an act is done or who is so represented, is called his principal. *PLD 1986 Karachi 234.*

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

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

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

Case-Law

Consideration not necessary—under the provisions of section 185 no consideration is necessary to create an agency. *1929 (Lah) 182; 144 IC 321.*

186. Agent's authority may be expressed or implied— The authority of an agent may be expressed or implied[1].

Case-Law

Scope—The relationship of principal and agent need not be expressly constituted but can be brought about by implication of law on a particular situation arising or from the necessity of a case. Where the agent of the plaintiffs entered into a contract or their behalf and they did not by word or deed disclaim the contract or disown the agency. The plaintiffs were held to be bound by the agreement. *PLD 1978 Quetta 45.*

—Extent of authority.—Section 186 provides that the authority of an agent may be expressed or implied. In cases where the authority is not expressed, the question whether an agent had or had not authority to act in a particular matter on behalf of the principal is to be decided according to the circumstances of each case. *PLD 1986 Karachi 234.*

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

Illustration

A owns a shop in [2][Mymensingh], living himself in [3][Dacca], and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purpose of the shop.

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1. See, however, section 33 of the Registration Act, 1908 (Act XVI of 1908), See also the Code of Civil Procedure, 1908 (Act V of 1908), Schedule 1, Order III, rule 4.

2. Subs. by the Central Laws (Statute Reform) Ordinance, 1960) Order XXI of 1960), section 9 and 2nd Schedule, for "Serampur" (with effect from 14th October, 1955).

3. Subs. ibid, for "Calcutta" (with effect from the 14th October, 1955).

Case-Law

Express or implied authority—where the agent of a trustee (shebait, who is mother of the agent) is permitted to carry on management of trust properties and a question as to whether a lease of debuttar properties is binding arises, it must be shown that the contract is one of a class of acts delegated to the agent or that the particular contract was authorised either expressly or impliedly by the sheba it. *36 CWN 1108.*

—liability of a husband for his wife's debts depends on the principle of agency. *1936 (All) 393.*

—where in a communal trouble an agreement was arrived at and it was signed by certain representatives of both the factions and subsequently the members of the community also acted according to the same held that the representative character of the signatories could be inferred. *27 ALJ 1083.*

—Agent by fiction of law—Where no authority has been conferred by a person either expressly or impliedly to act as an agent but he acts as one, he may by fiction of law be deemed to be an agent and be treated as such. He is a purported agent and is subject to the same liability as an agent would be, who acted without authority. The principal can elect to ratify the transaction, in which case, the purported agent is relieved from the liability to the third persons for his tortious conduct. The purported agent however, would be subject to the liability to the principal, for having received as the result of the transaction, its proceeds or its value, and his liability to him for a breach of fiduciary obligations as if he had been an agent at the time. *PLD 1977 Lahore 75(DB).*

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

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

Illustrations

A is employed by B, residing in London, to recover at [1][Chittagong] a debt to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

1. The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

A constitutes B his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.

Case-Law

—Extent of agent's authority.

—Agent's authority—where the agent holds a power of attorney, the authority to do an act must be found within the four comers of the instrument either expressly or by necessary implication. *1938 (Mad) 966.*

—agent may retain money for his remuneration for the sale of the goods consigned to him for sale. *30 C 202, 8 CWN 831.*

—an agent may not be justified in selling the principal's goods without his authority but when the agent has spent a large sum of money from his own pocket in purchasing goods on behalf of the principal and is in the position of a ta 'edgee, he can recover as much of his outlay as possible by selling the g ods in his custody. *1928 (Lah) 747, 8 (Lah) 376,* rel on.

Section 221 does not mean that an agent is in a position analogous to that of a mortgagee in possession, i.e., to remain in possession of the principal property till the payment of his commission. *110 IC 23.*

—Where under the contract an agent is to get commission on payment for the goods by the purchaser, the agent is not entitled to remuneration on cancelled contracts. *29 (Bom) LR 375; 1927 (Bom) 225; 102 IC 225.*

—a commission agent cannot sell the goods at any place according to his discretion. Under section 211 an agent is bound to conduct the business according to the principal's direction and under section 214 the agent is bound to consult the principal when there is difficulty. *1927 MWN 578.*

—Agent's action how far binds the principal—agent's action within apparent scope of authority binds the principal. *19 CWN 56*

—an agent has implied authority to borrows money when necessary. *33 C 343.*

—principal is bound by the action of his agent done beyond his authority if the contracting party has reasonable grounds for believing and in good faith believes, in the authority of the agent. *26 C 701; 3 CWN 313 PC.*

—agent conducting business binds the firm by his action. *20 (CWN) 229; 23 CLJ 348 PC.*

—knowledge of the agent not acquired during agency cannot be imputed to the principal. *11 (CWN) 1109; 6(CLJ) 674; 31 B 566; 2 (MLJ) 394 PC.*

—a business does not terminate on the receipt of the money by the agent inasmuch as there is a subsequent obligation to account for the sum and to pay them. *12 A 541; 26 C 715.*

—agreement which interferes with the agent's duty is void. *22 C 14, 125, 152, 22 A 220, 27A 73.*

—a wagering contract is void and not unlawful, so when a suit is brought by a betting agent to recover a loss on betting paid by agent, the principal cannot escape liability on the ground that the agent's act was unlawful. *23 A. 165, 14 (MLJ) 326.*

—agency extends to receiving of notice on behalf of principal of whatever is material to be stated in the course of proceeding. *25 A, 1, 17; 19 IA 203 (PC).*

—an honorary secretary of a school alleged to have been maintained by an association is personally liable for the rent of a house hired by him in his name for the purpose of the school (name of the principal being undisclosed). *22 B 754;* but if the other party knows that the agent is contracting as such, the agent is not personally liable. *5 B 584,* thus the secretary of a club cannot be sued personally unless he has pledged his personal credit. *20A 497,* and he cannot sue a member on behalf of the club for goods supplied. *14 M 362.*

—principal may sue and be sued upon a deed even though it may not have been executed in his name. *19 M 471; 16 B 568 Diss.*

—the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name. *23 M 597.*

—in case of joint Hindu family all the members may be sued for a debt contracted by one, provided it was demanded and contracted for the benefit of the family. *23 M 597.*

—agent entering into a contract can sue in his own name if he has an interest in the contract. *1938 (Lah) 673.*

—an agent cannot recover on a contract if he really acts as a principal. *34 C 628; 11 CWN 609.*

—agent can deviate from his instructions where goods are perishable or perishing. *1940 (LAH) 412.*

—when servant is employed on monthly salary both the servant and master are entitled to one month's notice. *35 A 132.*

—Act necessary to do authorised acts—An agent having authority to do an act has authority to do any lawful thing necessary to do such act. In order to delegate his power there should be a specific authority to an agent by the principal. If in the absence of any authority to delegate the power the agent does any act to the effect it cannot be a valid act binding upon the principal. *PLD 1981 Karachi 367; PLD 1983 Karachi 99.*

—Lawful—Where the Principal entered into a forward contract of a wagering nature, through an agent, the transaction between the agent and principal is not unlawful as it does not carry any element of wagering. Where the agent paid up the losses on a cotton forward contract on behalf of his Principal and it was contended that it being a wagering contract, the Principal was not bound to reimburse the agent, it was held that the contracts may be wagering ones but if they are made through the brokers or commission agents who are not concerned with the nature of the transactions and who carry on business for their principal in consideration of the commission charges, then the transaction between the principal and the agent is not necessarily a wagering contract nor one against public policy. Thus where plaintiff, a commission agent, bets in his own name for the defendant and pays the losses, the plaintiff can recover from the defendant the sums so paid. But an agent so authorised to enter into a wagering contract can claim indemnity from the principal only upon actual proof of payment for there is no legal liability upon the agent to make payments in respect of wagering transactions. *PLD 1975 Karachi 661.*

—Construction of power of attorney—The deed of power of attorney has to be strictly construed and a power which is not specifically given therein, except to the extent of doing lawful things incidental to the exercise of such specified power cannot be regarded to have been impliedly conferred. A power of attorney is not an instrument of title and

construction of such documents does not involve any issue of law. The meanings covered by the words in such documents remain questions of fact so that the interpretation placed thereon in the first appeal is final and cannot be departed from. *PLD 1987 Lah 342.*

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

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provision to B at [1][Chittagong], with directions to send them immediately to C at 69[Dacca]. B may sell the provisions at [1][Chittagong], if they will not bear the journey to [2][Dacca] without spoiling.

Case-Law

—Agent authority in emergency—power of the Managing Director of a company to borrow money in emergency, ratification of directors. *1931 ALJ 1038; IR 1931 All 820; 134 IC 24.*

Section 189—Authority of Agent in emergency—This section authorises an agent, in emergency to do all such acts as are required for the purpose of protecting his principal from loss. *PLD 1986 Karachi 234.*

Sub-Agents

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

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1. The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

2. Subs. ibid, for "Calcutta" (with effect from the 14th October, 1955).

Case-Law

Sections 190-195: Sub-agents—every agent who employs a sub-agent is liable to the principal for money received by the sub-agent for the principal's use and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. *1930 (PC) 274; 127 (IC) 529; (IR) 1930 (PC) 337 (PC).*

Sections 194 and 195 should be read together and the authority to create a third person an agent of the principal implies that the agent has discretion in selecting the person. 56 C 686.

—when a person appoints one branch of a bank as his agent for the purchase of certain goods and that branch instructs another branch of the same bank to purchase for him, the latter branch becomes a substituted agent of the person and is bound to carry out all the instructions of the principal in respect of the transaction. *1929 (Lah) 536; 30 (Punj) (LR) 433, 1927 (Lah) 502, reversed.*

—Agents not authorised to appoint agent for his principal—Such agent is agent's agent and not that of principal. *Qayyum Wahid vs Bank of Bahawalpur Ltd., (PLD) 1957 (Kar) 229.*

—Scope. As a general rule an agent cannot lawfully employ another person to perform acts which he has expressly or impliedly undertaken to perform personally. However, there is a rider that a sub-agent can be employed if it is the ordinary custom of trade or the action is justified from the nature of the agency. Thus when a particular bank cannot carry out itself the duties as agent it employs another bank to perform the duties on the bank's behalf as a sub-agent. *PLD 1983 Karachi 99, PLD 1980 Pesh 248.*

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

Case-Law

—Sub-agent appointed without authority of principal. Where a sub-agent is appointed by an agent without the authority of the principal, the sub-agent is the agent of the agent and the principal has nothing to do with him. Therefore any act done by such an unauthorised sub-agent

cannot bind the principal. *PLD 1983 Karachi 99; PLD 1981 Karachi 367.*

—Ratification of acts of sub-agent. Acts of a sub-agent appointed without the authority of the plaintiff can be legalised by ratification by the principal. But acts of agent forbidden by principal or by law cannot be ratified. *PLD 1983 Karachi 99.*

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

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

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

Case-Law

—Liability of sub-agent. The sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or wilful wrong. *PLD 1980 Pesh 248.*

—Where A remits money from a foreign country through its bank in that country to a person in Pakistan and the contract of remittance contemplates the appointment of a sub-agent. The branch of the foreign Bank instructs another Bank to make payment to the payee after observing certain formalities as to due identification, etc. There was no privity of contract between A and the Bank making the payment. The latter was held not liable to A even if negligence of its servant was proved. But where the sub-agent commits a fraud of a wilful wrong by issuing a draft on a non-existing party he becomes liable to the principal as well as the agent who appointed him. *PLD 1980 Pesh 248.*

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

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

Illustrations

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

(b) A authorises B, a merchant in [1][Chittagong], to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

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

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1. The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Case-Law

Section 195—Selection of sub-agent—When a principal selects an agent and in making the selection exercises the amount of discretion as a man of ordinary prudence would exercise in his own case, he does not remain responsible to the principal for the acts of negligence of such sub-agent. *PLD 1980 Pesh 248.*

196. Right of person as to acts done for him without his authority. Effect of ratification—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them the same effects will follow as if they had been performed by his authority.

Case-Law

Sections 196-200—Ratification—ratification is in law equivalent to previous authority. *1943 PC 66; 47 CWN 616; (1943) 2 MLJ 48; 46(Bom LR 228.*

—a minor on attaining majority may ratify a transfer by the guardian. *1943 (Nag) 263.*

—but an act by a person who is not a guardian cannot be ratified. *1937 (Nag) 390.*

—general rule as to ratification would not apply when it would affect the rights of other parties. *1941 (Mad) 6.*

—ratification of part operates as a ratification of whole. *19 CWN 56.*

—ratification in the proper sense of the term, is applicable only to acts done on behalf of the rectifier. *12 CWN 393; 35 C 420; 35 IA 48; 7 CLJ 335 PC* and not with respect to acts done for the agent himself. *6 B 463.*

—an effective ratification necessarily involves knowledge of all the *material facts on the part of the person who ratifies. 1930 PC 278: 60 MLJ 149; 128 IC 669; IR 1931 PC 45 PC, 1936 (Bom) 62 948 (Nag) 293.*

—and act done by an agent in excess of authority may be ratified. 7 *MIA 476 PC* but it does not authorise the doing of such acts in future. 3 *C 280, 287.*

—a transaction which is void cannot be ratified. *3 A 852, 1943 (Bom) 362; 45 (Bom) IR 761.*

—Acts of the public officers may be ratified by the Govtrnment 7 *MIA 476, 8 MIA 529 PC.*

—where the agent refers to arbitration without authority and principal does not raise any objection, it is ratification by conduct. *24 C 469.*

—Act forbidden by principal or by law cannot be ratified—Section 196 refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later on, or by law. *PLD 1983 Karachi 99.*

—Nobody can institute a suit on behalf of another unless he has been given power of attorney to do so. Where no such power had been given to the agent at the time of filing of suit but his act was subsequently ratified by the principal. It was held the suit was incompetent. Since it is a presupposition in section 196 of the Contract Act that the act intended to be ratified may have been done by the agent without the knowledge and authority of the principal, therefore, in relying upon the rule of ratification, the appellant is deemed to have admitted that the institution of the suit by the agent was without the requisite authority vesting in him at the relevant by time. *PLD 1987 Lahore 392.*

Effect of ratification—Where an overdraft was granted unauthorisedly by Manager of a Bank and the Bank charged interest on the amount and sued on the hypothecation, the act of the agent stood ratified by the Principal, e.g. the Bank. *PLD 1975 Karachi 844.*

—Servant, ratification of act of—Sections 196, 197 are not limited to acts of agents but they lay down general principles which are equally applicable to a servant who is generally his master's agent for some purposes, the extent of the agency depending on the duties and position of the servant. *PLD 1975 Karachi 870.*

197. Ratification may be expressed or implied—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A without B's authority lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

198. Knowledge requisite for valid ratification—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Case-Law

—Earnest money paid to defendant's son on agreement to sell land—Cheque for earnest money cashed by defendant—Enough ratification of agreement. *Parveen Begum vs Muhammad Sarwar Khan, PLD 1956 (Kar) 521.*

199. Effect of ratifying unauthorised act forming part of a transaction—A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorised act cannot injure third person—An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a

third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) A, not being authorised thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Case-Law

—Scope. The provisions of the Act relating to agency are not meant to be exhaustive. Neither section 200, Contract Act, nor the other provisions relating to ratification affect the general principle of law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. *PLD 1987 Lahore 392.*

Revocation of Authority

201. Termination of agency—An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

[For cases under sections 201-210, see cases under section 210].

Case-Law

—Death of principal or agent.—Under the section an agency is terminated by the death of either the principal or the agent. *PLD 1980 Lahore 110.*

—Several principals—Where a power-of-attorney has been executed by several principals in favour of a person, and one of the principals having a distinct interest in the subject-matter of the power-of-attorney dies, the death of the principal terminates the power-of-attorney. *PLD 1980 Lahore 110.*

Section 201—On demise of either party to the power of attorney the relationship between the principal and the attorney ceases. *Abdur Rahman (Md) vs Md Iqbal Ahmed and others 49 DLR (AD) 142.*

202. Termination of agency where agent has an interest in subject-matter—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

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

Case-Law

Section 202—Agency coupled with interest—Mere investment made by the agent in the business does not create an interest in agency unless the interest which is allegedly involved fulfils the condition that it forms part of the subject-matter of the contract as provided in section 202. After all, the plaintiff had to make certain investments in the business, for example, on hiring the shops/offices at several places, setting up of a service centre, employing staff, etc *PLD Karachi 234.*

—Revocation of authority of agent—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of express contract, be terminated to the prejudice of such interest. *PLD 1986 Karachi 234.*

—A distinction must be drawn between the interest which the agent has in the property and his authority as an agent. Where the latter is distinct from the former, section 202 would not apply. Thus where the agent had interest in the property as a lessee, and he had been given authority as an agent to file and continue proceedings before the Custodian of Evacuee Property, that authority, is totally independent of the interest claimed by the petitioner in the property which is the subject-matter of the proceedings; and section 202 of the Contract Act is not attracted to such an authority to protect it from being terminated on account of the death of the agent. *PLD 1977 Karachi 162.*

—The principle underlying those sections, as it appears is that a contract of agency in its very nature, is terminable. However, if it is coupled with interest of the agent in the property forming part of the subject-matter of the agency it cannot be terminated to the prejudice of such interest, unless there is an express contract to it that it can be unilaterally terminated even to the prejudice of such interest. *PLD 1986 Karachi 234.*

Sections 202 and 203—Where the agent has himself an interest in the property forming subject matter of the agency, as provided by sections 202 and 203 of the Contract Act, cannot be terminated to the prejudice of such interest in the absence of an express contract. In the present case, from the recital of the power of attorney it appears that the agent himself has an interest in the property and hence such agency cannot be revoked unilaterally to the prejudice of such interest. *Abdun Naim Parvez (Md) vs Sachindra Kumar Mandal and others 5 BLC 14.*

Sections 202 and 203—A power of attorney becomes irrevocable when it the power were revoked the attorney would be deprived of a substantial right. *Begum Shamsunnahar Chowdhury vs Md Masud Jamal and others 48 DLR 267.*

203. When principal may revoke agent's authority—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

Case-Law

Sections 203 and 202—Where the agent has himself an interest in the property forming subject matter of the agency, as provided by sections 202 and 203 of the Contract Act, cannot be terminated to the prejudice of such interest in the absence of an express contract. In the present case, from the recital of the power of attorney it appears that the agent himself has an interest in the property and hence such agency cannot be revoked unilaterally to the prejudice of such interest. *Abdun Naim Parvez (Md) vs Sachindra Kumar Mandal and others 5 BLC 14*

Sections 203 and 202—A power of attorney becomes irrevocable when it the power were revoked the attorney would be deprived of a substantial right. *Begum Shamsunnahar Chowdhury vs Md Masud Jamal and others 48 DLR 267.*

204. Revocation where authority has been partly exercised—The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205. Compensation for revocation by principal or remuneration by agent—Where there is an express or implied contract that the agency should be continued for

any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Case-Law

—Agency for certain time. An agreement of agency is by its nature determinable. It is not permanent. *PLD 1986 Karachi 234.*

—Agency for definite time. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make a compensation to the agent, for any previous revocation or renunciation of the agency, without sufficient cause. *PLD 1986 Karachi 234.*

206. Notice of revocation or renunciation—Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and renunciation may be expressed or implied—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

208. When termination of agent's authority takes effect as to agent, and as to third persons—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 [1]Taka. The sale is binding on A, and B is entitled to five Taka as his commission.

(b) A, at [2][Dacca], by letter directs B to sell for him some cotton lying in a warehouse in [3][Rajshahi], and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to [2][Dacca]. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Case-Law

—Termination of agent's authority, when effective against third party. Section 208, Contract Act provides that the termination of the authority of an agent does not take effect so far as regards third persons before it becomes known to them. *PLD 1980 Lahore 110.*

209. Agent's duty on termination of agency by principal's death or insanity—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

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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).

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

3. The word "Rajshahi" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule, (with effect from 26-3-71).

210. Termination of sub-agent's authority—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Case-Law

Sections 201-210—Revocation of authority—power of attorney is revoked by death of one of the executants. *1938 (Mad)542.*

—the authority of a person holding a power of attorney from a minor's guardian is not revoked by the minor attaining majority. *1946 (All) 1.*

—insanity of the principal terminates authority of the person holding a power of attorney. *1940 PC 211; 45 CWN 317; 43 LR 459.*

—death of one of the executants of a power of attorney does not terminate the agency under others, unless the principals are joint principals and the power was given jointly. *1936 (Cal) 650; 41 CWN 27.*

—a power of attorney to present a document for registration is revoked by the death of the principal. *23 A 223 PC.*

—when an agent is employed by the Karta of a joint Hindu family, the agency is not terminated with the death of the Karta. *1934 (All) 553.*

—if the authority of an agent to admit execution of a document is revoked before registration, but such revocation is not known to the guarantee of the document or the registering officer, the document is not invalid if registered. *30 C 265, 1934 (Rang) 104.*

—A contract is concluded when in the mind of each contracting party there is a consensus *ad idem* and a modification or revocation requires a like consensus. *1925 PC. 232 PC.*

—when the agent has an interest in the subject-matter of the agency it cannot be revoked. *24 M 130; 2 B 311; 1946 (Mad) 9.*

—an agency created by an ordinary power of attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of his family including the agent, because

such spiritual benefit cannot amount to an "interest". *121 IC 598; 1930 (Mad). 231; IR 1930 (Mad) 214.*

—where there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation of the agency. *58 C 1153; 35 CWN 361; IR 1931 (Cal) 899; 134 IC 899.*

—where there is no revocation of authority or any renunciation of the business of the agency by the agent, there is no termination of the agency. *1931 (All) 372; 132 IC 43.*

—termination of a contract of agency by a firm will take effect, so far as third parties are condemned, when they have knowledge of dissolution of the firm. *1951 (Nag) 313.*

Agent's Duty to Principal

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

Illustrations

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

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

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

Illustrations

(a) A, a merchant in [1][Chittagong], has an agent, B, in London to whom a sum of money is paid A's account, with orders to remit. B retains the Money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at [1][Chittagong], who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived. but not any profit he might have made by the subsequent rise.

[For cases under sections 212-221, see cases under section 221, infra.]

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1. The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

Case-Law

Bankers—Where respondent Bank was under obligation to present three bill of lading to foreign Bank before a specified date along with Bill of Exchange. The Bank did not do that and when payment of the bill was not made sought recovery of the amount due to it from the customer by recourse to security held by it. It was held that the respondent had failed to perform his duty in presenting the full set of bill of lading within time to the American Bank and since the bill of exchange could not be presented for payment without full set of bill of lading, therefore, respondent had marred the security and they were chargeable with what they might have received from it but for their neglect or wilful default. *PLD 1982 Karachi 902.*

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

Case-Law

—Suit by agent. This section lays down that agent is bound to render accounts to his principal, but it is no where laid down in the Act that it is the duty of the principal to render account to his agent. *PLD 193 Karachi 253.*

—The general rule is that an agent is not entitled to bring a suit for accounts against his principal except in exceptional circumstances, or under trade usage or a definite contract. *PLD 1983 Karachi 253.*

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

Case-Law

—Scope—It is the duty of the agent to communicate with the principal in cases of difficulty and the principal is bound by the knowledge of the agent, if it is on a material point and such that the agent was bound to communicate it to the principal. It was held that it will be a case of difficulty if the power-of-attorney is susceptible to doubt about its interpretation. *PLD 1985 SC 341.*

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

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B had bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Case-Law

—Agent having other interest—If the agent deals on his own account with the property under agency, e.g. if he purchases it himself or for his own benefit, he in his own interest should obtain the consent of the principal in that behalf after acquainting him with all material circumstances on the subject, failing which the principal is at liberty to repudiate the transaction. *PLD 1985 SC 341.*

216. Principal's right to benefit gained by agent dealing on his own account in business of agency—If an agent, without the knowledge of his principal, deals in the

business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

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

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

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

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

220. Agent not entitled to remuneration for business misconduct—An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in

respect of that part of the business which he has misconducted

Illustrations

(a) A employs B to recover 1,00,000 [1]Taka from C, and to lay it out on good security. B recovers the 1,00,000 [1]Taka and lays ought 90,000 [1]Taka on good security, but lays out 10,000 [1]Taka on security which he out to have known to be bad, whereby A loses 2,000 [1]Taka. B is entitled to remuneration for recovering the 1,00,000 [1]Taka and for investing the 90,000 [1]Taka. He is not entitled to any remuneration for investing the 10,000 [1]Taka and he must make good the 2,000 [1]Taka to B.

(b) A employs B to recover 1,000 [1]Taka from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

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

Case-Law

Sections 212-221—Agents duty to principal—Bank acting as clearing agent—Responsibility of—In a case where a bank in whose favour the drafts for the value of the goods have been endorsed also acts as a clearing agent, the responsibility of such a bank as a clearing agent is no more than that between a principal and agent under the Contract Act. In such cases, before any damages can be claimed from the agent, it is to be fully established that the agent concerned has acted carelessly and not in accordance with the duties imposed on him as an agent. Lakhany Bros vs National Bank of India, *PLD 1959 (WP) (Kar) 415.*

—an agent who negligently omits to comply with the clear instructions given by his principal must be regarded as guilty of gross

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).

negligence and whether he acts gratuitously or not he is responsible to the principal for any loss caused by that negligence. *1931 (Lah) 302; 134 IC 577; IR 1931 (Lah) 961.*

—neglect of duty does not cease, by repetition, to be neglectful and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. *1930 PC 278; 128 IC 669 PC.*

—where under the mercantile usage the commission agent could mix up the goods he had received from a particular party with other similar goods and have them sold the person who had entrusted the goods to the agent could not sue him for loss incurred owing to such sale. *1929 (Lah) 591; 11 (Lah) LJ 235.*

—question of employee's liability for defects in a completed building has to be determined with reference to relationship between him and his employer. *43 CLJ 479; 1926 (Cal) 988.*

—undisclosed principal, right to proceed against agent for damages is not barred by section 231. *61 C 504;1934 (Cal) 721.*

—payment of damages caused by the misconduct is in addition to the forfeiture of commission or remuneration. *1940 (Mad) 299.*

—a broker when entitled to commission. *1950 SC 15; 5 DLR SC 17; 1950 SCR 30; 1950 SCJ 153.*

—For cases relating to accounts, section "Accounts."—Clearing agent—Liability of—When the clearing agent failed to conduct the work entrusted to him with as much skill as is generally possessed by persons engaged in similar business and he failed to act with reasonable diligence in this connection. He was held liable for the loss incurred by the principal on that ground. *Syed and Co vs MM Ispahani Ltd, 10 DLR 552.*

—Suit for accounts—If lies against the agent—A suit for accounts will lie if the defendant is under an obligation to account and an obligation to account arises only—

(i) if the person upon whom the obligation is sought to be imposed has received some kind of property not belonging to himself;

(ii) that the person seeking to impose the liability must be the owner or must have some title to that property as would enable him to recover it,

(iii) that the defendant must have received the property in his possession and control; and

(iv) there must be fiduciary relationship between the plaintiff and the defendant. *Ashutosh Roy vs Arun Sankar Das=PLD 1951 Dacca 1.*

—Suit for accounts against legal representative of agent—Remedy open to principal—A suit for recovery of the money misappropriated by a trustee or agent will lie against the legal representatives of the agent and in such a suit the decree will be against the assets of the deceased agent or trustee. *Ashutosh Roy vs Arun Sankar Das, PLD 1951 Dacca 1.*

Principal's Duty to Agent

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

Illustrations

(a) B, at Singapore, under instructions from A at [1][Chittagong], contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at [1][Chittagong], by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and had to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

[For cases under sections 222-225, see cases under section 225, infra.]

223. Agent to be indemnified against consequences of acts done in good faith—Where one person employs another to do an act, and the agent does the act in good faith,

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1. The word "Chittagong" was substituted for the word "Karachi" by Act VIII of 1973, Second Schedule (with effect from 26-3-71).

the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Illustrations

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

(b) B, at the request of A, sells goods in the possession of A, but which A had not right to dispose. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

224. Non-liability of employer of agent to do criminal act—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that Act[1].

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

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1. See section 24, supra.

225. Compensation to agent for injury caused by principal's neglect—The principal must make compensation to his agent in respect of injury[1] caused to such agent by the principal's neglect or want of skill.

Illustrations

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

Case-Law

Sections 222-225—Principal's duty to agent—to claim compensation, agent's act must be lawful. *1947 (Cal) 137.*

—agents, who engage in a fraudulent scheme to defraud the principal, forfeit their right to an indemnity. *1938 PC 23; 177 IC 754.*

—plaintiff company purchased goods as commission agent for the defendant firm under a contract that the defendant firm would indemnify the plaintiff company against all losses, but the defendant firm failed to pay or to take delivery of the goods, the vendor resold the goods and suffered losses and claimed the balance from the plaintiff and the plaintiff's suit to indemnify was maintainable even if the plaintiff had not in fact paid the third party. *33 CWN 179; 56 C 262; 1929 (Cal) 208.*

—an agent can recover moneys paid by him on behalf of his principals even on wagering contracts and a set off or adjustment in accounts of third parties should be treated on the same footing as cash payments. *1932 (Lah) 356; 138 IC 241.*

Effect of agency on contract with third persons

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

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1. Cf. the Fatal Accidents Act, 1855 (XIII of 1855).

Illustrations

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

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

[For cases under sections 226-238, see under section 238, infra.]

Case-Law

—Sale transactions. It is wrong to assume that every "general" Power of Attorney on account of the said description means and includes the power to alienate or dispose of property of the principal. In order to achieve that object it must contain a clear separate clause devoted to that object. *PLD 1987 Lahore 392.*

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

Illustrations

A, being owner of a ship and cargo, authorises B to procure an insurance for 4,000 [1]Taka on the ship. B procures a policy for 4,000 Taka on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

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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).

Case-Law

—Partly unauthorised acts of agent—Where agent did more than he was authorised to do part whereof, being within his authority and same could be separated from that part which was beyond his authority, work done in accordance with authority, would be binding as between such agent and principal. *PLD 1986 Karachi 574.*

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

Illustrations

A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 [1]Taka. A may repudiate the whole transaction.

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

Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact, B is not entitled to set off a debt owing to him from C against the price of goods.

(b) A is employed by B to buy from C goods, of which C is the apparent owner, A was, before he was so employed, a servant of C, and then learnt

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).

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

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

Presumption of contract to contrary : Such a contract shall be presumed to exist in the following cases:–

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

(2) where agent does not disclose the name of his principal:

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

Case-Law

—Liability of agent—Liability for acts done on behalf of disclosed principals—The agent cannot personally be liable for the work done by him on behalf of his principal in absence of a contract that the agent would be liable—Defendant Nos. 2, 3 and 4 being agents of disclosed principals they are not liable to answer the claims arising out of wrongs done by their principals. *Bangladesh Chemical Industries Corporation and another vs MV Kavo Alkyon & Ors (1987) BLD 1.*

—Carriage of goods—Loss of goods while in possession of agent of the carrier after off-loading—Both the carrier and its agent found liable—*Bangladesh Biman vs MV Roxana Traders & Ors (1981) BLD 352.*

—The contract was between the plaintiff Company and the foreign-company through their agent in Chittagong. The arbitration clause in the contract clearly asserts that the agent will have no personal liability as its agent at Chittagong.

Held: In these circumstances it must be held that section 230 of the Contract Act is not applicable to this case and, therefore, the agent is not liable for any loss which the plaintiff might sustain. *M/s Buban More and Co Ltd vs M/s Modern Trading Co Ltd 12 DLR 261.*

—Principal and agent both being the parties, decree can be passed only against the principal. *East & West Steamship Co vs Hossain Brothers. 19 DLR 75.*

—Agent's liability in a contract—when he made himself personally liable as a guarantor.

In the present case the agent had made himself personally liable as a guarantor and it was thus a case of personal liability by contract. The liability of the agent being thus direct, both as a guarantor and as agent, he cannot enjoy the negative protection afforded by section 230 of the Act, nor is it necessary in this case to invoke the presumptive clause of section 230 in favour of that contract to hold the agent liable because his principal (appellant No.1) was a merchant residing abroad. *Bird & Co (Pak) Ltd. Chittagong vs Central Hardware Stores, Chittagong. 21 DLR (SC) 245.*

Section 230 clause (2)—Provisions of clause (2) of the section is applicable when the contract is effected on behalf of the concealed principal by the agent himself. *Hegge & Co vs Arag Limited. 19 DLR 24.*

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

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

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

Illustration

A, who owes 500 [1]Taka to B, sells 1,000 [1]Taka worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

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

Illustration

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

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

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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).

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

Case-Law

—Scope—Where express or implied authority of agent was not established on record and his acts were not ratified by principal the latter was not liable for acts of such agent. *PLD 1981 Karachi 504 (DB).*

Section 235—The petitioners did not adduce any evidence what rights and obligations are subsisting between the agent and the other party to the contract, i.e. the petitioners. If there were such evidence the plaintiff-respondent could have obtained a much lesser amount of decree or no amount at all. In the absence of such evidence both the Courts below rightly decreed the suit. *Habib Bank Ltd and another vs UAE Bangladesh Investment Company Ltd and another 4 BLC (AD) 110.*

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

237. Liability of principal inducing belief that agent's unauthorised acts were authorised—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority.

Illustration

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Section 237—Applicability. Where administrator having no power to transfer plots in a housing scheme on behalf of Allotment Committee, made allotments, section 237 was not attracted. *PLD 1981 Pesh 99.*

Applicability—Where administrator having no power to transfer plots in a housing scheme on behalf of Allotment committee made allotments section 237 was not attracted. *PLD 1981 Pesh 99.*

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

Illustrations

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

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

Case-Law

Sections 226-238—Relation with third person.—agent when personally liable. *ILR (1951) 1 (Cal) 82.*

—the presumption that agent is bound by contract when the name of the principal is not disclosed may be rebutted. *5 C 71; 5 B 584, 7B, 51, 65,* but the signature of the agent as such will not rebut the presumption. *17 C 449.*

—a person who contracts for an undisclosed principal where no such principal exists, cannot enforce performance. *18 CWN 643.*

—an agent who enters into a contract on behalf of a principal not disclosing the latter's name is entitled to sue in respect of any of the those transactions and subsequently handover the benefit to the principal. *99 IC 687; 52 MLJ 33. 1927 (Mad) 204.*

—where in pursuance of contract for supply of goods to the Military authorities certain sum was deposited in one of the banks specified in the contract, subsequently the Bank became insolvent and the plaintiff sued the Military authorities represented by the Secretary of State, for the recovery of the amount, held that the bank was the agent of the defendant. *32 PLR 819; 133 IC 881; IR 1931 (Lah)849.*

—undisclosed principal, remedy of principal, right to proceed against contracting party for damages is no bar to proceed against agent under section 211. *61 C 504; 1934 (Cal) 721.*

—where a promissory note was signed by the agent of a Mohant and money was utilised for the latter's personal litigation, the Mohant was personally liable and not the agent who signed for the disclosed principal. *1934 (Pat) 435,* in case of doubt as to who is liable both may be sued. *1934 (Pat) 269.*

—when an agent may be sued. *1934 (Pat) 269; 1939 (Mad) 520.*

—Fraud of agent when makes the principal liable—to make the principal liable for the fraud need not be committed for the benefit of the principal. *50 C 258; 1923 C 157.*

—Principal is liable for the fraud of the agent if done within the scope of authority, whether for the benefit or the principal or the agent. *20 CWN 268, 23 CLJ 225.*

—under section 238 Contract Act to make the principal liable, fraud need not be committed by the agent for the benefit of the principal. *39 CLJ 290; 36 C 647; 13 CWN 619 Diss.*

—agent's fraud may invalidate agreement entered into by the principal. *1942 (All) 341.*

Section 230—Applicability—Does not apply to action in tort—Sections 230 and 233 of Contract Act which deal with breaches of contract do not apply to an action which is solely in tort and turns upon liability in negligence. *River Steam Navigation Co Ltd vs Jogesh Chandra Ghosh, PLD 1956 Dacca 196.*

—Broker—Performing contract under Colombo Market usage—If can recover damages for refusing to accept delivery.

Under the usage in Colombo Market relating to rubber coupon contracts the broker's note never discloses the name of the other party to the contract, each party is entitled to look to the broker for performance of the contract, and so far as the buyer is concerned the broker is liable to tender and deliver the coupon irrespective of whether the seller has tendered or not. Where in a suit a broker claimed in reconvention to recover damages against the buyer for breach of a contract of purchase of coupons and the District Judge dismissed the claim on the ground that as the broker entered into the contract with the buyer as an agent he could not sue upon it.

Held : The under the agreed usage of the market the broker was liable to deliver to the buyer the coupons sold whether or not he had received them from the seller, and the buyer was liable to pay. In the event of the buyer accepting delivery and refusing payment it is plain that the broker must have a right to enforce the liability. It followed logically from this position that if the buyer wrongfully refused to accept delivery broker is the person to recover damages for the breach of the contract. *EL Ebrahim Lebbe Marikar vs Austin De Mel Ltd AIR 1946 PC 63.*

—Contract by agent—When presumption raised by 230 is rebutted—The contract was between the plaintiff company and the foreign company through their Agent in Chittagong. Further, the Arbitration clause in the contract clearly asserts that the Agent will have no personal liability in the matter. Hence the presumption raised by

section 230 is rebutted here. *Bubna More & Co vs Modern Trading Co 12 DLR 261 PLD 1960 Dacca 668, 261.*

—Liability of agent—If may be implied—The Legislature has recognised that a presumption does arise from certain circumstance; the fact that section 230 directs the Court in these cases to draw a rebuttable presumption of an implied contract does not displace the ordinary rule that a Court may in appropriate cases hold that a term of a contract is implied.

The course of business may in a particular case lead to the inference that the agent has made himself personally liable. *Bombay Co Ltd vs Haji Adom, PLD 1959 (WP) 411.*

—Fraud—Sale of goods by agent on receiving secret commission—Contract void—Principal can claim the advantage gained or profit made by the buyer from the goods so bought by him.

When a contract is found to be based on fraud, it becomes a voidable transaction and the affected party can repudiate it. The result of repudiation is that the aggrieved party will be restored to the original position and the party at fault can be compelled either to return the property or to compensate the aggrieved party. *Hussain Bhai vs Faridasons Ltd, PLD 1960 (Kar) 291.*

—It could not be said that the then manager of the Bank received the cheques in course of his employment under the Bank but it seems that he was carrying on a parallel business—one as the agent of the Banks and the other as the agent of the plaintiff. *Sonali Bank vs MA Hakim. 39 DLR 367.*

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Chapter XI

[Of Partnership] Rep by the Partnership Act, 1932 (IX of 1932), section 73 and Schedule. II.

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Schedule

Rep by the Repealing and Amending Act, 1914 (X of 1914), section 3 and schedule II.

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