CHAPTER XV

EQUITABLE RELIEF IN CONTRACTS

§ 89. Influence of Equity on the law of Contract.

The equitable doctrine discussed in the foregoing Chapters relates more or less to the law of property. In the following pages we shall discuss some of the more important doctrines of equity which relate generally to the law of contract. These may be grouped under three heads—(*i*) Equity relieving against *terms* in a contract which cause hardship, e.g., stipulations as to penalties or forfeitures, or those concerning time; (*ii*) Equity avoiding a contract *altogether* on grounds relating to consent, e.g., mistake, fraud, undue influence, etc.; (*iii*) Equity granting novel *remedies* on the ground of inadequacy of the common law remedy of damages, e.g., specific performance, injunction, rectification, rescission, cancellation.

(I)
EQUITABLE RULES OF CONSTRUCTION

§ 90. Doctrine of Penalties and Forfeitures.

I. Penalties and Liquidated Damages :

(A) *England.*

1. Where the terms of a contract stipulated that a certain sum of money was payable by a party to contract to the other party in case of non-performance or breach thereof, *common law* would enforce such money penalty on non-performance in all cases. But *equity* regarded performance as the principal intent of the parties to the contract, and the penalty as a mere accessory. It looked into the intention of the parties according to the maxim "Equity looks to the intent rather than to the form." [*Cf.* p. 34, *ante*], in order to ascertain whether such term (*a*) was intended to be a punishment for breach of the contract or (*b*) was a genuine pre-estimate of the damage likely to result from the breach. In the former case it is called a 'penalty', and in the latter 'liquidated damages'. If it is a **penalty** or *in terrorem*, a Court of Equity will relieve against such term and grant only compensation for the actual damage sustained on account of non-performance [*Soloman* v. *Walter*, (1784) 1 Bro. C.C. 417]. But if it is construed as **liquidated damages,** no relief will be granted, and the amount stipulated will be recoverable.

"The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a 'penalty'; but if, on the other hand, the intention is to assess the damages for breach of contract, it is liquidated damages". (*Law* v. *Redditch Local Board*, (1892) 1 Q.B. 127 (132).

The intention of the parties is to be gathered from the whole contract, and the mere use of either term in the contract is not conclusive.

2. Several rules have, however, been framed by the Courts for the purpose of determining whether the sum stipulated is a penalty or liquidated damages:—(*i*) Where a contract provides that upon non-payment of a sum of money a larger sum shall be payable, the larger sum is a penalty. (*ii*) The covenanted sum is a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach. It is impossible, however, to lay down an abstract rule as to what would be extravagant and unconscionable [*Clydebank Co.* v. *Don Jose*, (1905) A.C. 6 (10)]. (*iii*) Where a contract stipulates for the performance of several acts, though some of them may occasion serious damage while others mere trifling damage, there is presumptoin that the lump sum is a penalty.[*Kemble* v. *Farren*, (1829) 6 Bing. 141]. (*iv*) Where a contract is for the performance of an act the damage resulting from the breach of which is altogether uncertain and yet a fixed and reasonable sum of money is payable for breach thereof, such sum is recoverable as liquidated damages [*Dunlop* v. *New Garage Co.*, (1915) A.C. 79].

(B) *India.*

Indian Courts have not to trouble themselves about whether the sum is by way of penalty or liquidated damages, for the distinction has not been accepted in s. 74 of the Indian Contract Act. The party complaining of the breach will not be entitled to receive more than what is *reasonable compensation* in any case. The Court's discretion is not fettered in any way except that it cannot award damages *exceeding* the amount stipulated.

II. Forfeiture.

(A) *England.*

1. Where the terms of a contract provide that a specific *property* (as distinguished from a sum of money) is to be transferred by one party to the other, on the former's failure to perform the contract, such a provision is called a *forfeiture*. The difference between a penalty and a forfeiture is that in the former the payment of a sum of money is stipulated in case of failure of performance, while in the latter it involves the loss of an interest in property, e.g., a lease generally contains a provision that if the lessee

commits a breach of any of the covenants, the lease shall be forfeited, and the landlord may re-enter.

2. Equity had no general jurisdiction to relieve against forfeiture and relief was granted only in case of a covenant in a lease for forfeiture for non-payment of rent. It regarded the right of re-entry simply as security for the payment of rent. For the same reason, equity would not extend its relief to breaches of other covenants such as for repair or insurance.

3. But the relief has been extended and modified by statute. Under the Law of Property Act, 1925, relief may be given by the Court upon such terms as it thinks fit, in all leases and underleases, in case of forfeiture for breach of every covenant other than—

(1) A covenant to permit inspection in a mining lease, and (2) condition of forfeiture on bankruptcy or execution, except in certain specified cases.

4. In the case of breach of a covenant to pay rent, a tenant who is ejected by the landlord for non-payment of rent may be relieved from the forfeiture, provided that (*i*) he applies to the Court within 6 months after the ejectment, (*ii*) he pays all arrears of rent, and (*iii*) it is equitable that he should be relieved.

5. In the case of breach of other covenants, excepting the two referred to as above, a lessor cannot take advantage of any proviso for forfeiture (*a*) until he has served on the lessee a notice (*i*) specifying the breach complained of; (*ii*) requiring the lessee to remedy the breach if possible; (*iii*) in any case, requiring compensation in damages; and (*b*) until a *reasonable time* has elapsed after the service of such notice is not complied with.

(B) *India.*

The provisions in ss. 114 and 114A of the Transfer of Property Act deal with relief against forfeiture (*a*) for non-payment of rent, and (*b*) in other cases.

(*a*) *For non-payment of rent*, s. 114 of the Transfer of Property Act provides—

"Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

S. 114 gives the Court a discretion to relieve the lessee in a suit for ejectment for non-payment of rent if the lessor pays or tenders the rent in arrear with interest and full costs of the suit. The principle underlying the same is the equitable principle that provisions for forfeiture of leases for non-payment of rent are intended merely as a security for the non-

payment of rent and a Court of Equity would give relief if the lessor recovered full compensation for the non-payment in time.[1]

The relief being *discretionary*, the maxim 'He who seeks equity must do equity and must come with clean hands', applies and, accordingly, if the conduct of the tenant is such that it disentitles him to relief in equity, the Court is not bound to give him relief.[2] The difficulties to which the landlord has been put should also be weighed against the tenant.[2] Relief will also be refused where it cannot be given without causing injury to third parties.[3]

(*b*) *For breach of condition,* s. 114A of the Transfer of Property Act provides—

"Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(*a*) specifying the particular breach complained of; and (*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, underletting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

S. 114A provides that in cases where a lease stipulates that on breach of an express condition, the lessor may re-enter, although the breach may be capable of easy remedy, e.g., breach of a covenant to repair, no suit for ejectment shall lie without first giving the lessee a written notice to remedy the breach within a reasonable time. But this section does not apply to forfeiture for breaches of covenants which have the effect of creating a subordinate interest such as assigning, underletting, etc.

§ 91. Stipulations as to time in a Contract.

(A) *England.*

1. Where the time was fixed in a contract for the performance by one of the parties of his part of the contract, and the condition as to time was not strictly fulfilled, the other party might *at law,* treat the contract as broken and discharged. In other words, at *common law* time was deemed to be always 'of the essence of the contract'. *Equity*, however, inquired whether the parties, when they fixed a date, meant anything more than to secure performance within a *reasonable* time. In other words, equity held time to be *prima facie* non-essential and, unless the parties expressly declared it to be so, regarded performance within a reasonable time as generally sufficient, on the same principle as the right of the mortgagor to redeem after expiry of the stipulated date.

1. *Dhurrumtolla Properties* v. *Dhunbai,* A.I.R. 1931 Cal. 457.
2. *Namdeo* v. *Narmadabai,* (1953) S.C.R. 1009.
3. *Stanhope* v. *Haworth,* (1886) 3 T.L.R. 34.

Thus, in *Tilley* v. *Thomas* [(1867) 3 Ch. App. 61], Lord Cairns observed—

"A Court of Equity will, indeed, relieve against and enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion or for the steps towards completion, if it can do justice between the parties and if there is nothing in the express stipulation between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to intervene and modify the legal right."

2. But if in any particular case time had been made of the essence by express declaration of the parties or otherwise, the stipulation was required to be strictly observed even in equity. Thus time was deemed to be of the essence, in equity, in three cases—

(1) Where the contract expressly states that time shall be of the essence of the contract. But to have this effect, the language of the stipulation must unmistakably show that the intention was to make the rights of the parties depend on the observance of the time-limit prescribed.

(2) Where time, although not originally made the essence of the contract, has been made so by one party giving a reasonable notice to the other party.

(3) Where from the nature of the property time may be considered to be of the essence, e.g., in mercantile contracts, contracts for the sale of leaseholds. In commercial contracts, there is a presumption that time is of the essence of the contract, because "merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" [*Bowes* v. *Shand*, 2 A.C. 463].

3. The rule of equity now prevails at law also, for the Judicature Act, 1873, provided that stipulations as to time 'shall receive in all Courts the same construction and effect as they would have heretofore received in equity'.

(B) *India.*

1. In *India*, the law is contained in s. 55 of the Indian Contract Act. It has been held by the Judicial Committee[4] that that section does not lay down any principle which differs from those which obtain under the law of England as regards contracts to sell land. It has already been stated that equity looks not at the letter but the *substance* of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. In this case, the Privy Council observed—

"Specific performance of a contract will be granted although there has been a failure to keep the dates assigned by it if justice can be done between the parties and if nothing in (*a*) the expressed stipulation of the parties, (*b*) the nature of the property, or (*c*) the surrounding circumstances makes it equitable to grant the relief."[4]

4. *Jamshed* v. *Burjorji*, (1915) 40 Bom. 289 (297) P.C.

Under s. 55 of the Contract Act, the question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract. Even where the parties have expressly provided that time is of the essence of the contract, such a stipulation will have to be read along with the other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental.[4a]

In a works contract, the time mentioned was made the essence of the contract but some of the other clauses showed that the contract would be enforceable till the completion of the work or its abandonment. From these clauses, the Supreme Court held that the rescission of the contract and consequent forfeiture of the security deposit were valid notwithstanding that the time stipulated in the contract had expired.[4b]

2. It follows that though *as a rule time is non-essential*, it may be of the essence of the contract by reason of—(*a*) an *express condition or* (*b*) such condition *inferred* from the circumstances and intention of the parties.

(*a*) An *express* declaration of intention to treat time as essential must receive effect, but the intention must be *clearly expressed*.[4] If a party has stipulated that, as to certain provisions in his favour, time is to be of the essence of the contract, the Court will *prima facie* hold time as essential in respect of other provisions which are against him.[5] What is to be ascertained is whether in fact performance of the contract by one party was made to depend on the other party's promise being fulfilled by the day named therefor, or whether a day was named merely to secure performance within a *reasonable* time. *The mere fact that a date has been mentioned* does not prove conclusively that time was intended to be of the essence of the contract.[6]

An agreement for sale of a leasehold specified a date for completion of the purchase and contained an additional covenant that should the purchaser fail to pay the residue of the purchase money within the fixed date, the earnest money would stand forfeited and the vendor would have authority to sell the property to another. *Held*, there was nothing in the language or in the subject-matter of the agreement to displace the *presumption* that for the purposes of specific performance time was not of the essence of the bargain.[4]

(*b*) Even apart from an express term, the Court may *infer* an intention of the parties to treat time as essential by reason of the *nature of the contract*. Such an intention is inferred in the case of a contract of a reversionary interest, or contracts for the sale of land to be used directly for purposes of trade and commerce and, in particular, public houses as

4a. *H.C.C.* v. *State of Maharashtra*, A.I.R. 1979 S.C. 720.
4b. *State of Maharashtra* v. *Digamber*, A.I.R. 1979 S.C. 1339 (para. 2).
5. *Seaton* v. *Mapp*, (1846) 2 Coll. 556 (564).
6. *Mahadeo* v. *Narain*, 30 C.L.J. 224.

going concerns and of mines or contracts relating to things which are subject to fluctuations in value from time to time.[7]

(*c*) In **mercantile contracts**, the presumption is that time where specified is an essential condition.[8-9] So also in cases where the nature of the business demands punctual completion,[10] e.g., in the case of a mining lease.[11]

On the other hand,—

(*i*) In the case of contracts for the **sale of land**, time is not, as a rule, of the essence of the contract,[12] the presumption in such contracts being that the parties intended that performance should take place within a reasonable time even though a time was mentioned. The presumption is, however, rebuttable.[12]

Where under the terms, the vendor was to submit the title-deeds within a certain time and the vendee to give a final reply within another fixed period of time, while the purchase itself was to be completed within a certain time and delay was caused by the vendor himself, *held*, that time was not of the essence of the contract.[13]

(*ii*) Even where the parties have expressly stipulated that time was of the essence of the contract, such stipulation has to be read along with the other provisions of the contract.[14] As our Supreme Court has observed,[14] if the contract contains a clause providing for extension of time in specified contingencies or for payment of fine or penalty for every day or week the work remains unfinished on the expiry of the date specified for completion, such clauses would be construed as rendering ineffective the express term relating to time being of the essence of the contract.

(*d*) Even in cases where time was *not* originally of the essence of the contract, it may be made so by the *subsequent conduct* of the parties, e.g., one party giving *reasonable notice* to the other party to make it the essence.[15]

Even if time be not of the essence of the contract, under s. 46 of the Contract Act it has to be performed within a *reasonable* time. So, if there

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7. Halsbury, 2nd Ed., Vol. 31, para. 471, pp. 402, 403.
8. *Bowes* v. *Shand*, 2 A.C. 463.
9. *D* agreed to transport coal for *R*. It was agreed that *R* was to make payment regularly every month of bills submitted by *D* for despatch of coal and that *R* should keep the road in good repair. *R* sued *D* for damages for stopping the work. It was found that *R* had not paid the bills within the stipulated time or within a reasonable time after presentation, and that *R* had also not kept the road in repair.

Held, the case was covered by sec. 55 and *D* was entitled to rescind the contract and could not be held liable in damages (*Mahabir* v. *Durga Dutta*, A.I.R. 1961 S.C. 990).
10. *Lock* v. *Bell*, (1931) 1 Ch. 35; *Bhudar* v. *Betts*, 22 C.L.J. 566.
11. Fry, *Specific Performance*, 6th Ed., p. 506; *Rudra Das* v. *Kamakhya*, A.I.R. 1925 Pat. 259.
12. *Jamshed* v. *Burjorji*, A.I.R. 1915 P.C. 83: (1915) 40 Bom. 269 P.C.
13. *Krishna* v. *Graham*, 50 C. 700 (on appeal, 52 Cal. 335 P.C.).
14. *Hind Construction* v. *State of Maharashtra*, A.I.R. 1979 S.C. 720.
15. *Krishna* v. *Khan Mamud*, A.I.R. 1936 Cal. 51.

is unnecessary delay on the part of one party, it would be open to the other party to put an end to the contract by giving a notice of its termination.[16]

"Equity will not assist where there has been undue delay on the part of one party to the contract, and the other party has given him reasonable notice that he must complete within a definite time."[12]

Notice will, however, fail to make time of the essence of the contract unless the time specified by the notice is *reasonable*.[17] In order to be effectual, the notice must also be express, clear and unequivocal.[18]

(*e*) Similarly, where time *was originally* of the essence of a contract, the condition may be obliterated by conduct of the parties, e.g., by allowing the negotiations to continue far beyond the time appointed.[19]

But where time was originally of the essence of the contract, the mere *extension* of the time *does not destroy the essentiality of the time* but merely substitutes the extended time for the original time given in the contract, subject to the same condition of time being essential.[20]

(II)
EQUITABLE RELIEF AGAINST ACCIDENT, MISTAKE AND FRAUD

§ 92. Accident.

1. Accident, as remediable in equity, has been defined to be "an unforeseen and injurious occurrence, not attributable to mistake, neglect or misconduct" (*Smith*). It is to be distinguished from mistake which is also a ground for equitable relief: while mistake is subjective, accident is objective. Mistake has reference to a state of thing at the time at which the contract or other transaction in question takes place. Accident refers to some event which occurs subsequently to the transaction.

2. Equity had a concurrent jurisdiction in cases of accident. To give equity jurisdiction, there must have been no adequate remedy at law, and the party must have a conscientious title to relief. In England, equity gives relief against accident in cases of—

(*i*) Lost and destroyed documents; (*ii*) Imperfect execution of powers; (*iii*) Erroneous payments.

(*i*) Thus, when a bond or other document under seal is lost, equity

16. *Alakhram* v. *Kulwanti*, A.I.R. 1950 Nag. 288.
17. Fry, *Specific Performance*, 6th Ed., p. 511.
18. *Karsondas* v. *Chhotelal*, A.I.R. 1924 Bom. 119.
19. *Motilal* v. *Haji*, (1925) 30 C.W.N. 184 P.C.
20. Fry, *Specific Performance*, 6th Ed., p. 522.

allows the plaintiff to maintain an action, requiring proper indemnity. In the case of title-deeds, mere loss does not give equity jurisdiction, because law gives relief by allowing secondary evidence. Equity would interfere only if there were special circumstances irremediable at law, e.g., undue peril to which the loss exposed the plaintiff in future assertion of his title.

(*ii*) Relief is granted where a power is imperfectly executed owing to accident, and the defect is merely a formal one, not being of the essence of the power. In such cases, if there is the ability to exercise a power and distinct *intention* to exercise it, equity will aid the defective execution of it by compelling the person having the legal interest to transfer the same in accordance with the defective appointment.

(*iii*) An executor or administrator, if he has made an erroneous payment accidentally, but in good faith and with due caution, will be relieved from liability.

3. No relief will be given in equity against accident—

(*a*) In matters of positive contract, for here the injury is not *unforeseen*, but might have been provided for by the contract. Thus, no relief is given from an absolute covenant to pay rent or to repair where the demised premises are destroyed.

(*b*) In contracts where the parties are equally improvident against contingencies.

(c) Where the accident has arisen from the gross neglect of the party seeking relief.

(*d*) Where the party seeking relief has no vested right, but a mere expectancy only.

(*e*) Where the party against whom the relief is sought is equally entitled to the protection of equity, e.g., a *bona fide* purchaser for value without notice.

§ 93. Mistake as a ground of relief in equity.

(A) *England.*

1. While *common law* allowed mistake to be set up merely as a defence in an action for damages, *equity* took cognisance of mistake in a much wider sense, and afforded relief in contracts on the ground of mistake not only by *refusing* to grant the purely equitable remedy of *specific performance* (this will be discussed later), but by *avoiding* or setting aside the contract altogether.

2. When a person is induced to do an act by misconception of facts, there is a 'mistake of fact'; when the misconception is as to legal rights, there is a 'mistake of law'. It is usually stated as a general rule that while relief can be obtained against a *mistake of fact*, **mistake of law is no ground for relief, the** maxim being 'Ignorance of law is no excuse.' (*Ignorantia juris non excusat*). The reason behind the maxim is 'that

everybody is supposed to know the law', or as Lord Ellenborough observed, 'that if ignorance of law were allowed to be made an excuse to extinguish the most solemn transactions, there is no knowing to what extent the excuse of ignorance might not be carried'. But this general rule cannot be accepted without considerable qualification: (*i*) *Firstly*, the maxim is applicable only to the general law of the country, and not to a mere private right. "The word *jus* in the maxim is used in the sense of denoting the general law, the ordinary law of the country. But where the word *jus* is used in the sense of denoting private right, the maxim has no application. Private right of ownership is a matter of fact" [*Cooper* v. *Phibbs*,[21] (1867) L.R. 2 H.L. 149]. (*ii*) *Secondly*, mistake as to law of a foreign country is deemed to be a matter of fact. (*iii*) *Thirdly*, even apart from this, equity will grant relief if the mistake is as to a *plain* and established rule of law and hence raises a presumption of undue influence, fraud and the like.

(B) *India.*

1. The Indian law as to the effect of mistake on contracts is embodied in three sections of the Contract Act, viz., ss. 20-22.

2. As to mistake regarding a matter of fact, the rules are—

(*i*) Where *both* parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is *void* (s. 20).

(*ii*) But a contract is not voidable merely because it was caused by *one* of the parties to it being under a mistake as to a matter of fact (s. 22).

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

In order to vitiate a contract, the mutual mistake must be on a matter which is *essential* to the agreement, e.g., as to the identity of the subject-matter[22] or of one of the parties; title of a party;[23] a vital term of the contract or as to the nature of the contract itself.

Where there is no mistake as to the essential facts, the contract cannot be held to be altogether void.

Government represented to *A* that Government had the right to forfeit the lease of *B* and grant a fresh lease to *A*, and, believing in this representation, *A* entered into a contract with the Government. It was known to *A* that *K*, the lessee from Government (for 20 years), had made an unauthorised assignment in favour of *B*,

21. *Cooper* v. *Phibbs*.—By misreading a private Act of Parliament, *X* believed, and represented to his nephew (Cooper) that he was entitled absolutely to a fishery. On the uncle's death leaving daughters, *C*, believing what his uncle had represented, took a lease of the fishery from Phibbs who was trustee for those daughters. Afterwards *C* read the Act, and discovered that he himself was the owner of the fishery. He then applied for setting aside the agreement of lease on the ground of mistake. *Held*, that the parties being under a common mistake as to the existence of a private right, the agreement was liable to be set aside.

22. *Raffles* v. *Wichelhaus*, (1864) 2 H. & C. 906.

23. *Cooper* v. *Phibbs*, (1867) 2 H.L. 149.

without the consent of the lessor (Government) and that the interest of *B* was accordingly liable to be forfeited, in terms of the lease in favour of *K*.

Subsequently, however, *K* instituted a suit against Government and obtained a declaration that the lease in favour of *K* had not been validly forfeited inasmuch as the assignment in favour of *B* had no legal effect, being unregistered, and accordingly, prevented *A* from getting possession during the remainder of the term of 20 years.

On the expiry of the term of 20 years, Government resumed possession, but refused to perform the contract with *A* on the ground that the contract was vitiated by mutual mistake as to fact, viz., the title of Government to grant lease in favour of *A*.

Negativing the contention of Government, the Supreme Court *held* that there was no mutual mistake of *fact* as in the English case of *Cooper* v. *Phibbs*,[23] because the fact that *K* had assigned the leasehold interest to B was known to both parties and the mistake, if any, was as to a matter of *law*, viz., the effect of the law of registration on the assignment. There was, of course, a misrepresentation by Government as to the effect of the assignment and *A* might, if he liked, repudiate the contract on that ground.

But as there was no mutual mistake as to fact, Government could not plead that the contract was altogether void. As a result of the decree in the previous suit, its title was not altogether gone, but was postponed to the expiry of the term of the lease in favour of *K*. Government could *not*, therefore, refuse specific performance of that part of the agreement with *A* which it was possible for Government to perform even after the expiry of the lease in favour of *K*.[24]

3. As to mistake of law, the rule is—

A contract is not voidable because it was caused by a mistake as to any law in force in India. But a mistake as to a law not in force in India has the same effect as a mistake of fact (s. 21).

A and *B* make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation: the contract is *not* voidable.

§ 94. Money paid under mistake.

(A) *England.*

1. At common law, money paid under a mistake of *fact* (as distinguished from a mistake of *law*), might be recovered back "where the supposed state of fact is such as to create a liability to pay the money, which in reality is not due". In other words, there was a total failure of consideration where it was paid under a fundamental mistake of fact which led the prayer to suppose that he was legally liable to pay [*Morgan* v. *Ashcroft*, (1938) 1 K.B. 49]. Hence, an implied promise to repay was raised and the law set up the relationship of debtor and creditor between the parties, for the performance of this implied promise.

There were certain exceptions to this rule, and no action lay for money paid under a mistake of law [*Anglo-Scottish Corpn.* v. *Spalding*, (1937) 3 A.E.R. 335].

24. *Kalyanpur Lime Works* v. *State of Bihar*, A.I.R. 1954 S.C. 165.

2. But equity extended the relief to cases of mistake of law, where there were circumstances which rendered it inequitable that the party receiving the money should retain it[25]; for instance—

(*a*) Where it has been paid under a mistake of foreign law, on the ground that foreign law is treated by English Courts as a matter of fact to be proved like any other fact.

(*b*) Where money is paid to an officer of the Court under a mistake of law, the money can be recovered from him, for the officer of the Court must, in virtue of the position he holds act as a high-minded man would, and not take advantage of the mistake.[26] "The Court will compel its officer to recognise the rules of honesty as between man and man and act accordingly."[27]

(*c*) Money paid under a mistake of law is also recoverable if the mistake was induced by the other party fraudulently, or where the other party standing in a fiduciary relationship, misled the aggrieved party even if inadvertently.[28]

(B) *India.*

In India, the relief for money paid under mistake is laid down in s. 72 of the Contract Act which says—

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

The following points are to be noted—

(*i*) The above right being statutory, it cannot be rejected on equitable considerations, viz., that there are circumstances under which it is not *equitable* that the plaintiff should recover his money.[29] But plaintiff may disentitle himself by estoppel or other statutory bars.

(*ii*) The section is wider than the English rule inasmuch as it gives relief not only in cases of mistake, but also in cases of payment under coercion. The word 'coercion', in this context, is not to be understood in the sense in which it is used in s. 15 of the Act, but in the general and ordinary sense of the word.[29] Thus, money paid under protest, in order to get release of property from a wrongful attachment, is recoverable under this section.[29]

(*iii*) S. 72 makes no distinction between a mistake of fact and a mistake of law.[30] Payment 'by mistake' in s. 72 means a payment which was not legally due and which could not have been enforced; the mistake lies in thinking that the money paid was due when, in fact, it was not due. From the standpoint of a mistake of law, there is no inconsistency between s. 21 (*see* p. 230, *ante*) and s. 72. There is nothing inconsistent in enacting on

25. *Rogers* v. *Ingham*, (1876) 3 Ch. D. 357.
26. *Ex parte James*, (1874) 9 Ch. 609.
27. *Re Opera Ltd.*, 2 Ch. 154.
28. *Rogers* v. *Ingham*, (1876) 3 Ch. D. 356.
29. *Kanhaya Lal* v. *National Bank*, (1923) 40 Cal. 598 P.C.
30. *Shiba Prasad* v. *Sris Chandra*, A.I.R. 1949 P.C. 297.

the one hand that if parties enter into a contract under a mistake of law, that contract must stand and is enforceable (s. 21), but, on the other hand, that if one party, acting under mistake of law, *pays* to another party money which is not due by contract *or otherwise*, that money must be repaid.[30]

The lessee under a mining lease had been paying his lessor on a wrong view of his rights based on a misconstruction of the terms of the lease, larger sums by way of royalty than what was really due on a proper construction of those terms. On a question whether the lessee could set off the amount of the overpayment against royalties which became subsequently due by him, *held*, the money was paid under the mistaken belief that it was due and, therefore, the lessee was entitled to relief, under s. 72 of the Contract Act.[30]

§ 95. Equitable relief on the ground of mistake.

The relief given by equity on the ground of mistake may take the form of (*a*) refusal to grant specific performance; (*b*) avoidance of a contract; (*c*) rectification of a written document; (*d*) an order for return of money paid.

(*a*) *Refusal of specific performance.*—In cases where this relief is granted, the Court, even though it decides that the mistake does not invalidate the contract, refuses the *equitable* remedy of specific performance on the ground of hardship amounting to injustice arising from the mistake[31] [*Preston* v. *Luck*, (1884) 27 Ch. D. 497], and gives the plaintiff only his remedy in damages at common law; for example, where the purchaser bid for and bought one lot at an auction in the belief that he was buying a totally different lot, and it would have been a great hardship on him to compel him to take the property [*Malins* v. *Freeman*, (1837) 2 Keen 25]. But if the mistake is wholly that of the defendant, *not induced in any way by the plaintiff*,[32] and there is no hardship amounting to injustice, specific performance will not be refused. Thus, where a purchaser had bought at an auction an inn and a shop in the mistaken belief that two plots at the back also formed part of the property auctioned, but the particulars of sale and the plan exhibited at the auction described the property correctly, he was compelled to perform the contract [*Tamplin* v. *James*, (1880) 15 Ch. D. 215].

(*b*) *Avoiding the contract.*—Contracts may be set aside, even though the mistake is unilateral, if its effect is to prevent any real consensus between the parties. This mistake may be—

(*i*) As to the nature of the transaction: Thus, in *Thoroughgood's case* [(1854) 2 Co., Rep. Ib], an illiterate man was held not bound by a deed the contents of which had been misrepresented to him.

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31. In *India*, defence on the ground of mistake is provided by cl. (*a*) of s. 18 of the Specific Relief Act, 1963. (*See*, further, under Ch. XVII, *post*.)

32. The provision in s. 22 of the Indian Contract Act means the same thing by enacting that "a contract is not voidable *merely* because it was caused by *one* of the parties to it being under a mistake as to a matter of fact".

(*ii*) As to the identity of the person contracted with: One Blenkarn, a man of no means, assumed the name of Blenkiron, and, corresponding through the post, bought goods under that name from sellers who imagined that they were dealing with a firm, Blenkiron & Co., known to them as a respectable firm; it was *held* that the contract of sale was void *ab initio* [*Cundy* v. *Lindsay*, (1878) 3 A.C. 459].

(*iii*) As to a term of contract known to the other party: Thus, *A* sells oats to *B* by sample, nothing being said as to whether the oats are old or new. *B*, however, erroneously thinks that the contract is for sale of *old* oats. *A* knows that the contract is simply for the sale of oats, but at the same time knows that *B* supposes the contract to be for the sale of old oats. *Held*, *B* is not bound by the contract [*Smith* v. *Hughes*, (1871) 6 Q.B. 597]. The result would be otherwise if *A* did not know that *B* made the mistake (*ibid*).

(*iv*) As to the subject-matter of the contract: There was a contract for the sale of cotton "*ex* ship Peerless from Bombay". There were two ships answering to that description, one arriving in October and the other in December, and it was proved that each party was thinking of a different ship. *Held*, that there was no real consensus between the parties and that there was no contract [*Raffles* v. *Wichelhaus*, (1864) 2 H. & C. 906].

(*v*) Mutual mistake[33]: Even where the parties are in agreement, but both parties may be labouring under a common mistake as to some fact essential to the agreement. An instance to the point is *Cooper* v. *Phibbs* (*see* p. 230, *ante*).

(*c*) *Rectification.*[34]—Even where the parties are in real agreement and there is true consent, there may be some mistake in the written expression of the contract entered into. In such cases the Court will reform the document so as to express correctly the parties' intention.

This relief will be separately dealt with, hereafter.

(*d*) *Refund of money.*—Money paid under a mistake is recoverable, if there is a mistake as to the liability of the plaintiff as well as the fact on which his liability depended.

This has been already dealt with (pp. 231-232, *ante*).

§ 96. Family Compromises.

(A) *England.*

1. An exception to the equitable rule of relief on the ground of mistake is furnished by a special class of contracts known as 'family compromises'. Where the mistake arises from ignorance of *doubtful* rights, and a compromise is effected for the purpose of setting such doubtful interests in property or claims amongst the members of a family, equity will not interfere to set aside the transaction on the ground of mistake either of fact or law.

33. *Cf.* s. 20, Indian Contract Act. (*See* p. 230, *ante*.)
34. *Cf.* s. 26, Specific Relief Act, 1963.

The principle was laid down in *Stapilton* v. *Stapilton*[35] [(1739) 1 Atk. 27] thus—

"An agreement entered into upon the supposition of right, or of doubtful right, though it afterwards appears that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other, and therefore the compromise of a doubtful right is a *sufficient foundation of an agreement.* Where agreements are entered into to save the *honour* of a family, and are reasonable ones, a Court of Equity will, if possible, decree a performance of them."

Similarly, in *Westby* v. *Westby* [(1842) 2 D. & W. 503], it was said,

"Wherever doubts and disputes have arisen with regard to the rights of different members of the same family, and especially where those doubts have related to a question of legitimacy, and fair compromises have been entered into to preserve the harmony and affection, or to save the honour, of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered as satisfactory if the transaction had occurred between strangers."

In such cases, the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim. Hence, the reality of the right is immaterial, if the claim was *bona fide.*

2. It is to be noted, however, that in such arrangements there must be a full *disclosure* of all material circumstances by the parties. It is one of those agreements in which *uberrimae fides* is required. If either party takes any advantage of the known ignorance of the other, the arrangement will then be set aside [*Gordon* v. *Gordon*,[36] (1816) 3 Swan 400], or where mistake is due to surprise or imposition by the other party.

3. Family compromises form an exception to the rule against volunteers. Any person who is entitled to any benefit under the arrangement and those claiming under him are entitled to enforce it, though not a party to the contract or its consideration [*Gale* v. *Gale*, 6 Ch. D. 114].

(B) *India*

1. The English principles relating to family arrangements have been

35. *Stapilton* v. *Stapilton.*—*S* had 2 sons, *H* and *P.* There was some doubt as to the legitimacy of the elder son *H.* To prevent future disputes, the father brought the sons into an agreement to divide his estate equally between themselves. In a suit by *H* to enforce the agreement against *P,* it was found that in fact *H* was illegitimate. *Held,* that the agreement would not be rescinded, being a reasonable compromise of doubtful rights for the peace and honour of the family.

36. *Gordon* v. *Gordon.*—An agreement was entered into between two brothers, the younger of whom disputes the legitimacy of the elder for the division of the family estates. At the time of the agreement the younger brother was apprised of a private ceremony of marriage which had passed between their parents, but did not communicate the fact to the elder. The legitimacy of the elder brother was established later on. The compromise was set aside on the ground that the younger brother had concealed the fact, which he knew, that the elder brother was legitimate.

applied in India, as a rule of equity and justice. Broadly speaking, a family settlement is an arrangement between the members of a family, having claim to or interest in the family property which is intended to set at rest disputes, either already existing or apprehended, with regard to the family property, in order to restore or preserve the peace of the family and to save its property from being wasted in litigation. It may merely recognise pre-existing rights or it may create fresh rights in persons who do not possess them or it may amount to an abandonment of rights by persons who possess them.

The principle was thus explained by the Privy Council—

"Where family arrangements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly *misunderstood* their situation, and mistaken their rights, a Court of Equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been *unfair*, a Court of Equity would have a very great difficulty in permitting such a contract to bind the parties."[37]

2. The essential requisite of a family arrangement is that it should be a *bona fide* settlement of disputes, either existing or future, between members of a family.

3. A family settlement, properly arrived at, will not be set aside on the ground that it gave to one of the parties more than what he might possibly have recovered, if he had taken the judgment of the Court upon the matters then in difference between them.

4. A mere *mistake* about the rights of the parties, without concealment or imposition, is no ground for setting aside a family compromise.

Thus,—

(*a*) If a compromise has been entered into a good faith by the manager of a joint Hindu family or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family, and the minor was, therefore, a party to the contract.[38] But when it is not proved that the person entering into the compromise had any authority, either under the law of contract or under the personal law applicable to the minors to make the compromise on their behalf, the compromise cannot be made to bind the minors by calling it a family settlement. A party cannot, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract.[39]

37. *Cashin* v. *Cashin*, A.I.R. 1938 P.C. 103.
38. *Bindą* v. *Lalita*, (1936) 41 C.W.N. 161 P.C.
39. *Pratap* v. *Sant Kaur*, (1938) 42 C.W.N. 817 P.C.

On the death of a female proprietor, there was a contest in the mutation record between her illegitimate daughters and the reversioners of her husband. This was settled by a compromise under which the daughters got a half share and the reversioners the other half. One of the daughters was a minor and one of the reversioners purported to act as her guardian. *Held*, the reversioner had no authority to act as the guardian of the minor daughter, and since the compromise failed as against the minor daughter, it should be set aside *in toto*, and it was not binding even against the major parties.[39]

But,—

The Court would not uphold, as a family arrangement, a compromise by a presumptive reversioner by which he bargained away the chances of his descendants in general to the *spes successionis* in order to obtain for himself an immediate share. Such a compromise even though binding against the contracting presumptive reversioner, cannot debar his descendants, who happen to be the actual reversioners, from claiming to succeed to the reversion.[40]

5. Family compromises form an exception to the rule that none but the parties to a contract or their privies may enforce a contract. S. 15(c) of the Specific Relief Act, 1963, provides that 'a compromise of doubtful rights between members of the same family' may be enforced by any person *beneficially entitled thereunder.*

§ 97. Mistake and Misrepresentation.

(A) *England.*

1. In both cases, a person is induced to enter into a legal relationship with another, by a misconception of the facts surrounding or the legal rights and obligations arising out of such legal relationship. But where the misconception is due to an error on his *own* part, it is a case of *mistake*; on the other hand, if the misconception is due to an erroneous or untrue representation made by *another*, it is a case of *misrepresentation.*

2. Misrepresentation may be *innocent* or *fraudulent.* It is innocent, if the person making the representation *honestly* believed it to be true. But if he *knew* it to be false, or made it *recklessly*, not whether it was true or false, the representation is said to be fraudulent [*Derry* v. *Peek*, (1889) 14 A.C. 337]. Fraudulent representation is also referred to simply as 'fraud'. It will be dealt with separately. [*See* §98, *post.*]

3. Misrepresentation, again, may be *positive* or *negative.* Positive misrepresentation is actual representation by words or conduct of facts as being different from what they are. Negative misrepresentation is a failure to disclose facts where there is a legal duty to disclose them.

4. Generally speaking, a person entering into an agreement is not under a legal duty to disclose to the other party all facts relevant to the

40. *Binda* v. *Lalita*, (1936) 41 C.W.N. 161 P.C.

agreement that are within his knowledge, even though he knows that the other person is labouring under a mistake as to these facts. To this general rule, there are certain exceptional cases where mere *non-disclosure* constitutes negative representation. These are contracts in which one of the parties is presumed to have means of knowledge not accessible to the other, and is, therefore, bound to tell him everything which may be supposed likely to affect his judgment.

5. A duty to disclose may arise—

(*i*) *From the nature of the contract.* Here one of the parties has either actual or presumptive knowledge of all material facts which are not within the knowledge of the other party. These are, therefore, called contracts *'Uberrimae Fidei'*.

(*ii*) *From the relation of the parties.* In these cases, one party stands in a fiduciary relationship to the other and as such has some influence over the other. He is, therefore, under an obligation to disclose all material facts. These cases will be discussed under *'Undue Influence'*, below.

(B) *India.*

1. The above principles are generally embodied in the definition of 'misrepresentation' in s. 18 of the Indian Contract Act—

" 'Misrepresentation' means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement."

2. It will appear that cl. (1) of the section deals the *innocent* representation by an untrue statement which is, however, believed to be true by the person who makes the statement. (If there is no honest belief in the truth of the statement, it would become a *fraudulent* misrepresentation).

Cl. (2) goes beyond simple misrepresentation and relates to cases of 'constructive fraud' (*see* p. 241, *post*) in which, though there is no intention to deceive, the circumstances are such as to make the party, who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of actual fraud or deceit. The conditions for the application of this clause are—(*a*) a breach of duty; (*b*) an advantage gained by misleading another to his prejudice.

Such 'misleading' may be the result not only of a positive assertion but also of non-disclosure or silence where there is a duty to disclose. If the non-diclosure is made with an intent to deceive, it becomes 'fraud'. Where there is no intention to deceive, it is innocent misrepresentation

within the meaning of this clause. A duty to disclose exists, apart from cases of fiduciary relationship, in cases of contracts *uberrimae fidei*, such as contracts of insurance, for the sale of land, of suretyship and partnership, for the purchase of shares in a company and in contracts relating to family settlements.

Cl. (3) deals with a case of unilateral mistake *caused* by the *innocent* representation of either party. The mistake must, however, be as to the *substance* of the thing which is the subject of the agreement. If however, the misrepresentation did *not* cause the consent of the party to whom the misrepresentation was made, it would not vitiate the contract (*Expl.* to s. 19).

§ 98. Remedies for fraudulent and innocent misrepresentation.

(A) Fraudulent misrepresentation.

(I) *Where the contract is voidable.*

1. Where a contract has been induced by a fraudulent misrepresentation, the party defrauded has a remedy by way of *rescission* of the contract. This right existed both at law and in equity, but as it means restitution of the parties in their original position, by taking accounts and making allowances for deterioration in the property etc., the jurisdiction in respect of rescission is mainly equitable.

A party rescinding a contract may either (*i*) bring an action for rescission or (*ii*) rescind the contract and communicate the same to the other party, and, if sued by the other party, take the defence that the contract has been rescinded.

As a contract induced by fraud is not void, but only voidable at the option of the party defrauded, he may affirm the contract instead of rescinding, when he discovers the fraud. Thus, the right of rescission will be lost—(*i*) If after discovery of the fraud, he fails to give notice of his intention to avoid the contract or if he accepts any benefit or otherwise acts upon the contract after such discovery. (*ii*) Though mere lapse of time is not a bar to rescission, a great lapse of time after knowledge of the fraud may be evidence of acquiescence or intention to affirm. (*iii*) The right to rescind may be lost if the parties are so changed in their position that they cannot be replaced in their former position. (*iv*) The right to rescind is lost if third parties *bona fide* and for value acquire rights in the subject-matter of the contract.[41]

41. The position under s. 19 of the Indian Contract Act is similar. This section says that—

(*a*) When consent to an agreement is caused by fraud or misrepresentation, the contract is *voidable* at the option of the party whose consent was so caused. The fraud or misrepresentation would, however, have no effect if it did *not* cause the consent of that party.

(*b*) The aggrieved party would also have no right to rescind if he had the means of discovering the truth by exercising *ordinary diligence*.

(*c*) Where the contract is voidable, the party whose consent has been caused by the

2. The party defrauded may also resist a suit for specific performance.[42]

3. He may treat the contract as binding and demand fulfilment of those terms which misled him.[43]

4. He may sue for damages.[44]

5. He may have the instrument cancelled.[45]

(II) *Where the contract is void.*

There are cases where the fraud is such that it has prevented any *consensus* between the parties at all. Here the aggrieved party has, as a result of the fraud, been mistaken as to the nature of the agreement or as to the individual with whom he is dealing. In such cases, the contract is not merely voidable but also void *ab initio*,[46] and a third party who may have acquired goods for value from the fraudulent person gets no title against the person so defrauded.[47]

(B) Innocent misrepresentation.

1. An innocent misrepresentation differs from fraud in this that it does not give rise to an action for damages. At common law a misrepresentation was of no effect unless (*i*) it was fraudulent, or (*ii*) it formed part of the contract.

2. In equity, specific performance was refused and contracts were set aside if they were induced by representation which was material in obtaining the consent and was untrue in fact. Since the Judicature Act, 1873, the rules of equity prevail at law also, so that innocent misrepresentation, if it furnishes a material inducement, is a ground for *resisting* an action for a breach of contract or for specific performance, and also for asking to have the contract *rescinded*.[48]

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fraud or misrepresentation has the option either to rescind the contract or to affirm the contract and claim performance with *restitutio in integrum*, that is to say, he may insist that he shall be put in the position in which he would have been if the representation made had been true.

This may be illustrated as follows :

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

As to the equitable limitations upon the right to rescind and s. 35 of the Specific Relief Act, *see*, further, *post*.

42. In India, this is dealt with in s. 9 of the Specific Relief Act, 1963. (*See* Ch. XVII, *post*.)

43. This is laid down in para. 2 of s. 19 of the Indian Contract Act, which has already been mentioned.

44. The right to sue for damages for fraudulent representation is an action for 'deceit' in tort (*see* Author's *Principles of the Law of Torts*).

45. S. 31 of the Specific Relief Act (see *post*).

46. In India, such cases would come under s. 20 of the Indian Contract Act (*see* p. 230, *ante*).

47. *A*, a person of no financial standing by personating *B*, a firm of good credit, induced *C* to sell goods on credit to *A*. *A* afterwards sold to *X*. *Held*, that no property in the goods passed to *A*; and *X*, though an innocent purchaser, acquired no right by purchase from *A* [*Cundy* v. *Lindsay*, (1878) 3 A.C. 459].

48. *See* ss. 28(*b*), 35 and 39 of the Specific Relief Act [*Prem Raj* v. *D.L.J.*, A.I.R. 1968 S.C. 1355].

But rescission will be granted only when the contract is repudiated at once, and when the parties can be relegated to the position which they occupied before the contract was made. Rescission will not be granted after the property has changed hands under a contract.

3. Though fraudulent and innocent misrepresentation have thus the effect of avoiding the contract at the option of the party aggrieved, there is this difference: when the transaction goes beyond the stage of contract and is completed by a conveyance, innocent misrepresentation will not avoid the conveyance, but if the representation is fraudulent, the conveyance is voidable.

§ 99. Fraud.

(A) Actual Fraud or Fraud in Law:

At common law only actual fraud was remediable in an action of deceit, or by way of defence, and the remedy was restricted to *damages*. Actual fraud has been defined as "something said, done, or omitted with the design of perpetrating what the party must have known to be a *positive* fraud". It may arise from (*a*) *fraudulent misrepresentation,* i.e., "the false representation of a fact made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false' [*Derry* v. *Peek*, (1889) 14 A.C. 337]; or (*b*) *fraudulent concealment,* i.e., the suppression of a material fact which a party was under a legal duty to disclose to the other, e.g., in contracts *uberrimae fidei*,—made with intent to deceive.

(B) Constructive Fraud or Fraud in Equity:

1. Equity refused to lay down any general rule beyond which it would not go in affording relief against fraud, on the ground that fraud is *infinite*.

"As to relief against fraud, no invariable rules can be established. Fraud is infinite, and were a Court of Equity once to lay down rules how far they would go, and no further, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive" (*Parke*, quoted in *Snell*).

Thus Equity had jurisdiction to relieve against every species of fraud, and the remedy was *rescission* of the contract. While in cases of actual fraud it exercised a jurisdiction *concurrent* with the common law Courts, it evolved, in addition, the doctrine of constructive fraud, otherwise known as fraud in equity or **equitable fraud,** its jurisdiction over cases of this latter class being *exclusive* of common law. The fundamental distinction between actual and constructive frauds is that while in the former there is always a design to do evil, in the latter there is not necessarily such an evil design, and yet to allow it to stand would be to open the door to much possible evil in other cases. Constructive fraud is thus an extension in equity of the legal doctrine of actual fraud. Constructive fraud has been

defined as "something said, done, or omitted, which is treated by equity as fraud, because if generally permitted it would (*a*) be prejudicial to public welfare, or (*b*) would operate as virtual fraud on individuals, though it may have been unconnected with any selfish or evil design".

2. Equity acts upon weaker evidence than law in inferring fraud. Thus, in *Nocton* v. *Ashburton*, it was laid down that where fiduciary relations, exist between the parties to a transaction and such relations impose a fiduciary duty on one party to be careful, mere *negligence* on the part of this party will amount to fraud in equity, and make him liable to account to the other for loss resulting from his negligence. (It should be noted that at law mere negligence would not sustain an action for deceit or fraud. It must be proved that the misrepresentation was made with a dishonest mind,—either knowing it to be false, or recklessly.)

3. The chief species of constructive fraud may be grouped under the following heads—

(I) *Frauds on Public Policy:*

It is a general rule that no relief will be given to any of the parties to an unlawful agreement. But where the agreement is illegal as against *public policy*, relief will be given on the ground of public interest. Such contracts, however, are not merely voidable, but absolutely *void*. Transactions falling within this group include—(*a*) Marriage brokerage contracts, (*b*) Contracts in general restraint of marriage, (*c*) Contracts in restraint of trade which are not reasonable etc.

(II) *Frauds in the case of persons in Fiduciary Relations Undue Influence.*

This is being dealt with separately.

§ 100. Undue Influence.

(A) *England.*

1. Where there is *absence* of consent, there is no contract at all. Transactions with infants, lunatics, etc., are thus actual frauds at law. Equity made an extension of this rule and held that where one party to a contract has been induced to enter into it under such influence of the other, that the consent of the former has not been *free*, it should be set aside. Not only will relief be granted on actual proof of influence, but undue influence will be presumed in cases where a fiduciary relationship exists between the parties.

2. The equitable doctrine of **undue influence** thus means that where parties stand to each other in fiduciary relation, e.g., (1) parent and child, (2) guardian and ward, (3) solicitor and client, (4) principal and agent, (5) trustee and *cestui que trust*, and the like, the first-named party is generally *presumed* to be in a position to influence the will of the other, and so equity will not allow him to retain any advantage he may have obtained at the

expense of the other, though the transaction might have been otherwise justifiable, i.e., if no such relation existed [*Cf.* s. 89, Indian Trusts Act]. Thus a voluntary donation by a child to his father, or by a ward to his guardian, will be *prima facie* set aside, unless the father or the guardian can show that the child or ward acted as a free agent and had independent advice. The underlying *principle* was explained in *Huguenin* v. *Baseley* [(1807) 14 Ves. 237] thus—

"Where influence is acquired and abused, or confidence reposed and betrayed, equity will give relief. It is *independent* of any admixture of *imposition*, being based upon a motive of general public policy. Influence is presumed until the contrary is shown."

In this case, the Court set aside a voluntary settlement made by a widow in favour of her family priest whom she had also appointed agent of her property and affairs. It was observed, "The question is not whether she knew what she was doing.....but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which, from their situation and relation with respect to her, they were bound to exert on her behalf."

In *Allcard* v. *Skinner*[49] [(1887) 36 Ch. D.145] also, spiritual influence was held to be a good ground for rescission of a contract.

3. As regards the relation of solicitor and client, these rules appear to be applied with a special strictness. Thus, a gift to a solicitor, *inter vivos*, by his client, can be supported only if (*a*) made under independent advice, and (*b*) only if it can be inferred that the influence due to the former relation of solicitor and client no longer exists. Of course, a gift made by the client by his will is valid. Generally speaking, a solicitor must not in any way whatever, either personally or through his wife or son, make any gain to himself at the expense of his client, beyond the just and fair remuneration for his services. Where a solicitor purchases property from his client, he must be prepared to satisfy the Court (*i*) that the client was fully informed, (*ii*) that he had competent independent advice, and (*iii*) that the price given was a fair one. The same principles apply to a purchase by him from his client's trustee in bankruptcy and to a sale by him to his client. In the latter

49. *Allcard* v. *Skinner*.—The plaintiff Miss A became the member of a Protestant Sisterhood of which the defendant was the Lady Superior. The rules of the Sisterhood enjoined absolute submission to the Lady Superior and prevented any Sister from obtaining the advice of any person unconnected with the Sisterhood. A joined in 1871 and left in 1879. During this period she made over considerable property to S for the purposes of the Sisterhood. In 1885 she brought an action to recover the properties. *Held*, that although no deception or pressure other than of the rules or vows had been brought to bear upon the gift could have been set aside on the ground of undue influence, for "of all influences, religious influence is most dangerous and powerful". (But the fact is that the plaintiff did not commence the action until 6 years after the influence had ceased, as well as that other circumstances were taken as subsequent confirmation of the gift, and, consequently, her claim was held to have been barred by *laches and acquiescence*).

case, he must disclose to his client any facts known to him to show that the price being paid by the client is excessive, and he owes this duty of disclosure even though he is not himself the owner, but a trustee of the property he is selling. The principle applies though the relation of solicitor and client has in the strict sense terminated if the confidence arising from that relation continues (*Snell*).

4. The presumption of undue influence may be rebutted by proving that (*a*) the donee did not in fact possess any such influence, or (*b*) the donor had, at the time of making the gift, *independent* and disinterested *advice* of a third person. But such advice, in order to be effective, must be given with knowledge of all the relevant circumstances under which the transaction is made, and such as a competent and honest adviser would give if acting solely in the interest of the donor,—so as to enable the Court to believe that the gift was the result of the free exercise of independent will.[50]

A Malay an woman, about 80 years of age, and wholly illiterate, executed a deed of gift of practically the whole of her property in favour of her nephew who managed all her affairs. Before making the gift, she had independent advice from a lawyer, who acted in good faith, but did not know that she was giving her all and so could not suggest that she could more prudently give the benefit by the making of a will, instead of by a deed of gift. *Held,* the gift must be set aside as the presumption of undue influence was not rebutted (because the lawyer did not know a material fact).[50]

5. While in the case of persons standing in fiduciary relation to each other there is a presumption of undue influence, in the case of other relations there is no such presumption and undue influence has to be *proved.* But the proof may not only be of direct exercise of influence; it may also be inferred from the circumstances.

Thus, though a presumption of undue influence does not arise in every case where a *wife* confers a benefit upon her husband without consideration, undue influence may be inferred from circumstances like the following;

(*i*) A wife who was a confirmed invalid and who was found on the evidence to have no will of her own entered into an important transaction for the benefit of her husband. While giving evidence, she somewhat indignantly denied that she was influenced by any pressure. *Held,* that this evidence only showed how deep-rooted and lasting the influence of the husband was.[51]

(*ii*) The husband, a businessman, was heavily indebted to the plaintiff, a money-lender. When the husband approached the plaintiff for a further loan of Rs. 7,000, the plaintiff refused to advance any further sum on the security of the husband's encumbered lands. The only security that the husband could offer was the *stridhan* property of his wife which was the only means of subsistence of the family, including children, and which was managed by the husband. The wife was a young illiterate woman who could only sign her name and was always submissive

50. *Inche Noriah* v. *Shaik Allie,* (1929) A.C. 127: A.I.R. 1929 P.C. 3.
51. *Bank of Montreal* v. *Stuart,* (1911) A.C. 120.

to her husband. When plaintiff, before execution of the mortgage deed, wanted some letters from the wife, the husband wrote some letters and got them signed by the wife, without explaining the contents thereof. At the time of execution of the deed also, she was given to understand that it was a lease. The husband got the benefit of the transaction. *Held*, that in the circumstances, it was evident that the wife was acting under the undue influence of the husband and that it was not necessary to come to a finding of actual fraud on the part of the husband.[52]

(III) *Frauds in the case of persons peculiarly liable to be imposed.*

[This will be dealt with separately, under §**101**, *post*].

(B) *India.*

1. **S. 16 of the Indian Contract Act** deals with undue Influence. Sub-s. (1) defines undue influence, and sub-sec. (2) enumerates the cases in which a presumption of undue influence is made, considering the nature of relationship between the parties. Outside these cases, sub-sec. (1) will still apply, if undue influence is *actually* proved, by showing that one of the parties was in a position to dominate the will of the other and did in fact use that position to obtain an unfair advantage over the other.

2. The foundation of relief under s. 16 of the Indian Contract Act, in any case, is a finding that the plaintiff was in a *position to dominate* the will of the defendant. Unless there is such a finding, the mere fact that the plaintiff has obtained an unfair advantage over the defendant is no ground for relief under this section.[53-54] Nor does it raise a presumption of undue influence.[55] The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relation of the parties.[56]

In cases coming under sub-sec. (2), it is presumed that the person who seeks to enforce the contract, was in a position to dominate the will of the other; but in cases outside the scope of sub-sec. (2), this fact must be proved. Mere urgent need of the borrower for money does not *of itself* place the lender in a position to dominate the will of the borrower.[56-57] But where the borrower is in a position of helplessness owing to his estate being under the Court of Wards, and the lender knows this fact at the time of the transaction, the lender is *prima facie* in a position to dominate the will of the borrower.[58]

3. On the other hand, undue influence is not established merely by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Whether by the law of India or the law of

52. *Tungabai* v. *Yeswant*, A.I.R. 1945 P.C. 8.
53. *Sunder Koer* v. *Shamkishen*, (1906) 34 Cal. 150 P.C.
54. *Homeswar* v. *Kameswar*, (1935) 39 C.W.N. 1130 P.C.
55. *Raghunath* v. *Sarju*, (1923) 28 C.W.N. 834 P.C.
56. *Sunder Koer* v. *Shamkishen*, (1906) 34 Cal. 150 P.C.
57. *Barkatunissa* v. *Debi Buksh*, (1927) 31 C.W.N. 693 P.C.
58. *Dhanipal* v. *Maneswar*, (1906) 28 All. 570 P.C.; *Muneshar* v. *Shadilal*, (1909) 31 All. 386 P.C.

England, more than mere influence must be proved so as to render influence 'undue'. it must be proved that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.[59]

In *Mahomed Buksh* v. *Hosseini*,[60] the Privy Council laid down that on an issue of undue influence, a Court should consider whether the gift in question—(*a*) is one which a right-minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to make the gift originated with the donor,—the principles being always the same, although the circumstances may differ.

4. A presumption of domination is made in the case enumerated in sub-sec. (2) :

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

(*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation[61] to the other; or,

(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress."

5. In the case of relations other than those enumerated above, e.g., as between husband and wife, there is no invariable presumption of undue influence, but nevertheless it will arise in any case where the circumstances are such that influence can fairly be inferred. Thus, a mortgage was set aside where it was executed by an illiterate wife, simply as a passive agent of her husband without knowing the nature of the transaction and the money was utilised for the discharge of the husband's personal debts.[62]

On the other hand, there cannot be any inference of undue influence merely because the grantor was weakened in brain from advanced age[63] or some other cause. Thus, it is legitimate to urge upon a man whose condition is precarious, the desirability of making a will. If such pressure falls short of coercion and not influenced by any dishonourable or improper motive, and no benefit is secured by the party giving such advice, it cannot be said that the will was the result of undue influence.[64]

6. Where a transaction is voidable on the ground of undue influence, it can be set aside not only as against the person exercising the influence but also as against any person taking any interest under the transaction

59. *Poosathurai* v. *Kannappa*, (1919) 43 Mad. 546 (548) P.C.
60. *Mahomed* v. *Hosseini*, (1888) 15 Cal. 684 P.C.
61. As to fiduciary relationship, see. p. 152, *ante*.
62. *Tungabai* v. *Yesvant*, (144) 208 I.C. 362 (P.C.): A.I.R. 1945 P.C. 8. (*See* p. 245, *ante*.)
63. *Afsar* v. *Soleman*, AIR 1976 S.C. 163.
64. *Harmes* v. *Hinkson*, (1946) 50 C.W.N. 895 P.C.

with *knowledge* that it was induced by undue influence.[65] Further, when a third party who benefits by transaction has notice of the facts which raise the presumption of influence (i.e., of the relationship between the parties to the transaction), he is in no better position than the person who exercises the influence.[66] In other words, the presumption arising from the position between the parties is also applicable against such third party. A contract may thus be vitiated by undue influence exercised by a third party. In such cases the party seeking to avoid the contract was not acting out of his or her free will owing to the undue influence exercised by the third party.[66]

A young and illiterate wife, whose properties were managed by her husband and who acquiesced in all that was done by her husband, mortgaged her *stridhan* properties in order to pay off the creditors of her husband who was heavily encumbered and had no other security to offer. She herself had no benefit under the transaction. The mortgagee was aware of all these facts. *Held*, the evidence abundantly justified the presumption that the wife was acting under the influence of the husband for whose benefit the mortgage was being executed and not of her free will, and that the mortgage was not binding against her.[67]

Under s. 16 of the Contract Act, the plea relating to undue influence has to undergo three tests:—(1) relationship between the parties being that of domination and submission; (2) fiduciary relation; (3) the relation must have resulted in an incriminating transaction for one of the parties which could not have been agreed upon ordinarily.

The Court trying a case of undue influence must consider:—(a) Are the relations between the donor and donee such that the donee is *in a position* to dominate the will of the donor, and (b) has the donee *used* that position to obtain an unfair advantage over the donor? (c) If the transaction appears to be unconscionable, then the *burden* of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. No presumption of undue influence can arise merely because the parties were nearly related to each other or merely because the donor was old or of a weak character. Relations in which such presumption arises are—solicitor and client, trustee and *cestui que trust*, spiritual adviser and devotee, medical attendant and patient, parent and child, etc. The Court must scrutinise pleadings to find out that a plea has been made out and that full particulars thereof have been given, before examining whether undue influence was exercised or not.[67a]

§ 101. Frauds in the case of persons peculiarly liable to be imposed on.

1. Even where the parties do not stand in any fiduciary relation, equity

65. *Morley* v. *Loughman*, (1893) 1 Ch. 752.
66. *Shamji* v. *Yeshvant*, (1944) 49 C.W.N. 55 P.C., approving *Badiatannessa* v. *Ambika*, (1914) 18 C.W.N. 1133.
67. *Shamji* v. *Yeshvant*, (1944) 49 C.W.N. 55 P.C.
67a. *Subhas* v. *Ganga Prasad*, AIR 1967 S.C. 878.

will relieve against transactions which are unconscionable in the particular circumstances, e.g., transactions with ignorant and poor person, expectant heirs, common sailors, etc.—where the parties do not stand on equal terms. An important species of this class is known as **Catching Bargains,** meaning unconscionable contracts for loan with expectant heirs.

2. An expectant heir is a person who has either (*a*) some reversionary interest, or (*b*) the hope of succession to a relative's property as heir or by reason of presumed affection. Bargains with expectant heirs are relieved against on the same ground of disparity in the position of the parties: When a person enters into a transaction on the security of such future interest, it is presumed that he must be under urgent need, so urgent as has induced him to sacrifice *future* advantage—and, therefore, particularly liable to pressure. The principle was explained in *Aylesford* v. *Morris,*[68] [(1873) 8 Ch. 484] thus,—

"Fraud here does not mean deceit or circumvention; it means an unconscientious use of the power arising out of circumstances and conditions; and when the relation of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, *proving* it to have been, in fact, *fair, just,* and *reasonable."*

It is to be noted, however, (*i*) firstly, that the bargain will be voidable only if the expectant applies to the Court within a reasonable time after coming into possession. If confirmed by him after the death of the ancestor, it will not be relieved against [*Chesterfield* v. *Janssen,* (1750) 8 Ch. App. 484]. In this case, the expectant, after he succeeded to the property, gave a fresh bond and made successive part-payments on the old one. *Held,* that no relief would be given, for the expectant had confirmed the transaction by his conduct after the pressure of the necessity had ceased. (*ii*) Secondly, when relief is granted against unconscionable bargains, it is given on equitable terms,—of repaying the sum advanced at reasonable interest (usually 5%).

3. The present doctrine has nothing to do with fraud. The only thing that the Court looks at in such cases is reasonableness of the bargain, and if it is a 'hard bargain', the Court gives an equitable relief, even though the entire contract may not be liable to be set aside [*Beynon* v. *Cook,* 10 (1875) Ch. Ap. 391].

68. *Earl of Aylesford* v. *Morris.*—The plaintiff, the eldest son of a large landowner, was entitled to large estates immediately expectant on the death of his father. Soon after he came of age, he borrowed from *M,* a money-lender, sums amounting to £7,000, for which he gave bills, which carried interest and discount exceeding 60 per cent. All these transactions were carefully concealed from his father. On the death of his father, *M* sued *A* for payment, and *A* brought this suit for setting aside the transaction. *Held,* that under the circumstances, *onus* lay upon the defendant (*M*) to prove that the transaction was fair and reasonable. He having failed, the plaintiff was entitled to set aside the transaction on payment of the sums actually received with interest at 5 per cent.

§ 101A. Purdanishin women in India.

1. *Purdanishin* women were afforded special protection by the Indian Courts, in respect of contractual liabilities, upon the presumption that they are specially exposed to undue influence. *'Purdanishin'* means secluded, and a *purdanishin* woman may be said to be an adult female who, according to the custom of the class to which she belongs, observes *purdah* or seclusion.[69] But the protection afforded to *purdanishin* women will not be extended to those women who, though observing *purdah,* are capable of managing their own affairs,[70] e.g., one who goes to Court to give evidence, fixes rents with tenants and collects rents, or communicates with men other than members of family in matters of business, when necessary.[71]

2. The treatment of *purdanishin* ladies by the Indian Courts is somewhat analogous to the treatment of dealings with 'expectant heirs' by the Court of Equity, though founded on conditions peculiar to India. In *Kali Buksh* v. *Ramgopal,*[70] the Council observed,—

"The law throws round her a special protection. It demands that the burden of proof shall, in such a case, rest not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was *explained* to and was readily *understood* by the grantor.[72] In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor."

3. Thus, the ordinary presumption that a person understands a document, which he has signed, does not apply in the case of a *purdanishin* woman,[73] and, on the contrary, the Court starts with the presumption of undue influence, which has to be rebutted by proving that the transaction was carried out by the lady out of her free will and after due comprehension.

Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. If it is in a language which she does not understand, it must, of course, be translated, and it is to be remembered that the clearness of the meaning of the deed will suffer in the process. The extent and character of the explanation required must depend on the circumstances. Length, intricacy, the number and complexity of the dispositions, or the unfamiliarity of the subject-matter are all reasons for requiring an increased amount and efficiency of explanation. Thus a matter not likely to attract

69. In *India,* this doctrine has been applied to the case of a *purdanishin* woman, even when there is no finding of fraud or undue influence. Thus, compound interest was disallowed when a *purdanishin* lady borrowed from her own *mukthar* under the cloak of a *benamdar,* with ample security [*Kaminisundari* v. *Ranjan,* (1885) 12 Cal. 219 P.C.].

70. *Kali Buksh* v. *Ramgopal,* (1914) 36 All. 81 P.C.

71. *Ismail* v. *Hafiz Boo,* (1906) 33 Cal. 773 (783) P.C.

72. *Shambati* v. *Jago,* (1902) 29 Cal. 749 P.C.

73. *Ashgar* v. *Delroos,* (1877) 3 Cal. 324 P.C.

the attention of the expectant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it.[74-75]

4. But it is not absolutely necessary to prove that she had *independent* and *disinterested advice* before entering into the transaction.[74-77]

"There is no absolute rule that a deed executed by a *purdanishin* lady cannot stand unless it is proved that she had independent advice. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did, the issue is solved and the transaction is upheld, but if upon a review of the facts—which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution,—the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand".[78]

5. The protection given by law to a *purdanishin* lady cannot be turned into a legal disability.[78] The mere declaration by the settlor, subsequently, that she had not understood what she was doing, is not itself *conclusive.*[79]

6. The presumption is rebutted if it is reasonably established that, having regard to the personality of the lady, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties,—the deed executed was the free and intelligent act of the lady.[78-79]

7. As to the extent of her comprehension, the Privy Council has observed that though it is not necessary that she must be proved to have understood every *technical* detail of a bargain,[80] she must understand the bargain *substantially,* so that the disposition may be said to be her 'mental or conscious' act.[78] If she has understood it substantially, the bargain is good as a whole.[80] But if (*a*) a feature of the transaction affecting in a high degree the expediency of her entering into the bargain is not understood by the lady (e.g., in the case of a mortgage bond, that she was making herself personally liable for the mortgage money), the bargain does not bind her at all, and cannot be enforced as to certain portions of it.[81] (*b*) Similarly, when it is found that she was not aware of the inclusion of certain properties in the document, the mortgage of certain other properties covered by the document cannot be severed and held to be operative on the ground that to that extent she was prepared to contract. The document must fail as a whole.[82]

1. In a suit for cancellation of a deed of gift executed by a *purdanishin* lady,

74. *Faridunissa* v. *Muktar,* (1925) 30 C.W.N. 337 P.C.
75. *Sham Koer* v. *Dah Koer,* (1912) 6 C.W.N. 657 P.C.
76. *Kali Buksh* v. *Ramgopal,* (1914) 36 All. 81 (91) P.C.
77. *Sikandar* v. *Zulfikar,* (1937) 42 C.W.N. 332 P.C.
78. *Faridunissa* v. *Muktar,* (1925) 30 C.W.N. 337 P.C.
79. *Barkatunissa* v. *Debi Buksh,* (1927) 31 C.W.N. 693 P.C.
80. *Sunitabala* v. *Dharasundari,* (1919) 24 C.W.N. 297 P.C.
81. *Hem Chandra* v. *Suradhani,* (1940) 45 C.W.N. 253 (P.C.).
82. *Bank of Khulna* v. *Jyoti Prakash,* (1940) 45 C.W.N. 259 (P.C.).

the facts were that her husband had died long before, and her property was managed by her mukhtar with whom she had formed an intimacy, the result of which was the birth of two illegitimate daughters, one of whom was alive at the date of the deed. The donee was the legitimate son of her paramour, the mukhtar. The deed was found to be duly executed, and attested by just the persons who would naturally be called upon for such purpose, and registered in the usual way by the proper officer. The property given was about one half of her estate, and there was no question of her being impoverished by giving it. No undue influence was affirmatively proved. On the other hand, it appeared that the lady was strong-minded and had been in the habit for many years of managing her own affairs, of entering up her accounts and attending to business matters. The Privy Council *upheld* the gift in consideration of the above facts and with the observation that had independent advice been obtained, the lady would have acted just as she did.[83]

2. Where a *purdanishin* lady, 58 years old, brought a suit for declaration that a *heba-bil-ewaj* executed by her was obtained by fraud, it was found that the donee was her minor grandson whom she had brought up from his childhood with great love and affection, and the transaction was one for consideration and from it she derived substantial advantage. *Held*, the donee was bound to show that the lady had really understood and intended to execute the deed but not also that she had independent advice.[84]

§ 101B. No presumption unless strictly purdanishin.

It has already been pointed out (p. 249, *ante*) that the word *purdanishin* connotes *complete seclusion*. It is only in the case of this well-defined class of women that the law extends the protection and throws the burden of proof upon those who claim under a transaction entered into by a woman belonging to this class. Outside this class, there is no such presumption, and

> "It must depend in *each case* on the character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and prove that it was so in case of dispute".[85]

There is no general rule that a woman who, not being of the *purdanishin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her. In other words, there is no rule of protection for *quasi-purdanishin* women, and whether she would receive special protection from the law will depend upon her individual position and the circumstances of the case.[85]

§ 102. Equitable relief against unconscionable loans.

(A) *England.*

1. Equity intervened in contracts of loan, not only where the borrower

83. *Kali Buksh* v. *Ramgopal*, (1913) 36 All 81 P.C.
84. *Sikandar* v. *Zulfikar*, (1937) 42 C.W.N. 332 P.C.
85. *Hodges* v. *Delhi & London Bank*, (1901) 23 All. 137 (145) P.C.

was a person peculiarly liable to be imposed upon, but also where the terms of the loan were *unconscionable*, though the borrower was a free agent. In such cases equity relieved against the transaction and compelled the lender to be satisfied with the sum advanced, with fair interest. Excessive interest, however, was not *per se* a ground for relief in equity until the Money-lenders Acts of 1900 and 1927, which give a wider relief by way of reopening a transaction on equitable grounds as well as of excessive interest.

2. The Money-lenders Act, 1900, provides that any Court, in any proceedings taken by a money-lender for the recovery of money lent, or in any proceeding brought by the borrower for this purpose, may *reopen* the transaction, if the Court is satisfied—

"that the interest charged in respect of the sums actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are *excessive,* and that in either case the transaction is harsh and unconscionable or is otherwise such that a Court of Equity would give relief."

3. The Money-lenders Act, 1927, provides, without prejudice to the provisions of the Act of 1900 (that interest at any rate may be excessive in the circumstances of any particular case), that the Court shall *presume,* until the contrary is proved, that the interest charged is excessive and that the transaction is harsh and unconscionable.

(B) *India.*

1. In India, the Usurious Loans Act (X of 1918) follows the provisions contained in the English Money-lenders Act, 1900, and embodies the equitable relief as modified in England by the above legislation. Subsequent to the passing of this Act, most of the Indian Provinces had also passed Provincial Acts on the lines of the English Act of 1927, by which a statutory maximum rate of interest was laid down and provisions have been made for reopening any loan transaction which offends, directly or indirectly, against the statutory maximum. It is not proposed, here, to deal with these Provincial enactments, such as the Bengal Money-lenders Act, 1940. But though these Provincial Acts give better relief, they have not superseded the Usurious Loans Act, 1918, and even in those Provinces, relief is available under the Indian Act on the equitable ground that the 'transaction was substantially unfair.'

2. The main provisions of the Usurious Loans Act (X of 1918) may be summarised as follows :

If, in any suit for the enforcement or redemption of any security, whether heard *ex parte* or otherwise, the Court has reason to believe—

(*a*) that the interest is excessive; *and*

(*b*) that the transaction was as between the parties thereto substantially unfair,

the Court may reopen the transaction or set aside any agreement, subject to

certain limitations, but not so as to affect the right of any transferee for value who satisfied the Court that the transfer to him was *bona fide*, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

Interest may of itself be sufficient evidence that a transaction was substantially unfair. "Excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

Nothing in this Act shall be construed as derogating from the existing powers or jurisdiction of any Court.

§ 103. Fraudulent appointment or fraud on power.

1. This is another species of constructive fraud in England. It is relieved against on the ground of virtual fraud upon a person irrespective of any fiduciary relation or peculiar liability to imposition. A power of appointment may be 'special', i.e., subject to restrictions as to its objects or the persons in whose favour it may be exercised. In such a case, the donee of the special power must exercise the power *bona fide* and for the end designed. If it is exercised for any purpose foreign to the power, equity holds the appointment bad as a 'fraud upon the power' and sets it aside. *Fraud* in this connection simply means an exercise of the power "for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power."

2. Thus—

(1) An appointment is fraudulent if it is made in pursuance of an antecedent contract by the appointee to benefit a person not an object of the power. It makes no difference whether the appointment is made for a pecuniary advantage or for a personal advantage of any kind.

(2) Where without any bargain with the appointor, the appointment has been made with the intention that the appointor or a stranger would receive some benefit, it would be fraudulent. A father, having power to appoint an estate to any of his children, appointed it to an infant child at the point of death and the child died soon afterwards. The appointment was also unnecessary as the child would take on default of appointment, on attaining majority and in the meantime had a right of maintenance. *Held*, that the appointment was fraudulent, the only inference from the circumstances being that the father made the appointment with the expectation that he would, as the child's heir, take the estate on the child's death (*Hinchinbroke* v. *Seymour*, 1 Bro. Ch. 395).

3. A fraudulent appointment will be set aside, but a *bona fide* purchaser for value from such an 'appointee has been protected by the Law of Property Act, 1925, in the following case: Where an appointment has been made in favour of a person at least 25 years of age, who is entitled to a share in default of appointment, a purchaser for value from the appointee, without notice of the fraud, is protected to the extent of that share.

§ 104. Equitable relief against infants.

(A) *England.*

A contract by an infant being voidable, infancy was a complete answer at common law to an action for a breach of contract, even though the infant was guilty of fraudulent representation. But equity intervened and afforded relief in certain cases, where it would be inequitable for the infant to obtain benefit of the contract without being liable.

(I) *Necessaries.*

At law, a person who had lent money to an infant could not recover it. But, in equity, a person who has lent money to an infant can, if he proves that the money has been expended for the purpose of *necessaries*, claim to be subrogated into the rights of the seller, and recover the sum lent from the infant [*Marlow* v. *Pitfield*, (1719) 1 P.W. 558].

(II) *Fraudulent misrepresentation.*

1. When an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his 'ill-gotten gains' or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a *contractual* obligation, entered into while he was an infant, even by means of fraud.[86] Thus, an infant, who had procured promissory notes by falsely stating that he was of age, was ordered to return the promissory notes.[87] Similarly, where he obtained a lease on similar representation, he was directed to give up possession.[88]

2. But the remedy in equity is only against the property and the Court of Equity would not make a judgment *in personam* against the infant (which would amount to enforcing the void contract). Thus, in the above case,[88] the infant was not made liable for use and occupation under the lease. For the same reason when there is no possibility of restoring or tracing the very thing got by the fraud, there is no relief even in equity.

Thus, there is no equitable relief to obtain refund of money lent to an infant by fraudulent representation[89] even though it is upon a mortgage.[90] The equitable remedy is *restoration* and no repayment. "Restoration stopped where repayment began."[89]

"A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared void."[90]

86. *Leslie* v. *Shiell*, (1914) 3 K.B. 606.
87. *Clarke* v. *Cobley*, (1789) 2 R.R. 25.
88. *Lempriere* v. *Lange*, (1879) 12 Ch. D. 675.
89. *Leslie* v. *Shiell*, (1914) 3 K.B. 606.
90. *Thurston* v. *Nottingham Permanent Benefit Society*, (1903) A.C. 6.

(B) *India.*

1. Contracts with minors are absolutely void[91-92] and not merely voidable as in English law.

2. Following English law, it has been held[92-93] that there is no right of a mortgagee from a minor to *repayment* of the money lent, on a declaration being made that the mortgage is invalid. But though a minor is not personally liable to repay a loan, where he induces a person to enter into a contract with him on a fraudulent representation that he is a major, then unless the other party was himself aware of the fact of minority,[92] the minor can have the contract set aside only on restoring the benefit he has received from the contract, e.g., on condition of refund of purchase money in the case of sale.[94-95] This also follows from ss. 38 and 41 of the Indian Contract Act.

3. A minor, who has entered into a contract under a misrepresentation (fraudulent or innocent) that he was a major, is not estopped from showing that he was really a minor at the time of execution.[93-95] There cannot be an estoppel against a statute. But the burden rests heavily upon the executant and his representatives to prove such fact of minority.[95] Again, no question of estoppel arises where the other party was fully aware at the time of the contract that the defendant was a minor.[92]

4. Though a contract with a minor is absolutely void, relief in the case of supply of necessaries is provided (as in *England*) by s. 68 of the Indian Contract Act :

> "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."

Hence, in the case of a contract for the supply of 'necessaries' to a minor or to a person whom he is bound to support (e.g., his wife), though the supplier cannot get any relief against the minor personally, he is entitled to reimbursement out of the *property* of the minor.

Whatever is necessary for the subsistence, health, clothing, education and the like, having regard to his age and conditions of living would be necessaries, whereas articles which are purely ornamental would not be. Costs incurred in defending a suit against the property or person of the minor are also 'necessaries'.[96] In proper circumstances, even the costs of prosecuting[97] a suit would be regarded as necessaries, and the person who supplied the necessary money would be entitled to reimbursement.

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91. Ss. 10-11, Indian Contract Act.
92. *Mohori Bibee* v. *Dharamdas*, (1903) 30 Cal. 539 P.C.
93. *Syedul* v. *Ariff*, (1916) 21 C.W.N. 257 P.C.
94. *Harnath* v. *Indar*, 45 All. 179 P.C.
95. *Sadique* v. *Jai Kishore*, (1928) 32 C.W.N. 874 P.C.
96. *Venkata* v. *Pantulu*, 22 Mad. 314 (317).
97. *Kumar* v. *Hari*, 20 C.W.N. 537.

§ 105. Equitable gloss on the doctrine of privity of contract.

(A) *England.*

1. The rule at common law is that only a person who is party to a contract can either sue or be sued upon it. This is known as the doctrine of privity of contract. A stranger to a contract cannot take advantage of a contract even though it is made for his benefit [*Tweddle* v. *Atkinson*, (1861) 1 B. & S. 393; *Dunlop* v. *Selfridge*, (1915) A.C. 847].

2. But the common law caused hardship in many cases, for example, where the stranger is a near relation to the party who pays the consideration. Equity, therefore, intervened to make out an exception to the common law rule, founded upon the doctrine of constructive trust. The doctrine of equity is—

Where *A* makes a contract with *B*, *for benefit of C*, the construction is that *A* intended to contract *as trustee for C*, and in such cases, *C* can sue on the contract, making *A* either a co-plaintiff or a party defendant [*Tomlinson* v. *Gill*, (1756) Amb. 330; *Gandy* v. *Gandy*, (1885) 30 Ch. D. 57]. The doctrine of benefit of the contract has been applied not only to settlements [*Fletcher* v. *Fletcher*, (1844) 4 Hare 67] but also in the case of business transactions [*Gregory* v. *Williams*,[98] (1817) 3 Mer. 582; *Harmer* v. *Armstrong*, (1934) Ch. 65].

3. The doctrine of constructive trust would not, however, apply where the contract is of such a nature (e.g. insurance) which not only confers benefit but also obligations which cannot necessarily be imposed upon a person who is not a party to the contract and has not given his consent [*Vandepitte* v. *P.A.I. Corporation*, (1933) A.C. 70].

(B) *India.*

1. In India, too, the general rule is that a stranger to a contract cannot enforce, it. Thus, where a purchaser of the equity of redemption *contracts to pay off the* mortgage, the mortgagee who was no party to that contract cannot sue the purchaser personally, upon that contract.[99]

A mortgaged certain property to *B* and then sold the property to *C*, leaving with *C* sufficient money to redeem *B*. *B* obtained a decree on his mortgage and, as the sale proceeds were insufficient to meet his claim, he applied for a personal decree against *C* on the ground that *C* was liable as he retained part of the consideration payable to *A*, agreeing to pay it to *B*. *Held*, *B* was not a party to the contract between *A* and *C* and hence *C* was not liable on the contract to *B*. The Privy Council observed—"The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was *no party* to the sale. The purchaser entered into no contract with him and the purchaser is not personally bound to pay this mortgage debt."[99]

98. A contract for the sale of copyright was entered into for the benefit of the plaintiff. *Held*, the plaintiff was entitled to sue for specific performance as a *cestui que trust*, even though he was no party to the contract (*Gregory* v. *Williams*).

99. *Jamna Das* v. *Ram Autar*, (1912) 34 All. 63 P.C.

2. But certain exceptions have been engrafted upon the above rule not only by statute but also by equitable considerations :

(*i*) The doctrine of constructive trust has been applied where an interest in property is created by the contract in favour of a third party.

Where the contract is intended to secure a benefit to a third person so that the latter is entitled to say that he has a beneficial interest as *cestui que trust* under that contract, the latter is entitled to sue.[100]

The father of the bridegroom contracted with the father of the bride to give her an allowance if she married his son and *charged* his immovable property with the payment of the allowance. After the marriage, the bride sued her father-in-law for the allowance. *Held*, though she was no party to the contract for payment of the allowance, she was 'clearly entitled in equity to enforce her claim'.[101]

It seems that it is not necessary to specifically charge the property; it is sufficient if a beneficial right or interest in the nature of a proprietary right (as distinguished from a mere right to a sum of money) is created by the contract. Thus, it has been held that where on a partition between male members a provision is made for the maintenance[102] or marriage expenses of a female member,[103] the female member is entitled to sue the parties to the partition deed to enforce the provision in her favour.

But a mere contract that a party to the contract will pay a certain sum of money to a third person does not create a trust in favour of the third party.[104] The situation becomes different where specific property is *charged* for the payment; e.g., where in a deed of settlement it was stipulated that the donees should pay the debts of the settlor out of the sale proceeds of specified property, it was held that the creditors could enforce the obligation in the nature of a trust created in their favour against the donees of the settlement.[105]

(*ii*) S. 23 of the Specific Relief Act, 1877, specifically provided[106] certain cases where a contract may be specifically enforced by a stranger to the contract :

(*a*) Where the contract is a settlement on marriage, or a compromise of doubtful rights between the members of the same family, any person beneficially entitled thereunder may sue for specific performance of the contract.

(*b*) When a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation may sue.

100. *Mukherjea* v. *Kiran*, (1938) 42 C.W.N. 1212; *Subbu* v. *Arunachalam*, A.I.R. 1930 Mad. 382.
101. *Muhammad* v. *Hosseini*, (1910) 32 All. 410 P.C.
102. *Dan Kuer* v. *Sarla Devi*, A.I.R. 1947 P.C. 8.
103. *Sundaraja* v. *Lakshmiammal*, (1914) 38 Mad. 788.
104. *Adhar* v. *Dolgobinda*, (1935) 40 C.W.N. 1037.
105. *Atikulla* v. *Mobarak*, A.I.R. 1949 Cal. 174.
106. *See* cls. (c), (g), (h) of s. 15 of the Specific Relief Act, 1963.

(*c*) When the promoters of the public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company may sue for specific performance of the contract.

(iii)
EQUITABLE REMEDIES IN CONTRACTS

§ 106. Nature of the equitable remedies.

It was pointed out at the outset that the foundation of equitable remedies is the inadequacy of relief at common law. In the sphere of contracts, the inadequacy of the common law remedy of damages gave rise to the equitable remedies of specific performance, injunction, rectification, rescission and cancellation of contracts. Neither of these remedies will be granted if damages afford an adequate relief on the particular facts of the case. Again, while the common law remedy of damages is available as a matter of right, equitable remedy is a matter of discretion for the Court and in applying these equitable remedies, the Court is guided by certain special considerations and principles which were not recognised by a Court of Law, e.g., hardship, laches, conduct of parties, acquiescence and the like. Though the same Court now grants legal and equitable remedies, both in England and India,—while dealing with these equitable remedies,—the Court must be governed by those principles and conditions which were laid down by the Courts of Equity.

In this book, the remedies of specific performance and Injunction have been grouped together in a separate Chapter. In the present Chapter, we shall discuss the other equitable remedies in relation to contracts.

§ 107. Meaning of 'rectification'.

(A) *England.*

1. 'Rectification' means correction of an error in an instrument in order to give effect to the legal intention of the parties. Where a contract has been reduced to writing, in pursuance of a *previous engagement*, and the writing, owing to fraud or mutual mistake, fails to express the real intention of the parties, the Court of Equity will rectify the written instrument in accordance with their true intent.

2. This remedy is to be **distinguished** from similar equitable remedies. On the one hand, it is to be distinguished from the relief granted to a defendant in a suit for specific performance by way of *variation* from the contract on the ground of fraud or mistake, and, on the other hand, from the relief of *rescission* of the contract or *refusal of the remedy of specific*

performance of the contract on the ground of fraud or mistake. These remedies are applicable where the fraud or mistake goes to the root of the agreement and vitiates the contract itself. But rectification assumes that there exists between the parties a perfectly valid and objectionable contract but that the writing has failed to express that intention, either from fraud or mutual mistake. In other words, the remedy of rectification relates only to cases of mistake in *expression* only, as distinguished from the contract itself.

"Courts of Equity do not rectify contracts, though they may and do rectify *instruments* purporting to have been made in pursuance of contracts" (*Mackenzi* v. *Coulson*, 8 Eq. 375).

3. In such cases, to enforce the instrument, as it stands, must be to injure at least one party to it; to rescind it altogehter must be to injure both; but to rectify it and then enforce it is to injure neither, but to carry out the intention of both. Hence, it follows that in cases of rectification, the Court does not put it to the other party to submit to the variation alleged, but makes the instrument conformable to the intention of the parties without any such offer or submission.[107]

4. The remedy of rectification is not confined to contracts but exists in respect of any other instrument in writing which does not, strictly speaking, come within the category of contracts, but where the question of conformity to the intention of the parties is material..

5. The conditions necessary for obtaining rectification are—

(*i*) The relief is not granted unless a *completed* agreement was reached prior to the written instrument which is sought to be rectified. There must be two distinct stages, first, an agreement verbal or written, which clearly expresses the final intention of the parties, and then an instrument which purports to embody that intention.

"The essence of rectification is to bring the document which was expressed and intended in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract" [*Lovell* v. *Christmas*, (1911) 104 L.T. 85].

(*ii*) Both parties must have intended that the exact terms of the prior contract should be reduced to writing, and this intention must have continued unchanged up to the time when the instrument was executed.

(*iii*) *Clear* evidence of a mistake *common to both parties* must be adduced, and the burden of proving this lies on the party who seeks rectification [*Tucker* v. *Bennett*, (1887) 38 Ch. D. 1]. Fraud is a ground of rectification where it had led to a mistake as to the intention of the parties.[108]

107. Kerr on *Fraud*, 352.
108. *Durga Prasad* v. *Bhajan*, 31 Cal. 614 P.C.

(B) *India.*

1. The Indian law as to rectification of instruments is contained in **s. 26** of the Specific Relief Act, 1963, which says—

"(1) When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing [*not being the articles of association of a company to which the Companies Act, 1956* (1 of 1956) *applies*] does not express their *real* intention, *then*—

(*a*) either party or his representative in interest may institute a suit to have the instrument rectified; *or*

(*b*) the *plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or*

(*c*) *a defendant in such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.*

(2) *If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties,* the court may, in its discretion, *direct rectification of* the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value....."

2. The English principles have generally been followed in applying the above section. It has been held[109] that, in order to obtain rectification, the conditions mentioned above must be present. Thus—

(*i*) Rectification would be granted where, though there was a consensus between the parties as to the contract, through the *fraud* of one of the parties, the instrument did not correctly express the contract as agreed upon.

(*ii*) It will also be granted, at the instance of a third party, where both parties are equally innocent, but owing to a *common* mistake, the instrument does not express their intention.

By a marriage settlement, *A*, the father of *B*, the intended wife, covenants with *C*, the intended husband, to pay to *C*, his executors, administrators and assigns, during *A*'s life, an annuity of Rs. 5,000. *C* dies an insolvent and the official assignee claims the annuity from *A*. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for *B* and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.[110]

(*iii*) Sub-sec. (2) makes it clear that rectification would not be allowed so as to prejudice the rights acquired by third persons in good faith and for *value*.

A, intending to sell to *B* his house and one of three godowns adjacent to it, executes a conveyance prepared by *B*, in which, through *B*'s fraud, all three godowns are included. Of the two godowns which were fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified

109. *Amanat* v. *Lachman*, 14 Cal. 308 P.C.

110. The reason is that a lease is a transfer for value while a gift is not.

so as to exclude from it the godowns given to *C*, but it cannot be rectified so as to affect *D*'s lease.

3. Sub-sec. (3) of the section expressly provides that a party may obtain rectification and specific performance of the contract to be rectified in the same suit.

A contracts in writing to pay his attorney, *B*, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude *B* from all rights under it. *B* is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

4. The limitations of the remedy are—

(*i*) It is discretionary.

(*ii*) It will be allowed by the Court only so far as it can be done "without prejudice to the rights acquired by third persons in good faith and for value."

§ 108. Rescission and Cancellation.

The distinction between cancellation and rescission of a contract is subtle and since their effect is practically the same, in common use, the two terms are often confused. 'Rescission' means putting an end to a contract which is still operative and making it null and void *ab initio*. The relief of rescission, as it is given in Ch. IV of the Specific Relief Act, is not applicable to void contracts, but to contracts which are voidable for causes 'not apparent on the face of it'. Cancellation of a document, on the other hand, does not necessarily imply that it is operative. It applies to void and voidable contracts alike, and by cancellation it is merely made to appear upon the face of it that it is invalid (*Collet*). It is to be noted that both reliefs are available only in the case of *written* contracts.

§ 109. Cases in which Rescission is available.

1. Under s. 27 of the Specific Relief Act, 1963, rescission is available in the following cases—

(*a*) Where the contract is voidable or terminable by the plaintiff.—A contract is voidable under ss. 19-19A of the Contract Act when it is vitiated by fraud, misrepresentation, coercion and undue influence, or mistake in cases outside s. 20. Other cases of voidable contracts are dealt with in ss. 39, 53, 55 and 153.

(*b*) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.—If the contract is unlawful on its very face or the party seeking the equitable relief is more to blame than the plaintiff, there is no question of granting this relief. But it would be granted in other cases of unlawful agreements.

(*c*) Where a decree for specific performance of a contract of sale, or

of a contract to make a lease has been made, and the purchaser or lessee makes default in payment of the money or other sums which the Court has ordered him to pay.—It is clear that the party cannot get a lease or sale without payment of the consideration directed to be paid by the Court.

2. Rescission may be asked for in the alternative, in a suit for specific performance. **S. 29** of the Specific Relief Act says—

"A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly."

§ 110. Limits to the right of rescission.

The right to rescind a voidable contract is defeated in the following cases :

I. *Affirmation of the contract.*—In all cases of voidable contracts there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts.[111] If after becoming aware of the facts which constitute his right to rescind, he either declares his intention to proceed with the contract or does some act from which such an intention may reasonably be inferred, he loses his right to avoid the contract, though he may have other remedies open to him.[112-114]

Mere lapse of time, without any step towards repudiation, does not constitute affirmation, but when the lapse of time is great, it would be treated as almost conclusive evidence of an election to recognize the contract.[115] Similarly, where the other party has altered his position in the reasonable belief that rescission will not be enforced, or where third parties have been misled by the inactivity of the person having the right to rescind, lapse of time would amount to affirmation.[116-117]

II. *Restitutio in integram impossible.*—The object of rescission being to restore the parties to their former position, this relief will not be granted

111. *Rangasami* v. *Gounden*, (1918) 42 Mad. 523 (538) P.C.

112. *Ex parte Briggs*, (1886) L.R. 1 Eq. 483.

113. In *India*, this principle has been applied to the case of a reversioner's right to avoid an alienation by the limited owner. Thus, if a reversioner, after he became *in titulo* to reduce the estate into possession and knew of the alienation, did something which showed that he treated the alienation as good, he would lose his right to complain. Of course, the reversioner is not called upon to elect before his title is affirmed by the death of the widow [*Rangasami* v. *Gounden*, (1918) 42 Mad. 523 (538) P.C.]. Where the reversioner takes a benefit under the voidable transaction, he is precluded from questioning it (*Ramgouda* v. *Bhasudeb*, (1927) 52 Bom. 1 P.C.; *Kanhailal* v. *Brijlal*, (1918) 40 All. 487 P.C.).

114. S. 27(2)(*a*) of the Specific Relief Act, 1963, now codifies this exception by stating that the Court may refuse to rescind the contract "when the plaintiff has expressly or impliedly ratified the contract".

115. *Clough* v. *London & N. W. Ry. Co.*, (1871) 7 Ex. 26.

116. *Lindsay Petroleum Co.* v. *Hurd*, (1874) L.R. 5 P.C. 221.

117. *Hardei* v. *Bhagwan*, (1919) 24 C.W.N. 105 P.C.

when the parties cannot be relegated to the position which they occupied before the contract was made, e.g., because the property to be restored has changed hands [*Seddon* v. *N.E. Salt Co.*, (1905) 1 Ch. 326].

In *India*, this principle is embodied in **s. 27(2)(*b*)** of the Specific Relief Act, 1963—

"the court may refuse to rescind the contract where, owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made."

III. *Injury to third parties.*—For the same reason, the right of rescission is defeated, if, before the aggrieved party elects to rescind, an innocent third party acquires for value an interest in the subject-matter of the contract [*Clough* v. *L. & N. W. Rly. Co.*, (1871) 7 Ex. 26 (35)][118]

IV. Non-severability.—**S. 27(2)(*d*)** of the Specific Relief Act, 1963, provides—

"where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract."

§ 111. Equitable condition for Rescission.

In granting the relief of rescission, the Court may require the rescinding party to do equity. **S. 30** of the Specific Relief Act, 1963, states—

"On adjudging the rescission of a contract, the Court may require the party, to whom such relief is granted, to restore, so far as may be, any benefit which he may have received from the other party and make any compenstion to the other which justice may require."

The principle is illustrated by a suit for rescission of a minor's contract.

Though a contract with a minor is void, when a person purchases property from a minor *without knowledge* of the executant's minority, the sale can be rescinded on the ground of the executant's minority only on condition that the minor refunds to the purchaser the amount of consideration received from him.[119]

But a person dealing with a minor with knowledge of his minority cannot claim equity under this section.

A mortgagor employing an attorney, who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney, and, therefore, where the Court rescinded the contract of the mortgage on the ground of the mortgagor's infancy, and found that the attorney had notice of the infancy or was put upon inquiry as to it, it was *held* that the mortgagor was not entitled to compensation under the provisions of sections 38 and 41 of the S. R. Act.[120]

118. The exception is now codified in s. 27(2)(*c*) of the Specific Relief Act, 1963.
119. *Hanumantha* v. *Sitharamayya*, A.I.R. 1939 Mad. 106.
120. *Brohmo Dutt* v. *Dharmo Das*, 7 C.W.N. 441 (P.C.).

CHAPTER XVI

EQUITABLE REMEDIES

§ 111A. Equitable remedies are discretionary.

Once a legal right and its infringement is proved, the suitor is entitled to his common law remedy *as of right*. But in the case of an equitable remedy, the Court is not bound to grant it even though the infringement of a right has been established; the Court may yet refuse the equitable remedy if the conduct of the applicant is such that it would be unconscionable to assist him. The discretion of the Court of Equity, however, is not to be exercised arbitrarily. In course of time, the principles according to which the Court would grant or refuse an equitable remedy have become settled, so that the discretion has to be exercised according to such principles or rules and not according to the judge's personal notions of fairness.

Thus, the Court will not enforce a contract of sale of land by specific performance, where to do so would be productive of peculiar hardship to the other party to the contract [*Parkin* v. *Thorold*, (1895) 2 Ch. 205]. Similarly, injunction will not be granted in trivial cases, or where damages would afford an adequate remedy [*London & Blackwall Rly. Co.* v. *Cross*, (1886) 31 Ch. D. 369].

I. SPECIFIC PERFORMANCE

§ 112. Specific Relief in General.

1. The equitable remedies by way of specific relief were invented by equity in order to supplement the deficiency of the common law remedy which was compensatory.

"The remedies for the non-performance of a duty enforceable by law are either compensatory or specific. The *compensatory* remedy is by the award of damages. This remedy is often useless or inadequate,—useless where the person ordered to pay them is insolvent, and inadequate, when for instance, the duty is to transfer particular immovable property or a movable to which special interest is attached. The *specific* remedy is enforced by directing the party in default to do or forbear, the very thing which he is bound to do or forbear, and in case of disobedience, by imprisonment or attachment of his property, or both. When no one is in default, it is enforced by making such declarations and orders as the nature of the case may require" (*Whitley Stokes*, quoted in Woodroffe on *Injunctions*).

2. In India, the law of 'specific relief' is codified in the Specific Relief Act, 1963. The reliefs available under this Act are called 'specific relief', because while the aim of common law is to *compensate* a party who is aggrieved by the non-performance of a legal duty by another person, by awarding him damages, the object of specific relief is to give the aggrieved person relief *in specie*, by ordering the other party to do the very thing which he was bound to perform.

Under the Specific Relief Act, 1963, specific relief is given—(*a*) by taking possession of certain property, and delivering it to a claimant [ss. 5-7]; (*b*) by ordering a party to do the very act which he is under an obligation to do (i.e., by means of specific performance [ss. 8-24]; (*c*) by preventing a party from doing that which he is under an obligation not to do (i.e., by injunction) [ss. 36-42]; (*d*) by determining and declaring the rights of parties otherwise than by an award of compensation (e.g., by declaratory decree, rescission, rectification) [ss. 26-35].

3. S. 4 of the Specific Relief Act says—

"Specific relief cannot be granted for the mere purpose of enforcing a penal law."

This provision means that it is the enforcement of civil rights and obligations which is the object of 'specific relief' under the Specific Relief Act. The enforcement of penal or criminal laws is the subject of other statutes, such as the Criminal Procedure Code. No relief under the Specific Relief Act is available where the direct object is to enforce a penal law.

4. Specific relief granted under Part III of the Specific Relief Act, 1963 is called 'Preventive Relief.' This is—

"Preventing a party from doing that which he is under an obligation not to do."

In short, it means the relief given by Injunction (see *post*).

5. The main distinction between specific performance and injunction, as *Story points out*, lies in this—

"Specific performance is directed to compelling performance of an *active* duty, while injunction (though sometimes in a subsidiary way requiring an act to be done) is generally directed to preventing the violation of a *negative* one. The remedy of specific performance, relating as it does to active duties, deals in the main only with *contracts*; while the remedy of injunction, having to do with negative duties, deals not only with contracts, but also with *torts*, and with many other subjects, among them subjects of a purely equitable one."

6. As the Preamble states, the Specific Relief Act is not a consolidating but an *amending Act*, and it does not purport to be an exhaustive enactment. Hence, though it may be exhaustive with regard to those matters which are specifically dealt with by it, there is no reason to hold that the entire law as to specific relief is contained in the Act.

Thus,

(*a*) There are other kinds of specific remedy provided for by other enactments. For instance, the Transfer of Property Act deals with the specific remedies available to a mortgagor or mortgagee; the Partnership Act deals with the specific remedies like dissolution and accounts as between partners.

(*b*) On the other hand, it has been held that there is no reason to hold that the entire law relating to specific performance is codified in Chapter II of the Act or that it is confined to contractual obligations.

(*c*) Again, in matters on which the Act is *silent*, the principles of English common law may be followed.

§ 113. Speedy remedy for dispossession from immovable property.

S. 6 of the Specific Relief Act, 1963, says—

"(1) If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit."

The object of this section is to discourage people from taking the law into their own hands, however good their title may be, and to provide a speedy remedy where a person in physical possession of property has been dispossessed from it against his will.

The only questions for determination in a suit under this section are—(*a*) Whether the plaintiff *has been dispossessed from* the disputed property within 6 *months* previous to the institution of the suit, and (*b*) Whether he has been deprived of that possession *otherwise* than in due course of law.

It is immaterial whether the plaintiff's possession was without title and no question of title may be investigated in a suit under this section, 'Due course of law' means under the legal process. Thus, a person who is dispossessed in execution of a decree cannot bring a suit under the present section.

No appeal or review lies from a decree passed under this section. But the person against whom the decree is passed may bring a suit to establish his *title* to the property and to recover possession thereof. In short, s. 6 gives to the person who has been dispossessed otherwise than in due course of law a speedy remedy to recover possession even from the owner himself, without entering into any question of title. The rightful owner may then bring a regular suit and, on proof of his title, recover possession from the person who had obtained the decree under s.6.

§ 114. Action for possession and action for recovery of possession based on title.

Ss. 5 and 6 of the Specific Relief Act illustrate the distinction between the two kinds of action for recovery of possession :

(*i*) Under s. 5, a person 'entitled to possession,' i.e., a person having title to an immovable property may recover it in the manner provided in the Civil Procedure Code, i.e., by bringing a suit for ejectment on the basis of his title: Such action being founded on his title, he must allege and prove his title, if he fails to establish his title, the suit will fail.

(*ii*) But a person who was in possession of a property, without having title to it, may nevertheless sue a trespasser for recovery of possession, under s. 6. In this suit, if brought within 6 months of dispossession, the plaintiff may succeed in recovering possession, without proof of title, and the defendant cannot defeat the action by alleging better title, for questions of title cannot be investigated in a suit under s. 6.[1]

(*iii*) Apart from s. 6, a possessory action for recovery of possession may also be brought under the *general* law, as settled by the Supreme Court decision in *Nair Society's case.*[1]

Thus, if a person, who has been dispossessed does not bring a suit under s. 6 of the Specific Relief Act within 6 months, may still bring a suit for recovery alleging any title to the property. But, in this case, the suit may be defeated by the defendant by proving a better title.

§ 115. What is Specific Performance.

1. 'Specific performance' means the carrying out *in specie* of the subject-matter of an agreement. As *Strahan* **defines it,**

"The specific performance of a contract means the carrying out of an executory contract by each of the parties thereto precisely according to its terms."

According to *Fry*—

"The specific performance of a contract is its actual execution according to its stipulation and terms, and is contrasted with damages or compensation for the non-execution of the contract."

Maitland puts it thus,—'In granting a decree for specific performance, the Court in effect says to the defendant that he must do the very thing he promised to do on pain of going to prison as a contemner of the Court.' For example, in a contract for sale of land, the Court will (*a*) at the instance of the purchaser, who is willing to pay the agreed price, order the vendor (defendant) to *convey* the land to the purchaser, or, (*b*) at the instance of the vendor willing to convey the land, order the purchaser (defendant) to *pay* the price.

1. *Nair Service Society* v. *Alexander*, A.I.R. 1961 S.C. 1165 (*1173*).

2. **The foundation** of this jurisdiction of equity is the **inadequacy** of the common law remedy of **damages** for a breach of contract. There are many cases in which if a contract be broken, no amount of pecuniary damages will give sufficient compensation to the party who has suffered by the breach; in such cases equity held that he was entitled to the specific thing for which he had contracted. For example, where a man agrees to buy a plot of land and offers a fancy price for it, and then the seller refuses to perform his part of the agreement, it may be that no amount of damages based on the market price can be a just compensation to the buyer to whom that plot has a peculiar value. The choice of land by an intending purchaser is determined by various considerations such as profit, health, convenience and so on, and so damages cannot, as in the case of goods, or other articles, enable him to get another property of exactly the same description and value to him. Land was thus considered to be a thing of special value, and equity would almost *invariably* decree specific performance of contracts for **sale or lease of land.** On the other hand, inasmuch as damages would afford adequate compensation for a failure to supply goods (the intending purchaser being able to purchase goods of the same quality and quantity with the damages obtained), specific performance would not generally be decreed of contracts for **sale of goods.**[2] The same principles applied to other agreements regarding personal chattels or movables. But even in the case of sale of goods etc., specific performance would be decreed if damages would not be a complete remedy.

"It is only where the legal remedy is inadequate or defective that it becomes necessary for Courts of Equity to interfere" [*Flint* v. *Brandon*, (1803) 8 Ves. 159].

3. Thus, though in granting specific performance equity orginally started with contracts for sale or lease of land, the remedy has not been confined to this case alone but has been extended to contracts of other kinds also. But in all such latter cases, specific performance will be decreed only if damages will *in the particular circumstances* be inadequate. Hence, *Maitland* observes, "Specific performance applies to agreements for sale or lease of lands as a matter of course; its application outside these limits is somewhat exceptional and discretionary."

4. Specific performance will be decreed of *contracts respecting movables* only in exceptional cases where damages would be inadequate, e.g., in contracts (*i*) for the sale of unique chattels or articles of unusual beauty or rarity, say, a rare painting or rare China jars [*Falcke* v. *Gray*, (1859) 4 Drew 561]; (*ii*) for the sale of stocks or shares in a private company which would not always be brought to the market, e.g., railway shares of a particular kind,—but not Government stocks which are always readily obtained [*Cuddee* v. *Rutter*, (1720) 1 P.W. 570]; or (*iii*) for the delivery of heirlooms or other chattels of peculiar value to the plaintiff, e.g., a horn belonging to

2. *Cf.* S. 10, *Expl.*, Specific Relief Act, 1963, in India.

the ancestors of the plaintiff and held with the land from time immemorial [*Pusey* v. *Pusey*, (1684) 1 Vern. 273].

5. The principle which is acted upon in respect of chattels is, according to *Strahan*, this,—that (*i*) contracts for the sale of specific chattels of a rate and unprocurable kind, which can only be obtained from the defendant, will be enforced specifically; but (*ii*) where the chattel contracted to be sold is one which can easily be obtained from others than the defendant, as for instance, coal, then the wrong done by the defendant in refusing to carry out his contract is a mere matter of money, the plaintiff can buy the chattel from others and claim any greater price which he has to pay as damages against the defaulting contractor and then he will be in the same position as if the defaulting contractor had carried out the contract.

§ 116. Principles on which the Court acts in granting Specific Performance.

Firstly, the remedy of specific performance being **supplemental** to common law remedy of damages, equity will not interfere where pecuniary damages will put the plaintiff in a position as beneficial to him as if the agreement had been *specifically* performed.[3] Thus, an agreement for a *loan* of money (whether on a mortgage or otherwise) will not be enforced *specifically*, because the borrower can obtain money elsewhere, and if he has to pay more for it, he may obtain damages on the previous agreement at law. But on the other hand, where money has been actually advanced, an agreement to execute a mortgage will be specifically enforced.[4]

Secondly, it must be noted that where equity decrees specific performance at the suit of one party to a contract (because damages will not give him adequate relief), it will also decree specific performance of it at the suit of the other party, even though damages may be an adequate relief to this other party. This principle is expressed by the doctrine that the 'remedies should be **mutual'.** Thus, in a contract for sale of land, specific performance will be granted not only at the suit of the purchaser but also of the *vendor*, though it is clear that when the purchaser refuses to complete, the vendor cannot have anything more than a mere pecuniary demand which can be fully satisfied in an action for damages. Such an action will give him, (*a*) if he has conveyed the land, the whole of the purchase money, or (*b*) if he has not yet executed the conveyance, the difference in the stipulated price and the market price (that he may obtain on a resale). A converse example is supplied by cases of a contract with a minor. Equity will not enforce such a contract at the minor's suit where it would enforce it against the minor.[5] In short, specific performance is a **reciprocal** relief.

3. This principle is embodied in s. 14(1)(*a*) of the Specific Relief Act, 1963, which says that the following contract cannot be specifically enforced:
"A contract for the non-performance of which compensation in money is an adequate relief'."
4. *Jewan Lal* v. *Nilmani*, A.I.R. 1928 P.C. 80.
5. *Sarwarjan* v. *Fakhruddin*, (1911) 39 Cal. 232 P.C.

In *India*, **s. 15** (a) of the Specific Relief Act provides this by saying that "specific performance of a contract may be obtained by any party thereto".

The mutuality, however, refers to the time *when the contract was entered into*—"such that it (the contract) might, at the time it was entered into, have been enforced by either of the parties against the other of them" (*Fry*).

A contract for the purchase of immovable property was made by the guardian of a Mahommedan minor. The minor, attaining majority, sued the vendor for specific performance. The Privy Council dismissed the suit on the ground that since it was not within the competence of the guardian to bind the minor or the minor's estate by a contract for the purchase of immovable property, the contract was wanting in mutuality and, accordingly, the minor cannot, on attaining majority, obtain specific performance of the contract. The fact that the contract was advantageous to the minor is immaterial.[5]

Thirdly, the granting of the equitable remedy of specific performance, unlike the common law remedy of damages is **discretionary**[6] with the Court. This does not mean that it will be granted or refused arbitrarily, but that in granting this remedy the Court will consider the general fairness of the transaction and take into account such circumstances as *unfairness* on the part of the plaintiff, or *hardship* on the defendant that may result if specific performance is decreed—circumstances which would be immaterial in an action for damages. This characteristic of the equitable remedy is expressed by saying that specific performance will not be granted unless the contract is *certain, 'fair and just'*. Thus, in a contract for the sale of land where the vendor is unable to give a holding title to the purchaser the Court will, in the exercise of its discretion, refuse to decree specific performance of the contract, and leave the parties to the legal remedies. On the other hand, the Court would, in the exercise of its discretion, decree specific performance—where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance [s. 20(3), Specific Relief Act, 1963].

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the work should be decreed in favour of *A*.

Fourthly, specific performance will not be granted where it would involve a general superintendence which could not conveniently be undertaken by any Court of Justice.[7]

Further, there are certain classes of contracts of which specific performance will not be decreed at all, even though damages be insufficient. The Court will not grant specific performance where damages would fully compensate the plaintiff. But the converse of this proposition is not true. [*See* below.]

6. This principle is embodied in s. 20 of the Specific Relief Act, 1963.
7. This principle is embodied in s. 14(*a*) of the Specific Relief Act, 1963.

§ 117. Applicability of English principles in India.

While specific performance is an equitable remedy in *England*, it would not be quite correct to say so in *India*, inasmuch as the rules relating to specific performance are codified in the Specific Relief Act.

Hence,—

I. (*i*) In areas to which the Specific Relief Act applies and in matters which are dealt with by the Act, the provisions of the Act will prevail, in cases of any *divergence* between these provisions and the principles of English equity.[8]

(*ii*) But since the Specific Relief Act codifies (with modifications called for by Indian conditions) the English rules and practice relating to specific performance, a reference to the English rules, as they existed at the time of codification, would be a valuable guide in *interpreting* and *applying* the provisions of the Act.[9]

(*iii*) Where the Act is *silent*, the English principles and practice may be resorted to.[10]

II. In areas to which the Act does not apply, the Court has to act according to the principles of 'equity, justice and good conscience'.[11] In such areas, therefore, the provisions of the Act may be applied in so far as they are consonant with the principles of 'equity, justice and good conscience'.

III. The following are the main points on which the provisions of the Specific Relief Act differ from the English rules of equity:

1. When the title of the person agreeing to sell or lease is defective, s. 12 of the Act provides that only in *one* case will specific performance with abatement or compensation be granted, viz., where the part of the agreement which must be left unperformed bears only a small proportion to the whole in value. The complicated rules of English law relating to the subject are thus avoided.

The rule embodied in the sub-sec. (*e*) of s. 12 also differs from the English rule. Where the deficiency is so serious that the Court will not allow the vendor to claim specific performance, in *India* the purchaser will not be entitled to specific performance in respect of the property as is capable of being conveyed, unless he gives up his claim to compensation for the deficiency.

2. It has also been pointed out by the Judicial Committee that ss. 12 *et seq.*, taken together constitute a complete Code within the terms of which relief by way of specific performance of part of a contract may be brought, and although assistance may be derived from a consideration of cases upon

8. *Graham* v. *Krishna*, A.I.R. 1925 P.C. 45.
9. *Ardeshir* v. *Flora Sassoon*, A.I.R. 1928 P.C. 208.
10. *Akshyalingam* v. *Avayambala*, A.I.R. 1933 Mad. 386.
11. *Cf. Watson* v. *Ramchandra*, (1890) 18 Cal. 10 P.C.; *Waghela* v. *Masluddin*, (1887) 11 Bom. 551 P.C.

this branch of English jurisprudence, the language of the sections must ultimately prevail.[12]

3. The defence of 'mutuality', which prevails in England, has been abolished by the Specific Relief Act, 1963.

4. Since in this country, it is possible to have all the remedies for breach of an agreement in one Court, s. 24 of the Act provides that if a suit for specific performance is dismissed, no suit for compensation for a breach of that agreement shall lie.

5. In *England*, delay is a bar to specific performance and there is a large mass of cases relating to this doctrine. There is no provision in the Act relating to this subject, since, in India, under the provisions of the Limitation Act, 1963 (Art. 54), a suit for specific performance must be brought within 3 years from the date fixed for performance or, where no such date is fixed, when the plaintiff has notice that performance is refused. This provision "renders *the doctrine of laches inapplicable* to this kind of litigation" in India, and *mere* delay is no bar to specific performance [*see*, further, under s. 22, *post*, as to the circumstances when delay may be material, e.g., as constituting evidence of abandonment of the right].

§ 118. Contracts which can or cannot be specifically enforced.

I. **S. 10** of the Specific Relief Act lays down the cases in which a contract *may* be specifically enforced. It says—

"Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

(*a*) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(*b*) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

Explanation. Unless and until the contrary is proved, the Court shall presume (*i*) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and (*ii*) that the breach of a contract to transfer movable property can be thus relieved, except in the following cases—

(*a*) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(*b*) where the property is held by the defendant as the agent or trustee of the plaintiff.

II. **S.14(1)** of the Specific Relief Act, 1963, provides that the following contracts cannot be specifically enforced :

"(*a*) a contract for the non-performance of which compensation in money is an adequate relief;

12. *Graham* v. *Krishna*, (1925) 52 Cal. 335 P.C.

(*b*) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(*c*) a contract which is in its nature determinable;

(*d*) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise."

Reading ss. 10 and 14 together, we may now take up some notable kinds of contracts separately :

(*i*) **Contract to build or repair.**—The Court does not enforce the specific performance of contracts which involve continuous acts and require the watching and supervision of the Court. In particular, the Court does not, as a rule, order the specific performance of a contract to build or repair. This rule, is however, subject to important exceptions, and a decree for specific performance of a contract to build will be made if the following conditions are fulfilled: (1) that the building work is defined by the contract between the parties; (2) that the plaintiff has a substantial interest in the performance of the contract of such a nature that he cannot be adequately compensated in damages; (3) that the defendant has by the contract obtained possession of the land on which the work is contracted to be done.[13] (*Halsbury*, 2nd Edn., Vol. 31, para 365; *Fry*, 6th Edition, p. 48).[14]

(*ii*) **Agreement to lend money or to mortgage.**—An agreement to lend money[15] or to mortgage[16] cannot be specifically enforced.

The principle according to which equity refuses to specifically enforce an agreement to lend or mortgage is that damages would be an adequate remedy in such cases. But in some **exceptional circumstances,** when damages would not be an adequate remedy, an agreement to execute a mortgage would be specifically enforced. Thus,—

(*i*) Where *the loan has been actually advanced* either in whole or in part by the lender on a contract to execute a mortgage but the borrower refuses to execute the mortgage, specific performance of the contract can be obtained if the borrower is not willing to repay the loan at once.[17] In case of advance of a *part,* the lender must be ready and willing to advance the remaining sum according to the agreement.[18]

An agreement for a mortgage was made between the parties, the purpose of which was to arrange the terms upon which the respondent was to grant, for the true *amount of indebtedness,* whatever this might be, a mortgage of property,

13. *Wolverhampton Corpn.* v. *Emmons*, (1901) 1 K.B. 515.
14. *See* the Proviso to s. 14(3) (*c*) of the Specific Relief Act, 1963.
15. *South African Territories Ltd.* v. *Wallington*, 1898 A.C. 309; *Jaydayal* v. *Ram*, 17 Cal. 432 P.C.
16. *Western Wagon and Property Co.* v. *West*, (1892) 1 Ch. 271.
17. *See* s. 14(3)(*a*)(*i*) of the Specific Relief Act, 1963.
18. Fry, *Specific Performance*, 6th Ed., p. 24.

which had formerly been the subject of an agreement for sale and partnership between the parties. Following on the agreement a draft mortgage was in fact prepared purporting to carry out its terms, was approved by solicitors on behalf of the respondent, and the mortgage itself was engrossed and the stamp paid for by the respondent. *Held,* that the property being identified and the terms of the loan being fixed, the document constituted an agreement which equity would enforce, unless there were circumstances which the Court would consider sufficient to justify the unqualified refusal on the defendant's part to carry it out and that there was a valid agreement charging the property with whatever sum was actually due, together with interest.[19]

(*ii*) Where a loan has been advanced either in whole or in part by the lender on a contract to execute a mortgage but the borrower refuses to execute the mortgage, specific performance of the contract can be obtained if the borrower is not willing to repay the loan at once.[17,19]

(*iii*) **Contract of Service.**—Under section 14, clauses (*b*) and (*d*) of the Specific Relief Act, 1963, a contract of personal service cannot be specifically enforced by either the master or the servant. The bar applies both to affirmative and negative covenants and whether the employer is a private person or a company. The Court will not compel one man to *continue to employ* another in service of a personal nature, nor compel one to *serve* another.

A contracts to render personal service to *B*;

A contracts to employ *B* on personal service;

A, an author, contracts with *B*, a publisher, to complete a literary work;

B cannot enforce specific performance of these contracts.

Not only a contract of personal service, but any contract requiring personal skill, knowledge or volition of the parties, e.g., to marry, to paint a picture, to complete a literary work, or to sing or act at a theatre, will not be specifically enforced for 'to enforce specific performance of such contracts would require such a constant and general *superintendence* as cannot be conveniently undertaken by a Court of Justice'.

The foregoing general rule is not, however, applicable to employment under a *statutory* body.[20]

(*iv*) **Contract for the sale of goodwill.**—A contract for the sale of goodwill, unconnected with the business premises, cannot be specifically enforced not only by reason of the *uncertainty* of the subject-matter but also because of the *incapacity* of the Court to give directions as to what is to be done to transfer it. But where the goodwill is entirely or mainly annexed to the premises and the contract is for the sale of the premises and goodwill, the contract may be enforced (*Fry*, 6th Edn., p. 46).

19. *Jewanlal* v. *Nilmoni*, A.I.R. 1928 P.C. 80.
20. *Vaish Degree College* v. *Lakshmi Narayan*, A.I.R. 1976 S.C. 888.

(*v*) **Agreement to form Partnership.**—The Court does not, as a general rule, enforce an agreement to form and carry on a partnership, even though there is no particular objection on the ground of illegality, fraud or other impropriety. The Court does, however, enforce such an agreement by ordering the parties to execute a formal deed where the parties have *actually entered on performance* by carrying on the partnership business, and it also enforces a contract for the purchase of a share in partnership, or for an option to enter into partnership. (*Halsbury*, 3rd Edn., Vol. 36, para. 387). Again, it will be enforced if the agreement is to enter into a partnership for a fixed term.[21]

The *principle* is—

"If two persons have agreed to enter into partnership and one of them refuses to abide by the agreement, the remedy of the other is an action for damages and not, excepting in the case to be presently noticed, for specific performance. To compel an unwilling person to become partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be *nugatory,* inasmuch as it might be dissolved the moment after the decree was made ..... " (Lindley on *Partnership,* 11th Edn., p. 568).

A and *B* contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either *A* or *B* might at once dissolve the partnership.

(*vi*) **Agreement to refer to arbitration.**—All agreements to refer to arbitration are now governed by the Arbitration Act, 1940, which applies to the whole of India; and the remedy of any party to such an agreement when the other party is not willing to proceed to arbitration would be to *apply for filing the agreement in Court* under s. 21 of the above Act. Specific performance of such agreement does not lie.

Sub-sec. (2) of s. 14 of the Specific Relief Act, 1963, is as follows—

"Save as provided by the Arbitration Act, 1940 (10 of 1940), no contract to refer present or future differences to arbitration shall be specifically enforced; but if any person who has made such a contract (other than an arbitration agreement to which the provisions of the said Act apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

The effect of sec. 28 of the Indian Contract Act and the above provision of the Specific Relief Act, read with the related sections of the Arbitration Act, 1940, is that a person may not contract himself out of his right to have recourse to Courts of Law, but that, in the event of any party having made a lawful agreement to refer a matter of difference to arbitration as

21. *Scott* v. *Rayment*, (1868) 7 Eq. 112.

a condition precedent to going to Courts about it, the Courts will recognise the agreement and give effect to it by staying proceedings in the Courts.

§ 119. What the plaintiff must prove.

In a suit for specific performance, the plaintiff must show—

Firstly, that there was a concluded contract between himself and the defendant.

Secondly, that he had performed or was ready and willing to perform the terms of the contract on his part to be then performed.

Thirdly, that he was ready and willing to do all matters and things on his part thereafter to be done.[22]

A. **Concluded Contract.** The jurisdiction of equity for the enforcement of a contract by specific performance arose out of the fact that the common law remedy of damages for breach of the contract was inadequate in certain contracts, e.g., for the sale or lease of land. But, then, equity cannot intervene unless there has been, at law, a breach of contract, and there cannot be liability for a breach of contract where there has been as yet no concluded contract between the parties and something yet remains to be done to make it a legally binding contract. The maxim of equity is that—

"Equity will only enforce specific performance of a contract that is valid at law and provable in Courts of Law."

The determination of the question whether the agreement between the parties reached finality so as to be a concluded contract may not always be an easy one, as is demonstrated by the Supreme Court decision in *Durga Prasad* v. *Deep Chand.*[23]

The *facts* of the case, briefly, were as follows: As per agreement dated 7-2-1942 the vendor Nawab agreed to sell the disputed property to Deepchand, the plaintiff (respondent), for Rs. 62,000 and actually received Rs. 10,000 as earnest money the same day. Later, on 4-4-1942 the Nawab sold the same property to the appellant Durgaprasad for a sum of Rs. 72,000. It was also stated that the appellants had notice of the prior agreement. In the suit for specific performance, it was the case of the appellant that the plaintiff-respondent's agreement on 7-2-1942 was not a concluded contract as finality was never reached between the parties.

The Trial Court held that there was no concluded contract and hence the suit was dismissed. There was an appeal to the High Court and a Full Bench held that there was a concluded contract and the plaintiff-respondent's suit was decreed on condition of depositing Rs. 62,000 in

22. *Ardeshir* v. *Flora Sassoon,* A.I.R. 1928 P.C. 523.

23. *Durga Prasad* v. *Deep Chand,* A.I.R. 1954 S.C. 75. See also *Chandnee* v. *Katial,* A.I.R. 1964 S.C. 978.

Court which he did. The appellants who were subsequent purchasers appealed to the Supreme Court.

Agreeing with the High Court, the Supreme Court held that there *was* a completed contract on 7-2-1942, which the plaintiff-respondent was entitled to have specifically performed. In coming to this conclusion, the Surpreme Court relied on the fact that on 7-2-1942, the vendor Nawab executed a receipt for Rs. 10,000 as earnest money, in the following terms :

"Received this 7th of February, 1942, a sum of Rs. 10,000 by two cheques..... as *earnest money* out of Rs. 62,000 for *the contract of sale* (of the plaint property) through Babu Chhater Sen and executed a receipt. 7th February, 1942.

It is further declared that the sale deed would be executed within three months and that in default the *contract* would be deemed *cancelled."*

The Supreme Court held that this was the language of a completed contract.[23]

B. **Readiness to perform.**—In a suit for specific performance, the plaintiff must allege and (where the fact is traversed) prove a *continuous* readiness and willingness to perform the contract on his part, from the date of the contract *to the time of hearing.*

Where time is not of the essence of the contract, non-payment of the full purchase-money within the stipulated time is not a ground for refusing specific performance of a contract of sale.[24] Nevertheless, he must allege and prove his continuous readiness and willingness to perform the contract *as it really was,* and not as it was alleged by him to be.[25] Where the plaintiff alleges the terms to be different from those *proved* (e.g., as to the quantum of consideration), he cannot get specific performance.

But where the defendant has totally *repudiated* the contract and had failed to perform his part of the contract, it was useless for the plaintiff-vendor to make a formal tender of the purchase money, to show his readiness to perform the contract.[26]

On the other head, the plaintiff's unwillingness may be inferred from his *conduct* and repudiation by express words is not necessary for the present purpose. Thus, where it appears that the plaintiff was, without justification, insisting on absolute warranty of title or on the inclusion of property to which he was not entitled, *held,* he was not willing to perform his part of the contract and was not entitled to a decree for specific performance.[27] Plaintiff's repudiation, however, would not debar him from obtaining relief unless the terms he repudiated were *essential* and *considerable.*[28]

24. *Jamshed Khodaram* v. *Burjorji,* (1915) 43 I.A. 26 (33).
25. *Parul* v. *Saroj,* (1947) 82 C.L.J. 273.
26. *International Contractors* v. *Prasanta,* (1961) 3 S.C.R. 579.
27. *Bindeshri* v. *Jairam,* 9 All. 705 P.C.
28. *Ardeshir* v. *Flora Sassoon,* A.I.R. 1928 P.C. 523.

Failure to allege, and, where the allegation is controverted, to prove that the plaintiff has been continuously ready and willing to perform his part of the contract, leads to the dismissal of the suit for specific performance of the contract.[28]

The foregoing principles have been codified in s. 16(*c*) of the Specific Relief Act, 1963, in these terms—

"Specific performance of a contract cannot be enforced in favour of a person—

who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

Explanation.—For the purposes of clause (*c*),—

(*i*) where a contract involves the money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court;

(*ii*) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

What constitutes readiness to perform is a question of fact in each case; hence, the purchaser in a contract for sale need not, while suing for specific performance, necessarily produce the money in Court.[29]

Where it was proved that the plaintiff, in a suit for specific performance of an agreement to sell shares, was willing to pay the price on taking an advance from a Bank on the mortgage of his property, at the time when defendant repudiated the contract, *held* that there was ample material for concluding that the plaintiff was ready and willing to perform his part of the contract. It was not necessary for the plaintiff to produce the money or to vouch a concluded scheme for financing the transaction, i.e., to satisfy the Court, by working out actual figures, what specific amount the Bank would have advanced on the mortgage.[29]

Inordinate delay by the plaintiff in performing his part of the contract disentitles the plaintiff to specific performance.[30]

The acts, the performance of which or the readiness to perform which, must be shown by the plaintiff are—(*i*) past acts, as well as (*ii*) future acts. (*Fry*).

(*i*) Past acts : Plaintiff must show performance, on his part, of—

(*a*) all *conditions precedent;*

(*b*) the *express* and essential terms of the contract;

(*c*) the *implied* and essential terms;

(*d*) all *representations* made at the time of contract on the faith of which it was entered into.

29. *Bank of India* v. *Chinoy*, A.I.R. 1950 P.C. 90 (96).
30. *Sandhya* v. *Sudha*, A.I.R. 1978 S.C. 578.

But the plaintiff need not show performance of—

(*a*) *non-essential* terms;

(*b*) the terms of a *collateral* contract.

§ 120. Defences in a suit for specific performance.

The following defences, *inter alia*, are available in a suit for specific performance :

(*i*) That the agreement is not *enforceable by law*, either because the agreement is void, e.g., because of illegality, uncertainty, etc., or that it is voidable for want of consent, fraud, misrepresentation, mistake, undue influence, or because the contract is incomplete.

S. 9 of the Specific Relief Act, 1963, says—

"Except as otherwise provided herein, where any relief is claimed under this Chapter in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts."

(*ii*) That the plaintiff's *title* is not free from reasonable doubt (*see* s. 17, below).

(*iii*) That the circumstances under which the contract was made are such as to give the plaintiff an *unfair advantage* over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part [s. 20(2)(*a*), Specific Relief Act, 1963].

(*iv*) That the performance of the contract would involve some *hardship* on the defendant which *he could not foresee*, whereas its non-performance would involve no such hardship on the plaintiff [s. 20(2)(*b*), Specific Relief Act, 1963].

(*v*) There has been such a *delay* on the part of the plaintiff as constitutes evidence of *abandonment* of his rights.

(*vi*) That the plaintiff has not performed or has not been continuously *ready and willing* to perform his part of the contract (see p. 278, *ante*).

(*vii*) That the plaintiff has not performed his part of the contract within the stipulated time,—in cases *where time is of the essence of the contract.*

(*viii*) That the contract is of such a nature that it *cannot be specifically enforced,* e.g., because compensation would be an adequate remedy, or that it would require continuous supervision on the part of the Court, or that its performance depends upon the personal volition of the parties (s. 14).

(*ix*) That the *plaintiff is not competent* to sue for specific performance (s. 15).

(*x*) That the *defendant* is a person against whom *specific performance cannot be enforced* (s. 19).

(*xi*) That the plaintiff has *disentitled* himself to specific performance by his conduct, e.g., by abandonment or treating the contract as at an end, or *disabled* himself from performing his part of the contract, e.g., by selling away the property after the contract (s. 16).

(*xii*) That the defendant is *incapable* of performing his part of the contract, e.g., owing to a statutory bar preventing him from transferring his property; or the performance of the contract by the defendant has become *impossible* owing to destruction of the thing on the existence of which the performance depends according to the contract.

The more important of these grounds may be—

(A) **Uncertainty.**

1. Want of certainty in the terms of a contract is a ground for refusing specific performance. The certainty required must be a *reasonable* one with regard to the terms, parties, value or description of the subject-matter.

2. Uncertainty may arise in various ways:—(1) Where the contract is so vague in its general terms that the obligations of the parties are not ascertainable; (2) where the subject-matter of the contract is not sufficiently identified; (3) where the parties are not sufficiently identified; (4) where in the case of a sale, the price is not ascertained; and (5) where some material term of the contract is omitted. The completeness of a contract is to be determined at the commencement of the action, since it is at that time that non-performance must be incapable of justification. Performance is, however, ordered even if the contract is incomplete at that date, if the incompleteness is due to the default of the defendant and is such that it can be remedied or compensated; or where a term which is not then ascertained is capable of being ascertained by means available to the Court (*Halsbury*, 2nd Edn., Vol. 31, paras, 385, 386).

3. The general rule is that "there cannot be a contract to make a contract". This means that if parties to an agreement leave essential terms in it undetermined and to be settled by a subsequent contract, the agreement is not enforceable. But if an agreement is complete on essential matters, but silent on some detail, the Court will try to ascertain from intrinsic and external evidence those matters of detail and then enforce the contract, for what is required is '*reasonable* certainty'. Documents embodying a business agreement are often couched in terms which are intelligible to the parties but which appear to be vague to persons unfamiliar with business.[31] Hence,

"It is the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defect: but, on the contrary, the Court should seek to apply the old maxim, *verba ita sunt intelligenda ut res magis valeat quam pereat.* The maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so

31. Pollock on *Contracts,* 13th Ed., p. 36.

far as they are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for *future performance* over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted by the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain ....."[32]

4. Regarding the subject-matter of a contract, the principle is that the description must be such as to enable the Court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required and extrinsic proof is allowed in order to apply, not to alter or vary the written agreement.[33]

5. But as s. 21(*c*) of the Specific Relief Act says, a contract cannot be said to be uncertain where it is possible for the Court to ascertain the terms with **reasonable** certainty on proper enquiry. This also follows from s. 29 of the Contract Act which says—

"Agreements, the meaning of which is not certain, or capable of being made certain, are void."

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

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

(*c*) In a lease it was stipulated that if the lessees wanted more land for the purposes of the lease, the lessors should let such land "at a proper rate." The High Court refused specific performance on the ground that it was impossible to determine what was the proper rate. The Privy Council, reversing this decision, observed—"Their Lordships cannot think that in the present case the Court, upon a proper enquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome."[34]

(B) **Absence of title or title free from reasonable doubt.—S. 17** of the Specific Relief Act, 1963, provides—

"(1) A contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor—

(*a*) who, knowing himself not to have any title to the property, has contracted to sell or let the property;

32. *Hillas Co. Ltd.* v. *Arcos*, (1932) 147 L.T. 503 (515) H.L.
33. *Gaj Kumar* v. *Luchman Ram*, 14 C.L.J. 627 (632).
34. *New Beerbhum Coal Co.* v. *Buloram*, 5 Cal. 932 P.C.

(*b*) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court for the completion of that sale or letting, give the purchaser or lessee a title free from reasonable doubt.

(2) The provisions of sub-section (1) shall also apply, as far as may be, to contracts for the sale or hire of movable property."

(*a*) **Absence of title.**—1. Under sec. 55(2), Transfer of Property Act, the vendor impliedly contracts that (*i*) his interest subsists and (*ii*) that he has power to transfer. Under sec. 55(2), in all sales of immovable property, there is an implied covenant for title of the vendor. The title which the vendor must show must be a title in himself, or in those whom he has a legal or equitable right to require to join in the conveyance; he has no right to say that some other person is willing to enter into a contract, and to force the title of that other person on the purchaser (*Fry*, 6th Ed., p. 410).

1. S. 13 of the Specific Relief Act, 1963, lays down the rights of a purchaser or lessee against persons with no title or imperfect titles :

"(1) Where a person contracts to sell or let certain *immovable* property having *no title or* only an imperfect title, the purchaser or lessee (*subject to the other provisions of this Chapter*), has the following rights, namely:—

(*a*) if the vendor or lessor has subsequently to the *contract* acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(*b*) where the concurrence of other persons is necessary for validating the title, and they are bound to *concur at the request of* the vendor or lessor, the purchaser or lessee may compel him to procure such concurrence, *and when a conveyance by other persons is necessary to validate the title and they are bound to convey at the request of the vendor or lessor, the purchaser or lessee may compel him to procure such conveyance;*

(*c*) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a *valid discharge, and, where necessary, also a conveyance* from the mortgagee;

(*d*) where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his *want of title or* imperfect title, the defendant has a right to a return of his deposit, if any, with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest, *if any*, of the vendor or lessor in the property *which is the subject-matter of the contract.*"

(*i*) Cl. (*a*) of the above provision is founded on the well-known equitable principle[35] that if it is possible for a party to perform a contract when the time for performance comes, he cannot refuse to perform on the ground that he was incapable of performing the contract when it was executed.[36]

35. *Holroyd* v. *Marshall*, (1962) 10 H.L.C. 191 (211).
36. *Kalyanpur Lime Works* v. *State of Bihar*, A.I.R. 1954 S.C. 165 (169-70).

A agreed to grant a lease to *B* for 20 years from 1934, believing that a prior lease in favour of *C* had been terminated by forfeiture. In a suit brought by *C*, however, it was established that *C*'s lease was to subsist till 1948. In 1948, *A* got possession of the property but refused to perform the contract with *B* on the ground that it was not possible for him to grant a lease in favour of *B* in 1934 while another lease subsisted. *Held*, that the case was governed by s. 18(*a*), and that, read with s. 15, the result was that *B* was entitled to get a lease for the remainder of the term since 1948, i.e., for 6 years from 1948 to 1954, provided he relinquished all his claims to further performance.[36]

(*ii*) Cl. (*b*) lays down the rule that where in order to render the title of the purchaser valid, it is necessary to procure the concurrence of other persons to the conveyance, and those persons are bound to convey at the request of the vendor or lessor, then the purchaser or lessee may compel the vendor or lessor to procure the concurrence of such other persons. The other persons must be persons who are bound to do the act in question, i.e., persons against whom the vendor or lessor has a *legal right* to sue for its performance.

Where the subject-matter of an agreement sued upon was the same as the subject-matter of another deed of sale which mentioned the transfer of cultivating rights in *Sir* land along with a share of the village sold, but the suit agreement made no mention of the same, it was held that there was an agreement to transfer *Sir* rights also and an implied covenant on the part of the vendor to do all things necessary to effect such transfer, which would include an application to the Revenue Officer to sanction the transfer according to the provisions of the C.P. Tenancy Act. In this case, the Revenue Officer was bound to give the sanction if the conditions of the statute were satisfied. Hence, it was held that the Court had jurisdiction to make a decree for specific performance directing the vendor to apply for sanction and convey the property on receipt thereof and that such a decree was executable under O. 21, r. 32(5), C.P. Code.[37]

(*iii*) Cl. (*c*) lays down that where the vendor professes, that is, where he expressly declares that he is selling unencumbered property, or where he is guilty of fraudulent concealment, and if it is afterwards found that the property is mortgaged for a sum not exceeding the purchase-money, the purchaser may then compel the seller to obtain a conveyance from the mortgagee.

(*iv*) Cl. (*d*) contemplates a suit by the vendor or lessor against the purchaser or lessee for specific performance of his contract to purchase or take lease and if the suit is dismissed by reason of the imperfect title of the vendor or lessor, the defendant (purchaser or lessee) is entitled to an order in the same suit, for the return of his deposit with interest thereon and his costs, with a declaration of the lien for such deposit, interests and costs, on the right, title or interest of the vendor or lessor in the property agreed to be sold or let.

37. *Motilal* v. *Nanhelal*, A.I.R. 1930 P.C. 287.

(*b*) **'Title free from reasonable doubt'** means a marketable title. A marketable title, according to Turner, V. C., is "one which so far as its antecedents are concerned, may, at all times and under all circumstances, be forced upon an unwilling purchaser."[38]

"It is not right for the Court to force a title upon a purchaser which may mean that he is buying a law suit."[39]

"The doubt which may prevent the Court from compelling the purchaser to accept a title may be a doubt either of law or of fact; and as to law it may be connected with the general law of the realm, or with the construction of particular instruments; and as to fact, it may be in reference to facts appearing on the title or to facts extrinsic to it. Again, it may be about a matter of facts which admits of proof, but has not been, satisfactorily proved, or about such a matter as from its nature admits of no satisfactory proof." (*Fry*).

Thus,—

(1) Specific performance is refused if there is a great probability of litigation owing to the chance of adverse claims by *third parties* against the purchaser, and especially if the decision of such claims depends on disputed issues of fact. If, however, the probability of litigation against the purchaser is not great, the Court enforces the contract (*Halsbury*).

(2) Where the title depends on the particular words of an inartistic and ambiguous document, the Court treats the title as doubtful, but not if the difficulty can be solved by the application of general rules of construction, or if it depends on the general law of the land (*Halsbury*).

(3) Where the proof of the title depends on *doubtful facts* as to which no clear presumption in favour of title can be drawn, or as to which the presumption, though not necessarily conclusive, is adverse, the title is treated as doubtful; but the title is treated as not doubtful when there is a presumption in favour of the facts supporting the title, or when the objection amounts simply to a suspicion of bad faith, so that the presumption in favour of good faith may be invoked.[40]

"Where there is a real ground for suspicion of some matter which would cause a defect in the legal title to the property sold, the Court may, unless the suspicion be removed by sufficient evidence, pronounce the title to be too doubtful to be forced on the purchaser, or may at least do so if its acceptance would leave him exposed to the reasonable probability of adverse litigation."[41]

It was found that predecessors-in-title of the vendor had mortgaged the property to two persons. There was no reconveyance by the mortgagees but there was a release by one of them reciting that the other mortgagee had died leaving him as his sole heir. *Held*, that it was not a title free from reasonable doubt.[42]

38. *Pyke* v. *Waddingham*, (1852) 10 Hare 1.
39. Nichol's Contract, (1910) 1 Ch. 43 (C.A.).
40. *Krishnaji* v. *Ramchandra*, 33 Bom. L.R. 1377.
41. Williams on *Vendor & Purchaser*, 1906 Ed., p. 1011.
42. *Shrinivas* v. *Meherbai*, (1916) 21 C.W.N. 558 (P.C.).

It follows that the Court will *not* consider the title to be open to reasonable doubt in the following cases—

(*i*) Where the probability of litigation ensuing against the purchaser in respect of the doubt is not great. The Court refuses specific performance only if there is a "reasonable decent probability of litigation" (*Fry*).

(*ii*) Where there has been a decision adverse to the title by an *inferior* Court, whose decision the Superior Court considers to be *clearly* wrong.

(*iii*) Where the question depends on the *general* law of the land (*Fry*).

"As a general and almost universal rule, the Court is as much bound between vendor and purchaser, as in every other case, to ascertain and so determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined."[43]

(*iv*) Where the question, though one of construction, turns on a *general* rule of construction, unaffected by any *special context* in the instrument, and the Court is in favour of the title. (*Fry*).

(*v*) Where the doubt raised not on proof or presumption, but on a suspicion of *mala fides* (*Fry*).

(C). **Mistake.**—The general principles relating to mistake as a ground of defence in a suit for specific performance have already been discussed (p. 233, *ante*).

In *India*, ss. 20 and 22 of the Contract Act which lay down in what cases mistake would affect the validity of a contract.

When both parties are under a mistake as to a matter of fact, the agreement is void (sec. 20, Indian Contract Act); but a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact (sec. 22, Indian Contract Act).[44]

(*a*) The *common* error of both parties to a contract as to the substance of the transaction is a ground for refusing a specific performance altogether.

(*b*) When the error is that of the defendant, only, it may be an error contributed to by the plaintiff, in which case the plaintiff cannot enforce the contract. The error of the defendant may, on the other hand, be one to which the plaintiff did not contribute. In this case, the contract is not enforced if the mistake of the defendant was due to some *ambiguity*, or if there was some *misconception* on the part of an agent, or some special circumstances rendering the mistake of the defendant excusable, or where the *plaintiff must have known* of the defendant's mistake. If, however, the defendant cannot rely on some such excuse as the foregoing, and if the mistake is simply the result of his own carelessness, he is not allowed to evade performance simply by alleging that he made a mistake.

In short, unilateral mistake of the defendant is not allowed to defeat

43. *Alexander* v. *Mills*, 6 Ch. 131.
44. As to 'mistake', generally, see *ante*.

a suit for specific performance unless the circumstances are such that specific performance against the defendant would be 'highly unreasonable' [*Stewart* v. *Kennedy*, (1890) 15 App. Cas. 75 (105)], or would cause to the defendant 'hardship amounting to injustice' [*Tamplin* v. *James*, (1880) 15 Ch. D. 215].

A directs an auctioneer to sell certain land. *A* afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to *B*, who has no notice of the revocation. *B* cannot enforce specific performance of the agreement.[45]

(D) **Misrepresentation.**—Misrepresentation is defined in s. 18 of the Contract Act, 1872.[46]

Generally speaking, wherever the misrepresentation is such as would enable the defendant to sue for *rescission* of the contract (*see* p. 261, *ante*), it would also be a defence to resist specific performance. But in exceptional cases, a lesser degree of misrepresentation than is necessary for rescission may suffice for resisting specific performance, e.g., where there is a concealment of particulars, which ought, in fairness, to be stated (thus, where in a contract for sale of leasehold, the vendor did not mention that the lease contained covenants of an unusual nature).[47]

Thus, *fraudulent* misrepresentation of any kind, even where it would not be a ground for rescission of the contract by the defendant, and even *innocent* misrepresentation, however slight, made by the plaintiff in relation to the contract, is a ground for resisting specific performance by the defendant if he has been thereby induced to enter into the contract.

A positive misrepresentation made by a vendor, although innocently, with reference to the *quantity* or *quality* of the property affords a defence to a purchaser who has been *misled* by it, unless the case is one in which the vendor is able, either under the general principles of equity or by virtue of a special condition, to enforce the contract with compensation (*Ashburner*, 2nd Edn., p. 407).

Even when the misrepresentation relates to part only of the contract, performance of the entire contract is not compelled, even with compensation, against the defendant's will, though should the defendant consent, specific performance with compensation in respect the matter which is the subject of the misrepresentation is decreed. That the party making the representation believed it to be true is not material in an action of this nature, since it would be inequitable to allow a party to enforce performance of a contract obtained by a representation for which he is responsible and which he admits to be incorrect (*Halsbury*).

45. *Illustration* to s. 28(c) of the Specific Relief Act.
46. As to 'misrepresentation', generally, *see* pp.237-38, *ante*.
47. *Heywood* v. *Mallalieu*, (1883) 25 Ch. D. 357; *Dyster* v. *Randall*, (1926) Ch. 932.

(E) **Hardship.**—1. The Court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it, and this, although the party seeking specific performance, may be free from the least impropriety of contract. (*Fry*).

2. This principle is expressed in s. 20(2)(*b*) of the Specific Relief Act, 1963 as follows—

"When the performance of the contract would involve some *hardship* on the defendant *which he did not foresee*, whereas its non-performance would involve no such hardship on the plaintiff."

(*i*) *A*, a lessee of mines, contracts with *B*, his lessor, that at any time during the continuance of the lease *B* may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to *B*.

(*ii*) *A* contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.

(*iii*) *A* contracts with *B* to buy from *B*'s manufactory and not elsewhere all the goods of a certain class used by *A* in his trade. The Court cannot compel *B* to supply the goods, but if he does not supply them, *A* may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to *B*.

3. The essential elements for the application of this doctrine are—

(*i*) The hardship contemplated by this section is not mere improvidence or inadequacy; it means that the transaction must be unconscionable.

"The bargain must be so hard as to be unconscionable, so that its actual performance would, in the circumstances, be inequitable." (*Story*).

But unless the agreement is *unconscionable*, the Court will not refuse specific performance merely because it is *onerous*, in the absence of evidence of—(*a*) fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, or (*b*) that the plaintiff under the circumstances took an improper advantage of his position or the difficulties of the defendant.[48]

(*ii*) The hardship must be such as the defendant *could not foresee*, it is for the defendant to show that the hardship was the result not obviously flowing from the terms of the contract but that it *arose from something collateral*—from something which was not present to the minds of the contracting parties at the time of the contract.[49] The clause contemplates a case where the parties entered into the contract *without full knowledge* of

48. *Davis* v. *Maung Shew Goh*, 38 Cal. 805 P.C.
49. *Janukdhari* v. *Gossain Lal*, 37 Cal. 107.

the circumstances. The hardship must be the result of something concealed or latent.[50]

(*iii*) It follows from the foregoing principle that the Court will not help a defendant where the hardship has been brought about by the defendant himself. Hardship which flows from the conduct of the defendant or a hardship which simply results to the defendant because the purpose he had in view has failed, or because his speculation has proved unfortunate to him, cannot be set up by way of defence (*Halsbury*, 2nd Edn., Vol. 31, para, 421, p. 370).

(*iv*) The Court will relieve the defendant of hardship only if the non-performance of the contract would involve no hardship on the plaintiff. If, by the refusal of a decree for specific performance, a great hardship would be inflicted on the plaintiff, then the Court will pass a decree for specific performance without taking into consideration the hardship of the defendant.

(*v*) As a general rule, hardship to operate as a ground of defence must be such as existed *at the time of the contract,* and not such as has arisen subsequently from a change of circumstances; thus the Court may refuse to enforce an award on a submission to arbitration, if the submission involves hardship[51] but not on the ground of mere hardship and unreasonableness in the award itself.[52]

4. In some cases, however, hardship subsequently arising may be treated as a ground for refusing specific performance. This result generally follows, if the change of conditions, involving hardship to the defendant, has resulted *from the act of the plaintiff,* especially if the plaintiff's conduct operated as something in the nature of a trap (*Fry*).

1. Where a debtor agreed in writing to convey his property in liquidation of the whole debt due to him and subsequent to the execution of that document the creditor accepted a property of lesser value in part satisfaction of the obligation and in part payment of the sum due to him, and credited that part payment accordingly, a decree for specific performance of the contract by conveyance of the property cannot be granted.[53]

2. When parties had made a compromise comprising an agreement, the chief consideration for which was the execution of an *ekrar* by one party acknowledging the title (as adopted son) of the other party to the agreement and the former had subsequently by his conduct (in bringing a suit to set aside the adoption and alleging that the *ekrar* had been obtained from him by fraud) attempted and in a great measure succeeded in depriving the latter of the benefit of the agreement, it was held in a suit by the heirs of the party, who had so tried to rescind the agreement, that there had been a failure of consideration and the conduct referred to was at variance with and amounted to a subversion of the relation intended to

50. *Pichai Moideen* v. *Das & Sons*, A.I.R. 1933 Mad. 736.
51. *Nickels* v. *Hancock*, 1855, 7 De. G.M. & G. 300 C.A.
52. *Wood v. Griffith*, (1818) 1 Swan. 43.
53. *Khoo Sain Ban* v. *Tan Guat Tin*, A.I.R. 1929 P.C. 141.

be established by the compromise, and the specific performance of the agreement could not be enforced.[54]

(F) **Unfairness.**—1. Fairness is a general condition of equitable relief. It is, accordingly, provided in s. 20(2)(*a*) of the Specific Relief Act, 1963—

"(*a*) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant."

1. *A*, tenant for life of certain property, assigns his interest therein to *B*. *C* contracts to buy, and *B* contracts to sell, that interest. Before the contract is completed, *A* receives a mortal injury, from the effects of which he dies the day after the contract is executed. If *B* and *C* were equally ignorant or equally aware of the fact, *B* is entitled to specific performance of the contract. If *B* knew the fact, and *C* did not, specific performance of the contract should be refused to *B*.

2. *A* contracts to sell, and *B* contracts to buy, certain land. To protect that land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know of this circumstance, and *A* conceals it from him. Specific performance of the contract should be refused to *A*.

3. *A*'s property is put up to auction. *B* requests *C*, *A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*.

2. The unfairness may be in the terms of the contract itself or due to the surrounding circumstances, such as mental weakness, age, sex, poverty, illiteracy or intoxication. Even where there is no fraud or misrepresentation, the Court may refuse to grant the discretionary relief of specific performance where the bargain gives an unfair advantage to the plaintiff owing to the existence of such circumstances.

3. On the other hand,—

A Court will not refuse specific performance, in the absence of fraud or misrepresentation, where the contract, *though onerous, is not unconscionable*.[55]

Where no unfair advantage is taken, there cannot be any presumption of undue influence merely because the grantor was *weakened in brain* by advanced age or some other cause.[56]

4. The fairness of the contract, like all its other qualities, is to be judged of at the time *when the contract is entered into* and not by subsequent events. Thus, if at the time of making the agreement, both parties had equal means of knowledge, the fact that their relative position is subsequently discovered to be different from that supposed at the time does not affect the question.

54. *Srish Chandra* v. *Banomali Roy*, 31 Cal. 584 P.C.
55. *Davis* v. *Maung Shwe*, 38 Cal. 805 P.C.
56. *Harmes* v. *Hinkson*, (1946) 50 C.W.N. 895 P.C.

But in the case of contracts to sell at a price to be *fixed* or any other condition to be performed before they become absolute, the time when the contract *becomes absolute* and not the date of its execution, is the time to judge of its fairness (*Fry*, 6th Ed., p. 186).

(G) **Inadequacy of consideration amounting to fraud or undue advantage.**—1. Both in *England* as well as in *India* [s. 28(a)], mere inadequacy of consideration without any other circumstances that tend directly or indirectly to the conclusion of fraud or undue advantage is not of itself a sufficient ground for resisting a claim for specific performance of a contract. It may amount to great hardship, but that is no reason for relieving a man from a contract which he has willingly entered into.

"Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing specific performance." [*Coles* v. *Trecothic*, 9 Ves. 234 (246)].

2. Inadequacy of consideration may, therefore, be evidence of fraud in particular circumstances. It becomes material when the parties are of *unequal position*, viz., when a party is of unsound mind, or under age or ignorant etc. The bargain may sometimes be very unfair owing to a person's *ignorance* of the true value of the subject-matter of sale.

3. *Explanation 1* to s. 20(2) of the Specific Relief Act, 1963, says—

"Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (*a*) or hardship within the meaning of clause (*b*)."

In order to be a valid defence to a suit for specific performance, the inadequacy of consideration must be such that either (*a*) *by itself* it is evidence of fraud or undue advantage on the part of the plaintiff, or (*b*) it is evidence of fraud or undue advantage, when taken into consideration with *other circumstances*.

Thus, inadequacy of consideration in conjunction with the circumstances of the *indebtedness* or *ignorance* of the vendor are facts from which a Court may infer the exercise of undue influence.[57]

4. The adequacy or inadequacy of the consideration is, however, to be determined with reference to the circumstances existing when the contract was made and not with reference to subsequent events.[58]

(H) **Delay and Laches.**—1. In *India*, a period of limitation has been prescribed by Art. 54 of the Limitation Act, 1963, for suits for specific performance. It says that a suit for specific performance must be brought within—

"three years from the date fixed for performance, or if no such date is fixed, when the plaintiff has notice that performance is refused".

57. *Turnbull* v. *Duval*, 6 C.W.N. 809 P.C.
58. *Ganga Baksh* v. *Jagat*, 23 Cal. 15 P.C.

2. Having regard to the fact that a particular period has been prescribed by the Limitation Act for bringing a suit for specific performance of a contract, the English law of delay and laches disentitling a plaintiff to specific performance would not apply in India and **mere delay** would not be a ground for refusing specific performance unless time was of the essence of the contract.

In the Statement of Objects and Reasons of the Specific Relief Bill, 1877, it was thus observed—

"The right to enforce a contract specifically may, in England, be lost by delay in resorting to the Court and a large mass of cases exists relating to this doctrine. The Bill contains no rules on the subject, for in India the provisions of the Limitation Act that suits for specific performance must be brought within 3 years from the date on which the plaintiff has notice that performance is refused, renders the doctrine of laches inapplicable to this kind of litigation."

3. But delay, short of the statutory period of limitation, will be a ground for refusing specific performance, if—

(*a*) the circumstances are such that the delay may properly raise an inference that the plaintiff has **waived** or **abandoned** his right; or

(*b*) on account of the delay there has been a **change of circumstances** that the grant of specific performance would prejudice the defendant, e.g., where the delay has induced the defendant to alter his situation; or

(*c*) on account of the delay, the rights of **innocent third parties** have intervened.[59]

(I) **Time, when of essence of the contract.**—Delay in bringing the suit for specific performance is to be distinguished from **delay in performance of the contract.**

1. As to when time is 'of essence of the contract,' *see* p. 224, *ante*. When time is construed to be of the essence of the contract, failure on the part of the plaintiff to perform his part of the contract within the fixed time will bar a decree for specific performance.

2. Where no time for performance is fixed in the contract, it is evident that neither party can insist on performance within a given date. Nevertheless, in such cases, the law requires (s. 46 of the Contract Act) that the contract must be performed within a *reasonable* time. The question 'what is a reasonable time' is, in each particular case, a question of fact. Failure of the plaintiff to perform his part within a reasonable time, even when no time is specified in the contract, bars specific performance.[60]

Plaintiff (purchaser) sued the defendant (subsequent purchaser from plaintiff's vendor) for specific performance. The plaintiff had been put in possession of the property in pursuance of the contract and the earnest money was paid by him. Defendant did not complete the sale notwithstanding ample notice of the plaintiff's

59. *See* p. 29, *ante*.
60. *Binda Prasad* v. *Kishori*, A.I.R. 1929 P.C. 195.

claim, until after institution of the suit. *Held*, plaintiff was entitled to succeed in the suit as he was entitled to completion of the sale within a reasonable time even though no date for performance was specified in the contract.[60]

§ 121. Agreement by or on behalf of minors in India.

(A) Under s. 11 of the Indian Contract Act, an agreement entered into **by a minor** is *void* and, therefore, such an agreement cannot be enforced by or *against* the minor.[61]

(B) As regards contracts executed by the **manager or guardian** of a minor's estate, there has been some uncertainty of judicial opinion.

In *Sarwarjan* v. *Fakruddin*,[62] the Privy Council enunciated the doctrine of *mutuality* thus:

"It is not within the competence of a manager of a minor's estate or of a guardian of a minor to *bind* the minor or the minor's estate by a contract for the *purchase* of immovable property; hence, as the minor ..... was not bound by the contract, there was no *mutuality* and the minor who has now reached his majority cannot obtain specific performance of the contract."

The result, in short, was that when the guardian or a manager of a minor's estate makes an executory contract for the purchase or sale of immovable property, the contract could not be specifically enforced either by or on behalf of the minor or against the minor or his property. Nor was the minor bound to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property, since the money can only be treated as having been paid as a security for the performance of a contract which is no contract at all. The only remedy in such cases was against the guardian personally.[63]

A partial exception was made in respect of contracts executed by guardians on behalf of minors in cases where the guardian has, under that law, the power to bind the minor by his or her acts,—by the Privy Council in their later pronouncement in *Subramanyam* v. *Subba Rao*.[64-65] This exception may be stated thus :

(*a*) In *Hindu law*, it is competent for the guardian of a minor or the manager of his estate to enter into a contract to alienate the minor's property if it is (i) for legal necessity, or (ii) for the benefit of his estate. In these cases, therefore, the contract is enforceable both by or against the minor and his estate.[64]

A Hindu mother contracted (as guardian) to sell her minor son's property for paying off her husband's debt. *Held*, the contract was specifically enforceable against the minor's property.[64]

61. *Mohori Bibi* v. *Dharmadas*, 30 Cal. 530.
62. *Sarwarjan* v. *Fakhruddin*, (1912) 39 Cal. 232 P.C.
63. *Krishnachandra* v. *Sait Rishaba*, A.I.R. 1939 Nag. 265.
64. *Subramanyam* v. *Subba Rao*, A.I.R. 1949 P.C. 141.
65. *Imambandi* v. *Mutsaddi*, A.I.R. 1918 P.C. 11; Mulla's *Mahommedan Law*, 1950 Ed., p. 301.

The Law Commission recommended the abolition of the doctrine of mutuality on the grounds stated below :

So far as Hindu law is concerned, it is now practically settled, following a later decision of the Judicial Committee,[64] that a guardian is competent to alienate the property of a minor for purposes of legal necessity or for the benefit of the estate and that, accordingly, such a contract is specifically enforceable both by and against the minor.

At any rate, where the personal law of a minor enables a valid contract to be made by a guardian on behalf of the minor, no question of mutuality really arises, for the contract is binding on both parties. The position is the same when such power is conferred by or under some other law, e.g., the Guardian and Wards Act, 1890.[66]

Contracts made by the guardian of a Hindu minor, whether for purposes of legal necessity or not, have now ceased to create any problem which might necessitate the application of the doctrine of mutuality, for the Hindu Minority and Guardianship Act, 1956 (XXXII of 1956) lays down the conditions under which the guardian alone can bind the minor's property, and enacts a specific prohibition that in no case can the guardian bind the minor by a personal covenant [s. 8(1)].

Of course, there is no such statutory provision for persons other than Hindus. But even under the Mahommedan law it has been held that a contract for the sale of a Mahommedan minor's property by his *de jure* guardian is enforceable both by and against the minor if it is for the minor's benefit.[67]

In pursuance of the above recommendation, sub-sec. (4) of s. 20 of the Specific Relief Act, 1963, has been enacted to abolish the doctrine of mutuality, in India :

"The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

The effect of the insertion of sub-sec. (4) is that even in the narrow sphere where it is not within the competence of the guardian to contract for the sale or lease of land of the minor so that such contract is not enforceable against the minor's estate, it would still be open to the contract being enforced on behalf of the minor if the contract is otherwise valid.

§ 122. Specific Performance of Part of a Contract.

1. S. 12 of the Specific Relief Act, 1963, constitutes a complete code within the terms of which relief by way of specific performance of a part of a contract must be sought in India, notwithstanding any rule of English law which may go against the language of these sections.

66. *Baburam* v. *Saidunnissa*, (1913) 35 All. 499.
67. *Imambandi* v. *Mutsaddi*, A.I.R. 1918 P.C. 11.

2. The general rule of equity is that the Court will not compel specific performance of a contract unless it enforces the whole contract. The *only* exceptions to this rule are contained in sub-secs. (2)-(4) of s. 12, as follows—

"(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either—

(*a*) forms a considerable part of the whole, though admitting of compensation in money; or

(*b*) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party—

(*i*) in a case falling under clause (*a*), pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and in a case falling under clause (*b*), the consideration for the whole of the contract without any abatement; and

(*ii*) in either case, relinquishes all claims to the performance of the remaining part of the contract and all rights to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Explanation.—For the purposes of this section, a party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance."

I. When the defect is *not substantial* or the part unperformed is small, the Court will decree specific performance at the instance of either party, with abatement or compensation for the deficiency. Thus,—

(A) When the *vendor* sues for specific performance and is in a position to convey *substantially* what the purchaser has contracted to get, the Court will decree specific performance with compensation (to the purchaser) for any *small* and *immaterial* deficiency, provided the plaintiff (vendor) has not, by misrepresentation or otherwise, *disentitled* himself to his remedy.[68-69]

Thus, if there is a misdescription of the property as regards its *character, quantity or title*, but the misdescription is but *slight* and *admits fairly of compensation*, equity will enforce the contract at the instance of either party, but only with compensation for the misdescription.

68. *Duncan* v. *Acton*, A.I.R. 1915 P.C. 113.
69. *Arun* v. *Tulsi*, A.I.R. 1949 Cal. 510.

Cases of this kind occur mostly where a *deficiency in acreage appears on measurement* after the contract is made. Here, if the purchaser will get substantially what he bargained for (e.g., a plot described to be 10 acres is found to be only $9\frac{1}{2}$ acres), the vendor can compel him to take it with compensation for the difference, i.e., at an abated price; and the purchaser also can compel the vendor to convey with a lower price.

Similarly, where the vendor's title fails in respect of a portion of the property which is *immaterial* to the possession and enjoyment of the rest, the purchaser will be compelled to accept the rest of the property with abatement in price.

(B) When the *purchaser* sues for specific performance, but the vendor is unable to perform the whole of the contract, the purchaser has the *option* to take all he can get and to have a proportionate abatement from the purchase money.[68] In such a case, the election is with the purchaser, for he cannot be compelled to take a defective title[69] or less than what he contracted for.

II. On the other hand, where the part unperformed—

(*a*) bears a large proportion of the entire contract; or

(*b*) does not admit of compensation in money,—specific performance of the part unperformed cannot be granted unless the plaintiff expresses his willingness, to pay the consideration stipulated for the *entire* contract for a *portion* only of the property.

The owners of three-fourths share purported to agree to grant a lease of the whole property. The owner of the remaining one-fourth share refused to fulfil the agreement. The lessee sued for specific performance in respect of the entire property, making the 4-anna co-sharers parties. *Held*, the Court could not decree specific performance even as to three-fourths share as the plaintiff had not relinquished his claim to performance of the part which the contracting party was incapable of performing.[70]

§122A. Specific Performance with Variation.

(A) *England.*

1. There are certain cases where the contract cannot be specifically enforced except without a variation. These are cases where there is a written contract but the writing does not represent the true agreement between the parties owing to fraud, mistake or misrepresentation. In this respect, however, a distinction has been made between a plaintiff seeking specific performance and a defendant resisting specific performance.

2. The leading case on the subject is *Woolam* v. *Hearn* [(1802) 7 Ves. 211], where it was laid down that though a defendant resisting specific performance may go into parol evidence to show that by *fraud* the written

70. *Pramatha* v. *Gastha*, A.I.R. 1932 P.C. 43.

agreement does not express the terms, a plaintiff cannot do so for the purpose of obtaining specific performance with a variation, unless the real agreement has been part performed, or the variation sought is favourable to the defendant.

3. If the plaintiff claims specific performance of a written contract, and the defendant pleads that the written contract was *subsequently varied by a verbal agreement* in certain respects, the plaintiff can admit of this variation in reply and ask the Court to enforce the contract as varied in the manner set out in the defence [*Smith* v. *Wheatcraft*, (1878) 9 Ch. D. 233].

But, in such cases, the plaintiff cannot himself sue for specific performance of the contract as verbally altered. Since the Judicature Act, 1873, however, the plaintiff may, in such cases, first obtain a rectification of the contract and then in the same action obtain specific performance.

(B) *India.*

1. In India, **s. 18** of the Specific Relief Act, 1963, mentions five particular cases in which the defendant may set up a variation to the contract sought to be enforced:

"(*a*) where by fraud, mistake of fact or *misrepresentation*, the *written* contract of which performance is sought it in its terms *or effect* different from *what the parties agreed to, or does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract;*

(*b*) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(*c*) where the parties have, subsequently to the execution of the contract, contracted to vary it."

2. If any of these circumstances exist, plaintiff cannot obtain specific performance of the contract except with the variation set up by the *defendant*.

(*a*) *A, B* and *C* sign a writing by which they purport to contract each to enter into a bond to *D* for Rs. 1,000. In a suit by *D*, to make *A, B* and *C* separately liable each to the extent of Rs. 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. *D* can obtain the performance sought only with the variation thus set up.

(*b*) *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*.

(*c*) *A* and *B* enter into negotiations for the purpose of securing land for *B* for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on *B*. The contract so framed cannot be specifically enforced;

(*d*) *A* contracts in writing to let a house to *B*, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to

be not worth repairing; so, with *B*'s consent. *A* pulls it down and erects a new house in its place, *B* contracting orally to pay rent at Rs. 120 *per mensem*. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

3. If the defendant succeeds in proving his plea, the plaintiff is put on his election either to have the suit for specific performance dismissed or to have it subject to variation. But the plaintiff cannot on similar grounds set up a variation.

But though, as in England, the plaintiff is not entitled to set up parol variation, in a suit for specific performance he may, on the ground of fraud or common mistake, have the contract first rectified and then have it specifically enforced.

§ 123. Who may sue for specific performance.

1. **S. 15** of the Specific Relief Act lays down that specific performance of a contract may be obtained by—

"(*a*) any party thereto;[71]

(*b*) the representative in interest, or the principal, of any party thereto; provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract, or the performance thereof by his representative in interest, or his principal, has been accepted by the other party;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family—any person beneficially entitled thereunder;[72]

(*d*) where the contract has been entered into by a tenant for life in due exercise of power—the remainderman;

(*e*) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant;

(*f*) a reversioner in remainder, where the agreement is such a covenant, and reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach;

(*g*) when a company has entered into a contract and subsequently becomes amalgamated with another company,—the new company which arises out of the amalgamation;

(*h*) when the promoters of the company have, before its incorporation, entered into a contract, for the purposes of the company and such a contract is warranted by the terms of the incorporation,—the company :

Provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract."

71. As to when a stranger to a contract may sue on the contract, *see* §112, *ante*.

72. As to family settlements and compromises, *see* p. 236, *ante*.

2. **S. 16** of the Specific Relief Act, on the other hand, specifies the persons in whose favour specific performance of a contract *cannot* be enforced. These are cases where the plaintiff has *personally* disentitled himself to the relief. These are—

(*a*) A person who could not recover compensation for its breach.

A, in the character of agent for *B*, enters into an agreement with *C* to buy *C*'s house. *A* is in reality acting, not as agent for *B*, but on his own account. *A* cannot enforce specific performance of this contract.

This clause should be read with sec. 236, Indian Contract Act which provides that—

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

(*b*) A person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed.

This clause mentions two grounds which would prevent a plaintiff from enforcing specific performance, viz.,—

(1) His incapacity to perform, which may arise either on account of his legal incapacity, e.g., insolvency (first illustration) or on account of his mental or physical inability or it may arise on account of his destroying the purpose of the contract, as in the second illustration.

1. *A* contracts to sell *B* a house and to become a tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. *A* becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

2. *A* contracts to sell *B* a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. *A*, without *B*'s consent, fells the trees. *A* cannot enforce specific performance of the contract.

In order that he may enforce specific performance, it is but just and proper that the plaintiff must show that he has performed all conditions precedent relating to the contract, if any, and that he has done, or is ready and willing to do, all that is his duty to do. Repudiation of obligation under a contract also disentitles a plaintiff to claim specific performance.

A obtained a mortgage decree against *B* for sale of Whiteacre and Blackacre. Thereafter Whiteacre was sold under a prior mortgage. *C* being desirous of purchasing Whiteacre cheap agreed to purchase *A*'s decree for Rs. 19,000 and thereby prevented *A*'s executors from bidding and getting Whiteacre cheap. Owing to causes for which *C* was not responsible, there was great delay in assigning *A*'s decree to him, and eventually it became barred and *C* thereupon refused to take an assignment or to pay the Rs. 19,000. In a suit by *A*'s executors for specific

performance, *held*, that the contract could not be specifically enforced, the plaintiffs being unable to perform their part of the contract.[73]

(2) Where the plaintiff *violates* any *essential* terms of the contract, that on his part remains to be performed, that is, when he is guilty of the breach of the most *essential terms* of the contract, by acting in contravention of the contract or at variance with it.

1. *A*, holding land under a contract with *B* for a lease, commits waste, or treats the land in an unhusbandlike manner. *A* cannot enforce specific performance of the contract.

2. *A* contracts to let, and *B* contracts to take, an unfinished house, *B* contracting to finish the house and the lease to contain covenants on the part of *A* to keep the house in repair. *B* finishes the house in a very defective manner; he cannot enforce the contract specifically, though *A* and *B* may sue eachother for compensation for breach of it.

The principle underlying this exception has been explained by *Fry* as follows—

"Where the plaintiff has been guilty of acts in contravention of or at variance with the essential terms of a contract or acts tending to the rescission of the contract and the subversion of the relation established by it, he is no longer entitled to the intervention of the Court in specific performance."

(*c*) A person who has already chosen his remedy and obtained satisfaction for the alleged breach of contract.

A contracts to let, and *B* contracts to take, a house for a specified term at a specified rent. *B* refuses to perform the contract. *A* thereupon sues for, and obtains compensation for breach. *A* cannot obtain specific performance of the contract.

(*d*) A person who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) has been made and was then in force.

Under this clause, a settlement made even without valuable consideration, that is, a voluntary settlement, is protected as against a subsequent purchaser for value with notice of settlement. That is, where the subsequent purchaser for value has notice of such voluntary settlement, he will be debarred from enforcing specific performance. The settlement must be *executed* and not executory.

§ 124. Against whom is specific performance available?

1. **S. 19** of the Specific Relief Act enumerates the persons against whom a contract may be specifically enforced. It runs thus—

"Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against—

(*a*) either party thereto;

73. *Jatindra* v. *Peyer*, 43 Cal. 999 P.C.

(*b*) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(*c*) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(*d*) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(*e*) when the promoters of a company have, before its incorporation, entered into a contract *for the purpose of the company and such contract is warranted by the terms of the incorporation*, the company :

Provided that the company has *accepted the contract and communicated such acceptance to the other party to the contract.*"

2. Cls. (*a*) and (*b*) embody the principle that equity will enforce specific performance of a contract not only against either party thereto, but also against any person claiming under either of the parties a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. English equity, of course, goes beyond the Indian law in so far as the former recognises an *equitable interest* in the land which is good against all who claim under the vendor except a purchaser for value of the legal estate without notice of the agreement. In *India*, though s. 54 of the Transfer of Property Act says that an agreement for sale does not create any interest in the land, the agreement is *enforceable* against subsequent transferees except a transferee for value without notice of the earlier contract,—not only under s. 19(*b*) of the Specific Relief Act, 1963, but also under s. 40 of the Transfer of Property Act. Section 91 of the Indian Trusts Act is also founded on the same principle.

1. *A* contracts to convey certain land to *B* by a particular day. *A* dies intestate before that day without having conveyed the land. *B* may compel *A*'s heir or other representative in interest to perform the contract specifically.

2. *A* contracts to sell certain land to *B* for Rs. 5,000. *A* afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*.

3. *A* contracts to sell land to *B* for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no inquiry of *B* relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest, and he may enforce specific performance of the contract against *C*.

4. *A* contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract, *A* dies intestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*.

3. The following conditions must be present in order that specific performance may be available against a subsequent transferee :

(*i*) The contract which is sought to be enforced against the subsequent

transferee must be a valid and completed contract which might have been enforceable against the original party to it.

(*ii*) The subsequent transfer must also be a completed one. If the title of the subsequent transferee is not complete, by the execution and registration of a valid instrument, there is no room for application of this rule.

(*iii*) The subsequent transferee must not have paid his money in good faith and without notice of the earlier contract.

(*iv*) Further, there is no scope for application of this rule where the subsequent transfer is, in fact, in pursuance of an *earlier* contract. In such a case, no equity arises by reason of notice or otherwise.

A made a contract for sale of a land with *B* on 22-10-1920, and another contract with *C* for the sale of the same land on 25-10-1920 *B*, however, obtained a registered conveyance from *A* on 28-10-1920. *C*, next, brought a suit for specific performance of his contract dated 25-10-1920 against *A*, joining *B* as a transferee subsequent to the agreement with *C*. *Held*, *C* was not entitled to obtain specific performance against *B*, as the transfer in his favour took place in pursuance of an *agreement* which was prior to the agreement with *C*.[74]

4. Notice includes constructive notice.[75] When circumstances connected with the vendor's previous dealings with the property, which were known to the vendee, were such as to put the latter on enquiry and when, if reasonable enquiries had been made, he must have become aware of a previous agreement for sale between the vendor and a third party, the vendee cannot claim protection against specific performance of the said agreement under s. 19(*b*) of the Specific Relief Act, 1963, as a transferee in good faith.[76]

"The section lays down a general rule that the original contract may be specifically enforced against a subsequent transferee, but allows an exception to that general rule, not to the transferor, but to the transferee, and it is clearly for the transferee to establish the circumstances which will allow him to retain the benefit of a transfer which, *prima facie*, he had no right to get."[77]

5. In a purchaser's suit for specific performance against the vendor and a subsequent transferee with notice of the contract with the plaintiff, the proper form of a decree would be to direct specific performance of the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff.[78]

6. Cl. (*c*) is based on the principle—

"Equity will enforce specific performance of the contract of sale against persons

74. *Fatma Bibi* v. *Saadat Ali*, A.I.R 1930 P.C. 99.
75. *See* pp. 47 *et seq.*, *ante*.
76. *Aslam Khan* v. *Mian Feroze*, (1932) 37 C.W.N. 71 P.C.
77. *Bhupnarain* v. *Gokul*, (1938) 38 C.W.N. 393 (398) P.C.
78. *Durga Prasad* v. *Deep Chand*, (1954) S.C.A. 934.

claiming under a title, which though prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor, e.g., voluntary alienees, joint tenants claiming through survivorship, and remainderman." (*Dart*).

1. *A*, the tenant for life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is a tenant for life, contracts to sell the estate to *C*, who has notice of the settlement. Before the sale is completed, *A* dies. *C* may enforce specific performance of the contract against *B*.

2. *A* and *B* are joint tenants of land, whose undivided moiety of which either party may alienate in his lifetime, but which, subject to that right, devolves on the survivor. *A* contracts to sell his moiety to *C* and dies. *C* may enforce specific performance of the contract against *B*.

§ 125. Damages in suit for specific performance.

(A) *England.*

1. In a suit for specific performance, the plaintiff may ask for damages in the alternative, or in addition to, specific performance of the contract. In the words of *Fry*, the plaintiff may say—

"Give me specific performance and with it give me damages or in substitution for it give me damages, or if I am not entitled to specific performance, give me damages by reason of the breach of the agreement."

2. Damages can be given by the Court *in lieu of* specific performance only where specific performance could have been granted, but there are reasons why it would be better to give damages [*Lavery* v. *Pursell*, (1888) 39 Ch. D. 508]. The second paragraph of s. 19 of the Specific Relief Act embodies this principle—

"If in any such suit the Court decides that specific performance *ought not to be granted* but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach it shall award him compensation accordingly."

3. Damages are awarded in *addition to* specific performance in cases where the Court considers that specific performance itself is not sufficient to meet the justice of the case, and that the plaintiff should get some monetary compensation also for the breach of some incidental stipulation or for some incidental loss due to the misconduct of the defendant *(Jacques* v. *Miller*, 6 Ch. D. 153).

(B) *India.*

1. In *India*, the Court's power to award damages in a suit for specific performance is laid down in s. 21 of the Specific Relief Act, 1963, which says—

"(1) Any person suing for the specific performance of a contract may also claim compensation for its breach, either in addition to, or in substitution for, such performance.

(2) If in any such suit, the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

(3) If in any such suit, the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.....

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section."

2. The different alternatives open to a party on a breach of contract by the other party have been explained as follows by the Privy Council.[79]

Where there is an alleged breach of contract, the plaintiff may,

(*a*) treat the contract *as at an end* and sue for damages. No further performance by him is either contemplated or has to be tendered. If he sues for damages, whatever be the result, a subsequent suit for specific performance would be barred under sec. 24; or,

(*b*) treat the contract as *subsisting* and sue for specific performance and damages, *in addition to or in substitution for* specific performance as contemplated by s. 21. In such a case, the plaintiff must aver and prove his readiness and willingness to perform his part of the contract up to the date of hearing of the suit. Under s. 21, the Court has power to award compensation only in cases where the Court could have granted specific performance but refuses in its discretion to do so. It the plaintiff debars himself by his action from getting specific performance, the Court has no power in a suit as framed under s. 21 to grant damages.

(*i*) The conditions according to which damages may be awarded by the Court in addition to specific performance are—

(1) The Court decides that specific performance ought to be granted, but—

(2) the justice of the case requires that not only specific performance but also some compensation for the breach of contract should also be given to the plaintiff.

(*ii*) The circumstances in which the Court would award damages in *lieu* of specific performance are—

(*a*) Specific performance *could have been* granted but in the circumstances of the case, the Court in its discretion considers that it would be *better* to award damages instead of specific performance.

(*b*) Though specific performance is refused, plaintiff is *entitled* to compensation for breach of the contract.

If the circumstances are such that specific performance *could not* be granted, e.g., where the plaintiff has *disentitled* himself to specific

79. *Ardeshir* v. *Flora Sassoon*, A.I.R. 1928 P.C. 208.

performance, damages cannot be awarded under s. 21 in lieu of specific performance.

3. Where damages are claimed in the alternative or as an additional relief, in the suit for specific performance itself, the Court has no power, without sufficient amendment of the plaint, to award damages, where the plaintiff abandons his claim to specific performance, or otherwise *disentitles* himself to a decree for specific performance.[79]

It is only where the Court could have granted specific performance but refuses in its discretion to grant it, that damages may be awarded under s. 21.[79]

The plaintiff, after having brought a suit for specific performance and damages as contemplated by s. 19, wrote a letter to the defendant that he would not press for specific performance but would ask for damages for breach only and *he was not ready* with the price of the property which he had agreed to purchase. In the circumstances, the Privy Council held that the plaintiff had debarred himself from performing his part of the contract and thus could not get any damages in the suit. Although at the time of the hearing, the plaintiff was allowed to amend his plaint, the amendment was held to be not sufficient to convert the suit to one for damages *simpliciter*.[79]

4. It is not obligatory for a plaintiff to ask for damages in a suit for specific performance. He may bring a specific suit for damages, except where his suit for specific performance has been dismissed. S. 24 of the Specific Relief Act says—

"The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be....."[80]

5. The *Explanation* to s. 19 enacts a rule which differs from the corresponding rule in England. It says that in a suit for specific performance, the mere fact that the contract has become incapable of specific performance does not preclude the Court from exercising the power conferred by this section and passing a *decree for damages*; but the incapacity to perform must be one arising from the omission or neglect of the party, who was quite capable of performing his contract, if he had only thought fit to do so. For instance,

"the *time* for performing the contract *may expire*, without the promisor fulfilling his promise, though he might have done so had he so chosen. So again, the defendant may have *sold away, to a bona fide* purchaser without notice, the property which he had previously agreed to sell to the plaintiff. In such cases, the Court will award compensation for the non-performance of the contract" (*Banerji's Specific Relief Act.*).

80. This provision differs from the English law, where the dismissal of a bill in *equity* for specific performance would not bar an action at *law* for damages.

The impossibility contemplated by this *Explanation* must be one *arising subsequently to the contract* (Section 15 of this Act) and not existing at the same time when the contract is made; but section 56 of the Indian Contract Act contemplates initial impossibility which renders the contract void.

§ 126. The Doctrine of Part Performance.

1. As has been already stated, the doctrine of part performance operates as an exception to the principle that "Equity will only enforce specific performance of a contract that is valid at law and provable in Courts of Law." It was by virtue of this doctrine *"Equity would sometimes enforce an agreement which, owing to the absence of any written note of it, could not be relied on in a Court of Law" (Maitland).* Section 4 of the Statute of Frauds (now re-enacted in s. 40, L.P.A.) declared that 'no action can be brought upon any contract or sale of lands or interest in lands unless the agreement, or some memorandum thereof, is in writing and signed by the party to be charged therewith or by his duly authorised agent'. The strict application of this provision led to great *hardship* in cases where a *parol* agreement relating to land had been *partly performed* by one party to the contract. In such cases, therefore, equity intervened, and granted specific performance of the agreement, holding that part performance *took the case out of the Statute.*

2. The ground upon which this doctrine of part performance was based was the **prevention of fraud.** *The Statute of Frauds only laid down a rule of evidence and did not affect the validity of the contract,* its object being to prevent fraud by requiring a written proof of transaction of an important nature [cf. *Britain* v. *Rossiter,* (1879) 11 Q.B.D. 123]. But where one party had executed his part of the agreement in the confidence that the other party would do the same, it would be a *fraud* on the part of the other not to perform his part of the contract; and in such a case, to allow the latter to plead the Statute in defence would be to defeat the very object for which the Statute was passed. Equity, therefore, would not allow the Statute of Frauds to be used as 'an engine of fraud', and would regard part performance itself as a cogent evidence of the existence of some agreement relating to the land, and, consequently, in an action of specific performance, allow such agreement to be proved by *oral* evidence, notwithstanding the Statute of Frauds. In *Maddison* v. *Alderson* [(1883) 8 A.C. 467], Lord Selbourne explained the principle thus—

"In a suit founded upon such part performance, the defendant is really charged upon the equities resulting from the acts done in *execution of* the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have contemplated would follow. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached, cannot be admitted unless the contract is regarded."

3. In applying this doctrine, however, equity has confined it within strict limits by laying down the *conditions necessary for its application :*

(*a*) The act of part performance must have been done by the party who seeks to enforce the parol agreement; part performance by the defendant will not take a case out of the Statute.

(*b*) As to the **acts** that will be **deemed sufficient part performance** on the part of the plaintiff, it has been settled that they must be of such a nature that if stated, they would themselves infer the existence of some agreement, of which parol evidence would then be admissible. Thus, in the leading case of *Maddison* v. *Alderson* [(1883) 8 A.C. 467],[81] it has been held that in order to constitute part performance, the act must be **unequivocally referable** to the agreement set up by the plaintiff. For example, marriage is not *per se* deemed a part performance of an oral contract in consideration of marriage. If *B* marries *A*'s daughter on a verbal promise by *A* that he will settle Blackacre upon *B* in consideration of *B*'s marrying *A*'s daughter, the marriage will not be held as an act of part performance, for the fact of marriage may be explained as being due to other reasons apart from the alleged promise. For the same reason, acts merely introductory to or ancillary to the agreement, such as the payment of a part or even the whole of the purchase money, or delivery of the abstract of title, are not sufficient part performance of an oral contract for sale of land. But *delivery* of possession under the contract will be deemed part performance in an action by the vendor, and, conversely, *acceptance* of possession by him. In some cases, *retention of possession, when coupled with other circumstances, may constitute part performance,* e.g., when a tenant *holding over* after the expiry of a lease lays out money on the faith of an agreement for a fresh lease, he will be allowed to produce oral evidence of such agreement. Indeed, it has been stated that '*acts held sufficient for the purpose of part performance have been almost universally acts of possession or use of land.*' *Maitland* similarly observes that the only things that can be relied on as acts of part performance in contracts for the sale or lease of land are delivery and acceptance of possession, and in some cases retention of possession of the land. The principle underlying this doctrine has been explained in *Britain* v. *Rossiter* [(1882) 11 Q.B. 123] thus—

"The true ground is that if a Court found a man in occupation of land or doing such acts with regards to it as would *prima facie make him liable at law to an action of trespass, the Court would hold that there was strong evidence that a*

81. *Maddison* v. *Alderson.*—*A* induced *Miss M* to serve him as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a *verbal* promise to make a will leaving her a life estate in land. He afterwards died, leaving such a will but the will failed for want of attestation. *Held,* that there was no evidence of a contract and that the fact of *M*'s serving the deceased without wages could not be relied on as a part performance to take the case out of the Statute, for service without wages might be explicable on other grounds,—it was not *exclusively and unequivocally* referable to the contract alleged.

contract existed, and would thereafter allow verbal evidence to be given to show the real circumstances under which possession was taken."

(*c*) The acts relied upon must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.

(*d*) The contract must not be such as equity would not decree specific performance thereof had it been in writing.

§ 126A. Part Performance in India.

1. While in England the Statute of Frauds is a bar to an action when an agreement relating to land is not in *writing*, in India *registration* is necessary to the validity of a transfer of immovable property in some cases under the Transfer of Property Act, and the Indian Registration Act. But though the position is different, the need for prevention of fraud is just as great as or even greater than in England. Hence, by analogy, the doctrine of part performance has been applied in India to contracts of transfer of immovable property, which, though required to be registered, *have not been registered*. The doctrine has now been given statutory recognition by legislation in 1929, simultaneously adding two new sections, s. 53A to the Transfer of Property Act, and s. 27A to the Specific Relief Act, and a Proviso to s. 49 of the Indian Registration Act.

2. Section 53A of the Transfer of Property Act provides—

"Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

The conditions necessary for the application of s. 53A are—

(1) The agreement should be in writing[82] signed by the party or his

82. If there is a written contract of any kind, and the intended lessee has been in possession in pursuance thereof, the lessor cannot recover possession or eject the party to the contract on the ground that there is not formal agreement for a lease. In such a case, the terms of the lease can be gathered from the written contract, together with the relevant evidence [*Manek Lal* v. *Hormusji*, A.I.R. 1950 S.C. 1].

agent whom it is sought to bind; and must be for consideration,—as no equities arise in favour of volunteers.

(2) The transferee should in part performance of the agreement take possession of the property; or if already in possession, should continue in possession and do some act in furtherance of the contract.

The acts constituting part performance under the section are two-fold—(*a*) The transferee must take possession of the property or any part thereof, in pursuance of the contract; or (*b*) if the transferee is already in possession, he must continue in possession and must do something more *in furtherance of the contract,* e.g., payment of rent or spending money on improvements in performance of the agreement.

Where the transferees have never been in possession, either actual or constructive, and had not been put in such possession or allowed to continue in possession in pursuance of such agreement, the section has no application.[83]

(3) The transferee should perform or be willing to perform his part of the bargain as contained in the writing.

(4) When the contract has thus been partly performed, all rights and liabilities under the contract should arise and be enforceable as between the parties to the contract notwithstanding that the transaction has not been completed according to law.

(5) The application of the doctrine shall not affect the rights of a transferee for consideration, who has no notice of the contract or of the part performance thereof. This means that part performance does not do away with the necessity of registration altogether. The section merely lays down that convention between the transferor and transferee will be operative but it does not give any *title* to the transferee. Title will have to be completed by execution and registration of a deed of transfer. Again, part performance will be of no avail against a *bona fide* transferee for value from the transferor who has no notice of the transaction.

3. The proviso to s. 49 of the Registration Act provides—

"Provided that an unregistered document affecting immovable property and required by this Act or the T.P. Act, 1882, to be registered may be received (*i*) as evidence of a contract in a suit for specific performance under Ch. II of the Specific Relief Act, 1877....."

§126B. Difference between the English and Indian law of part performance

The Indian law of part performance differs from the English law in the following respects :

(*i*) Firstly, the agreement must be in **writing**, otherwise part perfor-

83. Thus, a person in whose favour an unregistered lease has been executed, cannot claim possession from the lessor on the basis of such unregistered lease. S. 53A is available only as a defence to a lessee who has obtained possession in pursuance of the unregistered lease and not as conferring a right on the basis of which the lessee could claim any rights against the lessor [*Delhi Motor Co.* v. *Basrurkar*, A.I.R. 1968 S.C. 794].

mance will be of no help (merely oral agreements have been excluded in India on the ground that they might lead to perjury). If the contract be **oral,** the doctrine is inapplicable. The English equitable doctrine of part performance as laid down in *Maddison* v. *Alderson* is applicable to India only so far as it has been codified in s. 53A, Transfer of Property Act. As it appears from the Privy Council cases, *Ariff* v. *Jadunath*[84] [(1931) 54 Cal. 1235 P.C.] and *Pir Bux* v. *Md. Tahar*[85] [(1934) 39 C.W.N. 34 P.C.]—apart from the provisions of the above section—part performance will be of no avail as an exception to the statutory requirement of registration.

(*ii*) S. 53A of the T.P. Act does not lay down a rule of *evidence* for a suit for specific performance,[86] but is intended merely to protect the interest of a transferee who has taken possession in part performance of an unregistered contract for transfer of immovable property. Section 53A says

84. *Ariff* v. *Jadunath.*—In 1913, *A* having *verbally* agreed with *J* to grant him a permanent lease of a plot of land, let him into *possession.* In 1918, *A* refused to grant the agreed lease, and in 1923 instituted a suit to eject *J* after a month's notice to quit. *J* pleaded that he was not liable to ejectment as the agreement had been part performed. *Held,* that *A* was entitled to eject, for "the English equitable doctrine of part performance referred to in *Maddison* v. *Alderson,* affecting the provisions of an English Statute as to the right to sue upon a contract, cannot be applied so as to create, *without writing,* an interest, which s. 107 of the Transfer of Property Act enacts, can be created only by a registered instrument." [In this case, the equity in *Walsh* v. *Lonsdale* (*cf.* p. 16) was also sought. But it was held that that was inapplicable, because *J*'s right to sue for specific performance had been barred (in 1921) before the commencement of this suit].

85. *Mia Pir Bux* v. *Md. Tahar.*—The Collector of Sukkur sold a plot of land to *A,* an Afghan refugee, on condition that he should execute an agreement with *B* to sell the plot, to *B* at cost price if *A* should within a stated time receive permission to reside at Quetta; *A* got permission within time stated but nevertheless failed to sell the plot to *B. B* approached the Collector who in 1920 illegally cancelled the grant to *A,* evicted him, and put *B* into possession. *A* filed a suit in 1921 to recover the plot. Before the suit was decided, *B*'s right to sue for specific performance had become barred by limitation. The Collector's order had been declared by the Court below as illegal, and that the plaintiff was, therefore, the registered proprietor of the land. *Held,* by the Privy Council that *B* was liable to be ejected.

Lord Macmillan observed, "By s. 54 of the Transfer of Property Act, a transfer by sale of immovable property of the value of Rs. 100, and upwards can be made only by a registered instrument...The section expressly enacts that a contract for the sale of immovable property 'does not itself create any interest in or charge on such property'. There is, therefore, no room for the application of the English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate ...The English equitable doctrine of part performance, as Lord Russel explained in *Ariff* v. *Jadunath,* is not available in India by way of defence to an action of ejectment (apart from the subsequent statutory provision in s. 53A, T.P. Act)....The result is that in cases not governed by s. 53A of the T.P. Act, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable, the defendant may found upon it to have the action stayed and by suing for specific performance obtain a title which will protect him from ejectment." (But after the right to specific performance is time-barred, part performance of the contract is of no avail, unless s. 53A of the T.P. Act is applicable).

86. It should be noted that since the introduction of the Proviso to s. 49 of the Indian Registration Act, an unregistered contract, which is required to be registered, may be enforced by a suit for specific performance [*Skinner* v. *Skinner,* (1929) 33 C.W.N. 1150 P.C. is superseded by these amendments], independent of the provisions of s. 53A of the Transfer of Property Act. Hence, for a suit for specific performance it is immaterial whether the unregistered contract has been part performed or not.

that if in such a case the contract is written, then the transferor and persons claiming under him shall be debarred from enforcing against the transferee any right in respect of the property other than a right expressly provided by the terms of the contract.

The provision in s. 53A is thus narrower than the English rule inasmuch as the right conferred on the transferee by this section is merely *passive.* The section merely imposes a statutory bar on the transferor who seeks to eject the transferee; it confers no active title and no right of action on a transferee in possession under an unregistered contract of sale. The right conferred by the section is a right available only as a defendant to protect his possession.[87]

(*iii*) It is also to be noted that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right (as in England): it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons.[88] Consequently, where under a contract of transfer of immovable property, requiring registration but unregistered, the transferee has taken possession; a third party cannot say that there has been a valid and effective transfer. Such an ineffective transfer, thus, cannot constitute a breach of a covenant with the lessor not to transfer and cannot cause a forfeiture by reason thereof.[88]

(*iv*) The English doctrine of part performance is not applicable to India where the conditions of s. 53A are not satisfied.[89]

§ 127. Part performance distinguished from analogous equities.

I. **Walsh** v. **Lonsdale** and **Maddison** v. **Alderson.**—The doctrine of part performance, enunciated in *Maddison* v. *Alderson,* is akin to the rule of equity in *Walsh* v. *Lonsdale*[90] in that both seek to give relief, under certain circumstances, to parties who have entered into an agreement to transfer immovable property, but a formal conveyance has not yet been executed.

But there are important points of **difference** between the two doctrines. The doctrine of *Walsh* v. *Lonsdale* is that if the defendant in an action of ejectment had a subsisting *right to enforce specific performance* of the contract entitling him to remain in occupation of the land, it would furnish a complete defence to the action. The equity in *Maddison* v. *Alderson,* on the other hand, affords relief in cases where the agreement *cannot be proved or specifically enforced* for want of any evidence in writing as required by the Statute of Frauds. In other words, in order to invite the application of *Walsh* v. *Lonsdale,* there must be a contract which is

87. *Probodh* v. *Dantmara Tea Co.*, (1939) 44 C.W.N. 145 P.C.
88. *S.N. Banerji* v. *K.L. & S. Co.*, (1941) 46 C.W.N. 374 P.C.
89. *Chaliagulia* v. *Bappana*, A.I.R. 1964 S.C. 877.
90. The doctrine in *Walsh* v. *Lonsdale* does not apply in INDIA (*see* p. 36, *ante*).

capable of being legally proved, and a subsisting right to enforce the contract specifically. Thus, it would not apply if the contract be oral, for the Statute of Frauds prevents it from being legally proved. Again, though the rule is attracted only if the intending lessee has entered into possession, equity does not depend on the fact of part performance, but on the fact that the contract is a valid contract which is specifically enforceable *at the time when the subsequent action is brought.* On the other hand, the equity in *Maddison* v. *Alderson* is invoked to aid the plaintiff in a suit for specific performance or the defendant in a suit for ejectment where the contract sought to be enforced is a parol contract, not capable of being proved at law, but which has been performed in part by delivery of possession or some other act which is unequivocally referable to the contract itself. *Maddison* v. *Alderson,* thus, gives the defendant higher rights, making it unnecessary for him to have specific performance of the contract.

II. **Part Performance and Equitable Estoppel.**—1. The doctrine of part peformance has to the distinguished from that of 'estoppel by acquiescence'. Where *A* builds on land which he thinks is his, but is really *B*'s, and *B* knowing of *A*'s mistake, encourages *A* to build either directly or by abstaining from asserting his legal right, equity will intervene for the protection of *A*, and prevent *B* from ejecting *A*. This rule is known as that of equitable estoppel, and is usually referred to as the rule in *Ramsden* v. *Dyson,* (1865) 1 H.L. 129. The doctrine of part performance, as it is propounded in s. 53A of the Transfer of Property Act, also prevents an owner of land from ejecting another who has no legal title to the land,—but in this case, the latter person comes upon the land under an otherwise valid agreement to convey title to him, but the agreement is not provable at law owing to defect in statutory form. In the case of equitable estoppel, the person who seeks the equity has no such agreement in his favour and enters as a bare trespasser or under an incomplete agreement, but relies upon an implied contract or estoppel against the owner by reason of some subsequent conduct or statement.

2. The doctrine of equitable estoppel was thus formulated in *Duke of Leeds* v. *Amherst* [(1846) 78 R.R. 47]—

> "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress, he cannot afterwards complain."

The conditions necessary for the application of the above rule were thus laid down in *Wilmott* v. *Barber* [(1880) 15 Ch. D. 96 (105)]—

(*i*) The defendant must have made a mistake about his rights. (*ii*) The plaintiff must know the existence of his better title which is inconsistent with that claimed by the defendant. (*iii*) The plaintiff must know that the defendant

has made a mistake as to his rights. (*iv*) The defendant must have expended money or done some act on the faith of his mistaken belief. (*v*) The plaintiff must have encouraged the defendant to spend the money or do the act, either directly, or by abstaining from asserting his right.

3. What is known as the rule in *Ramsden* v. *Dyson* [(1866) 1 H.L. 129 (170)] is an application of the above general rule—

"If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation."

4. If the defendant has no mistake about his rights, the rule does not apply—

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the *hope* or *expectation* of an extended term or an allowance for expenditure, then if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of Law or Equity can enforce" *(Ramsden* v. *Dyson,* (1866) 1 H.L. 129).[91]

§ 127A. Application of the rule of equitable estoppel in India.

1. It should first be pointed out that the rule in *Ramsden* v. *Dyson* goes far beyond the rule enacted in s. 51 of the Transfer of Property Act, which is founded on the maxim, "He who seeks equity must do equity" [*see* p. 21, *ante*]. Section 5 of the Transfer of Property Act says—

"When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement ...."

The equitable principle underlying s. 51 has been applied in India even to cases where the person building is not a 'transferee', but builds under any *bona fide* claim of title.[92-93]

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91. *Vallabhdas* v. *Development Officer,* (1929) 53 Bom. 589 P.C.

92. *Gobind* v. *Gooroocharan,* (1865) 3 W.R. 71, approved in *Narayandas* v. *Jatindra,* (1927) 31 C.W.N. 965 P.C., and *Vallabhdas* v. *Development Officer,* (1929) 33 C.W.N. 785 P.C.

93. *Vallabhdas* v. *Development Officer,* (1929) 33 C.W.N. 785 P.C.

Before notification under the Land Acquisition Act, Government took possession of the Appellant's land and erected buildings thereon, and issued notice only after the buildings were completed. *Held,* that before the acquisition, Government were in possession not as trespassers but under colour of such title that the buildings had not become the property of the Appellant but that he was entitled to compensation till notification, on the basis of interest on the value of the land.[93]

2. The principle contained in s. 51 of the Transfer of Property Act differs, as Sir D.F. Mulla points out [*Transfer of Property Act*, 2nd Ed., p. 215], from the wider principle of estoppel by acquiescence as laid down in *Ramsden* v. *Dyson* or *Beniram* v. *Kundanlal*[94] *[see* below], in the following respects :

(*i*) The equity in *Ramsden* v. *Dyson* rests on the doctrine of estoppel, which again arises out of a presumption of contract,[94-95] while the rule contained in s. 51 is founded on the maxim, "He who seeks equity must do equity" and there is no reference to any implied contract.

(*ii*) The rule of estoppel *prevents* the owner from *evicting* at all; s. 51 does not prevent eviction but merely puts him upon equitable terms as to *compensation* with an option to sell his interest to the person sought to be evicted.

(*iii*) The rule of estoppel looks to the conduct of the plaintiff who seeks to evict; s. 51 looks to the conduct of the defendant, viz., whether he made the improvement in *bona fide* belief that he had an absolute title.

3. The rule contained in s. 51 of the Transfer of Property Act does not bar the application, in India, of the wider rule enunciated in *Ramsden* v. *Dyson,* and, if the conditions laid down therein are satisfied, the plaintiff will be precluded from evicting the defendant at all.[96-97]

Thus, in *Beniram* v. *Kundan Lal,*[94] the Privy Council observed that the owner of a land cannot sue for ejectment "where he sees another person erecting buildings upon it, and knowing that such other person is under a *mistaken* belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected". But the rule will not apply unless (*i*) the defendant has a *bona fide* mistake as to his own rights and (*ii*) there is such abstinence from interfering on the part of the plaintiff which may lead to an implication of *contract* on his part not to interfere with the supposed right of the defendant.

4. The foundation of the doctrine of equitable estoppel as laid down in *Ramsden* v. *Dyson* [p. 312, *ante*] is the implication of a contract or the existence of some fact or statement which the owner is estopped from denying.[98-99] The reference to a 'contract' in the principle as stated in

94. *Beniram* v. *Kundanlal*, (1899) 21 All. 496 P.C.
95. *Gujarat Ginning Co.* v. *Motilal*, (1935) 40 C.W.N. 417 (427) P.C.
96. *Forbes* v. *Ralli*, (1925) 4 Pat. 707 P.C.
97. *Ahmad* v. *Secy. of State*, (1892) 19 I.A. 203.
98. *Canadian Pacific Ry. Co.* v. *Kind*, A.I.R. 1932 P.C. 108.
99. *Ariff* v. *Jadunath*, (1930) 35 C.W.N. 550 (558) P.C.

Beniram v. *Kundanlal*[94] above does not mean that the real consensus between the two parties must have existed, but that the *conduct* of the parties has been such that equity will presume the existence of such a contract as a matter of plain implication.[95]

1. Plaintiff granted a lease to the defendants "for the purpose of erecting buildings for trade". Defendants then asked for permission to erect a residence for his manager. In reply, the plaintiff informed that the lease was a permanent one and the defendants had the right to erect buildings but that the rent was liable to enhancement. Relying on this assurance, defendant erected the residence. Plaintiff then sought to evict the defendant. *Held,* whatever was the nature of the tenancy at its inception, plaintiff was estopped from questioning its permanence and from evicting the defendants in view of the above representations "that they (defendants) had a fixity of tenure, although not of rent".[100]

2. Defendants entered plaintiff's land as tenants for a limited term and erected substantial building without any objection from the plaintiff. *Held,* that defendants were liable to be evicted and that the rule of equitable estoppel did not apply, for—(a) that the defendants "knew that the plaintiffs were the owners of the land and that their own title was limited to their occupation of the land as tenants upon the terms and for the period provided by the lease....."; (b) that it was incumbent upon the defendants "to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees obtained possession of the land *should be changed* into a perpetual right of occupation".[94]

3. The Appellant Company had some land between the lines of a railway and the lands of the Respondent Company. By an agreement with the railway at a time when both the companies were under the management of the same person, and a sliding was constructed for use of both the companies. The management of the companies subsequently separated and differences arose and the Appellant Company sought to terminate the passage of the goods of the Respondent Company over the sliding across the Appellant's lands. It was found that the right of Respondent Company was not higher than a license, but the doctrine of equitable estoppel was raised against the termination of the way-leave on the ground that the Respondent Company had been led to rely on an expectation that they would be given a sliding. It was found that the arrangement was to the benefit of the Respondents and that the Appellants had no need to have a way-leave over the Respondent's land. *Held,* in the circumstances, no agreement could be inferred as a matter of implication that the way-leave was to be permanent. If there had been separate agents for the Appellants and the Respondents, it seems certain that if an agreement had been made, there would have been a provision for a way-leave rent and the like.[95]

5. The propositions relating to the equities arising in cases of building by one on another's land may be **summarised** as follows :

(*i*) If he who constructs the building or makes the improvement on

100. *Forbes* v. *Ralli,* (1925) 4 Pat. 707 P.C. [In this case there was a definite statement of fact by the plaintiff, attracting the application of s. 115 of the Evidence Act [*Ariff* v. *Jadunath,* (1931) 35 C.W.N. 550 (558).]

another's land is a mere trespasser, he cannot claim compensation from the owner of the soil, nor has he the right to remove them.[101] No equity prevents the owner from claiming his land with the benefit of all the expenditure made on it, where a stranger builds on it knowing it to be the latter's.[94]

(*ii*) If, however, the person constructing a building or effecting the improvement was in possession of the land under a *bona fide* title or claim of title, he can either remove them or obtain compensation for the value of the building or improvement if it is allowed to remain for the benefit of the owner of the soil, the option of retaining the building, or of allowing removal remaining with the latter. This rule applies whether the person who builds is a 'transferee'[102] or not[101], provided only he is not a 'trespasser' and has some *bona fide* claim of title. The reason is that the English law of fixtures, viz., that whatever is affixed to or built on the soil becomes a part of it as property of the owner of the soil, has no application in India, as it is artificial.[101, 103]

101. *Vallabhdas* v. *Development Officer*, (1929) 53 Bom. 589 P.C.
102. *Section* 51, T.P. Act.
103. *Narayandas* v. *Jatindra*, (1927) 31 C.W.N. 965 P.C.

CHAPTER XVII

EQUITABLE REMEDIES

II. INJUNCTION

§ 128. What is an injunction.

1. An Injunction is a "judicial order, the general purpose of which is to restrain the *commission, continuance,* or repetition of some wrongful act of the party enjoined". *Maitland* puts it thus—"It is an order made by the Court forbidding a person or class of persons doing a certain act, or acts of a certain class, upon pain of going to prison as contemners of the Court." The ground of equity jurisdiction in granting injunctions as in specific performance was the inadequacy of remedy at law.

2. Injunctions are either Prohibitory or Mandatory. (*a*) A **prohibitory** injunction *forbids* a defendant *to do* a wrongful act which would be an infringement of some right of the plaintiff, legal or equitable. (*b*) A **mandatory injunction** *forbids* the defendant to permit the *continuance* of a wrongful state of things that already exists at the time when the injunction is issued. Where a *prohibitory* injunction takes the form—'Let the defendant be restrained from *building* any wall to the injury of the plaintiff's right of light', a *mandatory* injunction says—'Let the defendant be restrained from permitting the *continuance* of any wall to the injury of the plaintiff's right of light.' It will appear that a mandatory injunction, in effect, calls upon a person to do some *positive* act; (for instance, in the example just given, it directs the defendant to *pull down* the wall that exists). The purpose of a mandatory injunction is thus to *restore* a wrongful state of things to their former rightful order. And for this very reason that a prohibitory injunction is merely restrictive in effect while a mandatory injunction indirectly enjoins a positive act, the former was far more common than the latter, and even when a mandatory injunction was granted, it was couched in a negative or positive language [*Cf.* example given above]. Now, however, it is made in the *positive form,*—of a *direct order* to do the act. But even now, a mandatory injunction requires a much *stronger* case to be made out than a prohibitory injunction; in general, it will not be granted until the plaintiff has proved that the existing state of things is wrongful and causes substantial injury. It is on this ground that it has been observed that 'the object of an injunction is usually *preventive* rather than *restorative*'.

3. While in respect of the nature of the act enjoined, injunctions may

be divided into prohibitory and mandatory, as regards the *time* of their operation, they may be divided into interlocutory (or temporary) and perpetual (or permanent). (*a*) An **interlouctory injunction** is an injunction granted on an 'interlocutory application' after the commencement of an action, to preserve the *status quo* pending trial and judgment. It holds good only until the trial of the action on its merit or until further orders. In granting an interlocutory or temporary injunction, the Court does not anticipate the determination of the right but will grant it if the plantiff can only show that 'he has a fair question to raise as to the existence of the right which he alleges, and that the property should be preserved in its present condition until such question can be disposed of' [*Preston* v. *Luck*, (1887) 27 Ch. D. 505]. An interlocutory injunction is granted only after *notice* of the application has been given to the opposite party, but in urgent cases, it may be granted *ex parte*.[1] In either case, however, the Court will require the plaintiff to give **'an undertaking in damages'**; that is to say, the plaintiff shall have to undertake to pay any damages which the Court may award to the defendant, if it subsequently appears at the trial that the injunction has been wrongly obtained. Such an undertaking is not required from the Attorney-General suing on behalf of the Government. (*b*) A **perpetual injunction** is one which is granted *after the trial* and holds good without any limit of time. While an interlocutory injunction may be granted at any time after commencement of the suit, on a *prima facie* case being made out by the plaintiff, a perpetual injunction can be granted only after the plaintiff has *established* his right to it at the trial. It is a final determination of the rights of the parties, and restrains the defendant *for ever* from doing the acts complained of. "The perpetual injunction is, in effect, a decree, and concludes a right. The interlocutory injunction is merely provisional in its nature, and does not conclude a right" (*Kerr*).

§ 128A. Temporary and Perpetual Injunctions in India.

1. In India, temporary and perpetual injunctions are defined in s. 37 of the Specific Relief Act, 1963, thus—

"(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the right of the plaintiff."

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1. "In cases of great emergency where irreparable damage may be done to the plaintiff if the defendant is permitted to proceed with the act, an injunction may be granted on the application *ex parte*, of the plaintiff together with leave to serve the defendant with notice of a motion for an injunction immediately after the writ is issued. Such injunctions are called *interim injunctions*, and continue in force only until the motion is heard."

The injunction thereafter granted on hearing the motion is called interlocutory injunction.

2. Temporary injunctions are granted under O. 39, rr. 1-2 of the Civil Procedure Code, while perpetual injunctions are dealt with in s. 38 of the Specific Relief Act, 1963.

3. Temporary injunctions, may be dissolved at any time under Or. 39, r. 4 of the C.P. Code on the defendant's showing sufficient cause to the satisfaction of the Court against the order granting the injunction. If a temporary injunction is not dissolved earlier, it automatically terminates with the disposal of the suit.

4. Perpetual or permanent injunction will be dealt with in §130, *post.*

§ 129. Principles governing Temporary Injunction.

The general principles governing temporary and permanent injunctions are mainly the same excepting those due to the fact that a temporary injunction is granted before the plaintiff establishes his case at the trial.

O. 39, r. 1 of the C.P. Code provides—

"Where in any suit it is provided by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(*b*) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders."

But all the principles of equity by which the Court will exercise its discretion are not codified in these provisions and for these we have to refer to the principles laid down in English cases, which are generally followed in India, subject to such modifications as may be necessary owing to the peculiar conditions and circumstances of the country.

These principles may be summarised as follows :

(*i*) *Application must show a prima facie case.*

1. It has been already pointed out that the only object of a temporary injunction is to preserve the subject-matter of the litigation in *statu quo*, until the trial on merits. Hence, in an application for temporary injunction, the plaintiff need not establish his title to the right claimed in the suit but needs only to make out *'a prima facie case'. A prima facie* case means 'that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief asked for' [*Preston* v. *Luck*, (1887) 27 Ch. D. 497 (506)]. In other words, the applicant is not required to make out a clear legal title, but to satisfy the Court that he has a *fair question to* raise (at the trial) as to the existence of the legal right which he *sets up*, or that there are substantial grounds for doubting

the existence of the alleged legal right, the exercise of which he seeks to prevent (*Woodroffe*).

2. A *prima facie* case may be shown by affidavit or otherwise. The Court is not called upon to decide which of the parties is right in their statement of facts and the Court should, as far as possible, abstain from prejudging the question in the case (*Woodroffe*).

"The real point is, not how these questions ought to be decided at the hearing of the cause, but whether the nature and the difficulty of the questions is such that it was proper that the injunction should be granted until the time for deciding them should arrive" [*Walker v. Jones*, (1885) L.R. I P.C. 50].

Plaintiff company manufactured thermionic valves with highly skilled workers. Defendant company, a newcomer in the field and a rival of the plaintiff, secretly procured the workers of the plaintiff company to work for them in their spare time and to put at their disposal their skill and experience so that their rival business might succeed. Plaintiffs sought an interlocutory injunction to restrain the defendants from employing any of the plaintiff's employees so as to cause such employees to commit breach of their contract or duty towards the plaintiffs. There was no written contract. *Held*, that *prima facie* there was a breach of an implied term of fidelity as between the plaintiffs and the employees, even though a different view might be taken on fuller evidence at the trial. The facts disclosed on the affidavits disclosed "a substantial question to determine at the trial", and hence a *prima facie* case was established [*Hivac Ltd.* v. *Park Loyal Ltd.*, (1946) 1 A.E.R. 350 (C.A.)].

3. From the above principle it follows that where the plaintiff asks for a temporary injunction in a suit for perpetual injunction, the Court should grant the temporary injunction, if the effect of not granting such an injunction will be to deprive the plaintiff for ever of the right claimed by him in the suit. Of course, the perpetual injunction sought must not *prima facie* be of such a nature as the Court will not grant.

Conversely, the Court should not, as a rule, grant an interlocutory injunction in a case where the effect of granting such an injunction on motion will be to give the plaintiff the entire or sole relief claimed in the suit. The Court would not depart from the rule except where the parties consent to treat the motion as the trial, or where there is a grave urgency and apprehension of serious injury to the applicant [*Dodd* v. *Amalgamated Marine Workers*, (1924) 93 Ch. 65 (105)].

4. A temporary injunction will not be granted where the plaintiff fails to make out a *prima facie case*. Thus, if it be a suit for specific performance, and the plant discloses *prima facie* that it is a contract of which the Court cannot or will not grant specific performance, no temporary injunction will be granted only because it will not harm the defendant.

(*ii*) *Applicant must show that the injunction is necessary to protect him from irreparable injury.*

1. "Irreparable injury" does not mean that there must be no physical

possibility of repairing the injury; all that is meant is that the injury is a serious one, or at least a material one, and *not adequately reparable by the remedy of damages.* "Inadequacy of damages," on the other hand, means that the damages obtainable are not such a compensation as will, *in effect*, though not *in specie,* place the parties in the position in which they formerly stood (*Spelling*, quoted in *Woodroffe*). Thus, the fact that the amount of damages cannot be ascertained in money may constitute irreparable damage. Shortly speaking, 'irreparable injury' means 'injury which cannot be compensated in damages' [*Moghul Steamship Co.* v. *McGregor*, (1885) 15 Q.B.D. 486].

For instance, neither a perpetual nor a temporary injunction is available to a *building contractor* when the owner rescinds the contract wrongfully. The remedy of the contractor is to sue for damages.

2. O. 39, rule 1(a) of the Civil Procedure Code suggests that, in India, it is an irreparable injury, without more, if the property in dispute in a suit is "in danger of being *wasted, damaged or alienated* by any party to the suit, or *wrongfully sold* in execution of a decree". The words "any party" in the above rule also suggest that though ordinarily it is the plaintiff who is entitled to a temporary injunction, in a suit regarding property the defendant may also seek a temporary injunction to prevent waste or alienation, provided he makes a *prima facie* case to the right he claims over the property (e.g., where the defendant sets up a right of tenancy in the land in dispute).

3. In determining 'irreparable injury', the Court should have regard to the circumstances of Indian society and not merely to English decisions applicable to different conditions. Thus, in India it has been held that in a suit for partition brought by a Hindu co-sharer of a family dwelling-house against an execution-purchaser of the undivided interest of his co-sharer, the plaintiff is entitled to obtain a temporary injunction restraining the defendant from executing his decree for possession pending the partition suit, though such an injunction might not be available in England. The reason is—

> "A forced joint occupation in this fashion of an undivided dwelling-house by an intruder, even though he be an owner, against the will of the resident Hindu coparcener, amounts to a proprietary injury which the latter is not in equity called upon to sustain, and for which pecuniary damages would not be compensation."[2]

The same principle is applicable to Mahommedan society.

(*iii*) *The balance of convenience must be in favour of granting the injunction.*

1. This rule is known as the principle of 'balance of convenience', but in fact it is the balance of inconvenience which the Court is to see in granting an injunction—"on which side will lie the balance of convenience, if the injunction

2. *Anant* v. *Mackintosh*, (1871) 6 B.L.R. 571.

do not issue" [*Doherty* v. *Allman*, (1878) 3 A.C. 709]. The plaintiff must show that the mischief or inconvenience which is likely to arise in consequence of withholding the injunction is greater than the mischief or inconvenience that is likely to be caused to the other party if the injunction is granted.

2. The question of balance of convenience, however, does not arise until the plaintiff made out a *prima facie* case [*Doherty* v. *Allman*, (1887) 27 Ch. D. 497].

§ 130. Principles on which the Court acts in granting or refusing Permanent Injunction.

(A) *England.*

Since the fusion of law and equity by the Judicature Acts, both injunction and damages may be obtained from the same Court and in the same action,—they are no *longer alternative* remedies. The distinction between the two remedies has not, however, been blurred. As *Maitland* points out, **"while the remedy by damages is a matter of strict right, the remedy by injunction is discretionary".** Thus,—

(*i*) An injunction will not be granted where there has been *no substantial damage*, or pecuniary *damages* will be an *adequate* relief. A claim for damages is a matter of right, but a claim for an injunction, being equitable, is a matter for judicial discretion. Thus, in some cases of tort where the plaintiff has not suffered any substantial damage or injury, the Court will award him even *nominal* damages merely because some right has been infringed, but it will not interfere by injunction because the wrong though a tort, has done no *real damage.* For example, in a case where some young people were alleged to have disturbed game by hunting for months on a highway, the Court refused injunction but awarded damages of 1s. only, and at the same time ordered the plaintiff to pay the whole of the defendant's costs [*Fielden* v. *Cox*, (1906) 22 T.L.R. 411].

(*ii*) Then in exercising this discretion, the Court may consider the plaintiff's *conduct*, whereas in action for damages conduct of parties matters little. Thus injunction will be refused on the ground of *laches* or unreasonable delay in bringing the action; but to an action for damages, delay is no defence unless the case falls within the Statutes of Limitation. Even apart from delay, *acquiescence* will be a ground for refusing injunction.[3]

(*iii*) Similarly, the Court will not grant it when it will be needlessly oppressive, unjust or inconvenient to the defendant. The Court will regard the *'balance of convenience'* specially in granting mandatory injunction, say, to pull down his wall will not be granted if it will inflict on him more harm than he deserves, considering all the facts as well as the conduct of the parties. (It must be noted, however, that in granting injunction to restrain a

3. *Leeds* v. *Amherst*, (1846) 41 E.R. 886.

breach of contract, the question of 'balance of convenience' is absolutely immaterial. *See* p. 331, *post*.)

(B) *India.*

1. While s. 37(1) of the Specific Relief Act, 1963, gives the meaning of a perpetual injunction, ss. 37-42 lay down the principles according to which a perpetual injunction would be granted.

2. The cases in which a perpetual injunction may be granted are of two classes. The object of such injunction is to prevent the breach of an *obligation* existing in favour of the applicant, whether expressly or by implication. But such obligation may arise either out of a contract or otherwise. Different principles are applicable in the two classes of cases :

(A) In the case of contractual obligations, the same principles as govern the granting of specific performance also govern the granting of injunction. These will be explained more fully hereafter.

(B) In other cases, the plaintiff can get an injunction if he can show that the defendant has a legal duty or obligation towards him and that by the non-performance of such duty or breach of that obligation, the plaintiff's right to or enjoyment of his property has been materially affected. Such injury is deemed to exist in the following cases :

"(*a*) where the defendant is trustee of the property of the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(*c*) where the invasion is such that compensation in money would not afford adequate relief;

(*d*) where the injunction is necessary to prevent a multiplicity of judicial proceedings." [s. 38(3)].

Whenever a Court considers it necessary on the facts and in the circumstances of a particular case to pass an order of injunction without notice to the other side, it must record the reasons for doing so and should take into consideration all relevant factors including as to how the object of granting an injunction itself shall be defeated if an *ex parte* order is not passed. But any such *ex parte* order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned.[3a]

3. The discretionary nature of the relief is indicated by the words 'the Court may' in s. 38(3).

(*i*) In the course of *A*'s employment as a vakil, certain papers belonging to his client, *B*, come into his possession. *A* threatens to make these papers public or to communicate their contents to a stranger. *B* may sue for an injunction to restrain *A* from so doing.

(*ii*) *A* is *B*'s medical adviser. He demands money of *B*, which *B* declines to

3a. *Chawla* v. *Municipal Corpn. of Delhi*, (1993) 3 S.C.C. 161.

pay. *A* then threatens to make known the effects of *B*'s communications to him as a patient. This is contrary to *A*'s duty and *B* may sue for an injunction to restrain him from so doing.

(*iii*) *A* rings bells or makes more other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier. *B* may sue for an injunction to restrain *A* from making the noise.

(*iv*) *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and *C*, who carry on business in a neighbouring house. *B* and *C* may sue for an injunction to restrain the pollution.

(*v*) *A* infringes *B*'s patent. If the Court is satisfied that the patent is valid and has been infringed, *B* may obtain an injunction to restrain the infringement.

4. It has already been pointed out that the jurisdiction of the Court to grant or to refuse injunctions, temporary or perpetual, is discretionary, that is, the granting or refusing to grant injunctions is a matter of discretion for the Court and is not a matter of right in either party. In granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff and compare with that which the injunction, if granted, would inflict upon the defendant. The discretion of the Court must not be arbitrary and capricious, that is, it should not depend merely upon its pleasure, but must be sound and reasonable and guided by the principles of justice, equity and good conscience.

Broadly speaking, a Court will not issue an injunction in circumstances where it would not have granted specific performance. Hence, the grounds upon which the discretionary relief of specific performance is refused, are also applicable in the case of injunction. Thus, where damages would afford an adequate remedy to the party, injunction would not be granted. Again, it ought to be applied only in very clear cases; otherwise, instead of being an instrument to promote the public as well as private welfare, it may become a means of extensive and irreparable injustice (*Story*). Thus,

Where the appellants failed to show that the respondents had interfered with the enjoyment of any right vested in the appellants, and the invasion, if any, of the latter's right was of a theoretical and trivial character, and if the injunction were granted, far more injury would be inflicted on the respondent than any advantage which the appellants could derive therefrom, it was held by the Privy Council that no injunction should issue.[4]

5. The cases in which injunction is never granted in India will be dealt with separately.

§ 131. Cases in which injunction will be granted.

Leaving aside the case of orders to restrain judicial proceedings, the more important cases, where injunctions are granted, fall into two broad

4. *Tituram* v. *Cohen*, (1906) 33 Cal. 203 P.C.

classes: (I) to prevent torts (i.e., wrongs independent of contract), and (II) to restrain breaches of contract.

(I) Injunctions in cases of Tort :

1. As *Maitland* observes, **"A very large part of the whole province of tort is a proper field for the injunction."** In restraining wrongful acts, equity follows the maxim "Where there is a right, there is a remedy for its violation", and, consequently, it is not possible to make an exhaustive enumeration of the various torts the commission of which is restrained by injunction. As a matter of fact, "the only torts that lie outside the field of injunctions are assault and battery, false imprisonment and malicious prosecution" [*Maitland*]. The ground upon which they are excluded is that in most cases these wrongs will not only be torts but crimes as well, and equity as a civil court has no jurisdiction to prevent the commission of acts which are *criminal.* But with these exceptions, 'it would be hard to find a tort which might not in a given case be a proper subject for an injunction; indeed there are many rights which are chiefly, if not solely, protected by injunction—the remedy by action of damages being most inadequate'.

2. For example, it was the Chancery's power to issue injunction that gave rise to the doctrine of **Equitable Waste.** 'Waste is a material alteration of things forming an integral part of the inheritance (property) made by a limited owner such as the life tenant, to the injury of the remainderman.' The expression 'equitable waste' does not mean 'waste which is equitable;' but waste 'which is so *inequitable* that it would be restrained in equity, although allowed at common law'. *Common law* afforded relief against waste by the remedy of damages. **Legal Waste** or (waste recognised by law) was either (*a*) *voluntary,* i.e., an offence of commission, e.g., pulling down a house, cutting timber, or (*b*) *permissive,* i.e., an offence of omission, e.g., allowing the land to go out of repair. But the remedy at law proved inadequate, because in some cases it would not afford any relief at all—and here equity interfered. Thus, a tenant for life, expressly made *unimpeachable for waste* (i.e., when he was given power to commit waste by the grantor), could commit any waste at common law. But the Court of Chancery would restrain him by injunction from committing *wanton destruction,* e.g., cutting down ornamental timber, pulling down the family mansion [*Vane* v. *Bernard,* (1716) 2 Vern. 738]. Such wanton destruction would be *'equitable waste'.* Since the Judicature Act, 1873, both legal and equitable waste may be restrained by injunction. But injunction will not be granted to restrain *permissive* waste, for, in this case, the remedy of damages is adequate. The Judicature Act further provides expressly that injunction may be granted to prevent 'threatened or apprehended *waste or trespass' in any* cases the Court shall think fit.

3. On the torts the commission of which will be restrained by injunction

we may mention some others,—*nuisance, libel or slander; infringement of copyright, patents, and trade-marks, expulsion from club or society etc.* The Court may award damages in lieu of or in addition to an injunction. But as stated above, whether the Court will grant an injunction or award damages is a question for judicial discretion to be exercised with regard to 'balance of convenience'.

4. The more important of these specific torts may now be dealt with separately.

(1) **Injunction to restrain Nuisances.** 1. As a general rule, equity does not interfere by injunction in the case of a private nuisance unless it is so serious that damages would not be an adequate compensation. Where the injury is irreparable and is not susceptible of being adequately compensated by damages, equity will interfere by injunction, unless the nuisance is legalised by statute. Thus, equity will grant injunction in cases of—(*a*) Darkening of ancient lights; (*b*) Obstruction of air; (*c*) Disturbance of right to lateral support; (*d*) Pollution of streams injuring riparian owners; (*e*) Smoke or noxious fumes visibly diminishing the value of property.

2. It should be clearly noted that injunction would not be granted to restrain trifling inconvenience, and, before granting the injunction, the Court must be reasonably satisfied that the act, if allowed to be committed, must result in an actionable nuisance.

"If the thing sought to be prohibited is itself a nuisance, the Court will interfere to stay irreparable mischief without waiting for the result of a trial, but, where the thing to be restrained is not unavoidable and in itself noxious but only something which may, according to circumstances, prove so, the Court will refuse to interfere till the matter is decided at law. The Court will be very slow to interfere where the thing to be stopped very possibly be prejudicial to none" (*Earl of Ripon* v. *Hobarta*, M. & K. 140).

3. In the case of continuing nuisances and disturbance of easements, however, once the legal right is proved and as well its violation, the Court grants an injunction almost as a matter of course to prevent the recurrence of such violation, for the very fact that the injury is continuous makes it irreparable in the sense of 'grievous and intolerable' [*Att.-Gen.* v. *Cambridge Co.*, (1868) 4 Ch. 81]. It is refused where the violation of the right is only trivial or the plaintiff is guilty of laches [*Cowper* v. *Laidler*, (1903) 2 Ch. 341]. But proof of actual damage is not necessary where the wrong is recurring [*Clowes* v. *Staffordshire Co.*, (1878) 8 Ch. 142].

(*a*) *Obstruction of light and support.*

(A) *England.*—Of these, cases of *obstruction of light and air* deserve a fuller treatment :

(*i*) A person has no 'natural' right to the **light** coming to his building laterally, as it would involve a serious restriction of the natural right of

adjacent land to build as he pleases. But he can acquire a right to lateral light, i.e., light coming over the adjoining space, (*a*) by grant, or (*b*) by prescription. He can by prescription[5] acquire a light coming into his building through definite apertures like windows. When the right is acquired by prescription, the apertures are called *ancient lights.*

(*ii*) An injunction will be granted to restrain a darkening and obstruction of ancient light, provided it is shown that there has been a *substantial diminution* of light, so as to interfere with the *ordinary use* of the plaintiff's premises. "The owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of the mankind" [*Colls* v. *Home & Colonial Stores Ltd.*, (1904) A.C. 179]. The plaintiff must, therefore, prove not a mere obstruction or diminution of the light previously enjoyed, but that sufficient light is not left for the ordinary purposes of habitation or business, according to the *ordinary notions of mankind.*

(*iii*) Similarly, a right to **air** coming laterally to a premises through apertures may be acquired by prescription, and an injunction will be granted to restrain an interference with such right. But, in England, the right to air is treated as different from the right to light. While an action for obstruction of light lies on proof of substantial interference with comfort as explained above, an action for obstruction of air is allowed only on proof of *danger* to health or something very nearly approaching it [*City of London Brewery Co.* v. *Tennant*, (1893) L.R. 9 Ch. App. 221].

(*iv*) A prohibitory injunction restraining the defendant from proceeding with an intended building is more easily obtainable than a mandatory injunction ordering him to pull down a completed building. But a mandatory injunction will be granted if the defendant, after service of notice, hurries on with his building in the hope that, once completed, the Court might decline to order him to pull down [*Daniel* v. *Ferguson*, (1891) 2 Ch. 27].

(B) *India.*

1. The law of prescriptive acquisition of an easement of light or air is contained in s. 26 of the Limitation Act, 1963, and s. 15 of the Indian Easements Act, the two provisions being similar as to the mode and period of enjoyment required for acquisition of the right by prescription. The conditions laid down for acquisition of the prescriptive right[5] are—

(*i*) The right should be enjoyed—

(*a*) peaceably; (*b*) as an easement; (*c*) as of right; (*d*) openly except in the case of light and air; and (*e*) without interruption.

(*ii*) The enjoyment must be for a period of 20 years. [If the property

5. S. 25 of the Limitation Act, 1963 and s. 15 of the Indian Easements Act.

over which the right is claimed belongs to Government, period of enjoyment must be 60 years.]

(*iii*) In the suit in which the right is contested, it must be proved that the obstruction complained of has taken place within two years preceding the suit and that, before such obstruction, the 20 years' user had been completed.

2. As to the amount of obstruction that will constitute an actionable nuisance, the principles of English law have been followed so far as the right to light is concerned.

S. 33 of the Easements Act expressly provides that it must be a substantial interference in the English sense. It provides thus :

"The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement, or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or, by materially diminishing the value of the dominant heritage, is substantial damages within the meaning of this section.....

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first *Explanation*, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit."

There is, of course, no corresponding provision in any statute law in those States where the Easements Act does not apply.[6] But the English law as enunciated in *Colls* v. *Home & Colonial Stores*, (*see* p. 326, *ante*) has been applied in those territories, the leading case being that of *Paul* v. *Robson* [(1914) 18 C.W.N. 933 P.C.], where it has been held that to constitute an illegal obstruction to light, it is not sufficient for a plaintiff to show that he has *less* light than he enjoyed previously, or his premises cannot be used for all the purposes to which they might otherwise be applied; to maintain an action there must be substantial interference with the plaintiff's comfortable or profitable use of his dwelling-house or business premises *according to the ordinary notions of persons in the locality*. The test is not how much light has been taken, and is the remaining amount of light such as to materially lessen the enjoyment and use of the house, but the test really is *how much light is left*, and is that sufficient for the comfortable use and enjoyment of the house according to the ordinary requirements of persons in the locality? In determining whether or not the quantity of light which the owner of the dominant tenement will continue to enjoy, after the obstruction, is sufficient, regard will be had to the light *coming from other sources* which the dominant owner is by grant or prescription entitled to receive.

6. The Easements Act has been extended only to Madras, Bombay, Madhya Pradesh, Oudh, Ajmer-Merwara, Coorg.

3. Similarly, a right to air coming laterally to a premises through apertures may be acquired by prescription. But, in England, the right to air is treated as different from the right to light. While an action for obstruction of light lies on proof of substantial interference with comfort as explained above, an action for obstruction of air is allowed only on proof of *danger* to health or something very nearly approaching it [*City of London Brewery Co.* v. *Tennant*, (1803) L.R. 9 Ch. App. 221].

But ventilation of houses is of much greater importance in India than in England. Accordingly, the Indian Easements Act (s. 33) places light and air on the same footing and allows an action for interference with the right to air when it materially affects the physical comfort of the plaintiff though it is not injurious to his health. This seems to be the law also in those States where the Easements Act does not apply.[7]

4. Subject to the general principles governing the granting of an injunction, an injunction will be issued where there has been an 'actionable nuisance' according to the foregoing rules.

(*b*) *Injury to lateral support.*

Every owner of land has a right to the support of his land in its natural state. It is not an easement; it is a right of property. In a suit for injunction restraining the defendant from interfering with the plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before the institution of the suit.

(2) **Disturbance of an easement.**—1. S. 35 of the Easements Act provides—

"Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbances of easement—

(*a*) if the easement is actually disturbed—when compensation for such disturbance might be recovered under the chapter;

(*b*) if the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed, disturb the easement."

While, in *England,* injunction is *prima facie* granted in cases of disturbance of easement, in India the general rule that no injunction would issue where damages would afford an adequate remedy is also applicable to cases of disturbance of easements. In practice, however, in such cases, damages are usually awarded, for, in cases like obstruction to the right to light and air[8], it is difficult to say that the injury can be adequately remedied by an injunction.

7. *Bagram* v. *Khettranath*, 3 B.L.R. 18; *Madhoosoodun* v. *Bissonath*, 15 B.L.R. 361.
8. *Esa* v. *Jacob*, 20 M.L.J. 291.

2. If, however, the injury to the plaintiff's right is small and is capable of being estimated in money, and the case is one in which the plaintiff has suffered injury but has disentitled himself to an injunction by his conduct or laches, damages may be awarded instead of an injunction. Thus, damages were awarded in the following cases in lieu of an injunction:

(*a*) Where the obstruction complained of did not render the plaintiff's house unhabitable but nevertheless reduced its market value.[9]

(*b*) Where the damage complained of did not render the plaintiff's house incur moderate expense to so alter or re-arrange his premises as to neutralise the effect of the defendant's construction which darkened the plaintiff's windows.[10]

3. Where the injury is only threatened or apprehended, the plaintiff must show that the alleged right is in imminent danger of being violated and that the apprehended damage to follow from the violation of the plaintiff's right would be substantial.

(3) Libel.

(A) *England.*

Before the Judicature Acts, an injunction would not be granted to restrain the publication of a libel, either before or after trial because,—(*a*) the publication of a libel was usually a crime, and the Court of Chancery had no jurisdiction in criminal matters; and (*b*) the question whether there was a libel or not in a given case being a question to be of property decided by a jury, the Court of Chancery was not competent to deal with it for it knew no trial by jury. But after the Judicature Acts, by virtue of the fusion of the two systems of Courts, the High Court claimed the power of granting injunction against the publication of a libel which had been conferred upon the old Common Law Couns by a former Statute (the Common Law Procedure Act, 1854). Consequently, any Division of the High Court may now restrain by injunction the utterance or repetition of libels either (*i*) at the trial (by a *perpetual* injunction) or (*ii*) before the trial (by an *interlocutory* injunction), and its power is only limited by what is *just and convenient.*

The Judicature Act did not lay down the conditions upon which the Court would grant injunctions. The following principles have, however, been established in subsequent cases, showing the circumstances in which it would be just and convenient to grant an injunction in cases of libel (Odgers on *Libel and Slander*):

I. *At the final hearing.*—If the Court sees any reasons to apprehend any repetition of the publication which would be injurious to the plaintiff, an injunction will be granted to restrain further publication.

9. *Sultan Nawaz* v. *Rustomji*, (1896) 20 Bom. 704.
10. *Boyson* v. *Deane*, (1899) 22 Mad. 251.

II. *On interlocutory application.*—An *interlocutory injunction against* the publication of a libel will not be readily granted. For, in an action of libel the defendant has a right to trial by jury, and he may at the trial set up the defence that the libel is true, and if the jury finds the plea to be true, the publication of the alleged libel will be no civil wrong at all. Hence, the Court will not, by granting an interlocutory injunction *before* the trial, assume that the defendant will not be able to establish such a defence at the trial *[Bonnard* v. *Pearyman,* (1891) 2 Ch. 269]. So it has been observed that the power to grant *interim* injunction in cases of a libel "is of a delicate nature; it ought only to be exercised in the clearest cases" [*Coulson* v. *Coulson,* (1887) 3 T.L.R. 846]. The Court will not grant an interlocutory injunction—

(*i*) Unless the words are so clearly libellous that if a jury found them to be libellous, the Court of Appeal would set the verdict aside as unreasonable.

(*ii*) If the words are such that a jury might properly find them to be a fair comment on a matter of public interest; or a fair and accurate report of judicial proceedings; or if the occasion of publication is privileged.

(*iii*) Where the defendant has pleaded or intends to plead a justification, unless the Court is satisfied that there is no reasonable prospect that the defendant will succeed at the trial in proving his words true.

(*iv*) Unless there is some evidence that the defendant intends to continue the circulation of the words complained of.

(*v*) If the injury done to the plaintiff can be fully compensated by damages.

(*iv*) Where the plaintiff has, by delaying the proceeding or by other conduct, disentitled himself to such relief.

(B) *India.*

No general principles relating to this subject are laid down in the Specific Relief Act and, accordingly, the English principles will be followed.

(4) **Waste.**

(A) *England.*—The English principles relating to this subject have already been dealt with.

(B) *India.*—In general, where a limited owner is in possession of a property, e.g., a Hindu widow or a tenant, the Court will interfere with an injunction if the limited owner attempts to commit an injury to the corpus of the property which will affect the reversion.

Thus, a presumptive reversioner is entitled to sue for an injunction restraining a Hindu widow from wasting the estate.

Similarly, where a tenant, who has no permanent right in his holding, erects permanent structures upon it, the landlord is entitled to a perpetual

injunction restraining the erection of those structures; and a suit for ejectment and removal of the structures is not his proper remedy.

(II) Injunctions in cases of Contract :

General Principles

1. **"Within the province of contract the injunction plays a considerable part, but not so large as that which it plays in the field of tort"** *(Maitland).* The difference in the two cases as to the scope of injunction lies in the fact that in the case of contract, equity has another weapon, viz., the decree for specific performance, whereby it may secure the enforcement of its doctrines. Hence, in contracts the jurisdiction of granting an injunction is *supplemental* to that of enforcing specific performance. Thus, *speaking generally,* while a promise to do is enforced by specific performance, a promise to *forbear* is enforced by injunction. In other words, while the observance of a *positive* contract is directly enforced by means of specific performance, a contract which is *negative* in terms will be *indirectly* enforced by an injunction to restrain a breach thereof. In short, it may be stated as a general rule that an injunction to restrain the breach of a contract will be granted *only when the contract is negative.*

2. On the other hand, as *Maitland* points out, 'applications for an injunction in cases of contract are treated somewhat differently from similar applications founded on torts'. To restrain the breach of a negative contract, an injunction is granted as a *matter of course,* and the Court has practically little discretion to exercise. The question of '*balance of convenience*' is here immaterial, for, "when a man has definitely contracted not to do a certain thing, it is not for him to say that it will be greatly to his convenience, and not much to the convenience of the other party that he should be allowed to do it."

"If parties, for valuable consideration, with their eyes open, contract that a particular thing shall be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done. It is not then a question of the balance of convenience or inconvenience or the amount of damage or injury—it is the specific performance, by the Court, of the negative bargain which the parties have made" [*Doherty* v. *Allman,* (1878) 3 A.C. 709].

3. For the enforcement of a negative contract, injunction has been largely employed. Thus, **restrictive covenants** in leases are chiefly enforced by injunction.

A. Covenants in leases.

We have already discussed [p. 63, *ante*] how the equitable doctrine as to restrictive covenants arose out of this power of equity to grant an injunction and how it was confined to *negative* covenants only (simply because the remedy of injunction could go no further).

An illustration as to how a Court would issue an injunction in favour of a lessor even when he is out of possession at the date of the suit is offered by the Supreme Court decision in the case of *Karnani Industrial Bank.*[11]

The *facts* of the case,[11] shortly, were as follows : A lease deed was executed by the said lessor (Government of Bengal) in favour of the said lessee (the Appellant Bank) on the 17th February, 1928, in respect of some 1125 bighas of land for manufacturing bricks for a period of 10 years from the 24th February, 1928.

The appellant, in breach of the terms of the lease, sublet the brick-field without consent and caused serious damage resulting in heavy loss to the lessor. Further, the lessee, in spite of the termination of the lease, did not deliver the possession of the said premises. Hence, a suit was filed against the lessee by the lessor (Province of Bengal), claiming ejectment and *khas* possession, damages, and permanent injunction to restrain the defendants from removing bricks, pugmills, etc.

The prayer for injunction arose out of the covenant in the latter part of Part III(1) of the deed of lease, which was as follows :

"The lessee shall be at liberty to keep on the premises demised for 3 months after the ..... termination of the lease any bricks, boilers ..... and all other materials whatsoever as may have been *manufactured* by him in the premises ..... but any *bricks and other materials left in contravention.... to this condition shall become the absolute property of the Secretary of State without payment.*"

The plaintiff-Government claimed that the bricks etc. which had been manufactured by the lessee but were *not* removed from the premises by the lessee within three months of the expiry of the lease, became the absolute property of the Government and, hence, the appellant-lessee should be restrained from removing or otherwise disposing of those materials.

The plea of the defendant-appellant was that since the plaintiff was out of possession at the date of the suit, it could not ask for relief by way of injunction without asking for a declaration of the plaintiff's title and possession in respect of those materials.

The Supreme Court rejected this plea of the defendant on the ground that the general principle as to a plaintiff out of possession in a suit for injunction was not applicable in the present case, because under the terms of the contract of lease (reproduced above), the title to the materials left on the premises by the lessee beyond three months of expiry of the lease passed, absolutely, to the lessor. Hence, even though the bricks

11. *Karnani Industrial Bank* v. *Province of Bengal,* (1951) S.C.R. 560. [The major portion of this decision relates to s. 116 of the Transfer of Property Act as to tenancy by holding over after the expiry of a lease, with which we are not concerned in this book. Hence, only the portion dealing with the prayer for permanent injunction is included above].

etc. had been *manufactured* by the defendant-lessee, there could not be any legal objection to the plaintiff's prayer for permanent injunction as founded on the terms of the contract between the parties, and the injunction sought was granted.

But as regards other materials which had not been *manufactured* by the lessee on the premises, such as boilers, engines, etc., which had been brought for the purpose of working the brick-field, the Court refused injunction on the ground that the relevant clause of the contract (reproduced above) gave the property in the materials to the lessor only in respect of those materials "as may have been manufactured by him (i.e., the lessee) in the premises". It is to be noted that the contract being out of the way, the title and possession of these engineering materials did *not* belong to the lessor Government.[11]

B. **Personal Contracts.**

4. The very fact that an injunction *indirectly* secures the specific performance of a contract, by preventing a party from doing that which he is under an obligation not to do, puts a limitation to the general rule that an injunction will be granted to restrain the breach of negative contracts. The limitation is this that *'the Court will not indirectly by means of an injunction compel performance of an agreement which is of such a kind that specific performance will not be directly decreed of it'*. To this, however, an exception has been laid down by the decision in *Lumley* v. *Wagner.*

5. **The Rule in Lumley v. Wagner**[12] [(1852) 1 De G.M. & G. 604] may be stated thus—"Where a contract comprises an *affirmative* agreement to do a certain act, coupled with a *negative* agreement, **express or implied**, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement." The rule may be illustrated with reference to a contract for personal service, which, as we know, would not be specifically enforced because to do so would involve a general superintendence such as the Court could not undertake. Now if such a contract contains both positive and negative terms, the Court will, according to the rule in *Lumley's* case, restrain breach of the negative terms, although specific performance of the remainder (positive term) cannot be enforced.

6. In *Lumley's* case, the negative term was *express*. After this decision, an attempt was made to carry the principle further by contending that an

12. *Lumley* v. *Wagner.—Miss W* agreed to *sing* at *L*'s theatre for a certain period and *not to sing* anywhere else during that period. Afterwards she entered into a contract to sing at another theatre and refused to perform her contract with *L*. The Court refused to enforce her positive agreement to sing at *L*'s theatre (by specific performance) but granted an injunction restraining her from singing at any other theatre,—thereby preventing breach of the negative part of the agreement though the positive part of it, being a contract for personal service, could not be specially enforced.

express **positive** promise to do anything gives rise to a *negative* undertaking not to do anything which should interfere with the performance of this promise. But the Courts have expressed reluctance to extend further the principle of *Lumley* v. *Wagner* at least in the case of **contracts of personal service.** In the *absence of a clear or express negative term, the rule will not apply.* Thus, in *Whitwood Chemical Co.* v. *Hardman*[13] [(1891) 2 Ch. 416], Lindley, J., observed, "I look upon *Lumley* v. *Wagner* rather as an anomaly to be followed in cases like it, but an anomaly which it would be dangerous to extend. Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. But it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing everything else which is inconsistent with it." In this case, injunction was refused to enforce an affirmative contract by the company's manager to give, during a specific term, the whole of his time to the company's business. Even if a stipulation is couched in a negative language, but is affirmative in substance, injunction will not be granted [*Dass* v. *Foreman,* (1894) 3 Ch. 654]. There must be a distinct negative stipulation, otherwise injunction will be refused [*Mortimer* v. *Beckett,* (1920) 1 Ch. 571].

7. The effect of these subsequent decisions upon the rule in *Lumley* v. *Wagner* has been stated in *Halsbury* thus :

"The doctrine in *(Lumley* v. *Wagner)* has however, been criticised, and is not to be extended. It seems that the right to an injunction of this kind will not now be held to depend upon the use of a negative rather than a positive form of expression, and that if the substance of the contract is such that it ought not to be performed specially, an injunction will not be granted merely because the covenant is in a negative rather than a positive form, nor, on the other hand, will the injunction necessarily be refused merely because the agreement contains no negative stipulation."

(B) *India.*

1. **S. 42** of the Specific Relief Act, 1963, adopts the rule in *Lumley* v. *Wagner* (p. 333, *ante*) almost *verbatim.* It says—

"Notwithstanding anything contained in clause (*c*) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement : provided that the applicant has not failed to perform the contract so far as it is binding on him."

13. *Whitwood Chemical Co.* v. *Hardman.*—The Manager of a manufacturing company had agreed at the time of his employment to *"give the whole of his time to* the company's business" during the term of his service. *Held,* that the company could not have an injunction to prevent him from giving *part of his time* to a rival company, because there was no express NEGATIVE stipulation in the contract to the effect (viz., that he *should not give* any of his time to a rival company.) [But an injunction would be issued to restrain a film artist who has contracted *"not,* during the period of employment, to act as a film artist for any motion picture company other than the employers" (*Warner Bros.* v. *Nelson,* (1937) 1 K.B. 209].

It means that where a contract contains an affirmative agreement to do a certain act and also a negative agreement (either express or implied) to abstain from doing a certain act, the Court is not precluded from enforcing the negative part of the agreement, because it is precluded from decreeing specific performance of the positive part by reason of the rule contained in s. 56, cl.(*f*) read with the provisions of s. 21 of this Act.

2. Enacted at a time when the recent English decision limiting the scope of the rule had not yet been passed, illustration (*d*) of that section demonstrates that a negative agreement will be inferred from an affirmative one—'*B* contracts with *A* that he will serve him faithfully for twelve months as a clerk. *A* is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining *B* from serving a rival house as clerk.' It is obvious that this illustration is directly in conflict with subsequent English decisions such as *Whitwood Chemical Co.* v. *Hardman* quoted above.

3. Our Supreme Court has also pointed out the exceptional cases where the general rule that equity will not enforce a contract of personal service[14] either by specific performance or injunction (the only remedy being damages for a breach of contract) shall not apply owing to provisions in the Indian Constitution and statutes. These exceptional cases where the Court may interfere by issuing a declaration, injunction or order of reinstatement of a dismissed employee are[15]—

(*a*) Cases coming under Art. 311 of the Constitution, that is, where a public servant has been dismissed or removed in contravention of the requirements of Art. 311 of the Constitution. Contravention of the mandatory terms of the Constitution renders the termination of service invalid, as distinguished from a mere breach of contract.

(*b*) The Industrial Law provides for the reinstatement of industrial workmen who have been dismissed in contravention of the relevant statutory provisions.

(*c*) Even in the case of non-industrial employees, where the employer is a statutory authority, the Court may interfere if the statutory body, in terminating the service of its employee, has violated any mandatory obligation imposed by the statute.

In all such cases, the law lifts the employee from his status out of his basic relationship between master and servant which is governed solely by the law of contract and enables the Court to give such relief as may be appropriate to the dismissed employee, on the footing that the order of termination of service, in breach of the Constitution or of a statute, is *ultra vires and void.*[14-15]

14. *Sirsi Municipality* v. *Francis*, A.I.R. 1973 S.C. 855; *Indian Airlines* v. *Sukhdeo*, A.I.R. 1971 S.C. 1828; *Tewari* v. *Dt. Bd.*, A.I.R. 1964 S.C. 1680 (*1682*).

15. *Vaish Degree College* v. *Lakshmi Narain*, A.I.R. 1976 S.C. 888.

§ 132. Injunction to protect equitable estates or interests.

(A) *England.*

The jurisdiction to grant injunctions restraining violation of trusts and fiduciary relations or of purely equitable rights and interests was commensurate with the exclusive jurisdiction of the Court of Equity to enforce these equitable rights and interests. For here there was no remedy at law and no question of inadequacy of remedy at law would arise. So, when the existence of such a right was proved, a Court of Equity not only had the jurisdiction but was bound to grant every kind of remedy available to it for its enforcement. Hence, as *Pomeroy* observes,—

"Whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interest or claims in or to specific property, requires the aid of injunction, a Court of Equity has jurisdiction, and will exercise that jurisdiction, to grant an injunction, either pending the suit or as a part of the final decree, to restrain a breach of trust or of fiduciary duty, or to restrain an alienation, transfer, assignment, encumbrance, or other kind of dealing with the property, which would be in violation of the trust or fiduciary duty, or in fraud of the complainant's rights."

Thus, a Court of Equity will always enjoin a breach of trust, whether grave or light, without enquiring if the same may be adequately compensated for by award of damages in money.

(B) *India.*

S. 38(3)(a) of the Specific Relief Act, 1963, says that the Court may grant a perpetual injunction "where the defendant is a trustee of the property".

§ 133. Cases in which injunction is refused in India.

S. 41 of the Specific Relief Act, 1963, enumerates the cases and circumstances in which a perpetual injunction cannot be granted. These may be discussed under proper heads :

I. To restrain judicial proceedings.—

1. S. 10 of the Civil Procedure Code empowers a Court to stay proceedings in a suit pending before *itself* if the parties have got a previously instituted suit pending in some other Court of competent jurisdiction, relating to the same matter in issue. An injunction to restrain judicial proceedings pending in *another* Court should be distinguished from the above power to stay its own proceedings. Cls. (*a*), (*b*) and (*d*) of s. 41 of the Specific Relief Act deal with the subject of restraining judicial proceedings pending in *another* Court.

2. Section 41 of the Specific Relief Act lays down that an injunction to stay judicial proceedings cannot be granted in the following cases—

(*a*) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(*b*) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought;

(*c*) to restrain any person from instituting or prosecuting any proceeding in any criminal matters.

These may be treated serially.

(*a*) **Stay of pending judicial proceedings: Multiplicity of proceedings.**— A perpetual injunction cannot be granted to stay judicial proceedings *pending* in other Courts at the time of institution of the suit in which the relief for injunction is sought. The only exception to this rule is that where the object of the injunction is to prevent unnecessary litigation and to suppress a multiplicity of suits, that is, when by granting the injunction a great number of suits pending in Courts, other than the Court in which the suit for an injunction is brought, can be suppressed, in such cases only an injunction can be granted. But before this clause can be relied upon as a ground of defence in a suit for perpetual injunction it must be shown that (1) at the time of institution of the suit in which the injunction is sought *a judicial proceeding must be pending* in another Court and not *contemplated merely*, and (2) that the object of the relief by way of injunction is *to prevent a multiplicity of suits*. The *institution* of proceedings may, therefore, be restrained by issuing an injunction against the party.

The general reasoning upon which the doctrine is maintained is the common maxim that Courts of Equity, like Courts of Law, require due and reasonable diligence from all parties in suits, and that it is a sound policy to suppress a multiplicity of suits: "Courts of Equity will not grant an injunction to stay proceedings at law, merely on account of any defect of jurisdiction of the Court where such proceedings are pending" (*Story*).

Where no judicial proceeding is pending at the time when the suit for an injunction is filed, neither clause (*a*) nor clause (*b*) of sec. 56, can have any application, and, therefore, s. 56 is not a bar to the granting of the injunction.

(*b*) **Stay of proceedings in a Court not subordinate.**—One Court cannot by injunction restrain the proceedings pending in another Court which is not subordinate to it. Injunctions to stay proceedings can only be granted in cases where the Court in which the proceedings are to be stayed is subordinate to that Court in which the injunction is sought. An injunction cannot be issued to restrain proceedings in a foreign Court.

Hence, even where an injunction to stay proceedings in another Court

has to be issued to prevent a multiplicity of proceedings, it can be issued only if the latter Court is subordinate to the issuing Court.

(*c*) **Staying proceedings in criminal matter.**—A Court has no jurisdiction to stay, by way of perpetual injunction, proceedings in any criminal matter. A Civil Court cannot, therefore, stay proceedings in a Criminal Court on the ground that the subject-matter of dispute in the civil suit and the criminal proceedings is the same.

But under s. 561A of the Criminal Procedure Code, the High Court has inherent power to stay criminal proceedings in special circumstances.

II. To restrain persons from applying to a legislative body.—This exception is based on public policy. The Court cannot restrain a person from seeking whatever relief he can seek from the Legislature.

III. To prevent breach of contracts which cannot be specifically enforced.—A Court will not grant an injunction to prevent the breach of a contract, if the contract be such as cannot be specifically enforced under the provisions of Chapter II of this Act. The grant of injunctions, therefore, is always guided by the same principles as the grant of specific performance of contracts. This clause naturally follows from the rule that when the obligation arises from a contract, the Court in granting or refusing an injunction shall be guided by the rules and provisions regarding the grant of specific performance of a contract in Chapter II. So, if the contract is such as not to be capable of being specifically enforced, no injunction can be granted to prevent its breach. The defences available to a suit for specific performance of such a contract would also be available in the like matter of an injunction.

IV. To restrain an act which is not clearly a nuisance.—The principle is that the Court will refuse to grant an injunction to prevent an act as to which it is not reasonably clear that it will be a nuisance; or in other words, an injunction ought not to be granted to prevent a contingent nuisance; that is, to prevent an act which may or may not be a nuisance according to circumstances. The Court will not exercise its jurisdiction to grant an injunction unless there has been an actual nuisance, or the probability is so great that, if not restrained, it must inevitably result in a nuisance. The injury must be substantial and such that it cannot be adequately compensated in damages.

The Court will not in general interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance. The plaintiff, however, must show a strong case of probability that the apprehended mischief will, in fact, arise in order to induce the Court to interfere.

V. To prevent a continuing breach in which the plaintiff has acquiesced.—'Acquiescence' has already been explained at p. 28, *ante*.

Acquiescence is no ground for refusing an injunction unless the breach be a 'continuing' one and extends over a long period with the knowledge or consent of the person interested to prevent it. Thus,

A had a right of way over *B*'s land. He allowed *B* to erect a house on the pathway and enjoy it for seven years. He then brought a suit to have the pathway reopened by pulling down *B*'s house. It was *held* that *A* must be taken to have acquiesced in the interrupton of his right of way, and his claim was one that a Court of Equity and good conscience would not enforce.[16]

There is no continuing breach where each act, though similar in kind, is separate and complete in itself.

VI. Where plaintiff has an equally efficacious remedy.—It has already been explained that an injunction is not to be granted when the ordinary remedy in damages is considered adequate. The only exception to this rule is in the case of a breach of trust. The reason is that the beneficiary, being the true owner of the property, has a right to restrain a trustee by injunction from making a wanton exercise of his legal powers, from dealing with the property improperly, or from violating his trust.

VII. Where the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court.—This exception is founded on the fact that, in its origin, injunction is an *equitable remedy.*

The conduct of the plaintiff or his agent must be honest, fair, and blameless, and, before he can claim the relief under this section, he must come before the Court with clean hands. If the plaintiff's own conduct be improper and tainted with fraud or misrepresentation, then the Court will refuse to grant him the relief by way of injunction even though he may have a right. The provision contained in this clause is an application of the maxims of equity that, *"He who seeks equity must do equity"* and *"He who comes into equity must come with clean hands."*

(*a*) *A* seeks an injunction to restrain his partner, *B*, from receiving the partnership debts and effects. It appears that *A* had improperly possessed himself of the books of the firm and refused *B* access to them. The Court will refuse the injunction.

(*b*) *A* sells an article called "Mexican Balm", stating that it is compounded of diverse rare essences, and has sovereign medical qualities. *B* commences to sell a similar article to which he gives name and description such as to lead people into the belief that they are buying *A*'s "Mexican Balm". *A* sues *B* for an injunction to restrain the sale. *B* shows that *A*'s "Mexican Balm" consists of nothing but scented hog's lard. *A*'s use of his description is not an honest one and he cannot obtain an injunction.

VIII. Where the applicant has no personal interest in the matter in connection with which the injunction is sought.—The Court will refuse to grant an injunction if the plaintiff has no personal interest in the matter, that is, if he is merely a nominal plaintiff and has no personal interest at all in the subject-matter of the suit. But where he has some interest either as

16. *Benimadhab* v. *Ram Jay*, (1872) 10 W.R. 316.

a member of a community, or as a ratepayer in a municipality, then he is entitled to the relief by way of injunction to protect the interest, however small that interest may be.

In the case of public funds or endowments, any person having the smallest degree of interest may sue for injunction, in case of waste, misappropriation or misapplication of the fund. Thus, a suit will lie, at the instance of an individual taxpayer in a municipality, for an injunction restraining the municipality from misapplying its funds.[17]

The general rule is that where the plaintiff applies for an injunction to restrain the violation of an alleged right, he must establish that right, if it is disputed, before he gets the injunction to prevent the recurrence of its violation [*Imperial Gas Co.* v. *Broadbent*, (1859) 7 H.L. 600 (612)].

It follows that an injunction may be issued to protect the possession of a person who is in lawful possession but not that of a trespasser or of a person who has gained unlawful possession; or to protect the interest of a person which is no longer in existence.[17a]

§ 134. Mandatory Injunction.

1. While a prohibitory injunction forbids the defendant to do some act, a mandatory injunction compels him to do some act which is enjoined.

(1) In India, **s. 39** of the Specific Relief Act, 1963, deals with Mandatory Injunction—

"When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel the performance of the requisite acts."

The word 'obligation' in the section, however, does not refer to contractual obligations only, since, s. 3 of the Act says that "Obligation includes every duty enforceable by law." The English principles for the granting of mandatory injunction have, therefore, been followed in India.

2. The rules relating to the granting of a mandatory injunction are thus summarised by *Strahan* :

(1) As a rule, a mandatory injunction will be granted to remove any work interfering with the plaintiff's right which has been carried out after an action to restrain its being carried out has been commenced or notice has been received that if he continues carrying out the work, an action will be commenced.

(2) Where, however, the work was completed before the complaint was made or action brought, the Court will generally not grant a mandatory injunction to remove it except where the defendant is shown to have taken an *unfair advantage* of the plaintiff having an opportunity of applying in time

17. *Bindu Basini* v. *Janhavi*, (1897) 24 Cal. 260.

17a. *Premji* v. *Union of India*, (1994) 5 S.C.C. 547 (paras. 4-5).

for an ordinary injunction to restrain the defendant from carrying it out, or where it was not evident that the work would interfere with the plaintiff's right until it was completed.

3. In proper cases, a mandatory injunction may be issued even to prevent a *threatened* invasion of the plaintiff's right,[18] e.g., to close down a door which will 'inevitably' be used to commit a trespass on the plaintiff's land.[19] In order to claim a mandatory injunction in such cases, the plaintiff must establish that—

(*a*) the threatened wrong to his property would be such that an action for damages would not be an adequate redress;

(*b*) the threatened wrong would 'inevitably' result unless the injunction is issued, in the sense that the probability is so great that in the view of ordinary men, using ordinary sense, the injury would follow;

(*c*) the plaintiff is free from blame and has promptly applied for relief.[20]

Thus, where a person allows a structure which obstructs his easement of light and air, to be completed, the Court may not grant a mandatory injunction in cases where, by granting a mandatory injunction, the injury to the defendant will be out of all comparison to the injury of the plaintiff by the obstruction of his easement.[20]

4. Such an injunction is seldom granted on an *interlocutory* application, that is, before the establishment of the plaintiff's right, except where irreparable injury would otherwise result, or where the defendant continues the act complained of after direct notice, or after proceedings have commenced. When, for example, a defendant in an action to restrain him from building so as to infringe the plaintiff's right to light, after receiving notice of motion for an an injunction, endeavoured to anticipate the action of the Court by hurrying on the building complained of, an injunction was granted ordering him to pull down the building so erected [*Daniel* v. *Ferguson*, (1891) 2 Ch. 27].

In *Kandasami* v. *Subramania*,[21] it has been held that the description of temporary injunction in s. 53 does not exclude injunctions of mandatory nature, so that Courts in India have power to issue temporary mandatory injunctions, under O. 39, r. 2 of the C.P. Code.[22] But the power to grant a mandatory interim injunction should be exercised in very exceptional circumstances.

5. A mandatory injunction would not be issued (*a*) where the injury can be adequately compensated by damages; (*b*) where the alleged obstruction is of a *temporary* character; (*c*) if the plaintiff stands by and allows the obstruction to be completed before he comes into the Court.

18. *Meghu* v. *Kishun*, A.I.R. 1954 Pat. 477.
19. *Behari* v. *Sheo Lal*, 3 N.L.R. 114.
20. *Kandasami* v. *Subramania*, 41 Mad. 208.
21. See also *Champsey Bhimji & Co.* v. *Jamna Flour Mills & Co.*, 16 Bom. L.R. 566; *Israil* v. *Shamser*, (1914) 41 Cal. 436.
22. *Haroon Bros.* v. *Cowasji*, 94 I.C. 840.

CHAPTER XVIII

EQUITABLE REMEDIES

III. RECEIVER

§ 135. When appointed.

In *India*, a Receiver is appointed primarily in two classes of cases—(*a*) as a mode of execution, and (*b*) as an interim relief in pending suits. Both are governed by statutory provisions and it would be convenient to treat the two classes of cases separately.

I. *In pending suits.*

§ 136. Principles according to which Receiver is appointed pendente lite.

1. The object of appointment of a Receiver during pendency of a suit is the protection or preservation of the property for the benefit of persons who have an interest in it (*Halsbury*), until their rights in the property are judicially determined in the pending litigation.

"The Receiver is appointed for the benefit of all concerned; he is the representative of the Court and of all parties interested in the litigation, wherein he is appointed."

2. As an interim relief, thus, the appointment of a Receiver is analogous to the issue of a temporary injunction, which has been already dealt with (p. 318, *ante*). Nevertheless, there are important differences both as to the object and the principles governing the granting of the relief. Thus,

While in either case it must be shown that the property should be preserved from waste or alienation, in the case of temporary injunction it is sufficient for the plaintiff to show that there is a *fair question* to raise as to the existence of the right alleged; but for the appointment of a Receiver the plaintiff must make out a good *prima facie title* to the property over which the Receiver is sought to be appointed (*Kerr*).

A Receiver is appointed when the object is to exclude *all* the persons interested in the property from possessing it, while a temporary injunction is usually to prevent the defendant from alienating or wasting the property. A Receiver, thus, is an impartial person who is appointed by the Court *to collect and receive*, pending the litigation, the rents and profits of the

property, which does not seem reasonable to the Court that either party should collect or receive. While an injunction simply enjoins a party to do or forbear from doing something, a Receiver is an officer of the Court who removes the party in possession and takes charge of the property. Of course, in special circumstances, even a party to the litigation may be appointed Receiver; but, then, he would no longer possess as owner but as an officer of the Court, subject to all the duties and accountability of a Receiver (see *post*).

3. Though, in India, there are statutory provisions governing the appointment of a Receiver pending suits in O. 40, r. 1, C.P. Code, the English principles governing the relief have to be followed by the Courts, because the statutory provisions do not go far beyond laying down that the relief may be granted.

4. O. 40, r. 1 of the Code provides—

"(1) Where it appears to the Court to be *just and convenient,* the Court may by order—

(*a*) appoint a receiver of any property, whether before or after decree;

(*b*) remove any person from the possession or custody of the property;

(*c*) commit the same to the possession, custody or management of the receiver; and

(*d*) confer upon the receiver all such powers, and to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

The above provision of the Code also does not lay down the circumstances in which it may be 'just and convenient' to grant this relief. This is, however, laid down in numerous English decisions, which have been followed in India. These principles may be discussed under two heads—(*a*) when the relief would be granted, and (*b*) when it would be refused.

§137. When the relief would be granted.

(*a*) Where the property is in the possession of neither of the parties to the suit, the Court will readily appoint a Receiver, it being their common interest to place the property in the possession of the Court to prevent a scramble, e.g., over the property of a deceased person pending a litigation as to the right to probate or administration (*Kerr*).

(*b*) Where the *defendant* is in possession, the Court will interfere only if there is a well-grounded fear that the property in question will be dissipated

or other irreparable mischief will be done unless the Court gives its protection.[1] Thus,—

(*i*) The removal of a large amount of property by the defendant and under circumstances which might fairly give rise to suspicion during the pendency of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a Receiver.[2]

(*ii*) The Court would appoint a Receiver at the instance of the representative of a deceased partner if it is shown that the surviving partner is endeavouring to divert the goodwill of the business to himself.[3]

(*c*) Even where the property is in the possession of a third party, the Court may appoint a Receiver, provided any party to the suit has a present right to remove him [Or. 40, r. 1(2)]. But before removing a person who is not a party to the suit, the Court should inquire into his claims to the property.

(*d*) A Receiver cannot be appointed merely on the ground that it will do no harm to anybody.

In order to justify the appointment of a Receiver, the plaintiff must establish a reasonable possibility that the plaintiff will ultimately succeed in obtaining the relief claimed in the suit. The requirement, thus, is that he must establish a good *prima facie* case. It may further be remembered that the appointment of a Receiver is, as a general rule, discretionary, and not a matter of right; a Court will make such appointment with great caution and circumspection. In a case where the remedy of the appointment of a Receiver seems necessary to prevent fraud, to protect and preserve the property against an imminent danger of loss or discrimination in value, destruction, squandering, wastage or removal from jurisdiction, the Court may appoint a Receiver. A Court in exercise of its discretion to appoint or refuse a Receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, ends of justice, the rights of all the parties interested in the subject-matter and the adequacy of other remedies.[3a]

§ 138. When the relief would be refused.

1. The primary consideration, in this connection, which is to be remembered is that the relief is *discretionary*. Other rules would follow from this primary principle. Thus—

(*a*) The relief being discretionary, the Court always looks to the contract of the applicant and refuses the relief unless his conduct has been free from blame. A person, who has *acquiesced* in the property being enjoyed against his alleged right, cannot, except in special circumstances, come into the Court for appointment of a Receiver.

1. *Benoy* v. *Satish*, A.I.R. 1928 P.C. 49.
2. *Sita Ram* v. *Mahabir Dass*, 27 Cal. 270.
3. *Young* v. *Buckett*, (1882) 46 L.T. 266.

3a. *S.B. Industries* v. *United Bank of India*, A.I.R. 1978 All. 189.

Thus, one of several co-adventurers in a mining concern, who has never asserted his title while it was being conducted at a loss, will not be allowed after many years to come forward at a time of prosperity and claim the appointment of a Receiver on the ground of exclusion and mismanagement.[4]

Conversely, the Court may abstain from appointing a Receiver if the defendant submits to an order to pay money into Court or otherwise (*Kerr*).

(*b*) Though the circumstances may justify the appointment of a Receiver, it would not be made if it appears that it is being sought for an *improper purpose*. Thus, a partner is not allowed, by getting *himself* appointed a Receiver, to obtain powers in excess of those authorised by the articles of partnership.[5]

(*c*) It has already been stated that a very strong case must be made out where the appointment of a Receiver would be to dispossess the defendant in possession, who claims the property by a legal title.

The ground for this caution when the property is in the possession of the defendant was explained by Lord Crawnnorth in *Owen* v. *Homan* [4 H.L.C. 997(1032)] thus—"The Court must, of necessity, exercise a discretion as to whether it will or will not make possession of the property by its officer. (*a*) Where, indeed, the property is in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. (*b*) But when the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the Court is necessarily involved in further questions. The Court, by taking possession at the instance of the plaintiff, may be doing a wrong to the defendant, in some cases an irreparable wrong, if the plaintiff should eventually fail in establishing his right against the defendant, for which the subsequent restoration of the property may afford no adequate compensation."

(*d*) In appointing a Receiver the Court will take care not to affect the right of *third parties* who may be interested in the property.

2. The object of the appointment of a Receiver being to protect the property for the benefit of the person who will be entitled to it according to the decision of the Court at the trial when it has all the materials necessary for a determination, on a motion for a Receiver, the Court will not prejudice the trial or say what view it will take at the trial Hence, the Court will not appoint a Receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the Court is satisfied that the person against whom the demand is made is fencing off the claim. (*Kerr*).

4. *Norway* v. *Rowe*, (1812) 19 Ves. 144.
5. *Niemann* v. *Niemann*, (1889) 43 Ch. D. 198 (C.A.).

II. *In execution proceedings.*

§ 139. When appointed as a mode of execution.

1. S. 51 of the Civil Procedure Code says that one of the modes of executing a decree is by appointing a Receiver. The conditions for exercise of this power by the Court are not, however, laid down in that section. The conditions are to be found in O. 40, r. 1.

2. The result is that in execution proceedings a Receiver may be appointed whenever the Court considers it to be 'just convenient'. The decree-holder cannot ask for this relief as a matter of right. Being an equitable relief, the decree-holder seeking this relief must show that owing to the nature of the property or otherwise it was difficult for him to obtain by the usual modes of execution and that it was necessary to appoint a Receiver to allow him to realise his just dues. A Receiver may, therefore, be appointed to execute even a simple money decree when that appears to be the only mode of the decree-holder's realising an appreciable part of his dues. It is not, however, necessary that all the other modes of execution must be exhausted before appointment of a Receiver may be made for execution.[6]

§ 140. Status of the Receiver.

A Reciever is the officer of the Court, and subject to its orders. From this important consequences follow. Thus,—

(*i*) Property in the hands of Receiver cannot be attached without leave of the Court first obtained. Nor can the Receiver grant tenancy interest to anybody without permission of the Court.[7]

(*ii*) A Receiver cannot sue or be sued except with the leave of the Court by which he was appointed Receiver.

(*iii*) It is a contempt of Court on the part of any of the parties to enter into an agreement restricting or controlling the Receiver's powers.

(*iv*) He is a public officer and cannot be sued without notice under s. 80 of the C.P. Code for acts purporting to be done in his official capacity.

(*v*) The appointment of a Receiver operates as an injunction restraining the parties to the action from receiving any part of the property affected by the appointment. For the same reason, tenants or debtors cannot make their payments to either of the parties but must pay to the Receiver since they receive notice of the appointment of the Receiver.

(*vi*) The Receiver's possession being the possession of the Court, neither party can claim to be in adverse possession against the other party, during the continuance of the possession of the Receiver.[7]

(*vii*) The Receiver is in no sense an agent or trustee for any of the parties to the action though he holds for the benefit of the person who may ultimately be held to be the rightful owner.

6. *Midnapore Zemindary* v. *Chandra*, A.I.R. 1949 Cal. 63.
7. [illegible] v. *Baikuntha*, (1994) 6 S.C.C. 545 (para. 7).

§ 141. Duties of the Receiver.

1. O. 40, r. 3 of the C.P. Code provides—

"Every receiver so appointed shall—

(*a*) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(*b*) submit his accounts at such periods and in such form as the Court directs;

(*c*) pay the amount due from him as the Court directs; and

(*d*) be responsible for any loss occasioned to the property by his wilful default or gross negligence."

2. The Receiver is thus liable to account not only for sums actually received by him but also for what he might have received but for his wilful default or negligence.

It follows that he is liable for loss occasioned by parting with the control of the property or by wilful neglect to carry out the orders of the Court or by placing money in what he knows to be improper hands, and for any loss to which his own fraud or collusion has contributed. (*Halsbury*).

3. This liability can be enforced against his security or by attaching his property and selling it under O. 40, r. 4 of the C.P. Code.

4. Being in a fiduciary position, a Receiver cannot make any profit out of the property beyond the remuneration fixed by the Court nor can he purchase the property without leave of the Court which appointed him. Similarly, he cannot even take lease of the property committed to his care, without sanction of the Court. Nor can he delegate to any other person the duties entrusted to him by the Court. The Receiver cannot, during continuance of his appointment, set up a title in himself adverse to the parties.

CHAPTER XIX

DECLARATORY DECREE

§142. Nature of declaratory relief.

A. 1. In *England*, there is some controversy as to whether the relief available in a declaratory action is equitable or not. Some textbooks[1] exclude declaratory relief from the treatment of 'equitable remedies'. This view rests on the proposition that though this remedy (like other equitable remedies) is discretionary, it does not partake of the *other* characteristics of an equitable remedy, e.g., that the Court can, while granting the relief to a plaintiff, put him on terms.[2] On the other hand, there are others who emphasise that the remedy by way of declaration had its origin in the Court of Chancery and that it retains its discretionary character and describe the jurisdiction as equitable.[3]

2. The controversy has, however, become academic because the remedy, in England, is now governed entirely by statute.[4] While prior to 1852, the Court of Chancery could grant a declaration only as an ancillary to the grant of some present substantial relief, by a statute of 1852, the Court of Chancery was empowered to grant a binding declaration, without any consequential relief, provided the plaintiff was entitled to some *equitable* relief, even though he had not asked for it. The Judicature Acts extended this jurisdiction to all Divisions of the High Court, and by the Rules of Court, this condition has been eliminated,[5] and the condition now is that the declaration sought by the plaintiff must relate to some legally enforceable right of his.[6] The present state of the law as to declaratory relief, in England, may best be summarised in the words of *Keeton* :[4]

"No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

Of course, it still retains its discretionary character.[5]

1. E.g., Snell, *Principles of Equity*, 25th Ed. (1960), pp. 27, 564 Ch. 17.
2. *Chapman* v. *Michaelson*, (1909) 1 Ch. 238; *Guarantee Trust Co.* v. *Hannay*, (1915) 2 K.B. 536 (567-69).
3. *Hordern-Richmond* v. *Duncan*, (1947) 1 All E.R. 427 (*430*); *Barnard* v. *National Dock Labour Bd.*, (1953) 1 All E.R. 1113 (*1120*); *Hayes* v. *Bristol Plant*, (1957) 1 All E.R. 685 (*686*)
4. Keeton, *Equity* (1969), pp. 559-560; *I.R.C.* v. *Fed. of Self-Employed*, (1981) 2 All E.R. 93 (97) H.L.
5. *Halsbury*, 4th Ed., Vol. I, para. 185; Vol. II, para. 1414.
6. *Vine* v. *National Dock Labour Bd.*, (1956) 3 All E.R. 939 (H.L.); *Ridge* v. *Baldwin* (1963) 2 All E.R. 66 (H.L.).

B. 1. In *India*, the controversy as to the nature of a declaratory judgment is of little moment because it is governed entirely by s. 34 of the Specific Relief Act, 1963[7] (which replaces s. 42 of the Specific Relief Act, 1877, *without any change*). Hence, where the plaintiff seeks a relief of the nature described in s. 34, he can have some relief only if the conditions laid down therein are complied with. S. 34 provides—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character of right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.....".

2. Of course, if the declaration sought is *outside* the terms of s. 34, e.g., where a worshipper prays for a declaration that a compromise decree is not binding on the deity as regards whose property the compromise had been made on the footing that it was private property, the declaration would be available even though the plaintiff had no interest in the property to which the compromise related.[8] The Supreme Court held that, in such cases, falling outside the terms of the section, the Court should grant relief on general principles, as established by precedents.[8-9] S. 34 *does not sanction every form of declaration*, but only a declaration that the plaintiff is "entitled to a specific legal character or to any right as to property".

3. The object of this section is that where a person's status or legal character has been denied or where a cloud has been cast upon his title to rights and interests in some property, he may have the cloud removed by having his legal status or right declared by the Court. A declaratory decree means a decree whereby any right to any property or the legal character of a person is judicially ascertained; it does not direct the defendant either to perform any act or to pay anything to the plaintiff. Further, the declaration does not confer any new rights upon the plaintiff, it merely *declares* what he had before.

4. The requisites for bringing such a suit are—

(*i*) The plaintiff must, at the time of the suit, be entitled to any legal character or to any right as to any property.

(*ii*) The defendant should have denied or be interested in denying the character or right.

The conditions for the Court's decreeing the suit are—

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7. Since the Specific Relief Act has been included in the Law Syllabus by the Bar Council of India, this Chapter has been added, in the present edition of this book.

8. *Vemareddi* v. *Konduru*, A.I.R. 1967 S.C. 436 (paras 5-11), where the history of Declaratory Relief in India is elaborately dealt with.

9. *Fisher* v. *Secy. of State*, (1899) 26 I.A. 16; *Partab* v. *Bhabute*, (1913) 40 I.A. 182; *S.G. Films* v. *Brijnath*, A.I.R. 1975 S.C. 1810 (paras 15-16).

If the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. In other words, the Court will not give a mere declaratory decree where the plaintiff could have asked for an *executory* decree.

5. The Proviso to s. 34 seeks to avoid a multiplicity of suits. Its object is to prevent persons from getting a declaration for right in one suit, and seek the remedy already available, in another suit. The Proviso enjoins that a person shall not obtain a mere declaratory decree where he omits to seek 'further relief' which is available at the time of the suit. The 'further relief' is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration. It is 'further relief' in relation to the legal character or right as to any property which the plaintiff is entitled to, and is accordingly called 'consequential relief'. Thus, where a plaintiff is out of possession of his title, he must also ask for recovery of possession as a consequential relief. On the other hand, where the defendant is not in possession and not in a position to deliver possession to the plaintiff, the property being in the possession of a third party who is not under the control of the defendant, the suit for declaration would be competent without any claim for delivery of possession.[10] If, however, further relief is available and the plaintiff omits to ask for consequential relief, the Court will refuse the declaration sought. Before dismissing the suit, however, the Court would allow the plaintiff an opportunity to amend the plaint so as to include the consequential relief, if he chooses.

6. What is 'further relief' to satisfy the Proviso to s. 34 will depend upon the circumstances of each case. Injunction is a 'further relief'.[11]

7. A declaratory decree cannot be obtained as of right, even if the preceding conditions are satisfied. The Court has a discretion to grant it or not, on a review of all the circumstances. Thus, the Court will refuse a declaratory decree where the plaintiff has an appropriate remedy elsewhere; or where his real object is to eject a person who is in possession. S. 34, however, merely says that the granting of relief in a declaratory suit is in the discretion of the Court; but it does not elaborate the circumstances in which the Court would be justified in refusing to exercise such discretion. Such circumstances may be deduced from judicial decisions,[12] though not laying down hard and fast rules to control the discretion of the Court, according to the facts of each case :

(*a*) Where there is no substantial injury, or a mere declaration shall be of little practical utility to the plaintiff.

(*b*) Where the plaintiff's conduct is fraudulent, or he wants to evade the

10. *Deokar* v. *Sheo Prasad,* A.I.R. 1966 S.C. 359.
11. *Yunus* v. *Syedunnissa,* A.I.R. 1961 S.C. 808.
12. *Vaish Degree College* v. *Lakshmi Narain,* A.I.R. 1976 S.C. 888 (paras 26, 34).

stamp law under the colour of a declaratory suit,[13] or the plaintiff has made great delay in bringing his suit.

(*c*) Where some other remedy would be more effective, e.g., a suit for recovery of possession or a proceeding to set aside the sale.

(*d*) Where the declaration sought is contrary to the provisions of a statute or could be rendered nugatory by the defendant.

8. As s. 35 provides, a declaratory decree given by the Court binds not only the parties to the suit but also their privies. Privity, for this purpose, may arise[14] (*i*) by operation of law, e.g., by contract; (*ii*) by creation of subordinate interest in the property, e.g., by way of mortgage, lease; (*iii*) by blood, as in the case of an heir to a party; (*iv*) in the case of a decree against a trustee, any other person, in existence at the date of the declaration, who would have been a trustee.

13. *Phulkumari* v. *Ghanashyam*, 35 Cal. 202 P.C.
14. *Razia* v. *Sahebzadi*, A.I.R. 1958 S.C. 886.

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