THE CONTRACT ACT

Table of contents

Sections	CONTENTS
	Preamble
	Preliminary
1	Short title. Extent and Commencement Enactments repealed
2	Interpretation clause
	CHAPTER -- I **Of the Communication, Acceptance and Revocation of Proposals**
3	Communication, acceptance and revocation of proposals
4	Communication when complete
5	Revocation of proposal and acceptances
6	Revocation how made
7	Acceptance must be absolute
8	Acceptance by performing conditions, or receiving consideration
9	Promises, express and implied
	CHAPTER -- II **Of Contracts, Voidable Contracts and Void Agreements**
10	What agreements are contracts
11	Who are competent to contract
12	What is a sound mind for the purposes of contracting
13	'Consent' defined
14	'Free consent' defined
15	'Coercion' defined
16	'Undue influence' defined
17	'Fraud' denied
18	'Misrepresentation defined
19	Voidability of agreements without free consent
19-A	Power to set aside contract induced by undue influence
20	Agreement void where both parties are under mistakes as to matter of fact
21	Effect of mistakes as to law
22	Contract caused by mistake of one party as to matter of fact
23	What considerations and objects are lawful and what not
	Void Agreements
24	Agreements void, if considerations and objects unlawful in part
25	Agreement without consideration void, unless it is in writing and registered or is a

promise to compensate for something done, or is a promise to pay a debt barred by limitation law
26 Agreement in restraint of marriage void
27 Agreement in restraint of trade void Saving of agreement not to carry on business of which good will is sold
28 Agreement in restraint of legal proceedings void Saving of contract to refer to arbitration dispute that may arise Suits barred by such contracts Saving of contract to refer questions that have already arisen
29 Agreement void for uncertainty
30 Agreements by way of wager void Exception in favour of certain prizes for horse-racing Section 294-A of the Pakistan Penal Code not affected
30-A Agreements collateral to wagering agreements
30-B No suit for recovery ; of money, commission, etc., in respect of void agreement
30-C Payments by guardian, executor, etc., in respect of void agreements not to be allowed credit

CHAPTER -- III
Of Contingent Contracts

31 'Contingent contract' defined
32 Enforcement of contracts contingent on an event happening
33 Enforcement of contracts contingent on an event not happening
34 When event on which contract is contingent to be deemed impossible, if it is the future conduct of living person
35 When contracts become void which are contingent on happening of specified event within fixed time When contracts may be enforced which are contingent on specified event not happening with fixed time
36 Agreement contingent on impossible events void

CHAPTER IV
Of the Performance of Contracts
Contracts which must be performed

37 Obligation of parties to contracts
38 Effect of refusal to accept offer of performance
39 Effect of refusal of party to perform promise wholly

By whom contracts must be performed

40 Person by whom promise is to be performed
41. Effect of accepting performance from third person

42 Devolution of joint liabilities
43 Any one of joint promisors may be compelled to perform Each promisor may compel contribution Sharing of loss by default in contribution
44 Effect of release of one joint promisor
45 Devolution of joint rights

Time and place of performance

46. Time for performance of promise where no application is to be made and no time is specified
47. Time and place for performance of promise where time is specified and no application to be made
48. Application for performance on certain day to be at proper time and place
49. Place for performance of promise where no application to be made and no place fixed for performance
50. Performance in manner or at time prescribed or sanctioned by promise

Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform
52. Order of performance of reciprocal promises
53. Liability of party preventing event on which the contract is to take effect
54. Effect of default as to that promise which should be first performed, in contract, consisting of reciprocal promises
55. Effect of failure to perform at fixed time, in contract in which time is essential
Effect of such failure when time is not essential
Effect of acceptance of performance at time other than that agreed upon
56. Agreement to do impossible Act Contract to do Act afterwards becoming impossible or unlawful Compensation for loss through non-performance of Act known to be impossible or unlawful
57. Reciprocal promise to do things legal and also other things illegal ...
58. Alternative promise, one branch being illegal

Appropriation of payments

59. Application of payment where debt to be discharged is indicated ...
60. Application of payment where debt to be discharged is not indicated..
61. Application of payment where neither party appropriates

Contract which need not be performed

62. Effect of novation, rescission, and alteration of contract

63. Promisee may dispense with or remit performance of promise

64. Consequences of rescission of voidable contract

65. Obligation of person who has received advantage under void agreement or contract that becomes void

66. Mode of communicating or revoking rescission of voidable contract...

67. Effect of neglect of promisee to afford promisor reasonable facilities for performance

CHAPTER V
Of certain Relations Resembling those created by Contract

68. Claim for necessaries supplied to person incapable of contracting,, or on his account

69. Reimbursement of person paying money due by another in payment of which he is interested

70. Obligation of person enjoying benefit of non-gratuitous Act

71. Responsibility of finder of goods

72. Liability of persons to whom money is paid or thing delivered by mistake or under coercion

CHAPTER VI
Of the Consequences of Breach of Contract

73. Compensation for loss or damage caused by breach of contract Compensation for failure to discharge obligations resembling those created by contract

74. Compensation for breach of contract where penalty stipulated for ...

75. Party rightfully rescinding contract entitled to compensation

CHAPTER VII
Sale of Goods

76. **to** **123.** Repealed

CHAPTER VIII
Of Indemnity and Guarantee

124. 'Contract of indemnity' defined

125. Right of indemnity -holder when sued

126. 'Contract of guarantee', 'surety', 'principal debtor' and"creditor"...

127. Consideration for guarantee

128. Surety's liability

129. 'Continuing guarantee'

130. Revocation of continuing guarantee
131. Revocation of continuing guarantee by surety's death
132. Liability of two persons primarily liable, not affected by arrangement between them that one shall be surety on other's default
133. Discharge of surety by variance in terms of contracts
134. Discharge of surety by release or discharge of principal debtor
135. Discharge of surety when creditor compounds with, give'., time to, or agrees not to sue, principal debtor
136. Surety not discharged when agreement made with third person to give time to principal debtor
137. Creditor' for bearance to sue does not discharge surety
138. Release of one co-surety does not discharge others
139. Discharge of surety by creditor's Act or omission impairing surety's eventual remedy
140. Rights of surety on payment or performance
141. Surety's right to benefit of creditor's securities ' 142. Guarantee obtained by misrepresentation invalid
143. Guarantee obtained by concealment invalid
144. Guarantee on contract that creditor shall not Act on it until co-surety joins
145. Implied promise to indemnify surety
146. Co-sureties liable to contribute equally
147. Liability of co-sureties bound in different sums

CHAPTER IX
Of Bailment

148. 'Bailment' 'bailor,' and 'bailee', defined
149. Delivery to bailee how made
150. Bailor's duty to disclose faults in goods bailed
151. Care to be taken by bailee
152. Bailee when not liable for loss, etc., of thing bailed
153. Termination of bailment by bailee's Act inconsistent with conditions.
154. Liability, of bailee making unauthorised use of goods bailed
155. Effect of mixture, with bailor's consent, of his goods with bailee's ..
156. Effect of mixture, without bailor's consent, when the goods can be separated
157. Effect of mixture, without bailor's consent, when the goods cannot be separated ' ..
158. Repayment by bailor of necessary expenses
159. Restoration of goods lent gratuitously

160. Return of goods bailed, on expiration of time or accomplishment of purpose o
161. Bailee's responsibility when goods are not duly returned
162. Termination of gratuitous bailment by death
163. Bailor entitled to increase of profit from goods bailed
164. Bailor's responsibility to bailee
165. Bailment by several joint owners
166. Bailee not responsible on re-delivery to bailor without title
167. Right of third person claiming goods bailed
168. Right of finder of goods ; may sue for specific reward offered
169. When finder of thing commonly on sale may sell it
170. Bailee's particular lien
171. General, lien of bankers, factors, wharfingers, attorneys and policy-brokers

Bailments of pledges

172. 'Pledge', 'Pawnor' and 'Pawnee' defined
173. Pawnee's right of retainer
174. Pawnee not to retain for debt or promise other than that for which goods pledged Presumption in case of subsequent advances
175. Pawnee's right as to extra-ordinary expenses incurred
176. Pawnee's right where pawnor makes default
177. Defaulting pawnor's right to redeem
178. Pledge by mercantile agent
Case Law 178-A. Pledge by person in possession under voidable contract
179. Pledge where pawnor has only a limited interest

Suits by Bailees or Bailors against Wrongdoer

180. Suit by bailor or bailee against wrong-doer
181. Apportionment of relief or compensation obtained by such suits

CHAPTER X

Agency

Appointment and Authority of Agents

182. ' Agent' and 'principal' defined
183. Who may employ agent
184. Who may be an agent
185. Consideration not necessary
186. Agent's authority may be expressed or implied
187. Definitions of express and implied authority
188. Extent of agent's authority

189. Agent's authority in an emergency

Sub-agents

190. When agent cannot delegate
191. 'Sub-agent' defined ...
192. Representation of principal by sub-agent properly appointed Agent's responsibility for sub-agent Sub-agent's responsibility
193. Agent's responsibility for sub-agent appointed without authority ...
194. Relation between principal and person duly appointed by agent to Act in business of agency
195. Agent's duty in naming such person

Ratification

196. Right of person as to acts done for him without his authority Effect of ratification
197. Ratification may be expressed or implied
198. Knowledge requisite for valid ratification
199. Effect of ratifying unauthorized Act forming part of a transaction ...
200. Ratification of a unathorized Act cannot injure third person

Revocation of Authority

201. Termination of agency
202. Termination of agency where agent has an interest in subject-matter...
203. When principal may revoke agent's authority
204. Revocation where authority has been partly exercised
205. Compensation for revocation by principal, or renunciation by agent...
206. Notice of revocation or renunciation
207. Revocation and renunciation may be expressed or implied
208. When termination of agent's authority takes effect as to agent, and to third persons
209. Agent's duty on termination of agency by principal's death or insanity
210. Termination of sub-agent's authority

Agent's duty to Principal

211. Agent's duty in conducting principal's business
212. Skill and diligence required from agent
213. Agent's accounts
214. Agent's duty to communicate with principal
215. Right of principal when agent deals, on his own account, in business of agency without principal' s consent
216. Principal's right to benefit gained by agent dealing on his own account in business of agency

217. Agent's right of retainer but of sums received on principal's account..
218. Agent' s duty to pay sums received for principal
219. When agent's remuneration becomes due
220. Agent not entitled to remuneration for business misconducted
221. Agents lien on principal's property

Principal's duty to Agent

222. Agent to be indemnified against consequences of lawful Acts
223. Agent to be indemnified against consequences of Acts done in good faith
224. Non-liability of employer of agent to do a criminal Act
225. Compensation to agent for injury caused by principal' s neglect

Effect of Agency on contract with third persons

226. Enforcement and consequences of agent's contracts
227. Principal how far bound, when agent exceeds authority
228. Principal not bound when excess of agent's authority is not separable
229. Consequences of notice given to agent
230. Agent cannot personally enforce, not be bound by, contracts on behalf of principal , Presumption of contract to contrary
231. Rights of parties to a contract made by agent not disclosed
232. Performance of contract with agent supposed to be principal
233. Right of person dealing with agent personally liable
234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable
235. Liability of pretended agent
236. Person falsely contracting as agent not entitled to performance
237. Liability of principal inducing belief that agent's unauthorized act were authorized
238. Effect, on agreement, of misrepresentation of fraud by agent

THE
CONTRACT ACT 1872

(IX OF 1872)

25th April, 1872

Preamble. Whereas it is expedient to define and amend certain parts of the law relating to contract; It is hereby enacted as follows:--

PRELIMINARY

1. Short title. This Act may be called the Contract Act, 1872.

Extent and commencement. It extends to the whole of Pakistan; and it shall come into force on the first day of September, 1872.

Enactments repealed. Nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act.

2. Interpretation clause. In this Act the following words and expressions are used in the following senses unless, a contrary intention appears from the context--

(a) **"Proposal**": When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) "**Promise**": When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise;

(c) **Promisor and Promisee**": The person making the proposal is called the"promisor", and the person accepting the proposal is called the"promisee";

(d) "**Consideration":** When, at the desire of the promisor, the promisee or any other person who has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;

(e) "**Agreement":** Every promise and every set of promises, forming he consideration for each other, is an agreement;

(f) "**Reciprocal promises**": Promises which form the consideration or part of the consideration for each other called reciprocal promises;

(g) "**Void agreement**": An agreement not enforceable by law is said to be void;

(h) "Contract": An agreement enforceable by laws a contract;

(i) "**Voidable contract**": An agreement which is enforceable by law at the opinion of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract; and

(j) "**Void contract":** A contractor which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Court Decisions

Dispute between parties covered by Arbitration clause of contract :--Filing Agreement in Court and referring matter to Arbitration-Essentials-All questions relating to original contract or matters which could be decided by Arbitrator alone would be, by virtue of relevant cluase of contract, by mutual consensus, committed to Judgment of Arbitrator and the same would not fall within jurisdiction of Civil Court. **1999 SCMR 121**

Voidable and void agreement - Limitation - Where property had been transferred under a void agreement, the plaintiff was entitled to bring his suit for possession within 12 years and Art. 91, Limitation Act, 1908 would have no application. There is wide difference between an agreement which is voidable and one which is void. A voidable contract is a good contract so long as it is not avoided by the person who has the right to avoid the same, while a void contract is no contract in law, and in the eye of law it does not exist. When a party seeks to avoid a voidable contract and gets certain ancillary relief it follows that if his claim for avoidance of the contract is barred by limitation he cannot get the ancillary reliefs while if the contract is void it is not necessary to have the contract set aside and the rights of the parties can be determined independently of the deed. So, even if the claim for the cancellation of the deed or for declaration that it is void is barred by limitation, the rights of the parties can still be determined independently of the same. Therefore, where property has

been transferred under a void agreement, the plaintiff is entitled to bring his suit for possession within 12 years and Article 91 of the Limitation Act, 1908 would have no application. **2001 CLC 1298** Mst. Aisha Begum v. Mt. Kundan Jan and others AIR 1945 All. 367; Abdur Rehman v. Abdul Haq and others PLD 1960 (W.P.) Kar. 625; Muhammad Akbar Shah v. Muhammad Yousaf Shah and others PLD 1964 SC 329; Abdul Hamid alias MD. Abdul Hamid v. Dr. Saddique Ali Ahmad and others PLD 1969 Dacca 357 and Dhuman Khan and others v. Gurmukh Singh and others AIR 1936 Lah.394 ref.

Concluded contract :---Question whether the parties had reached a concluded contract or not, is a question of fact to be deduced from the correspondence and other documentary or oral evidence - True test for deciding the question is to ascertain whether the parties were of one mind on all the material terms at the time the contract was said to have been finalized between them and whether, the parties intended that the matter was closed and concluded between them. **2002 CLC 218** Custodian, Enemy Property, Islamabad v. Hoshand M. Dastur and 6 others PLD 1977 Kar. 377 and BaiJnath v. Ksetradhari Sarkar and others AIR 1955 Cal. 210 ref,

Oral agreement by Agent--- Person entering into oral agreement with the Agent had to prove the oral agreement according to the definition of agreement under S.2 (h), Contract Act, 1872. **PLD 2003 SC 31**

Agreement to sell-Trial Court, in the present case, on the one hand declared that the agreement to sell was without lawful authority and on the other hand forfeited the amount paid by the vendee in pursuance of the agreement to sell-Such finding of the Court being contrary to law and contradictory could not be sustained-Vendee would be entitled to receive amount which he had already paid. **PLD 2003 Azad J &K 16**

Agreement. Definition. A bare reading of agreement to sell unequivocally shows that there is proposal by vendor and acceptance by plaintiff for a valuable consideration. There is a stipulation of delivering vacant possession of property by vendor. These features do not admit of any ambiguity. Parties had mutually entered into a valid, lawful and a concluded contract.-**P.L.J.1996 Kar. 1072 = 1996MLD322.**

Whether a guarantee for part consideration is void. If a loan is given by a creditor to Principal borrower at the behest of surety, that in terms of section 2(d) and 127 constitutes sufficient consideration. Consideration for guarantee, was, therefore, advances granted by plaintiff in past as well as in future. Guarantee is good as to both past and future transactions. Said guarantee in question was given for sufficient consideration and not void.-**P.L.J.1996 Kar. 485 = 1996 CLC 106.**

Contractual obligation. Ordinarily, constitutional petition for enforcement of contractual obligation would not be maintainable in as much as enforcement of contract would entail factual inquiry into disputed questions of fact which is primarily function of Court of plenary Jurisdiction. Courts, however, have sometimes interfered in cases where enforcement of terms of contract was sought against statutory corporations of the Government-contract was signed by specified respondent on behalf of Government who was admitted competent authority and if specified Bank had promised to partly fund project in question, such was internal arrangement between that Bank and the Government and if such Bank had backed out to release funds, petitioners could not be denied payment for there was no conditionality in contract that payment would be subject to clearance from the Bank in question. State being symbol of social contract wherein citizens part with some of their freedom in lieu of security of life, property and honour to be provided by the state. State in its ideal sense is repository of Justice and its functionaries could not be permitted to take unfair stand violating all canons of equity. State having accepted terms of contract, delivery of item and liability to make payment, nonSuiting petitioner would not be fair merely on ground that contractual obligation could not be enforced through Constitutional petition. Respondents were directed to make payment of amount in question, in terms of contract within specified days. **P.L.J.2000 Lah. 568.**

Catering contract to supply food to passengers. Petitioner's bid being highest was accepted, he deposited 25 per cent of bid amount as also requisite security. Petitioner was subsequently

informed that his bid had been accepted. Respondents, thereafter, neither executed contract document nor delivered possession of Dining Car to petitioner in terms of contract. Respondents claimed that catering policy has been changed therefore, contract in question, could not be performed. Reasons furnished for inaction on the part of respondents, were after-thought, superficial and false pretext to defend constitutional petition in as much as petitioner was never informed that it was not possible to proceed with contract further and asked to secure refund of amount paid by it. Respondent also failed to produce any policy which had been formulated instead of system of letting out contract in question, through open auction. Petitioner's further reason in defence was that petitioner had offered such high price that it was not possible for it to perform the contract and maintain quality of edibles, such reason on the force of it was not genuine. Conduct of respondent's was classic case of dereliction of duty on the part of Railway administration. Constitutional petition was allowed with costs of Rs. Fifty thousand which would be responsibility of respondents, themselves and recovered from them. Respondents were directed to decide fate of contract of petitioner expeditiously by specified date. Secretary Establishment was directed that forthwith proceeding under Efficiency and Discipline Rules were initiated against specified Railway Officers for inefficiency and misconduct resulting in loss-to Railways. Chairman and General Manager were issued show-cause notice as to why they should not be proceeded and punished for contempt of Court as. they have failed to grant contract in accordance with Judgment of S.C.in Shaukat Ali's case PLD 1997 SC 342. Petitioner was also at liberty to initiate action against respondents in accordance with law.-**P.L.J. 2000Lah. 437.**

Unlawful agreement :--- Unlawful agreement by parties whereby plaintiff had given land in question, free of any consideration thereof, to civil surgeon for construction of Rural Health Centre with understanding that menial staff at the same would be appointed on recommendation of plaintiff. Effect. Unlawful act could not be made lawful by consent of parties. Public office could not be given for land grants, even if Department had agreed to appoint staff at Rural Health Centre on recommendation of plaintiff, that condition being not lawful would be of no avail.-**P.L.J.2000 Pesh. 313.**

Proposal--Acceptance--Unconditional appropriation of first premium--Not tantamount to implied acceptance of insurance proposal. **NLR 1978 Civil 870; PLD 1978 Lah. 264; P.L.J1978 Lah. 1; 1978 Law Notes 21.**

Agreement to sell--Effect of--Held: Agreement to sell per se not to create title in property--Held further: Such agreement only creating right to obtain another document, no registration of it to be required even though it contains acknowledgment of receipt of earnest money or part payment of price. **P.L.J1987 SC (AJK) 87.**

Interpretation of documents---Arbitration agreement essentially a contract. and to be governed by same rules in matter of interpretation as apply to construction of contract--Contract to be construed in harmoneous manner and each part to be construed in harmony with other parts so that a rational meaning be given to all parts of contract. **1981 CLC 106**.

Terms and conditions set forth in a document signed by parties--Document containing terms and conditions whether a "contract"--Constitutional Jurisdiction of High Court whether exercisable for breach of terms of contract--Document offering plots for construction of houses containing therein memorandum of acceptance, setting forth terms and conditions for allotment of plots Such a document, held, would have all the characteristics and necessary ingredient of a contract between parties--Allotment order relating to plots was nothing but a contract which came into being as a result of offer by Government to sell and acceptance by allottees--Where scheme for allotment of plots had not been framed or issued in pursuance to any statute or statutory Rules, same could not be enforced as statutory rules or instruments in constitutional Jurisdiction of High Court. Rights and obligations arising from and connected with contract between parties could not be enforced in constitutional Jurisdiction as remedy therefor was in a civil Court under ordinary law--Term "aggrieved person" would have no relevancy in the context of a case where breach of contract was to be adjudicated--Petition being devoid of merit was dismissed in circumstances. **PLD 1987 Lah. 440.**

Void and voidable-- There is a clear distinction between things "void" and "voidable" though the two terms arc not infrequently used without special regard for the difference or distinction particularly where such distinction is of no consequence or where the attention of the Court is not particularly directed to this distinction. The expression "void" in the strict or accurate sense means "absolutely null" that is to say incapable of ratification or confirmation and of no effect whatever. The word "voidable" on the other hand is something which could be avoided or confirmed and which is not absolutely void. In other words what is voidable has some force or effect, but which may be set aside or annulled for some error or inherent vice of defect. "Thus that which is voidable operates to accomplish the thing sought to be accomplished until the fatal vice in the transaction has been Judicially ascertained and declared." A common place instance of a void act or transaction in the sense of an absolute nullity is an agreement by a person under a legal disability, e.g. a minor or a person of unsound mind. Such act is void ab-initio and is incapable of ratification or confirmation. Law forbids the enforcement of such a transaction even if the minor were to ratify it after attaining majority. This is clearly distinguishable from a case in which a thing or an act is "relatively void" which the law condemns as wrong to the individual concerned who can avoid it by appropriate proceedings. A common-place instance of such transaction is that which is brought about by undue influence, fraud, etc. which remains of full effect unless avoided by appropriate proceedings. **PLD 1976 SC 258.**

Insurance contract--Proposal not accepted formally and no first premium receipt issued--Insurance contract does not come into effect. **PLD 1978 Lah. 264; P.L.J1978 Lah. 1; 1978 Law Notes 210; NLR 1978 Civ. 870 (D.B.)**

Void Contract :-- Party may claim compensation under S. 65. In the event of the contracts being found to be unenforceable or, in other words being 'void' within the meaning of section 2 of the Contract Act, the plaintiff could claim compensation in terms of section 65 of the Contract Act. **PLD 1962 (W.P.) Kar. 87; PLR 1962 (1) W.P. 830.**

Promise--When enforceable--Person resigning in response to general offer by employer to give financial benefits to persons voluntarily resigning. Resignation not accepted--No breach of contract. It is only a promise supported by a consideration which becomes a contract under our laws. Where file plaintiff employee had submitted his resignation in response to an alleged scheme introduced by the employer containing substantial financial benefits for persons resigning voluntarily. The employer, however, did not accept the resignation of the plaintiff. It was contended on behalf of the plaintiff that file alleged scheme being an offer, as soon as the resignation of the plaintiff in response thereto was received by the employer it created a legal contract binding upon the employer. Held; In submitting his letter of resignation the plaintiff did not act to his detriment, and this letter cannot be treated as consideration on his part so as to bind the employer. **PLD 1971 Kar. 305.**

Agreement to sell--No interest created in immovable property. An agreement to sell does not create any right, title or interest in immovable property. **PLD 1966 (W.P.) Lah. 953.**

Agreement to make gift of house to bride by father of bridegroom on her contracting marriage with his son--Marriage contracted--Bride may enforce contract. Such agreements are frequently made in Muslim families in this part of the country between the parents and guardians of the parties to the marriage and it would occasion serious injustice if a person in the position of the plaintiff is not allowed to take advantage of the provisions of such an agreement on the ground of her not being a party to it. **PLD 1968 Lah. 1001**.

Agreement discovered to be void-- The term "agreement" has not been used as being synonymous with the term 'contract' in this section. An agreement, which by its very nature was void from its inception, would still attract the consequences which this section provides if after the agreement is made it is discovered to be void. **PLD 1968 Kar. 196**

Consideration:----Deposit of money for safe custody not an act without consideration. In the eye of law, consideration would mean and include some right," interest, profit or benefit accruing to one party and some forbearance, by the other. Thus where a person deposited money with another for safe custody till such time that he buys, a rickshaw. Held: In the eye of law forbearance on the one side and acceptance of responsibility on the other, is sufficient consideration to constitute Contract. **PLD 1967 Dacca 152.**

Sporting offer--Not a proposal. As sporting offer made casually and not genuinely by a plaintiff in the course of his cross-examination, in reply to a question put by the counsel of the opposite party, primarily intended to discharge the burden of proof placed upon him under an issue, cannot be interpreted by any stretch of imagination or language as a "Proposal" within the meaning of section 2 of the Contract Act. **PLD 1956 Pesh. 55.**

Suit on basis of compromise--Compromise must be based on some consideration passing from the party. Where a party to a compromise brought a suit on the basis of the compromise by which he had settled matters pretaining to his claim in the property of a deceased person.The compromise was reJected by the Judges on the ground that the agreement was without consideration. Held: The question to be determined is whether any consideration moved from the respondent to support the agreement. This depends upon whether the respondent had a bona fide claim to the property which was the subject of the agreement of compromise. **PLD 1947 Privy Council 270**.

Mutuality in contract--Absence of--Contract voidable. The clause in contract was, "in the event of dispute of any nature arising in respect of the said goods or the execution of this contract you are always to have the option of cancelling the contract or referring the matter to the Arbitration of one or two merchants and I/we agree and bind myself/ourselves to accept the decision of the Arbitration/Arbitrators as final anti should the Arbitrators not agree they are to appoint an Umpire whose decision shall be final and binding upon the parties, the party at fault to pay the fee or fees."
Held: That as the clause gives right to cancel or to refer to Arbitration to one party only the agreement was voidable within the meaning of section 2 (1) of the Contract Act and therefore, cannot be enforced. **PLD 1953 Sind 57**

Contract in form of compromise in favour of stranger---Compromise arrived at between parties to contract that respondent, a party to contract, shall be bound to sell land in question to petitioner, a stranger to contract. Respondent, held, to trustee qua petitioner and petitioner can file suit against respondent to enforce his right of purchasing land on payment of stipulated sum of money in compromise deed--Finding of Courts below that plaint of petitioner disclosed no cause of action, held further, without Jurisdiction and illegal and set aside and case remanded to trial Court for decision of suit on merits. **PLD 1984 Lah. 59**

Agreement of sale. Specific performance--Mere inadequacy of consideration, held, no ground for refusing specific performance of contract in respect of immovable properties unless inadequacy was shown to be such which would shock conscience of Court while decreeing suit for specific performance or there were fraud or misrepresentation on part of plaintiff which induced defendant to enter into a contract for sale or there were certain circumstances under which plaintiff took

improper advantage of his position or difficulties of defendant making him victim of his imposition. **1985 CLC 29.63**. Document produced by plaintiff only a sort of receipt acknowledging a sum as earnest money and not showing essential terms of sale consideration, time for completion of sale, payment of balance of sale consideration or anything about delivery of possession of property.Serious doubts existing between parties about sale consideration--Burden of proving sale consideration not discharged by plaintiff who failed to examine witnesses before whom he paid earnest money--Held, since document relied by plaintiff was not mentioning most important term of sale namely sale consideration it could not be said that parties were ad interim or of one mind as to essential term of sale. **1985 CLC 342**

Ab initio valid contract. Subsequent event of adding letter 's' in contract, held, would not turn same to be void or voidable, even if it was assumed that letter 's' was added. Such contract, nevertheless, would remain enforceable in terms of its original condition. **PLD 1985 Kar. 215**.

Proof Suit for recovery of contract amount--Where defendant failed to prove that any breach of agreement was committed by plaintiff Justifying stoppage of payment to him, while admitting liability to pay claimed amount, plaintiff, held, was entitled to decree of his suit. **PLD 1987 Kar. 76**

Constitution of Agreement, Requirements--To constitute an agreement, it was held necessary that there should be an unconditional offer and same was accepted by competent person/authority giving rise to accrual of right to parties to such agreement--Where a tenderer made an offer to purchase Certain property and attached conditions thereto, an agreement could not come into effect unless conditions were also accepted by Authority issuing tenders--Offer of tenderer having not been accepted by Authority, no right had accrued to such tenderer on basis of his conditional offer. **1987 CLC 1322.**

Agreement--Liability under--Agreement for securing cash credit facility and Memorandum of deposit of title deeds signed by predecessor, held, would bind his successors on equitable mortgage of property--Transfer of Property Act, 1882, S. 58. **PLD 1986 Kar. 107.**

Doctrine of ratification - Act done by one person on behalf of another - Provision of S.196, Contract Act, 1872 - Applicability - Pre-requisites - Act should have been performed by a person acting for the other but without the knowledge of the other - Before ratifying unauthorised act of agent, the principal must be proved to have the knowledge of the action he is approving so that the principal can exercise the option of ratifying or disowning - Person ratifying the contract must know fully all the material circumstances, under which the act is so done - Act cited to be ratified must not be a void act. **2001 CLC 595**

Co-Sharer entered into the agreement with the plaintiff, regarding his share as well as on behalf of the other Co-Sharers - Such agreement was executed without the consent and knowledge of the other Co-Sharers - Executant was not acting as attorney for the other Co-Sharers, while executing the agreement - Trial Court dismissed the suit to the extent of specific performance whereas the lower Appellate Court allowed the appeal arid decreed the suit - Validity - Where the executant was not acting as attorney and the other Co-Sharers were not aware of the agreement on their behalf, doctrine of ratification was inapplicable - Lower Appellate Court failed to take into consideration the essentials of the provisions of S.196 of Contract Act, 1872, but had restricted itself to draw inferences which were not Justified on the basis of evidence adduced by the plaintiff-Judgment and decree of the Lower Appellate Court were set aside and that of the Trial Court were upheld. **2001 CLC 595**
Abdul Majid and 2 others v. Waris Ali and another 1999 YLR 1668; Imperial Bank of Canada v. Mary Victoria Begley AIR 1936 PC 193; Halsbury's Laws of England, 2nd Edn., p.231; Health v. Chilton (1844) 12 M&W 632 and Easten Construction Co. v. National Trust Co., 1914 AC 197 ref.

Termination of contract---Any written contract, subject to some exceptions could be terminated orally ---Factum of rescission, however has to be proved through evidence, oral and circumstantial. **P L D 1994 Kar. 492**

CHAPTER -- I

OF COMMUNICATIONS, ACCEPTANCE AND REVOCATION OF PROPOSALS

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

Illustrations

(a) A. proposes, by letter, to sell a house to B. at a certain price. The communication of the proposal is complete when B. receives the letter.

(b) B. accepts A.'s proposal by a letter sent by post. The communication of the acceptance is complete; as against A., when the letter is posted; as against B., when the letter is received by A.

(c) A revokes his proposal by telegram. The revocation is complete as against A., when the telegram is despatched.

It is complete as against B. when B. receives it.

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

Court Decisions

Specific performance of an agreement which is void ---. Agreement between Government and appellant was in the nature of sale of a public office, consideration being transfer of land. Sale of public office cannot be a legal transaction. Agreement is hit by section 3 of the Contract Act, whi'ch makes it void. As the agreement amounting to sale of public office is void.and illegal, specific performance thereof cannot be granted. **P.L.J.1997 SC 494 = 1997 SCMR 855 = NLR 1997 Civil 335.**

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

The communication of an acceptance is complete.

as against the propose, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

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

The communication of revocation is complete,---

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

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

Illustrations

(a) A. proposes, by letter, to sell a house to B. at a certain price.
The communication of the proposal is complete when B. receives the letter.

(b) B. accepts A.'s proposal by a letter sent by post.
The communication of the acceptance is complete; as against A., when the letter is posted; as against B., when the letter is received by A.

(c) A revokes his proposal by telegram.
The revocation is complete as against A., when the telegram is dispatched.
It is complete as against B. when B. receives it.
B. revokes his acceptance by telegram. B.'s revocation is complete as against B. when the telegram is dispatched, and as against A. when it reaches him.

Court Decisions

Communication when complete :-- Acquisition of land for construction of WAPDA Employees Co-operative Housing Society assailed on the ground that said society could not be

deemed to be a company and that such society was not formed for public purpose - Competency of issuing notification under S. 4 of Land Acquisition Act 1894 was also assailed - WAPDA Employees Co-operating Housing Society having been registered under Co-operative Societies Act 1925, was deemed to be a company within the meaning of S. 3 of Land Acquisition Act 1894, therefore, land in question can be acquired for it - Land proposed to be acquired was for public purpose in as much as, Land Acquired for construction of residential colony would fall under the definition of 'Public Purpose' - Codal formalities as required under the law having been fulfilled, District Collector vested with powers of Land Acquisition Collector was competent to issue notification under S. 4 of Land Acquisition Act 1894 - Land owners had alternate remedy to raise objection relating to 'public purpose' before Collector who after bearing parties could decide whether the land proposed to be acquired was for 'public purpose' or otherwise, therefore, in absence of availing of such remedy, that objection could not be raised the Constitutional petition--Petitioners, also had remedy to file appeal under S. 54, Land Acquisition Act 1894 in the High Court where such matter could be thrashed out--Constitutional petition was, thus, not competent and the same was dismissed in circumstances. **P.L.J. 2002 Pesh. 11**- NLR 1980 Rev. (41; PLD 1983 Lah.552 & 355; AIR 1960 S.C. 1203; AIR 1914 P.C. 20; AIR 1959 PunJ 479; AIR 1954 All 700; AIR 1962 SC 764; PLD 1960 SC 60; AIR 1963 M.P. 256; AIR 1925 Mad. 837.

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

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but afterwards.

Illustrations

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

B accepts the proposal by a letter sent by post.

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

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

Court Decisions

Revocation :-- President of Liverpool Cotton Association made compulsory appointment of Arbitrator under rules of Liverpool Cotton Association Limited to act on behalf of defendants. Arbitrators gave their award under which defendants were directed to pay damages together with interest and costs. No appeal was filed by defendants to Technical Award Committee against the award. Defendants filed objections that since admittedly arbitrators did not have sight of a contract form signed by both parties, Arbitrators were not seized of Jurisdiction and that the date of determination of breach of contract was not correct. Status. Defendnats had not denied the existence of contract. Objections being beyond the scope of S. 7 of Arbitration (Protocol and Convention) Act (VI of 1937) suit was decreed in terms of the award. **P.L.J. 1999 Kar. 481 = 1999CLC437.**

6. Revocation how made. A proposal is revoked-

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Court Decisions

Withdrawal of resignation before acceptance of same. Resignation if tendered voluntarily or by way of coercion, fraud etc. would be ineffective unless and until same was accepted or the same was withdrawn before acceptance thereof. Record indicated that civil servant did not tender his resignation voluntarily but be was, by application of force, coercion, duress and fraud, forced to sign resignation maneuvered and manipulated by respondents without free will/consent of civil servant which in no case could be legally Justified and declared valid. Resignation, on both counts whether the same was obtained ' fraudulently by respondents from civil servant or he tendered resignation

willingly, such resignation was ineffective being not legal and tendered in • normal way and in due course of events. Even if civil servant had tendered his resignation voluntarily, same was validly and legally withdrawn, therefore, in either case, he was declared to be in service and was entitled to back benefits. **P.L.J.20GO Tr. C. (.Service) 129**.

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

(1) be absolute and unqualified;

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

Court Decisions

Converting proposal into contract -- In order to convert a proposal into a contract, the acceptance to the proposal must be absolute and unqualified - Consensus ad idem between the parties with regard to all the terms of the contract must be shown to exist - Qualified acceptance of proposal or acceptance of proposal with a variation is no acceptance. **2002 CLC 218**
Von Hatzfeldt-Widenburg v. Alexander (1911-1913) All ER 148 and Shalsons Fisheries Limited, Kar. v. Lohmann & Co. and another PLD 1982 Kar. 76 ref.

Acceptance with variation does not bring into existance a binding contract between parties. **P.L.J.1982 Kar. 76.**

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

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

Court Decisions

Sale of immovable property--No price specified--Not enforceable contract. As a general rule, in the case of immovable properties price is of the essence of a contract of sale and unless the price is fixed there is no enforceable contract, because if no price is named the law does not imply, as in case of a sale of goods, a contract at a reasonable price. **22 DLR (S.C.) 443**.

CHAPTER -- II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

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

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

Court Decisions

Agreement termed as contract - Where acceptance of offer is subject to additional conditions, the same merely constitutes an expression of willingness to enter into a contract or a counter proposal but does not constitute a binding contract. **2002 CLC 218**

Arbitration clause in contract-- The words of the Arbitration clause should be given reasonable, ordinary, natural meaning and not extended meaning. The extended meaning must be kept within bounds. **PLD 1968 Dacca 361**

Bill of Lading--Non-payment--Appellant firm entering into general agreement with a foreign firm to export frozen shrimps of consignment basis to be paid for by means of opening letters of credit--Being in need of funds to finance export, appellant firm obtaining overdraft, called packing credit, from respondent-Bank against lien of letter of credit and on security of shipment to be made under letter of credit--A foreign Bank on instructions of purchaser opening an irrevocable letter of credit in favour of appellant-firm--Letter of credit in question bearing a specified date for expiry and respondent-Bank instructed to advise appellant firm of opening of letter of credit--Appellant firm negotiating documents called for by letter of credit together with a bill of exchange drawn on buyer--Bill of lading drawn to order of respondent-Bank and not to order of foreign Bank as required under credit. Respondent-Bank, forwarding shipping documents together with Bill of Exchange duly negotiated to foreign Bank for payment however forwarding only two copies of bill of lading instead of required full set of three--Foreign Bank declining to make payment for want of third copy--Third copy eventually sent by respondent-Bank to foreign Bank but reaching after expiry of period specified in such regard and foreign Bank again declining to make payment--Appellant-firm having supplied respondent Bank full set of three copies of Bill of Lading, respondent Bank, held, Committed negligence and lost its right to recourse under arrangements entered into with appellant firm. **PLD 1982 Kar. 902.**

Charter party agreement--How can be construed. Like ordinary contracts the terms of a charter party agreement can also be spelt from the correspondence exchanged between the parties. **PLD 1959 Kar. 750**

Concluded contract - Question whether the parties had reached a concluded contract or not, is a question of fact to be deduced from the correspondence and other documentary or oral evidence - True test for deciding the question is to ascertain whether the parties were of one mind on all the material terms at the time the contract was said to have been finalized between them and whether, the parties intended that the matter was closed and concluded between them. **2002 CLC 218** Custodian, Enemy Property, Islamabad v. Hoshand M. Dastur and 6 others PLD 1977 Kar. 377 and BaiJnath v. Ksetradhari Sarkar and others AIR 1955 Cal. 210 ref,

Contract-- Challenge to Sale deed allegedly executed in favour of son not given effect in revenue record in lifetime of seller and till further period of about four years after his death--Held:

Consent of seller having not been freely given, deed (in dispute) not to be genuine one. **P.L.J1987 Pesh. 75** Terms contained in letter leading to execution of contract--Cannot be relied upon for interpreting contract. **NLR 1981 UC 218**

Contract of sale of immovable property--Question whether time was of essence of contract is a question of intention of parties--Its determination depends upon terms of contract, conduct of parties before executing contract and surrounding circumstances--It is not a pure question of law but a question of fact--If not raised before trial Court, it cannot be raised in second appeal u/s. 100 before High Court or in leave proceedings before Supreme Court. **NLR 1985 SCJ 268.**

Contract with a Company --Presumption of act being properly done by company may be raised--Doctrine of indoor management. Broadly and briefly stated, the doctrine of "indoor management" is to the effect that persons contracting with a Company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regularly done. Thus where the lease was made by the Secretary of the Company, the lessee was not required to inquire as to whether in fact the Society had approved the terms which were being offered to him in writing by the Honorary Secretary of the Society. Even if there was no delegation of the necessary powers in favour of the Secretary or the delegation was not valid on account of its inconsistency with any rule or bye-law of the Society, the transaction appears to be saved by what is known as the doctrine of "indoor management". **PLD 1969 Kar. 474; 21 DLR (W.P.) 345**

Contract with Govt.--Validity challenged with contentions that it was without sanction/authorisation/approval and that it was arrived at in violation of Rules of Business--Contentions repelled to be untenable and validity of contract upheld. **NLR 1986 AC 585** No written agreement between contractor and Government--Claim of contractor not finally accepted by Government--Matter still under consideration--No claim may be sustained on entries in minute books of negotiation between contractor and Government. **PLD 1976 Kar. 623** Contract already performed Reversal not to be lightly ordered. Where a contract has actually been performed, it is only in most exceptional circumstances that the law permits a reopening and reversal of what has already been done on the basis of mutual agreement. **PLD 1966 S.C.439; 18 DLR (S.C.) 526** Where the requisitioning authority gave alternate accommodation to the person occupying the requisitioned premises and it was contended that there was a contract between K and the Government to provide him with the accommodation so that the Government could not ask him to vacate it.' Held: S. 176 of Government of India Act provides a particular method by which a contract should be made with the Govt. In this case no formal document was executed. The plaintiff has merely relied on the assurance given by the Accommodation Authority. The Government, however, is not bound by the said assurance as it was not expressed to be made by the Governor. It is well settled that, when a statute provides a particular method by which a contract should be made there must be compliance with the provisions of the statute. **13 DLR 11; PLD 1961 Dacca 536; PLR 1960 Dacca 972** Contract with Government not executed on proper form--Contract not void. When a particular form has been prescribed for execution of contracts with the Government or where it is prescribed that the contract should be in the name of a particulars person as was done by S. 175 (3) of the Government of India Act, 1935 or S. 135, Constitution of Pakistan, 1956, the observance of the forms is not mandatory and their non-compliance does not render the document, or instrument void. **PLD 1962 Kar. 467** When the matter has passed from the stage of contract to that of an executed conveyance and possession of the property has been given there-under even non-payment of consideration will not render the transaction void. The price if not paid, is a charge on the property sold and it can be recovered under the law. Title to the property nevertheless passed on the registration of the sale deed. **1971 SCMR 414; PLD -1971 S.C. 366**. Government contracts Must be within framework of Executive authority of Government. Even while entering into contracts the Government has to act necessarily within the framework of its executive authority. If the executive authority of the Government in relation to a particular subject is found to be wanting this void cannot be made good by the concerned Government purporting to act through a contract. Contract for definite period--Damages Salary for stipulated period must be paid. Held: Plaintiff's contract of service was for a definite period and has been terminated before its completion. In these circumstances the plaintiff is entitled to a salary for the remaining part of the period at the stipulated rate. Terms and conditions set forth by Government

in letter of appointment--Cannot be superseded by notification in Gazette. Where a retired Judge of High Court was appointed as Chairman of Industrial Court, and the letter of appointment among other things also stated that he was being appointed for an initial period of 3 years. But Gazette notification stated that his appointment was till further orders. Held: The plaintiff was in fact appointed for a minimum period of 3 years from the date he assumed office as Chairman of the Central Industrial Court and his services could not be terminated earlier than that. **PLD 1971 Kar. 833**. Government bound by contract. S. 175 (3), Government of India Act, 1935, provides a particular method by which a contract should be made with the Government. In this case no formal document was executed. The plaintiff has merely relied on the assurance given by the Accommodation Authority. The Government, however, is not bound by the said assurance as it was not expressed to be made by the Governor. It is well settled that, when a statute provides a particular method by which a contract should be made, there must be compliance with the provisions of the Statute. **PLD 1961 Dacca 536; PLR 1960 Dacca 972**

Document constituting contract envisaging another contract--.Whether such subsequent contract is condition precedent to the earlier contract depends on terms of contract. If the documents or letter relied on as constituting a contract contemplated the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. **PLD 1965 Kar. 202**

Earnest money--May be forfeited in case of breach of contract. Held: The amount of Rs. 5,000, though described as an advance was of the same nature as a deposit or earnest money. Such an amount is paid as a guarantee for the performance of the contract. When the contract is performed it goes as part of the price and when it is broken it is liable to be forfeited. **PLD 1967 Kar. 318; PLR 1968 (2) W.P. 623 (Rel. PLD 1961 Kar. 623; AIR 1926 P.C. 1; (1884) 27 Ch. D. 89** Forfeiture of money guaranteed may be ordered. An earnest ordinarily means a tangible thing including a deposit, it will be restricting its meaning too much if deposit only is said to be the subject-matter of earnest. The mordern trend in commerce is to take extensive advantage of facilities offered by banks. It is more advantageous for buyers to furnish Bank guarantees than to make deposits of cash money as earnest for fulfillment of the terms of contracts of the purchase. The denial to the sellers of the right to forfeit the amounts covered by Bank guarantees in case of breach of contract by the purchasers would result in reversing the trend and that will be in nobody's interest. **PLD 1969 S.C.80; 21 DLR (SC) 132**.

Hire purchase agreement--No clause in contract providing penalty for subletting premises--Contract cannot be rescinded for subletting. Held: As the hire purchase agreement for the bonus did not permit subletting but no penalty was prescribed for it, the Government could not rescined the contract because the hire purchaser had sublet it. **1972 SCRM 350** In the case of sale of movable property the ordinary presumption would be that property in the apparatus which was subject Of the contract passed to the alleged "hire-purchaser" when the contract was made, it being immaterial whether the time of payment of the price was postponed beyond the date of the contract. Reference in this connection may be made to section 20 of the Sale of Goods Act, 1930 which is relatable to an "unconditional contract for the sale of specific goods", but embodies a principle which may be extended to cover a case where there are terms in the contract which purport to retain ownership in the vendor until the fulfillment of a certain condition relating to the price, alongside with other conditions from which an equally clear conclusion may be drawn that ownership in the goods became vested in the vendee upon the making of the contract. **PLD 1961 S.C.321; 13 DLR S.C. 141; 1961 (2) PSCR 14; PLR 1961 S.C. 825**

Implied terms--When may be read into a contract--Agreement of parties on such term necessary. Whether an implication should or should not be made in a particular case depends on and must be answered with reference to the special facts and circumstances of a case but the principles which should guide us in the matter have been laid down in several leading cases. The principle is well settled that a stipulation not expressed in a written contract should not be implied merely

because the Court thinks that it would be reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business like manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made. The power of the Court of implying terms which the parties have not expressed should be exercised very sparingly and only in cases of necessity. **P.L.J1978 Kar. 471**

Indent business Relationship between indentors, indent merchant and foreign supplier is determined by terms of contract. In cases arising out of indent business the relationship between the various parties should be determined on the construction of the terms of the contract entered into between them. **PLD 1962 Kar. 447**

Law applicable to contract entered into foreign country--Principle stated. In Private International Law, it is often the case that the rights and obligations arising out of a contract entered into in a re, reign State are governed by lax loci contractus, namely the law of the country where the contract was made. However, whether the law of the country where the contract was made or whether the law of the country where it is to be executed will govern the case, is a matter which would be usually decided according to the intention of the parties. **PLR 1964 Dacca 275**

Legal and illegal agreement entered into at the same time.--Illegal agreement not to be effective if legal agreement fails--Illegal agreement is void--Legal agreement is good so far as it goes. If two persons enter into a perfectly legal agreement and at the same time provide that if this agreement fails then another agreement which the law does not permit will come into existence, the legal agreement does not become illegal because of such a provision. The illegal clause, which is in fact an agreement in the alternative, will remain void and ineffective whereas the other agreement will continue to be effective. **PLD 1964 S.C.337; 16 DLR S.C. 198**. Then again in order to determine which law will apply it shall have to be gathered from the intention of the parties in the contract. When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of contract and in general overrides every presumption. **PLD 1964 Dacca 637; PLR 1964 Dacca 1067; 14 DLR 73**

Letter of credit issued on basis of contract--Draft of consignment and bill of exchange negotiated. Subsequent amendment to letter of credit does not reduce liability of buyer. Where in accordance with the letter of credit, the Draft, the Bill of Exchange and Bill of Lading and other documents were negotiated. Thereafter the defendant allegedly amended the letter of credit. Held: The defendants could not raise the question of the belated amended letter of credit to avoid their liability. **1971 DLC 47**

Licence is only a privilege. The arrangement by which a liquor licensee was enabled to sell excisable liquor under a licence, cannot be described as a contract. A licence is in the nature of a privilege conferred to do that which it would not have been permissible for the licensee to do otherwise. **PLD 1961 S.C.17; PLR 1961 (1) S.C. 692; PLR 1960 (3) S.C. 111; 13 DLR (S.C.) 4**

Misapprehension of terms of contract. Rights of parties not affected. If there was no misrepresentation and both parties had been labouring under a misapprehension that the contract had been cancelled, the abandonment due to a mutual mistake, would not affect the plaintiff's rights. **PLD 1964 S.C.337; 16 DLR S.C. 198**

Misrepresentation by one party--Other party abandoning claim. Rights of latter not effected. If one of the parties to a contract abandons his claim on the basis of a misrepresentation made by the other party. It was held that the abandonment by it is of no legal effect. **PLD 1964 S.C.337; 16 DLR S.C. 198**

Non-receipt of acceptance by proposer-- Respondent was higher bidder in an open auction held by appellant in respect of plot of land--1/3rd amount of total sale price paid by respondent on spot--Possession of plot was also delivered to respondent on spot--Balance price had to be paid by respondent on receipt of letter of acceptance of bid from appellant--Letter of acceptance despatched by appellant but respondent never received same--Appellant cancelled sale of plot--Appellant never revoked acceptance. Respondent was willing to perform his part of contract. Suit for declaration that

appellant-defendant was leaned to communicate and plaintiff-respondent was entitled to' receive formal acceptance of their bid brought by respondent. Suit was decreed by civil Court and appellate Court affirmed finding of civil Court. Second appeal dismissed by High Court as being without any merit, however respondent was also bound to perform his part of contract within six weeks. **KLR 1984 C.C. 446**

Obligation inconsistent with terms of contract--Not to be implied in contract. Held: no obligation can be implied in a contract inconsistently with its expressed terms. **PLD 1964 Kar. 108**

Oral evidence as to interpretation of terms of contract--Not ordinarily admitted. Held: When parties entered into a written contract, the Court would be very slow to import oral evidence for a decision on the interpretation of the terms of the agreement. **PLD 1970 Dacca 490**

Parties deliberately making contract in a particular form with ulterior motive-. When the parties deliberately gave a particular form to a contract to evade income-tax. It was held that if the parties deliberately chose to give the transaction a particular form they must take the consequences. They cannot advance their case by pleading that the intention was to commit a fraud on the law relating to income-tax. A party to a fraud is not, except in circumstances with which we are not here concerned, allowed to plead his own fraud. **PLD 1962 S.C.134; 14 DLR S.C. 119; 1962 (2) PSCR 151**

Registration not necessary. A contract of sale of immovable property though it contains a recital of payment of a part of purchase money of more than Rs. 100 by the proposed vendee, does not require registration. **PLD 1963 Pesh. 128**

Sale by major in consideration of debt contracted during minority--Not a ratification of void contract. Sale valid. Where a minor after attaining majority executed a sale-deed stating that he, during minority, incurred debts for his maintenance, necessities of life and payment of revenue, etc. The sale document was challenged to be Void as being a ratification of a void contract. Held: A sale is a complete demise and as such when a sale has taken place it has passed the stage of contract the analogy of void contract is not available**. PLD 1971 Dacca 281 (Rel. AIR 1940 All 12**

Specific performance of agreement with a condition 'subject to contract' - Phrase 'subject to contract' is a suspensive condition - Any document or memorandum agreed to by the parties, subject to such condition does not become binding contract, unless such condition is lifted by a subsequent act of the parties. **2002 CLC 218** The Law of Contract by Cheshire & Fifoot, 10th Edn., p. 186 ref.

Suit for reconveyance of part of property--. Every contract not only creates a right but also corresponding obligation in another. Here the right of repurchase has created a corresponding obligation on the vendee to reconvey the property. He cannot reconvey, or it will be wrong to force him to reconvey, only a portion of it nor under the law he can reconvey any portion of it because the obligation is one and whole. Similarly, here the right created by the agreement for reconveyance is Joint and several and any one of them can enforce it in respect of whole and cannot enforce it in respect of his share only. If any one of the co-contractors wants to enforce the specific performance of contract for reconveyance he is to enforce it as a whole on payment of the entire consideration money and there will be no variation of the contract. where Agreement of reconveyance not signed by vendor but sub-registrar certifying agreement of vendor to terms of agreement--Agreement is not unilateral--Binding on parties. Where it was urged that the agreement, of reconveyance of property was unilateral and as such not binding on the party because it was not signed by the vendor. **PLD 1964 Dacca 406**

Transfer of movable property--Transfer affected by distributors and confirmed by owner--Both owner and distributor are transferors. Where in the case of rights in a cinema film, the transfer of rights was effected by the distributor and confirmed by the producer-owner of the film. It was held that the confirming party also became the transferor in the eye of law. **PLD 1964 S.C.337; 16 DLR S.C. 198**

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

Court Decisions

"Law to which he is subject."--The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. The following examples show that the Indian Courts recognize that all cases may not be governed by the same rule. **(1894) 19 Bom. 697**

Infancy.--As to infancy, the terms of the Act , as compared with the Common Law, were long a source of grave difficulty. By the Common Law an infant's contract is generally not void but voidable at his option, if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessaries. There was formerly, however, a current opinion, countenanced by the lax forms in which some of the decisions were expressed, that infants' agreements were of three kinds: namely, that some were wholly void as being obviously not for the infant's benefit, some valid as being obviously for his benefit, and all others voidable. This opinion is now quite exploded, but it was to be found in text-books the time when the Contract Act was framed. Still, there was never any authority fox saying that infants were absolutely incompetent to contract. The literal construction of the present section requires being of the age of majority according to one's personal law as a necessary element of contractual capacity. Since, however, the Act, as a whole, purports to consolidate the English law of contracts, with only such alteration as local circumstances require, and there is no trace in the report prefixed to the original draft, or any other relative document of any intention to make a new rule as to the contracts of minors, the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed; but the Privy Council in 1903 declared that the literal construction is correct, and suggested that it was intended to give effect to the rule of Hindu law on the subject. **(1903) 30 I.A. 114; 13 I.C. 331; (1920) 22 Bom. L.R. 531; 55 I.C. 793**

Lease in favour of minor-- Sections 10 and 11 of the Contract Act enacted for the benefit and protection of the minor cannot be made to operate against the minor. It is true that the contract in which the minor is a party cannot be enforced against the minor, but that does not mean that the major party who with his eyes wide open to the fact of the minority of the other side entered into a contract with him, and, after taking advantage of such a contract, can he allowed to go back from his part of the contract and repudiate it. Therefore, in a lease by the minor in favour of the defendants and of which the leasehold property was given in possession of the defendants there is no obligation on the part of the minor to be enforced by the defendants, the lessees. Obligations are created by the least to be discharged by the lessees, and it can be enforced by the minor. **PLD 1959 Dacca 625 Rel.; ILR 4 Mad. 108**

Sale of minor's property by his father as natural guardian Such sale would be invalid, unless expressly proved to be for benefit or welfare of minor-Onus would lie on vendee to so prove. **P L D 2004 Lah. 255**

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

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

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

Illustrations

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

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

Court Decisions

Party alleging Insanity must prove. Where it is alleged that an agreement is void as it was entered into by a party which was incompetent to do so on account of his insanity. It was held that

there is a presumption that every one is sane till otherwise proved. Therefore a party who alleges insanity must prove the same. **PLD 1963 Dacca 253; 14 DLR 60.**

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

Court Decisions

Definition of "consent" or free-consent in Contract Act, 1872 applies to provisions of Specific Relief Act under residuary clause of S. 3 of Specific Relief Act. **1982 SCMR 741**.

Entitled to protection given to 'pardanashin women. The rule of law, which is applicable to pardanashin ladies, is to protect the week and helpless and consequently such a rule should not be restricted to that class only, but should apply to the case of a poor woman who is equally ignorant and illiterate though not a pardanashin woman in the strict sense of the term. **PLD 1968 Dacca 265 (DB); PLD 969 Kar. 324**

Mutuality in contract--Contract of sale clearly showing names of two purchases Jointly with third purchaser. Such two purchasers not signing contract but both executing power of attorney in favour of third Joint purchaser who signed contract. Seller (appellant) accepting earnest money and also a further sum of maximum money--Held, it does not lie in seller's mouth to say that contract lacked mutuality--Held further, mere absence of their signatures on contract does not render contract void and privity of contract existed between them and seller. **1981 CLC 1416**.

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

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

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

Court Decisions

Contract Jointly by majors and minors--Contract void for minors--May be enforced so far as majors are concerned. Where a contract has been made by four persons Jointly, two minors and two adults, the invalidity of the contract with respect to two minors cannot have any contagious effect on the contract made by the other two majors. In such a case that part of the contract which relates to contract by minors is to be disregarded and the rest of the contract made by the adults should be taken to have been validly entered into by them and they are to be considered to be entitled to enforce the contract and claim specific performance of the same. **PLD I(X)7 Kar. 158; PLR 1967 (1) W.P. 394**

Contract on behalf of the minor by the father-- Since the contract was entered into by the father on behalf of and for the benefit of the minor it is a valid contract. **PLD 1957 Kar. 631 Rel.; AIR 936 Mad. 564.**

Contracts by or on behalf of Minors, Minors cannot enter into a Contract nor a natural guardian can bind minors by making a contract on their behalf. **PLD 1967 Kar. 158; PLR 1967 (1) W.P. 394.**

Firm, contract by--Department of firm entering into contract in a name different from name of firm--Department duly authorised to do such act--Contract valid. Where a department of a firm F & Co. operated under the name of S. & Sons and it entered into a contract in that name. Held: that a legal person was entitled to carry on business in different assumed names and since Messrs F & Co. was a legal person, the contract signed by its department Messrs S & Sons could not be held to be void. In law a contract can be signed in the trade name of a business by a person duly authorised on this behalf by the owners of such business. **PLD 1971 S.C.784**

Held further: There was no need for filing a suit for the cancellation or setting aside of the sale-deed in question, and in effect the suit of the plaintiff was not one for such cancellation or setting aside of the instrument in question. **PLD 1960 (Kar. 625; 1960 KLR 55**

Illiterate person signing document--Person obtaining signature must prove that he signed after document was properly explained to him. Held: the appellant is an illiterate person and the onus was on the respondent to establish beyond doubt that the signature of the appellant was obtained on that document after it was properly explained to him. **PLD 1963 Kar. 825** It is an

established principle that in case of a document executed by an illiterate pardahanashin lady the court must satisfy itself upon the evidence that the document was executed by the pardahanashin lady with full understanding of what she was about to do: that she had full knowledge of the nature and effect of the transaction and, that she had independent disinterested advice in the matter. The burden, in such a case, to prove that the document executed was untainted by fraud misrepresentation and undue influence, lies on the person alleging the document to be genuine. **PLD 1965 Dacca 531**

Lease in favour of minor-- Sections 10 and 11 of the Contract Act enacted for the benefit and protection of the minor cannot be made to operate against the minor. It is true that the contract in which the minor is a party cannot be enforced against the minor, but that does not mean that the major party who with his eyes wide open to the fact of the minority of the other side entered into a contract with him, and, after taking advantage of such a contract, can he allowed to go back from his part of the contract and repudiate it. Therefore, in a lease by the minor in favour of the defendants and of which the leasehold property was given in possession of the defendants there is no obligation on the part of the minor to be enforced by the defendants, the lessees. Obligations are created by the least to be discharged by the lessees, and it can be enforced by the minor. **PLD 1959 Dacca 625 Rel.; ILR 4 Mad. 108**

Minor cannot contract himself out of statutory right through his mother. Where the mother of the minors made a compromise with her husband so as to give up her right under S. 488, Cr.P.C. to receive maintenance of the minors. It was held that the right of a minor to receive maintenance under section 488, Cr.P.C., is inalienable. A minor cannot contract himself out of it either himself or through any other person including his mother for the short and sensible reason that the minor is incompetent to enter into a contract. **PLD 1966 Pesh. 56; PLR 1966 (2) W.P. 446.**

Minor executing sale deed. Sale nullity even when registered--Need not be set aside. Held: The deed was void and must be regarded a nullity in the eye of the law, and cannot be used for conferring any right or title on the purchaser.

Minor's contract--No express plea raised in plaint as to agreements executed by father having been executed as guardians on behalf of minor sons--Agreements thus executed whether void. **1981 CLC 1032; P.L.J1981 Kar. 88** Such act is void ab initio and is incapable of ratification or confirmation--Law forbids the enforcement of such a transaction even if the minor were to ratify it after attaining majority. **1987 PSC (AJK) 481.**

Purchase of property by guardian of minor on his behalf--Contract valid for benefit of minor. A distinction is to be drawn between contracts made by minors and those made by their guardians on their behalf. The important point for consideration in the latter class of cases should be as to whether the guardian is competent to make a contract on behalf of the minor or not. Therefore where the father of the minor had entered into a contract to purchase a piece of land on behalf of the minor, the contract is for the benefit of the minor and is valid and enforceable. **PLD 1968 Kar. 163; PLR 1969 (l) W.P. 401.**

Sale of minor's immovable property declared to be ab initio void--Consideration amount of such sale not found to have been spent for benefit of minor's estate--Held, alienee, in such circumstances, cannot be compensated by refund of consideration amount. **PLD 1981 Azad J & K 33, P.L.J1981 AJK 120**

15. "Coercion" defined."Coercion" is the committing, or threatening to commit, any act forbidden by the Pakistan Penal Code or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation. It is immaterial whether the Pakistan Penal Code is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes B, to enter into an agreement by an act amounting to criminal intimidation under the Pakistan Penal Code.

A afterwards sues B for breach of contract at Karachi.

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

Court Decisions

"Fraud". Fraud vitiate most solemn of transactions and renders same as voidable and a nullity in the eye of law. Main ingredient of fraud intention to deceive or to induced person by misrepresentation to enter into a contract on a false belief, A fraud may consist of an action in suppression of what is true or of an action in representation of what is false in. In order to sustain an action for deceit it must be proved that there was a statement as to a fact which was false; and secondly that it was false to the knowledge of person making it, or that they made it not caring whether it was true or false. When a Court is called upon to exercise its discretion in equity to set aside a decree on the ground of fraud or collusion then it does not confine itself to narrow definition contained section 17 of Contract Act and all possible kinds of fraud which can come to mind are covered by definition of fraud. Courts have been very careful and cautious in dealing with any situation where slightest allegation of fraud or collusion is raised by any of parties to case and, whenever any such allegations or issue is raised. Court takes upon itself to hold a thorough and complete inquiry to find out as to whether transaction was tainted with fraud or not and, if so, then entire proceedings of Court as well as proceedings prior to Court become illegal and void if it be established that basis of case before Court was a forged or fraudulent document. Even a Judgment/decree or an order obtained from a Court on basis of a fraudulent statement or any other kind of fraud would lose its authenticity or sanctity and fraud renders Judgment, decree and order of every Court and Tribunal as voidable. There can be no room for doubt that any allegation of fraud whether it is specifically made during course of proceedings in any Court or Tribunal or whether party raising issue of fraud made reference to it by using words "collusion", "surreptitiousness" and "concealment", necessarily casts duty upon Court or Tribunal to hold an enquiry as to allegation of fraud. **P.L.J.1997 Kar. 965 = 1997 CLC 1260**

Coercion:- Mortgage Deed & Agreement to pay misappropriated amount as loan. Avoidance of. Respondent bank lodged complaint against appellants for having fraudulently withdrawn various amounts from hank accounts opened by them in fictitious names. During trial before Summary Military Court, appellants acknowledged their liability to pay alleged amount, agreed to treat said amount as loan and executed registered mortgage deed as security for repayment of said loan. Military Court acquitted Appellant No. 1, but convicted Appellant No. 2. Appellants then filed suit for declaration and injunction seeking cancellation of said agreement and mortgage deed on ground that those had been obtained under coercion and duress. Trial Court dismissed suit holding that appellants failed to prove that they were pressurised for executing said documents. Findings of trial Court were affirmed by High Court after close scrutiny. Challenge to. Contention that there was sufficient oral and documentary evidence on record to show that documents in question would have never been executed, had appellants not been pressurised and coerced by Presiding Officer of Military Court to pay said amount. Held: Factum of misappropriation was established during investigation and trial. Prosecution had never given any assurance to appellants in respect of said trial. They had acknowledged their liability.. During course of arguments before Supreme Court, it was not established that they were not liable to pay said amount. Documents in question were executed voluntarily.-**P.L.J.2001 SC 25 = 2001 SCMR 265**

Execution of promissory note by defendant under threat from plaintiff about arrest of defendants husband who said to have committed an offence by issuing cheques which were dishonoured--Cannot be struck down on plea of coercion--Threat by plaintiff of defendant in such case would not amount to coercion within meaning of S. 15--Held; In present case Promissory Note was not signed under coercion but it was signed as a mutual settlement. **NLR 1987 SD 561; KLR 1987 CC 742; PLD 1987 Kar. 466**

Mere fear of Criminal proceedings not sufficient to be called coercion. In order to prove coercion it must be shown that the creditor applied pressure upon the debtor to procure his consent. The mere "act that an agreement was entered into under fear of criminal proceedings is not sufficient to avoid the agreement on the ground of coercion. I am of the opinion that simply because a creditor threatens his debtor to involve him in a criminal case, it will not be coercion if there be some basis for such a prosecution. **PLD 1959 Kar. 348**

Plaintiff alleged to have been defrauded by. defendant's husband, informed the defendant that her husband was likely to be arrested and his name was likely to appear in local newspaper, as he had defrauded the plaintiff of a substantial sum of money--Defendant was not made to sign for tin amount which was in excess of what her husband owned to file plaintiff nor plaintiff threatened to commit any offence against her husband or herself or her property--Threat of criminal prosecution

against husband of defendant, held, would not amount to coercion in circumstances. **PLD 1988 Kar. 466** Promissory note-execution of--Issue involving determination whether same executed by Defendant under coercion or of her own free will--Held: It was no coercion if plaintiff defrauded by Defendants husband had informed that her husband was likely to be arrested and his name in that context to appear in newspapers--Further it was not the case of the Defendant that she was made to sign for an amount in excess of what her husband owed to the plaintiff--Or that the plaintiff threatened to commit any offence against the Defendant's husband or herself or her property. Such a threat of criminal prosecution did not amount to coercion--Held further: Promissory note not signed under coercion. **KLR 1987 C.C. 742**

Original valid agreement: Subsequent agreement on the same subject illegal--Claim based on original agreement may be decreed. Where the original agreement is valid and enforceable, the fact that the petitioner has relied on a subsequent agreement in support of it and the latter is found illegal does not affect the validity of the claim based on the original agreement. That claim may be decreed. **PLD 1962 Kar. 409**

[1][**16. "Undue influence" defined**.

(1) A contract is said to be induced by "undue influence" where the relation subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain unfair advantage over the other.

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

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

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

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

Nothing in this sub-section shall affect the provisions of Section 111 of the Evidence Act, 1872.

Illustrations

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

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

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

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

Legal Amendments

This section was substituted for the original S. 16 by the Indian Contract (Amendment) Act, 1899 (VI of 1899), S. 2.

The section before it was amended stood as follows:---

"Undue influence" is said to be employed in the following cases:---

"(1) When a person in whom confidence is reposed by another, or who holds.. a real or apparent authority over that other, makes use' of such' confidence or authority for the purpose of obtaining an advantage over. that other which, but for such confidence or authority, he could not have obtained;

"(2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to Which, but for such treatment, he would not have consented, although such treatment may not amount to coercion."

There were no illustrations appended to the old section. Illustrations (a) and (b) of the present section are elementary law. They were intended to be added to the section in its original form, but for some reason withdrawn before the Act was passed. Illustrations (c) and (d) are evidently intended to explain the application and the limits of para 3.

Court Decisions

Undue influence:- A, who by virtue of an agreement had surrendered his share in the property had alleged that he suffered from a mental ailment and started living with Z (his father-in-law) who, by taking advantage of his ailment, got certain documents signed by him and implemented in the official record-Factum of the said agreement having been arrived at between the parties was clearly inferred and demonstrated-Agreement could not be rendered void or ineffective unless it had been proved by A that the same was result of "undue influence" exerted upon him-A though was a well placed educated person but had not appeared to make any statement before the concerned Authorities in support of his allegations, his appearance and deposition would have enabled the other party to the agreement to cross-examine him and that would have been of immense importance-Long silence of A in the matter also gave rise to adverse inferences against him-Mere certification by the doctor and statement who statedly had been giving to A treatment would have been only a corroborative and supporting piece of evidence-Mere existence of relationship between the parties did not necessarily lead to the conclusion, so to exercise of undue influence-Precise nature of influence allegedly exercised, manner of use of influence, unfair advantage derived by the other party, had to be proved with precision because essence of "undue influence" was that a person was constrained to do against his will, but for the influence, he would have refused to do, if left to exercise his won judgment-Agreement was indeed executed between the parties which suffered from no factual or legal infirmity and had fully legal efficacy and continued to bind the parties-Transaction made and envisage by the agreement between the parties, in circumstances, was neither unconscionable nor was detrimental to the interest of A. **PLD 2003 Lah. 662**

Suit on negotiable instrument (cheque) -Defendant setting up pleas of coercion and undue influence by Authorities while putting his signature on the cheque in question---Defendant's such version having not been challenged in cross-examination his plea of coercion and undue influence in signing cheque in question was established on record.-**1994 M L D 656**

Proof--Oral depositions of witnesses produced by plaintiff to prove mental incapacity of vendor and undue influence of vendees on such vendor in respect of disputed sale transaction, being not based on personal observations or knowledge of witnesses, held, could not be relied upon--Important facts like exercise of undue influence on vendor by vendees and mental incapacity of vendor which could affect sale transactions, could, hardly be established by such unreliable oral evidence. **1987 C L C 584**

In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing; (3)whether it was a matter requiring a legal adviser; and (4) whether the intention of making the gift originated with the donor. **(1888) 15 Cal. 684, at pp. 698-700; A.I.R. 1951 T.C. 42; A.I.R. 1948 Cal. 84**.

Rule of evidence.-- The third paragraph of the present section does not lay down any rule of law, but throws the burden of proving freedom of consent on a party who, being in dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities, it "shocks the conscience." Money-lending cases are those chiefly contemplated [see illustration]. It must not be supposed, however, that there may not be other forms of unconscionable bargain within the mischief and the remedy of this enactment. **A.I.R. 1930 P.C. 139**.

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

(1) the suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent.

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

Illustrations

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

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

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

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

Court Decisions

Fraud When a contract is found to be based on fraud, it becomes a voidable transaction and the affected party can repudiate it. The result of repudiation is that the aggrieved party will be restored to its original position and the party at fault can be compelled either to return the property or to compensate the aggrieved party. **PLD 1960 (W.P.) Kar. 291; 1960 KLR 56** Rel. (1) ILR. Cal. 81 (3); (1878) LR QBD 549 (3); (1899) I QBD 369.

Bank guarantee and letter of credit-Nature and effect-Rights and liabilities of surety/Bank, principal debtor and creditor under Bank guarantee and principal contract, determination and enforcement of --- Temporary injunction, grounds for grant of-Action by creditor against guarantor-Burden of proof-Liability of guarantor, when contract becomes unenforceable against principal debtor-Bank guarantee is an independent contract between Bank and customer imposing absolute obligation on Bank to comply with its terms, irrespective of any dispute between parties to principal contract-Bank guarantee becomes due on happening of a contingency on which same becomes due on happening of a contingency on which same becomes enforceable-Bank must pay on demand, if so stipulated, without proof or conditions, in absence of any special equities or clear/established fraud-Bank's obligation ends, once Bank guarantee is discharged-Court should refrain from probing into nature of transactions between Bank and customer, which led to furnishing of Bank guarantee-Unqualified terms of guarantee cannot be interfered with by Court irrespective of existence of dispute nor interim injunction restraining payment thereunder can be granted-Remedy arising out of ex-contract is not barred as cause of action for same was independent of enforcement of contract guarantee-Commitments of Banks must be honored free firm interference by Courts-Theory of non-interference by courts in respect of Bank guarantee and letter of credit-purpose, exceptions and considerations. **PLD 2003 SC 191**

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

Concurrent finding of Courts below--When P.C. will interfere. If the Privy Council was asked to reverse concurrent findings of both Courts below on an issue of fraud involving as one of its essential elements the intention to defraud, the party alleging fraud must make out a case for taking that course. **PLD 1958 P.C. 48**

Contract of guarantee-Grounds available for avoiding guarantee-Guarantee once given cannot be avoided, except on the ground of fraud or misrepresentation. **PLD 2003 SC 191**

Contract of Insurance--Concealment of fact in Insured ship encountering mechanical defect resulting in failure of battery--Anchor snapping Respondent not disclosing such position of ship before securing insurance extension--Held, insured bound to disclose every circumstance which would influence decision of insurer in either insuring risk or fixing rate of premium. **1982 CLC 790**

Contract vitiated by fraud:- Defendant may repudiate. The plaintiff entered into a contract with the defendant company and the contract, as found from the evidence and circumstances, of the

case, was brought about as a result of a secret deal between the plaintiff on the one hand and the defendant's officer on the other hand and the defendant was persuaded to agree to the contract on the misrepresentation of the officer of the defendant. Held: The defendant in the circumstances of the case is entitled to repudiate the contract on the ground of its being , vitiated by fraud. **23 DLR 150**

Fraudulent Transfer:-- Various dealings with property are made voidable as being fraudulent, or declared to be fraudulent as against the transferor's creditors or assignees, by other enactment. But as these transfers of property cannot well be employed as inducements to any other party to enter into any contract beyond such agreement as is involved in the fraudulent transfer itself, they do not come within the scope of the Contract Act, and we have no occasion to dwell upon them here. **(1902) 26 Bom. 765**

Fraud--What is--No fraud constituted where misrepresentation has been scrutinized before acting on it. There must be an intention to deceive or to induce a person by misrepresentation or active concealment of an existing fact, to do or omit to do anything which he would not have done but for the inducement. It is, therefore, necessary to prove that the act or omission was because of the inducement on account of the misrepresentation or concealment of fact and of not independent motives. There would be no cheating if the inducement had been subjected to scrutiny before the act or omission took place. **PLD 1977 Lah. 1377**

Mere non-disclosure.--There are special duties of disclosure (of which we have Just seen an instance) in particular classes of contracts, but there is no general duty to disclose facts which are or might be equally within the means of knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There is a well-known American case on this point arising out of the conclusion of peace between Great Britain and the United States after the war commonly known as the war of 1812. The contract was for the gale of tobacco: the buyer knew, but the seller did not, that peace had been made; and on the seller asking if there was any news affecting the market price, the buyer gave no answer. The S.C.of the United States held that there was nothing fraudulent in his silence. **(1817) 2 Wheat. 178.**

Transaction induced by fraud:-- Exchange deed wherein defendants showed themselves as full owners of property were guilty of suggesting a fact which was not true--Defendants, by such representation having deceived or induced plaintiff to enter into exchange with them were guilty of fraud within meaning of S. 17--Exchange deed entered into by plaintiffs was a deed voidable at their option as their consent was secured through fraud. **1987 CLC 2244**

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

(1) the positive assertion in a manner not warranted by the information of the person making it of that which is not true, through 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 prepidice 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.

Court Decisions

Misrepresentation of fact--Insured stating to have produced all relevant papers including registration book of car in name of former owner and mortgage deed before relevant officers of Insurance Company alongwith proposal form--Insured further stating that during currency of insurance policy, Insurance Company on perusal of such documents paid compensation to insured' for two other claims--Held, such facts lead to conclusion that insured made all facts known to Insurance Company and Insurance Company indicated declaration contrary to facts stated in registration book and issued insurance policy causing risk mentioned in policy. **1983 CLC 1117**

Dispute between parties covered by Arbitration clause of contract-Filing agreement in Court and referring matter to Arbitration-Essentials-All questions relating to original contract or matters which could be decided by arbitrator alone would be, by virtue of relevant clause of contract, by mutual consensus, committed to Judgment of arbitrator and the same would not fall within jurisdiction of Civil Court. **1999 SCMR 121**

19. Voidalibility of agreements without free consent. When consent to an agreement is caused by coercion by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

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

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

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

Illustrations

(a) A, intending to deceive B, falsely represents that 500 maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that 500 maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which shows that only 400 maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

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

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

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

Court Decisions

Agreements without free consent:- Plaintiff challenged gift executed by his mother in respect of her entire land in favour of defendant (her nephew) on the ground of fraud and misrepresentation contending that she being a 'Pardanashin lady' could not manage her land, but defendant was managing her land and he got a gift document executed in his favour pretending the same to be a document for management of land - Trial Court as well as Appellate Court dismissed the suit, but High Court in second appeal decreed the suit - Validity - Undisputed position emerging from statements of witnesses was that disputed land was located in the village, where defendant was residing and donor was not residing; that disputed land was being looked after by defendant, who had obtained the same on contract (Theka) from donor; that defendant after institution of suit had made serious attempts to get the matter compromised and offered one Murabba of land for withdrawal of suit; and that negotiation for compromise had taken place in presence of named persons - All said witness had supported each other on all material points and they stood firm to the test of cross-examination and nothing beneficial could be extracted from them - Even a remote suggestion had not been made to said witnesses that defendant as donee was owner of the land - No legal Justification existed to discard such evidence - Though evidence of said witnesses could not be discussed by High Court at length, but the same would have no substantial bearing on merits of the case as the conclusion derived by means of impugned Judgment was free from any infirmity - Statement of defendant's witness that gift deed had been executed at the behest of mother of plaintiff with the consent of plaintiff was not believable as no sourceless person like the plaintiff would give his consent to his mother for donating entire land in favour of her nephew (defendant) - Had consent of plaintiff been obtained, then he would have signed the gift deed, which would have been a solid proof for its execution, genuineness and authenticity whereof could not be challenged - If gift was executed with consent of plaintiff, then what had prompted him to file the suit, which was indicative of the fact that plaintiff was not aware about the gift-deed and was not a consenting party - Mother (donor) could not have deprived the plaintiff (her son), when there was nothing on record to show that they were not on good terms or plaintiff was disobedient - Contents of gift-deed had never been read to executants thereof - Gift-deed was not valid one and its authenticity was not above board - Dishonest omissions in statement of defendant's witness, also appeared to be self-contradictory - In view of defendant's assertion that disputed land had been transferred by means of a valid gift, there was absolutely no lawful Justification to take the plea of adverse possession and the only irresistible

conclusion of which would be that no such gift-deed had ever been executed - Neither any gift-deed whatsoever had been executed by mother of plaintiff nor conscious and unequivocal possession of land had been handed over to defendant as he could not adduce any convincing evidence in that regard - Defendant had failed to prove the execution of gift-deed by producing credible evidence - Trial Court and Appellate Court had failed to examine the evidence on record in its true perspective - S.C dismissed the appeal in circumstances. **PLD 2002 S.C581**

Applicability--It is an essential requirement that when executing sale deed a person (pardanashin lady) should be in know that deed in question was of sale. S. 19 would not apply if her awareness was only that deed she was executing was a power of attorney. **NLR 1981 AC 537; PLD 1981 SC 165; P.L.J1981 SC 420**.

Contract by statutory body--Consent to contract given by Board under mistake of fact--Contract invalid. Held: The Kar. Port Trust is a statutory body and is governed by the statute and its bye-laws. Before a contract of high valuation could have been validly awarded, it would have to be with the consent not only of the Chief Engineer but also of the Board. In the present case, the Chief Engineer and the Board gave their consent upon a mistake of fact. Therefore there was no valid contract in existence. **PLD 1967 Kar. 275.**

Limitation--Person in possession of land but a deed ownership of such land got executed by misrepresentation and fraud. Reason getting ownership of land by execution of such deed if suing for possession on basis of such deed and claiming deed to be genuine, executants of deed, held, within her right to plead deed being void on account of fraud and other party having no title or right to posses land and no impediment of limitation could arise to raise such plea. **PLD 1981 SC 165; P.L.J1981 SC 420: NLR 1981 AC 537.**

Misrepresentation regarding the model of the car by the seller--if contract can be rescinded after the car had been used by the buyer. The plaintiff purchased a car from the defendant which he was wrongly told was 1949 model. He used the car for sometime and then found that it was 1948 model car. He therefore gave notice to the defendant that he rescinded the contract on ground of fraud and asked them to pay back the price of the car paid by him. Held by Rehman C.J. on reference from D.B. There is no provision in the Sale of Goods Act, 1930, bearing on the effect of fraud, misrepresentation, coercion and undue influence, on a contract of sale. I would be, therefore, disposed to hold that the relevant provisions of the Contract Act on these questions continue to be applicable to contracts of sale despite the provisions of section 13 of the Sale of Goods Act. This section also does not contain any reference to cases of fraud etc, and apparently contemplates such cases as involve a breach of a condition without fraud, misrepresentation and the like affecting the formation of the contract itself, at its inception, if thus interpreted, there would be no difficulty in holding that section 19 of the Contract Act can stand with section 13 of the Sale of Goods Act, 1930. The result would be that in case of fraud and misrepresentation etc. vitiating the contract unless there was a waiver on the part of the party affected, the right of recision would not be lost. **PLD 1959 Lah. 681; PLR 1960 (2) (W.P.) 523**

Principle of section applicable where Fraud in procuring gift-. A gift is not contract (though in Muslim Law it is called a contract) but the principle of section 19 may be applicable even to a gift. Therefore a gift tainted with fraud would be voidable and not void. **PLD 1964 S.C.143; 16 DLR S.C. 330**.

Promise to do an act in future not performed--Not a misrepresentation. A promise to perform an act in future, if not fulfilled would not amount to misrepresentation. It may be a breach of promise or an agreement, but it is not a misrepresentation as to existing facts within the meaning of section 19. **PLD 1968 Kar. 812; PLR 1969 (l) W.P. 941**.

Registered sale deeds on basis of agreement. Suit for declaration and cancellation of deeds on plea that documents were procured from plaintiffs by deceased through fraud and misrepresentation. Requires ad valorem court-fee--Court Fees Act (VIII of 1870), Ss. 3, 12. **NLR 1984 Civil Lah. 59**

Voidable contract acted upon--Cannot be challenged subsequently. **P.L.J1974 Kar. 366**.

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

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

Illustrations

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

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 per cent per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

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

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

Illustrations

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

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

(c) A, being entitled to an estate for the life 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.

Court Decisions

Mistake of fact.--Contract may be avoided for, if both parties are under mistake--Cannot be avoided where one party is under mistake. Held: to avoid a contract on the ground that it is void for mistake, both parties to the contract should be under a mistake as to a matter of fact essential to the agreement, as required by section 20 of the Contract Act and, further, under section 22 of the Contract Act, a contract is not voidable because one of the parties only is under a mistake as to a matter of fact. **PLD 1973 Kar. 444**

Mistake of fact in regard to area or identification of land sold and such mistake needing rectification--Cannot be treated as a mistake on basis of which whole contract can be avoided. **NLR 1988 CLJ 367**

Mutual misapprehension about contract--Party abandoning right under contract--Abandonment is ineffective. Where on account of a mutual misapprehension about a contract one of the parties abandoned his rights under it. Held: If there was no misrepresentation and both parties had been labouring under a misapprehension that the contract had been cancelled, the abandonment of a right under the contract due to a mutual mistake, would not affect the plaintiff's rights. Under section 20 of the Contract Act an agreement based on a mutual mistake is void and the same principle will apply to an abandonment of a right under a contract. **PLD 1964 S.C. 337; 16 DLR S.C. 198**

21. Effect of mistake as a law. A contract is not voidable because it was caused by a mistake as to any law in force in Pakistan; but a mistake as to a law not in force in Pakistan has the same effect as a mistake of fact.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Pakistan Law of Limitation. The contract is not voidable.

Court Decisions

Payments made under mistake of law--When refundable. Section 21 deals only with mistakes of law which "cause a contract" or which give birth to a contract; it has nothing to do with any other kind of mistake. If therefore, a payment made under a mistake of law is not the origin of a contract such payment would be refundable under S. 72. The English common law rule that a payment made under a mistake of law is not recoverable can have no application in India where there is a statute governing the question. **A.I.R. (33) 1946 Cal. 245**

Miscalculation of a legal right--The agreement between the parties was that they would get their shares of inheritance according to Muslim law. Held; When the arrangement is that parties will get what they are entitled to under the law, the arrangement is not hit by section 21 Just because in the calculation of the legal rights some mistake is made. **PLD 1959 Lah. 616; PLR 1959 (2) W.P. 1756**

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

23. What considerations and objects are lawful or what not. The consideration or object of an agreement is lawful, unless-

it is forbidden by law; or

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

is fraudulent; or

Involves or implies injury to the person or property of another; or

the Court regards it as immoral, or opposed to public policy

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

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

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

(d) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

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

(f) A promises to obtain for B, an employment in the public service, and B. promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

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

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

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B., upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

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

Court Decisions

Applicability - Transferring of rights prior to completion, of allotment proceedings - Lawful contract was entered into for lawful consideration and purpose between the parties except that the bar existed with regard to the transfer of rights in the property - Authorities were to exercise or enforce barring clause and on completion of the formalities by the allottee, and they could waive/vacate the bar - Allottee had transferred the rights what he possessed under the terms of the agreement and the Authorities could have taken action against the allottee in case any of the terms of

the agreement in respect of allotment was infringed - Where terms of the contract could be enforced after removal of bar by the Authorities by ex post facto permission, such agreement between the parties with regard to sale of the property was not illegal or against the public policy, **2001 SCMR 1053** PLD 1981 Lah.146 and PLD 1971 Kar. 763 ref.

Public Policy :- Three amendments were subsequently made to Power Purchase Agreement whereby amount payable by WAPDA to HUBCO was allegedly increased. WAPDA subsequently claimed that Amendments in Power Purchase Agreement were tainted and that highly inflated demands for payment were void and ineffective on the ground of fraud and corruption which were against the concept of Public Policy under provisions of Contract Act, 1872. HUBCO's resolve to refer dispute to Arbitration as per terms of agreement was resisted by WAPDA Admitted proposition before Court was whether nature of dispute and questions of main fide, fraud, illegalities and legal incompetence raised preclude resolution of matter through Arbitration as a matter of Public Policy and, thus dispute between parties was not arbitrable and could not legitimately be subject matter of Arbitration. Allegations of corruption in support of which material was placed on record do provide prima facie basis for further probe into matter Judicially and if proved, would render documents in question, as void, therefore, according to public policy such matters which require finding about alleged criminality, were not referable to Arbitration and should be decided by Court of law. Disputes between parties were not commercial dispute arising from undisputed legally valid contract, or relatable to such contract for, according to case of WAPDA on account of such criminal acts disputed documents did not bring into existence any legally binding contract between parties, therefore, dispute primarily related to very existence of valid contract and not a dispute under such contract. Dispute between parties was thus, not arbitrable.- **P.L.J.2000 SC 1629 = PLD 2000 SC 841** It is not free from doubt that agreement stipulating to convey 30% of shares in estate left by deceased husband of plaintiff could be extortionate or unconscionable. In such matters proportion of benefit to claim to be pursued and its ratio with plausible prospective expenses of litigation are important considerations for Judging extortionate or immoral nature of transaction. Similar agreement regarding gambling etc. may be very welcome as between parties and yet third parties may be adversely affected, giving occasion for them to raise challenge. Proceedings in suit had potential of hitting respondent hard and she can well raise question about agreement on basis of which litigation may be getting financed. Agreement is obviously champertous and may have ingredients of. being extortionate. Premium is to be allowed to beneficiary to be Joined in suit as a matter of right.- **P.L.J.1996 Kar. 18 = 1996 CLC 678** Contract Act, 1872 (IX of 1872), S. 23. Both parties were members of Liverpool Cotton Association, entered into contract of sale of cotton (1050 bales) subject to Liverpool Cotton Association Rules. Defendants according to agreement shipped 582 bales and parties agreed (supply balance quantity in time, contract between parties would be losed on that day on basis of market difference. Defendant/exporter failed to 'make shipment of balance quantity of cotton up to specified date for reasons that Government of Pakistan had temporarily suspended export of cotton on account of poor crop of cotton. Plaintiffs refused to accept excuse of defendant, served formal notice on defendant of their intention to proceed to Arbitration to close out unfulfilled part of contract as per Rules of Liverpool Cotton Association and appointed their arbitrartor. Arbitrator appointed on behalf of defendant fully participated in Arbitration proceedings and arbitrators gave their award whereby defendant was directed to pay difference of amount. Appeal of defendant against award of Arbitrators was dismissed for non- payment of requisite fee for filing appeal within time. Plaintiff filed award in Court to make it rule of Court. Status. Award was objected to by defendant contending that due to suspension of export of cotton by Pakistan Government, it had no liability for non-delivery of balance quantity of cotton and that due to such prevention, force majeure clause in contract of sale had come into effect which had rendered contractual clause invalid including Arbitration clauses. Legality. Suspension of export of cotton being temporary, it could not be said that contract between parties had become impossible for performance or it had become frustrated at relevant time. Public Notice whereby export of cotton was temporarily suspended, by no stretch of ' imagination could be construed as declaration to the effect that export of cotton had become illegal. Reliance of defendant/exporter on S. 23 of Contract' Act, 1872, was misconceived. Obejctions raised by defendant/exporter to award being baseless, same was ordered to be made rule of Court. Courts ought not to entertain objections to foreign award, executable in Pakistan unless those strictly lay within four corners of S. 7 of Arbitration (Protocol Convention) Act, 1937. **P.L.J. 1999 Kar. 742 = 1999 CLC 1018**

"arbitration agreement" within the contemplation of S. 2(a), Arbitration Act, 1940 means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not - Terms employed in the arbitration clause expressly reflected mutual intention of the parties to resolve all the disputes concerning the implementation and execution of the contract through the nominated arbitrator jointly agreed upon without any duress or coercion - Mere fact that the chosen arbitrator happened to be the Chief Executive of the respondent-Corporation would not render the same illegal and against public policy - Consideration of facts and circumstances leading to the execution of contract between the parties and the phraseology employed in the arbitration clause of the agreement the agreement was not violative of principles of natural justice or the statute and thus was not void, invalid or of no legal effect. **PLD 2003 SC 808**

Power Purchase Agreement being entirely legal contract, Arbitration agreement contained therein was not contrary to public policy. Subsequent amendment which was allegedly procured by fraud could not on any analysis, taint Power Purchase Agreement itself. Valid contract cannot itself become contrary to public policy because of allegation that subsequent amendment therein was product of illegal act. Allegations of invalidity even serious allegations of its being ab-initio void would be perfectly capable of being referred to Arbitration. Arbitration clauses contained in contracts are treated as separate and self contained contracts in that if it were not so, Arbitration clauses would not at all survive an attack on main contract which is known as doctrine of separability. Appellant (Hubco) was. thus, entitled to invoke Arbitration clause and refer the dispute to Arbitration.- **P.L.J. 2000 SC 1629 = PLD 2000 SC 841**

Whether by-laws of a society will have force of law. Contention that there was restriction on transfer of plot in terms of allotment, thus. agreement of its sale being against public policy was void. Held ; Section 23 of Contract Act imposes restrictions in respect of contracts, which are considered to be against public policy or which are illegal and void. These provisions would not be attracted to instant case, because lawful agreement was entered into for lawful consideration and purpose between parties and terms of which could be enforced after removal of bar by CDA by ex post facto permission. Held Further-: Bar contained in agreement of allotment could not be termed to he law, consequently could not be said to be forbidden by law considering that prohibition in bye-laws of a society or other statutory body cannot have force of law.-**P.L.J.2001 SC 1194 = 2001 SOME 1053**

Doctrine of Indoor Manage-ment. Doctirne of Indoor Management applies transactions entered into between a third party and a cooperative Society registered under co-operative Societies Act 1925 or Companies Ordinance, 1984. Doctrine of Indoor Management would be application to transaction in question, on the principle of public policy, equity and good conscience to protect innocent persons dealing in good faith with a corporate entity. **P.L.J. 2000 SC 1708 = 2000 SCMR 506.**

Insurance Policy. Insurance policy whether contravenes provisions of S. 23 and 28 or not. Clause 13 was valid and did not contra-vene provisions of Ss. 23 and 28 of Contract Act. Claim of respondent was rejected on 10-1-1991 and suit was filed on 3-5-1992 after more than 12 months. Suit filed by respondent was time barred. **P.L.J.1997 Qta. 109 = 1997 CLC 1441 = NLR 1997 Civil 524.**

Compensation of acquired land-Courts below had rightly assessed compensation of land in question, thus, their findings were un-exceptional-Referee Judge had taken into consideration extracts from documents on record and had rightly enhanced compensation-Referee Judge had taken into consideration copy of transaction regarding land acquired for construction of Post Office and rightly maintained that area of the same was not within vicinity of land in question-One witness of petitioner had candidly stated that Dargai and Kharkhi (where land in question, was situated) were two separate Mozas and record of both was different although wand was same-Appellants having failed to make out case for enhancement of compensation, appeal was dismissed, Leave to appeal was granted to consider; whether High Court had erroneously considered acquisition by virtue of document produced by petitioners and disputed property to be falling in two different places in as much as Kharkai is part of Dargai as evident from list of delimitation of constituencies for year the 1987; whether land acquired for post office was adjacent to Dargai Bazar and, therefore, potential value of land was higher than awarded amount and; whether Referee Judge as well as Division Bench of High Court failed to appreciate that land in question, had the potential being developed into commercial property which was surrounded by building and was adjacent to rtain Dargai Bazar, **PLD 2003 SC 6**

Void agreement

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

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

25. Agreement without consideration void, unless. An agreement make without consideration is void, unless--

(1) it is in writing and registered, it is expressed in writing and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other: or unless.

(2) or is a promise to compensate for something done, it is a promise to compensate, wholly or in a part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compelable to do, or unless.

(3) Or is a promise to pay a debt, barred by Limitation Law, it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part of debt of which the creditor might have enforced payment but for the law for the limitation of suits.

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

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

Explanation 2. An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A find B's purse and gives it to him. B promise to give A Rs. 50. This is a contract.

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

(e) A ownes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

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

Court Decisions

Ingredients of a "Gift";. An examination of plaint shows that petitioner denied making any declaration and categorically stated that she never delivered possession of suit land to respondents under gift. There is no mention in written statement that gift was made for natural love and affection, neither it was suggested in cross-examination to petitioner that she had made gift, out of love and affection for respondents. U/S. 25 of Contract Act, all contracts without consideration are void. In present case, said consideration has not even alleged. There was no valid gift either under principles of Mahomadan Law or within meaning of S. 25 of Contract Act. Mere fact that lower Courts were fully satisfied that petitioner put her thumb impressions on mutation, would be no substitute for proof of three known ingredients of a valid gift or a gift contemplated by S. 25 of Act, 1872. **P.L.J.2000 Lah. 941**

Invalid Promise. Promise in writing to pay a debt which was already time barred was extracted from the defendant under policy pressure. Held: This document cannot be held to be a valid document and no relief on the basis of such a document can be granted to the respondent. Promise to pay should not be conditional but absolute--Conditional promise--Not effective. An agreement for payment of a debt should be an absolute promise. If it is a conditional promise dependent on the happening or the success of certain events. It is the duly of the plaintiff to prove that these events have happened and the defendant was to perform the promise. Failure to prove it is fatal to the success of a suit based on such a document. **PLD 1959 Kar. 384**

Promise deducible from instrument sufficient to constitute contract. The requirement of the section is not that the promise itself must be in express terms but that such promise should be deducible from a written and signed document. It is clear that without written words and the signature of the promiser, there cannot be a contract within the meaning of the said section; but if the words used in writing do mean a promise to pay, or if from the said words a clear intention to pay can be inferred, then the requirement of section 25 (3) of the Act is fulfilled. **PLD 1968 Dacca 260**; 20 DLR 44; PLR 1967 Dacca 611 (DB) (Rel. ILR 19 Lah. 193: LR 33 IA 165.

Debt of father:- Suit for recovery of debt on promise not barred by time. Son liable to pay debt to the extent of money received by him from estate of father. A son on the death of the father would be liable to pay the debt of the father to the extent of the estate of the deceased father in his hands or received by him. Therefore, on the basis of the acknowledgment, the suit is barred by time but on the basis of promise the suit is within time because the promise was made on 8th July, 1972 and the suit was filed on 4th August 1975, the date when the Court re-opened after summer vacation and as the time of three years had expired during the vacations. However, on the basis of the promise tile defendant shall be liable to the extent of the money of the deceased father received or to be received by him. **PLD 1977 Kar. 521**

Agreement without consideration--An agreement without consideration is void unless it comes under any of the exceptions set out in Sub-clauses (1) to (3) of section 25 of the Contract Act. **1960 (2) KLR 106**.

Recovery of Earnest money:--If the respondent who was the seller is held guilty of breach of contract, obviously, the appellant who was the buyer would be entitled to recover the money paid to the seller as purchase price, on account of the failure of consideration. Thus, the buyer has a quasi-contractual right of claim the recovery of the price, which is paid to the seller, for the seller, in breach of his obligation, failed to pass good title to the good sold. The buyer in such case has a right to sue in restitution to recover the price on the ground of total failure of consideration. Similarly, if the seller failed to deliver the goods the buyer may recover the deposit he paid to the seller. But in that case the buyer must terminate the contract. On the other hand, even if the buyer was in default he can in certain circumstances, claim restitution of the advance payment made to the seller, even if the seller Justifiably terminates the contract. **PLD 1976 Kar. 277**

Agreements in restraint of trade are illegal--Departure from Common Law on point stated. Section 27, prohibits all agreements in restraint of trade, and it is intended to invalidate many agreements that are valid under the Common Law. **PLD 1973 Kar. 49**

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

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

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

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

28. Agreement in restraint of legal proceedings void. Every agreement, by which any party thereto is restricted absolutely from enforcing his right under or in respect of any contract, by the usual legal proceedings in the ordinary Tribunals, or which limits the time which he may thus enforce his rights is void to that extent.

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

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

Court Decisions

Scope and intention of Section 28. Intention behind said provision of law is that all those agreements which restrain a person to enforce his rights under a contract by usual legal proceedings in ordinary tribunals are void. It obviously implies that a party cannot be restrained to enforce his rights in ordinary court of law but if by mutual agreement between parties a particular court having territorial or pecuniary Jurisdiction is selected for determination of-their dispute, there appears to be nothing wrong or illegal in it or opposed to public policy.-**P.L.J.1997 Qta. 109 = 1997 CLC 1441 = NLR 1997 Civil 524.**

Jurisdiction of Court--Parties agreeing to sue in Courts of one country and not in those of another--Agreement valid. In agreeing to bring a suit in one out of the two Courts belonging to two foreign countries, both of which would be competent to try the suit, the parties cannot be said to have contracted out of the Jurisdiction vested in the Court or to be depriving that Court of its Jurisdiction, which it otherwise possessed. Therefore, if two parties, one being a national of Pakistan and another of Denmark agreed by their contract to have their disputes settled under the contract by a Court in Denmark according to Danish Law, it cannot be said that they have contravened the provisions of section 28 of the Contract Act. **PLD 1986 Kar. 138**. Section 28 prevents parties from divesting Courts of their inherent Jurisdiction and makes void only those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. But it has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to limitation of the choice of forum which the law has conferred upon him and to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. **A.I.R. 1946 Lah. 57**

It is well settled that mutual consent cannot confer Jurisdiction upon any Court which it might not possess under the general law, nor individuals by agreement amongst themselves can divest any Court of its Jurisdiction which it might possess under the general law. Section 28 of the Contract Act makes void only the contract which absolutely restricts a party from enforcing his right under the contract in an ordinary Tribunal but it is not attracted to a party who agrees, not to restrict his right in the ordinary Tribunal but only consents to the selection of a Court in which the suit is to be decided. **9 DLR 197**

Where a clause in a contract stated that any legal action arising out of the contract would be taken at C, Court, though normally Court at C and D, would both have Jurisdiction, the effect of the agreement is to prevent the parties absolutely from filing a suit in the Court at D and as such it falls trader S. 28. Even if the agreement is not void, it is putting the matter rather too high to say that it has taken away the Jurisdiction from the Court at D. The fact that a party willingly made the agreement may, however, afford a ground for transfer. **A.I.R. (33) 1946 Calcutta 112.**

Jurisdiction--Clause in contract by which disputes are to be referred to foreign tribunals-..lf bars Jurisdiction of local court. There was a clause in a contract by which a dispute between the parties was to be referred to Bombay Chamber of Commerce for Arbitration at the option of one of

the parties. The question before the court was if such a clause ousts the Jurisdiction of the local courts, and as such a suit before a local Court could be stayed for reference to Arbitration to the foreign tribunal. Held: The correct rule in such cases seems to be that a clause of this character in a contract providing for determination of all disputes arising between the parties to the contract, by a foreign tribunal, must be construed as a submission clause for Arbitration purposes. It does not really oust the Jurisdiction of the local courts. The Jurisdiction of the local Courts is by no means ousted and it is only a question for consideration whether a suit brought before a local tribunal should be stayed or not, in the face of such an Arbitration clause which would dearly fall within section 34 of the Arbitration Act. Under this section it is not incumbent to stay proceedings but the Court has a discretion in the matter. **PLD 1952 Lah. 249.**

Contract providing that only a foreign court shall have Jurisdiction in case of dispute--Jurisdiction of Pakistan Courts is not ousted. Such Jurisdiction clause may be treated as Arbitration clause. Where a contract provides that in case of a dispute only certain foreign Courts would have Jurisdiction to decide the matter and Jurisdiction of the Pakistan Courts is ousted by it. Held: The language of section 28 is clear by itself, and can only, mean that a contract which absolutely restricts any party to it from enforcing his rights under or in respect of such a contract by the "usual legal proceedings" in the "ordinary tribunals" of the country, will, to that extent, be void unless protected by the exceptions to section 28. However, in order to preserve the sanctity of contracts it ought also to be held, as was done in the earlier cases in Great Britain that foreign Jurisdiction clauses, even when they purport to give Jurisdiction to a Court in a foreign country, are realy in the nature of Arbitration clauses which come within the, exceptions to section 28 and, therefore, should be dealt with in the same manner as other Arbitration clauses. In the case of an Arbitration it has to be, remembered that the Jurisdiction of the Courts is not altogether ousted, for, the Courts merely stay their hands to allow the parties to resort to the form of adjudication to which they have previously agreed. By only staying the actions before them the Courts still retain to themselves the Jurisdiction to resume the case if the Arbitration, for any reason, fails or the parties find it impossible to comply with the form of adjudication to which they had agreed. **PLD 1970 S.C.373**
22 DLR (SC) 334; (Approved)
PLD 1952 Lah. 249; AIR 1946 Lah. 57. Overruled
5 DLR 394; 9 DLR 197; PLD 1966 Dacca 481; PLD 1968 Dacca 860; 21 DLR 343.ref.

Redemption of mortgage:--Provisions of S. 28, Contract Act and Art. 148 of Limitation Act, cannot be interpreted to mean that a property cannot be mortgaged for more than 60 years Right to redeem mortgage for a certain fixed period--Accrues after expiry of such period unless any contrary stipulation exists in mortgage deed. **PLD 1982 Azad J & K 17**

Foreign Jurisdiction clause in contract--Onus of proof as to stay of proceedings. The party who seeks to invoke the foreign Jurisdiction clause, should ordinarily satisfy the Court that it is Just and equitable to bind the parties to their bargain. **PLD 1970 S.C.373; 22 DLR (SC) 334.**

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

Illustration

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

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

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

(d) A agrees to sell to B"all the grain at Rahimyar Khan."There is no uncertainty here to make the agreement void.

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

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

Court Decisions

Uncertain terms in such agreement:--Where terms of Arbitration agreement were not certain, like all other agreements, such agreement would also be void under S.29 of Contract Act,1872. **1999 CLC 1685** Where both contracting parties are at consensus ad idem with regard to essential terms of contract, any uncertainty or vagueness which is incapable of being ascertained, would have effect of vitiating contract--In letter of guarantee there was no vagueness or uncertainty, which could vitiate contract. **PLD 1986 Kar. 464**

Lease--Agreement that rent will be fixed by Chief Officer of Corporation and will be paid from date of possession--Not valid. The terms of the allotment of a shop by the Kar. Municipal Corporation provided that the lease would commence from the date from which possession will be handed over to the respondent.

Held; the agreement was not void under section 29 of the Contract Act, because the terms of the agreement it was agreed between the parties that the respondent will pay such rent as will be fixed by the Chief Officer and the lease will commence on delivery of possession of the shop. These two terms were quite plain and simple. **PLD 1961 (W.P.) Kar. 599.**

Vague contract:--Section 29 is based upon the principle that the contracting parties must be shown to be at ad idem with reference to the essential terms of the contract and, therefore, if there is any vagueness or uncertainty incapable of being made certain the contract fails for vagueness. For, in that case the parties cannot be said to agree to the same thing in the same sense. Therefore merely because the terms of the Arbitration agreement are capable of different and various interpretations it cannot ipso facto be liable to be struck down as void. It can only be regarded as void for uncertainty if its meaning is not certain or capable of being made certain as provided by section 29. **PLD 1977 Kar. 21; P.L.J1977 Kar. 113**

Terms of contract not ascertainable-- The document being incomplete, as its terms are not ascertainable with reasonable certainty, it comes within the mischief of section 29 and is void and by virtue of the provisions of S. 21 of the Specific Relief Act cannot be enforced specifically. **PLD 1973 Lah. 77**

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

Exception in favour of certain prices for horse-racing. This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race

Court Decisions

Wagering Contract :-- No suit for recovery of money can be brought on such contract. A wagering contract is one by which two persons mutually agree that on determination of a future uncertain event one shall win from the other and the other shall pay a sum of money, there being no other real consideration for the making of such contract. In cases of such contract the intention of the parties .is to be determined as a question of fact. It is to be seen whether actual delivery of the goods is contemplated or only the differences are required to be paid. All contracts by way of gaming or wagering are void and no action can be brought by the winner on a wager, either against the loser or the stake-holder to recover what is alleged to be won. **PLD 1975 Kar. 661; P.L.J1974 Kar. 395**

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

30.-B No suit for recovery of money, commission, etc., in respect of void agreement. No suit or other proceedings shall lie for the recovery of--

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

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

CHAPTER -- III

OF CONTINGENT CONTRACTS

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

Illustration

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

Court Decisions

Enforcement of contingent contract--Contended that contingent contracts cannot be enforced unless contingent event happens and that since appellants did not agree to execute a sale deed, contract of sale which was contingent upon such execution, could not be enforced--Contention repelled as being without any force--Held, agreement also provided that respondent shall have a right to obtain a sale deed through specific performance of contract and as such suit for specific performance did lie. **NLR 1981 AC 504; P.L.J1981 Lah. 345**

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

If the event becomes impossible, such contracts become void.

Illustrations

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

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

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

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

Illustration

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

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

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

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

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

Illustrations

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

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

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

Illustrations

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

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

CHAPTER – IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

37. Obligation of parties to contracts. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or executed under the provisions of this Act, or of any other law.

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

Illustrations

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

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

Court Decisions

Performance of Contract,--Appellant an insurance Company undertaking to compensate respondents a transport Company in event of goods stored in respondent's godown being destroyed by fire--Fire breaking out in respondent's godown and goods stored burnt down. Respondents examining consigness of goods, such persons producing vouchers and receipts showing goods and value of goods transported by them to respondents, delivery of which not taken when fire broke out. Respondents examining all available evidence to show goods having been transported to respondent's godown and same having been gutted by fire. Such versions as well as value given by witnesses not challenged by appellants. Respondents also examining a Surveyor, appointed by appellants and such person deposing to have been appointed by appellants, that he visited site only after two days of incident of fire examined actual damage to consignment, and estimated loss caused to respondents--Appellants, due to report of such Surveyor being not favourable to them allegedly appointing another Surveyor after four months but such Surveyor not produced in Court as witness--Versions of such second Serveyor, belated, inconclusive, and hardly carrying any weight in circumstances and not preferable to report of first Surveyor--No evidence produced by appellants in rebuttal--Claim, held, proved and appellants rightly found liable to extent of insurance cover. **PLD 1982 Kar. 549.**

Plaintiff not only failing to prove that he was prepared to perform his part of contract but in fact not performing his part of contract at all-Held: He was not entitled to any relief and three Courts below were right in non-Suiting him. **NLR 1986 AC 583**.

Rule of law: Contract to be brought into existence at least by two parties. Termination of contract being converse of its creation, principle demands that it should not be recognised unless this be what both parties intend. **P.L.J1986 SC 516.**

Mutual obligations in contract--Contract is considered performed only when respective obligations have been fulfilled. A contract which places mutual obligations on the contracting parties cannot be treated as wholly executed until the respective obligations have been discharged. Thus, in a contract for the supply of goods the contractor has to make the supplies and the other contracting party has to make payments for the said supplies and until the payments have been made the contract is not at an end and the liability arising under the said contract is still subsisting. If the contract has been wholly performed, that is to say, the supplies made and payments received, then there is nothing outstanding and no question of any liability occurring thereunder arise. **PLD 1961 Dacca 369; (1961) 13 D.L.R. 74**

38. Effect of refusal to accept after performance. Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non- performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions:--

(1) It must be conditional;

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

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

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

Illustration

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

39. Effect of refusal of party of perform promise wholly. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may but an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

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

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

By whom contracts must be performance

40. Person by whom promise is to be performed. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor.

In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A, may perform this promise either by personally paying the money to B, or by causing it to be paid to B by another; and, if A, dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A, promises to paint a picture for B, A must perform this promise personally.

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

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

Court Decisions

Joint liabilities of two guarantors - Petitioner and one other person stood surety for the Bank loan received by the loanee - Recovery of the loan was initiated by the Authorities as arrears of land revenue - Petitioner had paid half the amount of the loan but the Authorities were employing coercive measures against the petitioner for the recovery of the whole amount - Validity - Where there were two Guarantors of one loanee, under the provisions of Contract Act, 1872, the half loan had to be paid by one of the guarantors - Petitioner, in the present case, had already paid the amount for which he stood guarantor and he could not be held responsible for the payment of loan due from the other guarantor for which the petitioner had not given any guarantee or security - Action taken by the Authorities was misuse of authority for the reason that the petitioner stood surety for amount which had been obtained by the loanee - Coercive method could not be adopted against the petitioner under the provisions of West Pakistan Land Revenue Act, 1967, unless the amount was determined by a Court of competent Jurisdiction that could be recovered from the petitioner - Proceedings initiated without determination of amount by a Court of competent Jurisdiction by Authorities were illegal and unlawful - High Court restrained the Authorities from recovering the disputed amount from the petitioner unless the amount due was determined from the Court of competent Jurisdiction - Constitutional petition was allowed in circumstances. **2002 CLC 176**

PLD 1993 Lah.525; PLD 1988 Lah.627; 2001 CLC 57; 1991 CLC 450 and 2001 CLC 87 ref.

43. Any one of joint promisors may be compelled to perform. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution. Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution. If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation. Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B, and C jointly promise to pay D 3,000 rupees. D may compel either A or B, or C to pay him 3,000 rupees.

(b) A, B, and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A.'s estate, and 1,250 rupees from B.

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

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

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

45. Devolution of joint rights. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of

them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of 5,000 rupees lent to him by B, and C, promises B, and C, jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and after the death of C with representatives of B and C jointly.

Court Decisions

Insurance claim. Habib Bank cloth market branch being one of beneficiaries of insurance policy was a necessary party and in its absence suit filed alone by plaintiff/respondent was not maintainable.-**P.L.J.1997 Qta.. 109 = 1997 CLC 1441 = NLR 1997 Civil 524.**

Time and place for performance

46. Time of performance of promise where no application is to the made and no time is specified. Where, by the contract, a promisor is to perform this promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation. The question "what is a reasonable time", is in each particular case, a question of fact.

47. Time and place for performance of promise where time is specified and no application to be made. When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usually hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse but after the usual hour for closing it, and they are not received. A has not performed his promise.

48. Application for performance on certain day to be at proper time and place. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by a promisee, it is the duty of the promisee to apply for the performance at a proper place and within the usual hours of business.

Explanation. The question "what is a proper time and place" is, in each particular case, a question of fact.

49. Place for performance of promise where no application to be made and no place fixed for performance. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place of the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

50. Performance in manner or at time prescribed or sanctioned by promisee. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

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

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

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

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

Performance of Reciprocal Promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

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

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

52. Order of performance of reciprocal promises. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

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

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

53. Liability of party preventing event on which the contract is to take effect. When contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation3 from the other party for any loss which he is may sustain in consequence of the non-performance of the contract.

Illustration

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

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last-mentioned fails to perform it, such Promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

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

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

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

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

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

Effect of such failure when time is not essential. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor of any loss occasioned to him by such failure.

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

Court Decisions

Applicability - Where a condition in the agreement to sell showed that the specified date was not inevitably the cut-off date or the date of the execution of conveyance deed, then time was not of the essence of the contract between the parties in circumstances. **PLD 2002 Kar. 333**

Scope-Party guilty of preventing completion of contract within time could not plead that time was of the essence of contract. **PLD 2003 SC 430** Even the fixation of a date has material bearing upon the question whether a party was ready and willing to perform its part of the contract-Each case, however, is to be decided on its own merits keeping in view the attending circumstances and the court is required in each case to explore and fine out as to what was intended by the parties. **PLD 2003 SC 518**

Expiry of stipulated time -- Where even time is of the essence of contract, the contract does not come to an end immediately upon expiry of the agreed time - Only the non-breaching party acquires an option to put the contract to an end and the party may or may not exercise such option, **2001 CLC 1029** Haji Muhammad Yaqoob v. Shah Nawaz 1998 CLC 21 ref.

Factors to be considered - Mere insertion of term in agreement that certain act has to be performed up to a fixed time does not automatically make time as essence of the contract - Intention of the parties in such regard can be gathered not only from the terms of the contract but also from the surrounding circumstances, the nature of property and transaction involved in the matter. **2001 CLC 1029** AbdulLah. v. Mohommed Siddique 1992 CLC 1561 ref.

Time as essence of contract -- Where contract relates to immovable property time is not ordinarily regarded as of essence but as to other contracts, commercial or mercantile, the time is, prima facie, the essence of the contract with respect to the delivery of the subject-matter of the contract. **2002 C LD 61** AIR 1961 SC 1295; AIR 1961 Pat. 107; PLD 1967 Kar. 318; PLD 1967 Kar. 388; AIR 1986 Karnataka 14 ref. Terms of the agreement themselves speak, if the time was of the essence of the contract - Earlier events demonstrating the conduct of parties might also be taken into account

in this context. **PLD 2002 Kar. 333** Muhammad Nawaz Khan v. Farrah Naz PLD 1999 Lah.238; Muhammad Anwar Khan Ghouri v. Muhammad Taqi PLD 1977 Kar. 391; Faqir Muhammad v. Abdul Momin PLD 1995 Lah.405; Ghulam Nabi v. Muhammad Yaqoob PLD 1983 SC 344; Es Sabhoy v. Saboor Ahmed PLD 1973 SC 39; Ghulam Jilani v. Munir Ahmed Khan PLD 1960 (W.P.) Kar. 517; Abdul Hamid v. Abbas Bhai-Abdul Hussain PLD 1962 SC 1; Haji Muhammad Yaqoob v. Shah Nawaz PLD 1998 Kar. 758 and Abdul Hameed v. Ghulam Muhammad 1987 SCMR 1005 ref.

Time as essence of contract- Determination - Terms of the agreement themselves speak if the time was of the essence of the contract - Earlier events demonstrating the conduct of parties might also be taken into account in this context. **PLD 2002 Kar. 333** PLD 1999 Lah.238; PLD 1977 Kar. 391; PLD 1995 Lah.405; PLD 1983 SC 344; PLD 1973 SC 39; PLD 1960 (W.P.) Kar. 517; PLD 1962 SC 1; PLD 1998 Kar. 758 and 1987 SCMR 1005 ref.

Time when as essence of contract - Use of expression 'but in any case' in the contract between the parties - Meaning and significance - Dispute arose between the parties that according to the buyer the supplier failed to supply the goods within the stipulated time - Bank guarantee submitted by the supplier was encashed by the buyer-Matter was referred to arbitrator and award was made by the arbitrator in favour of the supplier - Such award was made rule of the Court - Contention of the buyer was that by the use of expression 'but in any case' in the contract time was made essence of the contract and the goods were to be supplied by the respondent within the stipulated time-Validity - Use of such expression in the contract was indicative of the Intention of the parties that the time was essence of the contract - Where the supplier failed to commence the supply till even expiry of the stipulated period, it was the supplier who committed breach of the contract and the same Justified the buyer to get the guarantee encashed - Not only the arbitrator misconstrued the particular clause of the contract and took wholly unwarranted view about the delivery schedule as to supply of the goods but also issued directions of declaratory nature to the buyer in the award - Issuance of directions of mandatory nature were not within the scope of the reference before the arbitrator - Where the award was not practicable or possible to implement or carry out the directions contained in the award, it would render the award invalid and not capable of implementation and execution - Trial Court having erred in making such award as rule of the Court, same was set aside, **2002 C LD 61**

Time when not essence of the contract :-- If, in a contract, there was power of extension and the provisions for penalties/damages, time would not be of the essence of the contract-Principles illustrated. **2004 C L C 478** In agreement itself time was stated to be the essence of contract and in case of contract and in case of default of payment on specified date, earnest money would stand forfeited-In view of such express terms, general principle that in case of contract of sale of immovable property, time should not be assumed to be essence of contract would have no applicability. **P L J 2004 SC 73** -Vendor was not permitted to forfeit sale consideration, unless such condition was specifically recorded in agreement itself--- when initial terms of agreement for forfeiting earnest money stood relaxed from time by consent, then vendor would not be justified in forfeiting amount paid to him as sale consideration. **PLD 2003 Kar. 45** Whether time was of the essence of such contract-Determination of-Guidelines stated. **PLD 2003 SC 430** Supreme court granted leave to appeal to examine questions, inter alia, whether in the facts and circumstances of case, parties had intended the time to be essence of contract or by their subsequent conduct, the time had become the essence of contract. **PLD 2003 SC 430**

Whether time was essence of a contract. In cases relating to transfer of .immovable property ordinarily time is not to be considered as essence of contract, but at any rate a party in breach of contract cannot be permitted to take advantage of its own wrong and to blow hot and cold at one and same time.- **P.L.J.1996 Kar. 1072 = 1996MLD322.**

56. Agreement to do impossible act. An agreement to do an act impossible in itself is void.

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

Compensation for loss through non-performance of an act known to be impossible or unlawful. Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not known to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void.
(b) A and B contract ot marry each other, Before the time fixed for the marriage, A goes made. The contract becomes void.
(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject o practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
(d) A contracts to take in cargo for B at a foreign port. A's government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. on several occasions A is too ill to act. The contract to act on those occasions becomes void.

Court Decisions

Defendant had already warned plaintiff that no remission will be given on account of decrease in traffic for any cause. Doctrine of frustration does not apply. **P.L.J.1988 Kaf. 218.**

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

Illustration

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

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

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

58. Alternative promise, one branch being illegal. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

Appropriations of Payments

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

Illustrations

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

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

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

61. Application of payment where neither party appropriates. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or is not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payments shall be applied in discharged of each proportionally.

Contracts which need not be performed

62. Effect of novation, rescission and alternation of contract. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need no be performed.

Illustrations

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

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

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

63. Promisee may dispense with or remit performance of promise. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

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

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

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

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

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

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

Illustrations

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

(b) A, contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day and none after. B retains the 130 maunds after the 1st of May. He is bound to pay A for them.

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

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

Court Decisions

Applicability:--Such agreement for the sale of disputed plot could not be termed to be void in its inception but voidable at the option of the Authorities - Bar contained in the agreement would not make the agreement for sale invalid or illegal - Petitioner had admitted the execution of agreement to sell the plot and had received the consideration, therefore, the petitioner could not be allowed to back out from his promise on the equitable doctrine of estoppel - High Court had given cogent reasons for arriving at the findings, and the same were legal and based on proper appreciation of evidence and law - S.C declined to interfere with the Judgment passed by High Court.-**2001 SCMR 1053** 1996 SCMR 669; 1989 SCMR 1473; 1992 SCMR 19; 1994 SCMR 782; PLD 1965 Dacca 56; 1991 MLD 801; 1995 CLC 1906; 1996 CLC 678; AIR 1940 AlLah.abad 453; 1983 SCMR 1199; PLD 1972 Lah.855 and 1993 MLD 1207 distinguished.

Restriction on 'transfer Agreement of allotment was executed between petitioner and CDA, to which respondent was .not party, whereunder allottee could not transfer his rights by sale untill payment of all amount due to the Authority. As said bar was subject to said .restriction could be vacated/waived by CDA on completion of required conditions, therefore, agreement for sale of plot could not be termed to be void from its inception, but voidable at the option of CDA. Said restriction was therein agreement of allotment and it was never subsequently found or became subsequently void, therefore, provisions of Section 65 of Contract Act would not be attracted. Held Further : Provisions of Section 65 of Contract Act could be availed of only by respondent and not by petitioner, whereas respondent had not approached Court for restoration of benefits or compensation received from him under agreement of sale. Held Further : Petitioner had admitted execution of agreement to sell the plot and received consideration thereof, could not be allowed to back out on consideration of equitable doctrine of estoppel.-**P.L.J.2001 SC 1194 = 2001 SCMR 1053**.

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

67. Effect of neglect promise to afford promisor reasonable facilities of performance. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER – V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

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

Illustrations

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

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

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

Illustration

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

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

Illustrations

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

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

Court Decisions

Conditions:-- Three conditions must he met before invocation of provisions of S 70 of Contract Act, 1872; viz. that a person must lawfully do something for another person and deliver something to him; that in doing said thing or delivering said thing, he must not intend to act gratuitously; and that other person for whom something was done or to whom something was delivered, must enjoy benefit thereof. If a conclusion was reached to effect that S. 70, Contract Act, 1872 was applicable and if there was no contractual term fixing compensation for work done or services rendered, Court could grant. compensation "quantum meruit". **P.L.J.2000 Kar. 188 = PLD 2000 Kar. 22**

Quantum meruit, was nothing but a reasonable compensation awarded on implication of contract to remunerate. Quantum meruit could not be granted where contract had provided for consideration payable. **P.L.J.2000 Kar. 188 = PLD 2000 Kar. 22**.

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

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

Illustrations

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

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

CHAPTER -- VI

OF CONSEQUENCES OF BREACH OF CONTRACT

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

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

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

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

Illustration

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

Court Decisions

Breach of contract:-- Where breach of obligation by defendant is so patent, that it floats on the surface of the record, causing immediate, pressing and irreparable injury to the plaintiff, the Court may, while exercising its powers under S.94 read with S.151. C.P.C., grant a status quo ante--In case of breach of contract which agreement is not even enforceable under the law, the Court cannot and should not exercise its Judicial discretion to create a situation, which has ceased to exist when the lis is commenced. **2002 CLC 77**

Claim of building material lying in premises and damages on account of shock and loss of health including mental torture--Proof-Disputed premises being on rent with plaintiffs, it was not expected that any building, material belonging to plaintiffs would be lying there--No condition present in agreement that such material would be removable by plaintiffs-Damages on account of shock, loss of mental health including mental torture could not be claimed in view of fact that plaintiffs had withdrawn most of the other huge claims which they had made with regard to sale agreement which were proved to be false--Plaintiffs having left the country at the relevant time and defendants being left to search out creditors of plaintiffs and for discharging their liabilities, question of shock, loss of health or mental torture would not arise in circumstances. **1988 M L D 1187** No prudent man could make payment to third party and that too in cash--Under agreement defendants were to discharge liabilities of the limn [rut were not obliged and required to discharge their personal or extraneous liabilities--Signatures of that third party were, however, not proved by defendants--Payment made by defendants to a person who was not creditor thereof, would be of no effect. **1988 M L D 1187**

Establishment manufacturing medicines sold by plaintiffs to defendants--Manufacturing of drugs by defendants objected to by plaintiffs--Carrying on of such business by defendants--Justification--Terms of agreement. made it clear in itself that plaintiffs had given up business of manufacturing of drugs and had transferred and sold said business to defendants--Defendants would have a right to carry on business of manufacturing of drugs in said premises with the material, machinery and the fixed assets lying therein--Not only right to manufacture was sold by defendants but plaintiff also undertook not to start identical business as carried out by that establishment for a period of five years--Terms of agreement thus clearly showed that not only the right to manufacture and right to obtain drugs manufacturing licence was

transferred to defendants but also plaintiffs undertook not to conduct similar business in any name for specified period--Plaintiffs' claim of damages based on such right would not be sustainable in circumstances. **1988 M L D 1187**

Compensation for breach of contract. Contracted goods were neither of extraordinary special kind nor are commodity which was not available in market so as to entitle plaintiffs to decree of specific performance. Plaintiffs in equity would be entitled to proportionate compensation for quantity of goods not supplied to them at least at that rate at which they purchased entire quantity of goods. Court while calculating price at that rate worked out specified amount to which plaintiffs were found entitled and they were awarded decree in terms of such specified amount.**-P.L.J.1997 Kar. 940 = 1997 CLC. 88**.

Proof of Breach of contract :--Agreement of sale of establishment between plaintiffs and defendants--Part-payment received by plaintiffs and possession of establishment handed over to defendants--Claim to a part of possession of premises and damages for dispossession therefrom given up by plaintiffs, during hearing of suit--Presumption from such abandonment of claim would be that plaintiffs conceded that establishment as a whole, alongwith right of possession of disputed premises was sold by plaintiffs to defendants and that only stocks in godowns comprising disputed premises were not sold--Terms of agreement, cancellation of insurance policies and refund claimed by plaintiffs, support the conclusion that establishment as a whole was sold by plaintiffs to defendants. **1988 M L D 1187**

Remedies against Breach of contract: -- Only two remedies are available to the aggrieved person, either to seek specific performance of the contract, or to seek for damages - Where specific performance cannot be granted under the law, as a substitute, the plaintiff is not entitled to file a suit for declaration or for that matter a suit for perpetual injunction, **2002 CLC 77** Malik and Haq v. Muhammad Shamsul Islam PLD 1961 SC 531; Kar. Shipyard Works v. Muhammad Shakir Sheikh 1993 CLC 330: Shahid Mahmood v. KESC 1997 CLC 1936; Alvi Sons v. Government of East Pakistan PLD 1968 Kar. 222 and M. Farooq v. Suleman A.G. PanJwani PLD 1977 Kar. 88 ref.

Contract of sale of establishment--Defendants first claimed re-imbursement of specified amount for which goods were pledged and on realizing that they had never paid the pledged amount of goods, subsequently claimed loss of profit on supply of those goods--Justification--Defendants under the agreement, were not authorised to clear specified debt of plaintiffs and were not authorised to get the pledged stock from the bank on payment of specified amount--Plaintiffs were, therefore, within their right to get the said goods released for their own use and benefit--' Defendants could not claim any profit in respect thereof. **1988 M L D 1187** Liabilities discharged by defendants on behalf of plaintiffs were allowed to be deducted by Court from the amount payable by defendants to plaintiffs on account of sale of establishment--Setting aside finding of Trial Court whereby suit of plaintiffs for recovery of amount of sale of establishment was dismissed, Appellate Court decreed suit of plaintiffs to the extent of sale amount after deducting there from amount already paid by defendants and the amount paid by them for discharging liabilities of the plaintiffs. **1988 M L D 1187**

Essentials. Compensation under S. 73 Contract Act 1872 could be claimed only for breach of contract when damage was caused directly by breach of contract. Contracting party for his own default could not be allowed either to defeat relevant contract or claim better position without fulfilling its obligation. Breach of contract by a party has specifically to be proved and unless it was done, it would not be possible on basis of general allegation to ascertain and pin point the person who had committed such breach. Plaintiff could not claim any sum as damages when due to his own negligence terms of contract had been breached. Plaintiff as . per terms of contract had to provide facility of go-down and residential accommodation to staff of defendant for specific period but if failed to provide the same. Plaintiff being negligent in performance of its obligation could not plead breach of contract by defendants. Default of plaintiff being apparent, it would be inequitable to allow plaintiff to get benefit of his wrong by enforcing the same as breach-of contract against defendants. General principle under S. 73, Contract Act, 1872 is that only special damages arising in consequence to breach of contract are allowed and general damages usually concerning with' non-pecuniary losses such as loss of reputation could not be estimated as special loss which is confined to injury caused to individual party as a result of breach. Damages due to breach of contract, would be governed by Section 73 of Contract Act, 1872 and plaintiff could get compensation for actual loss but general losses would not be permitted for such breach of contract. No compensation, however, could be given for any remote or indirect loss or damages sustained for breach of contract by reason of one's own default. **P.L.J.2000 Lah. 278 = 2000 MLD 1130. Where** Evidence on record indicated that only a small

quantity of wheat was grinded by plaintiff Mills while major bulk of wheat was yet to be grinded and plaintiff Mills having not grinded wheat as per schedule for regular supply to defendants to cater their need forced defendants to make alternate arrangement. Plaintiff (Mills) having failed to discharge its obligation was not entitled either to special or general damages and could not claim only the amount of compensation for grinding of actual quantity of wheat. Judgment, and decrees of Courts below granting damages for remote and indirect toss or damages sustained for breach of plaintiffs own fault were set aside and case was remanded to trial Court for determination of actual compensation payable to plaintiff for total quantity of wheat grinded by plaintiff Mills, alongwith liability of payment of telephone bills for actual use. Specified amount of security deposited by plaintiff would be returnable to him alongwith compensation for actual quantity of wheat grinded by it. **P.L.J.2000 Lah. 278 = 2000 MLD 1130**.

Interim injunction, grant of - Breach of contract - Defendant suspended supply of raw material to the plaintiff before the institution of the suit - Trial Court granted the injunction whereby the defendant was restrained from discontinuing the supply of the raw material - Validity - Where the supply had already been suspended by the defendant, the order passed by the Trial Court was not Justified to direct the sale of goods to the plaintiff - Plaintiff failed to make out a prima facie case and to show that the principles of irreparable loss and balance of convenience was in their favour - Order of temporary injunction granted by the Trial Court was set aside and the application filed by the plaintiff was dismissed. **2002 CLC 77** Mst. Salima Bibi v. Mst. Halima Bibi 1994 SCMR 1858; City Bank v. Tariq Mohsin Siddiqi and others PLD 1999 Kar. 196; AbdulLah. v. Abdul Majid 1999 MLD 2670; M, Younas v. AbdulLah. l992 CLC 15; Pakistan Paper Corporation Ltd. v. National Trading Company (NTC) Limited 1983 CLC 1695; Messrs Caltex Oil (Pakistan) Limited, Kar. v. Sheikh Rehan-ud-Din PLD 1958 (W.P.) Lah.63; Messrs Rohtas Industries Limited v. State of Bihar AIR 1958 Pat. 414; Moti Lal Channoo Lal Vaish v. Golden Tobacco Company AIR 1957 Madh. Pra. 223 Islamabad and others v. Muhammad Zaman Khan and others 1997 SCMR 1508 ref.

Principles-Claim of damages on basis of special circumstances/extraordinary nature of contract, anxiety, anguish, mental stress and vexation arising out of breach of contract-Requirements-Rules of thumb and res ipsa loquitur and doctrine of special notice-Applicability-Award of punitive or exemplary damages in a surely contractual action-Essentials-Court, in the present case, could not order the defendant to pay the amount of compensation which would actually make the plaintiff's position better than the one if the contract had been performed-Trial Court, having decreed the suit on no evidence, the judgment of Trial Court was perverse and thus unsustainable in law- principles. **PLD 2003 Lah. 358**

Suit for damages - Leave to appear and defend the suit - Grant of - Suit for the grant, of damages would stand slightly on different footings than an ordinary suit for recovery of amount based on negotiable instruments and other material - Plaintiff in such a suit was to prove that damages were caused and occasioned on account of acts and omissions of the defendant - Defendant was also entitled to controvert the adverse allegations and to defend himself - -Initial burden, in such a suit, would remain on the plaintiff to prove his case for the grant of damages and also its quantum - Serious and bonafide dispute having arisen in the matter for determination of the respective contentions of the parties, leave to appear and defend the suit was granted to the defendants, **2001 MLD 1181**

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

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

Exception 1. When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Federal Government or of any Provincial Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

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

Illustrations

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

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

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

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

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

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

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

Court Decisions

Liquidated damages. Difference on account of rates between .contracted rates and rates awarded to new contractor, was not claimed by Federation in plaint. In absence of any claim in plaint same could not have been decreed. Even on merits. Federation failed to prove that it had suffered any loss. According to new contract difference in rates was on account of use of steel drums for packing of formulated material instead of using polythelene double lined water proof cloth. Deputy Attorney General could not controvert above factual position and this item was hot sustainable.- **P.L.J.1996 SC 13 = 1995 SCMR 1431.**

Unconscionable forfeiture - Court, in order to determine the unconscionable forfeiture, has to take into consideration the nature of the contract, the conduct of the parties and proportion of the amount of deposit towards sale price - Where the purchaser had not merely defaulted but had repudiated the contract and his conduct suffered from impropriety, the Court would refuse to come to his aid, because one who seeks equity must come with clean hands - Where seller had sharply exercised his right or had obtained an unfair advantage, though acting within his right under law, would be taken into consideration in favour of granting relief to the purchaser. **PLD 2002 Kar. 333**
Kar. Port Trustees v. Ghulamali Habib PLD 1961 (W.P.) Kar. 623 ref.

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

Illustration

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

CHAPTER – VII

[1][**76-123**. Sale of Goods:

1. Rep. by the Sale of Goods Act, 1930 (III of 1930), S.65.

CHAPTER -- VIII
OF INDEMNITY AND GUARANTEE

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

Illustration

A, contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

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

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

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

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

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

S. 126-Bank guarantee-contention of the Bank was that the conduct of the plaintiff was mala fide, inasmuch as for about six years the plaintiff did not take any step towards recovery of decretal amount and that the plaintiff held 33% shares in the company-Validity-Responsibility of the Bank, in terms of the guarantee, would not become inoperative and it was the right of the plaintiff to seek remedy against the respondent, irrespective of its share, if any, in the company. PLD 2003 SC 215

Court Decision

Scope - Liability of guarantor depends on the language of the guarantee - Terms of the guarantee would demonstrate how far the guarantor has bound itself to indemnify the creditor - Guarantee may be absolute or conditional, dependant on the performance of a condition by either party within the terms of the guarantee. **PLD 2002 S.C1100** Company Judge to order encashment of Bank guarantee given on behalf of the company in liquidation - Bank had undertaken to pay a specified amount to the creditor (financial institution) if the borrower failed to raise capital within the stipulated period - No condition whatsoever was attached to the performance of the creditor before making demand - Guarantee was extended from time to time - Time limit in the guarantee was for the borrower, to raise the capital within the stipulated period, failure whereof had given unconditional right to the creditor for encashment of Bank guarantee - No time limit having been provided for the creditor, as such the direction given by the Company Judge could not be frustrated on that score - Contention that separate suit should have been filed for encashment of Bank guarantee and the Company Judge had no Jurisdiction to order encashment of the same in liquidation proceedings was devoid of any force. **PLD 2002 S.C1100** Discount Bank of India Ltd., Delhi v. Triloki Nath and others AIR 1953 PunJ. 145; Knowles v. Scott (1891) 1 Ch. 717; Palmer's Company Law, p.414; Manager, Jammu and Kashmir, State Property in Pakistan v. Khuda Yar and another PLD 1975 SC 678 and Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382 ref.

When the Bank guarantee had formed part of the principal contract covered by the arbitration clause therein, could such a guarantee be encased without recourse to arbitration and that when the contract project had already been completed of which respondent was taking full advantage, aw that equitable, in any case, on the part of the respondent to encase the Bank guarantee. **PLD 2003 SC 295**

"Contract of guarantee" and "mobilization advance guarantee"--Rights and liabilities of the parties in case of contract of guarantee-Determination-Such rights are strictly determined with reference to terms and conditions of the guarantee without recourse to any other instrument or document executed by the parties for any other different purpose-Mobilization advance guarantee is on different footing than guarantees of other nature, in such a case, the liability of surety would be the entire amount due from principal-debtor-Principal-debtor in such case normally receives consideration in case f any revocation, termination or completion of contract-Bank guarantee being a distinct contract not controlled by the primary contract between the parties, contention that in view of various term of the primary contract it would be more appropriate if the Court ordered to maintain status it would be more appropriate if the court ordered to maintain status quo till the dispute was finally decided in terms of arbitration clause to which the parties had agreed, was repelled for such order would for all practical purposes nullify the contract of guarantee, which was an independent contract. **PLD 2003 SC 295**

"Guarantee"-Definition-Guarantee is an accessory contract, whereby promisor undertakes to be answerable to promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated. **PLD 2003 SC 191**

Bank guarantee furnished by surety--Variation in terms of agreement--Proof - Burden to prove that original Bank guarantee furnished by surety stood varied in terms of agreement subsequent to Bank guarantee, would be upon surety/defendant--Such surety having failed to discharge onus of proof, would be bound to pay guaranteed amount on demand. **P L D 1989 Kar. 168**

Bank guarantee-Guarantee rights and liabilities of the parties, are determined with reference to the terms and conditions of the guarantee and a contract of a guarantee is to be strictly construed in terms of the guarantee-Guarantee, in the present case, unequivocally postulated that the total responsibility of the Bank was restricted to a specified amount-Bank irrevocably and unconditionally undertook to pay the said amount to the plaintiff had sustained damages on the ground of default-Effect – Liquidated damages, as a rule, required the positive evidence to show that the actual loss was suffered by the party claiming the damages and even fixed amount stipulated for liquidated damages could not be recovered if the quantum of actual loss was not proved-Plaintiff, in circumstances, was neither entitled to any interest nor to any amount as liquidated damages. **PLD 2003 SC 215**

Bank guarantee in Banking system has dual aspect, same being a contract between Bank and beneficiary by a third party-Enforceability of Bank guarantee depends upon the terms under which guarantor has bound himself, who cannot be made liable beyond what he has undertaken-Obligations arising under Bank guarantee are independent of the obligations arising out of the specific contract between parties-Bank guarantee comes to an end, once same is discharged. **PLD 2003 SC 191**

Condition imposed in Bank, guarantee with regard to encashment - Bank guarantee executed in favour of the defendant contained a built in condition to the effect that its encashment would depend upon violation of conditions of the tender - Plaintiff who had tendered the guarantee assailed the act of encashment of the guarantee in civil suit - Both the Courts below declined to grant interim injunction against encashment of Bank guarantee - -Validity - Where violation/breach could not be determined without conducting inquiry, departure could be made from the rule mentioned in S.126 of the Contract Act, 1872 - Till final decision of the suit filed by the defendant the Bank guarantee could not be encashed - Leave to appeal was granted by S.C in circumstances. **2002 CLC 1012 = 2002 SCMR 1781** Sirafi Trading Establishment v. Trading Corporation of Pakistan Ltd. 1984 CLC 381; Messrs Arul Murugan Traders v. Rashtriya Chemicals and Fertilizers Ltd., Bombay and another AIR 1986 Mad. 161; Kudremukh Iron Ore Co. Ltd. v. Korula Rubber Co. Pvt. and another AIR 1987 Karnataka 139; Messrs Synthetic Foams Ltd. v. Simpled Concrete Piles (India) Pvt. Ltd. AIR 1988 Delhi 207; S. Chand & Co. Ltd. v. Dr. K. Shivarama Karantha and others AIR 1990 NOC 178 (Kant.); State Associates v. Messrs Farben Industrial Development SPA and another 1992 MLD 1007; Messrs Zeenat Brother (Pvt.) Ltd. v. Aiwan-e-Iqbal Authority through Chairman, Lah.and 3 others PLD 1996 Kar. 183; Generale Biscuit, A French Company through Mr. Benoit Barme and another v. Messrs Diamond Food Industries (Pvt.) Ltd. through Chief Executive/Director/Secretary 1999 YLR 305; Messrs Kohinoor Trading (Pvt.) Ltd. v. Mangrani Trading Co. and 2 others 1987 CLC 1533; Messrs Rafidian Bank, Iraq v. M.L. International (Pvt.) Ltd., Kar. and 3 others 1993 MLD 1234; Pakistan Engineering Consultants v. Pakistan International Airlines Corporation and BCCI and others 1993 CLC 882; Messrs National Construction Co. Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 SC 311; Haral Textiles Limited v. Banque Indosues Belgium, SA and others 1999 SCMR 591 and Pakistan

National Shipping Corporation PNSC Building, Kar. v. Samsung Co. Ltd. and 3 others 2001 CLC 1473 ref.

Contract of guarantee, Parties to original contract mere in litigation with each other - Dispute was with regard to encashment of Bank guarantee during litigation by the Bank - Validity - Bank guarantee was independent contract between the Bank and the party in whose favour the guarantee had been furnished - Where the original parties to the main contract were litigating with each other, encashment of irrevocable Bank guarantee could not be declined by the Bank on the pretext of such litigation. **2002 CLC 1012** Messrs National Construction Co. Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 SC 311 ref.

Financial Institution was creditor while the guarantee was provided by a Bank which was surety - Said guarantee had been executed for the benefit of the company (creditor) now under liquidation - Essence of the guarantee was that the guarantor had agreed to discharge the liability of the debtor if the latter failed in performing his liability which all depended on the terms of the guarantee and guarantor could not be made liable beyond the terms of his guarantee - Whatever the guarantor had undertaken, the same had to be performed - Guarantee haying been executed by the Bank, satisfaction of the same could not be avoided on mere technicalities. **PLD 2002 S.C1100** Prudential Commercial Bank Limited v. Hydari Ghee Industries Limited and others 1999 MLD 1694 ref.

Contract of guarantee, encashment of -- Dispute was with regard to encashment of Bank guarantee during litigation by the Bank - -Validity - Bank guarantee was independent contract between the Bank and the party in whose favour the guarantee had been furnished - -Where the original parties to the main contract were litigating with each other, encashment of irrevocable Bank guarantee could not be declined by the Bank on the pretext of such litigation. **2002 SCMR 1781** Messrs National Construction Co. Ltd. v. Aiwan-e-Iqbal Authority PLD 1994 SC 311 ref.

Essential ingredients-Test to determine nature of guarantee and its effect-Guarantee contains the ingredients of "dedicated commitment", "absolute undertaking", "an unambiguous assurance", "unconditional willingness", "definite certainty", "compliance without objections", "sacred obligation" and "defined responsibility"-Nature of guarantee and its binding effect can be well-judged on the basis of such ingredients constituting a guarantee. **PLD 2003 SC 191**

Powers of Company Judge and function of Official Liquidator:-- Bank guarantee which was executed for the benefit of the company under liquidation could not be frustrated by putting up technicalities so as to thwart the efficient performance of the liquidator - Pushing the creditor for encashment of Bank guarantee through a civil suit would simply be generating multiplicity of litigation which was not the mandate of law - Mere technicalities unless offering insurmountable hurdle not to be allowed to defeat ends of Justice. Section 316 of the Companies Ordinance has given the Company Judge overriding powers for disposing of any matter germane to the winding-up proceedings. The principal object of winding-up of a company is to realize its property and its liabilities are discharged in accordance with law. The official liquidator who is an officer of the Court is appointed by the Company Judge who looks after and supervises the interests of all the parties concerned in a liquidation of a company. He is a trustee not only for the creditor but for the company under liquidation as well. He has to safeguard the interests of all the parties for the efficient performance of his duties. He is to take possession of movable and immovable properties of the company. Section 333 of the Ordinance has given wide powers to the official liquidator which are exercised by him under the supervision of Company Judge who has been authorized to issue such directions. The official liquidator has got ample powers to take steps for the efficient winding-up of the company so as to create a balance among the interest of the parties according to law and the rules. In a winding-up the liquidator acts not merely for creditor but for contributories and for the company also. A liquidator is an agent employed for the purpose of winding-up of the company. In some respects he is a trustee; but he is not a trustee for each individual creditor: see Knowles v. Scott (1891) 1 Ch. 717 at p. 723. His principal duties are to take possession of assets, to make out the requisite lists of contributories and creditors, to have disputed cases adjudicated upon, to realize the assets subject to the control of the Court in certain matters and to apply the proceeds in payment of the company debts and liabilities in due course of administration, and, having done that, to divide the surplus amongst the contributories and to adjust their rights. Any proceedings necessary for the protection of the property are taken by the liquidator in the name of the company, unless the Court has made a vesting order, in which case he can sue in his official name is respect of property vested in him by the order. He can institute or defend any suit with the sanction of the Court and he can take any other

legal proceedings, civil or criminal, also with such sanction. In the present case the bank guarantee was got executed for the benefit of the company under liquidation by the Bank as such the same could not be frustrated by putting up technicalities so as to thwart the efficient performance of the liquidator. What was permissible for the Courts of general Jurisdiction in the interest of Justice, fairplay and equity when there was no statutory bar, was also permissible for the Company Judge so as to spare the parties from the ordeal of rushing from one forum to another for the red Res Sal of their grievance. All legal formalities were to safeguard the paramount interest of Justice. In the present case pushing the creditor for the encashment of bank guarantee through a civil suit would simply be generating multiplicity of litigation which was not the mandate of law. The guarantor in the present case particularly the Bank could not avoid its liability on all these technicalities. Mere technicalities, unless offering insurmountable hurdle, should not be allowed to defeat the ends of Justice. **PLD 2002 S.C1100** Discount Bank of India Ltd., Delhi v. Triloki Nath and others AIR 1953 PunJ. 145; Knowles v. Scott (1891) 1 Ch. 717; Palmer's Company Law, p.414; Manager, Jammu and Kashmir State Property in Pakistan v. Khuda Yar and another PLD 1975 SC 678 and Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382 ref.

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

Illustrations

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

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

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

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

Illustration

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

129. "Continuing guarantee". A guarantee, which extents to a series of transactions, is called a "continuing guarantee".

Illustrations

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

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

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

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

Illustrations

(a) A, in consideration of B's discounting at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months. A revokes the guarantee. This revocation discharges A three months. A revokes the guarantee. This revocation discharges A to B for the 2,000 rupees on default of C.

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

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

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

Illustration

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

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

Illustrations

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

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

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

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

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

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

Illustrations

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

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is

necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

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

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

136. Surety not discharged when agreement made with third person to give time to principal debtor. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

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

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

Illustration

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

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

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

Illustrations

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

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

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

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

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

Illustrations

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

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

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

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

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

Illustrations

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

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

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

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

Illustrations

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

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

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

Court Decisions

Implied promise :-- Section 145 of Contract Act provides that in every contract of guarantee, there is an implied promise by principal debtor tp indemnify surety and' surety is entitled to recover from principal debtor whatever sum he has rightfully paid under guarantee and section 318 of Companies Ordinance provides that an order for winding up of a company operates; in favour of all creditors and contributories of company. If, therefore,, defendant becomes liable to pay by virtue of his guarantee, surely, he would be entitled to claim payment from liquidator of company.-**P.L.J.1996 Kar. 485 = 1996 CLC 106.**

Discharge of guarantee. Making of claim before liquidator do not amount to forgo claim against sureties. There is no such principle or authority that if petition for winding up of a firm is not opposed, his surety is discharged. There is nothing on record to show that approval for "revised repayment schedule" was ever accorded by plaintiff. There was, therefore, in fact, no Variation in repayment schedule, S. 133 provides that variation without consent of surety would have effect of discharging surety, whereas, guarantee admittedly contains such consent and therefore not discharged. **P.L.J.1996 Kar. 485 = 1996 CLC 106.**

146. Co-sureties liable to contribute equally. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contacts, and sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations

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

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

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

Illustrations

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

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E.D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

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

CHAPTER IX
OF BAILMENT

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

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

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

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

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

Illustrations

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

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

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

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

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

Illustrations

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

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

Illustrations

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

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

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

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

Illustration

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

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

Illustration

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

By the Trusts act, 1882, S. 66,"where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

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

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

160. Return of goods bailed on expiration of time or accomplishment of purpose. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed, has expired, or the purpose for which they were bailed had been accomplished.

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

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

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

Illustration

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

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

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

166. Bailee not responsible on redelivery to bailor without title. If the bailor has no title to the goods, and the bailee, in goods faith, delivers them back to, or according to the directions of the bailor, the bailee is to responsible to the owner in respect of such delivery.

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

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

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

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

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

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

Illustrations

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

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

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers. Bankers, factors, wharfingers attorneys of High Court and policy-brokers may, in the absence of a account, any goods bailed to them; but not other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect,

Bailments of Pledges

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

173. Pawnee's right of retainer. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all

necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

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

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

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

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

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

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

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

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

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

Suits by Bailees or Bailors against Wrong-doers

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

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

www.paklawyer.com

CHAPTER X
AGENCY

Appointment and Authority of Agents

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

Court Decision

Agency-Elementary principle of "agency" is that the relationship between the agent and the principal is very delicate and of a high trust-Agent, in such relationship, occupies the position of dominant influence, he is not permitted to make a transfer of the property of the principal in his own favour or in favour of his associates without the consent of his principal. **PLD 2003 Azad j &K 16**

An Attorney falls within the definition of an agent. **P.L.J.1997 SC (AJK) 17 == 1997 CLC 487**.

Law of land, gives to a citizen, right to appoint an agent to act on his behalf.-**P.L.J.1997 SC (AJK) 17 = 1997 CLC 487.**

Agreement of sale--Proof of execution--Agreement of sale allegedly entered by respondent with appellant--Appellant examining attesting witnesses to prove execution of agreement but Courts below requiring production of expert evidence--Nothing available on record to show that evidence of attesting witnesses on point was insufficient--Finding of Courts below requiring production of expert evidence for proof of execution of agreement, held, was not justified--No requirement of law existed to prove execution of a document by production of expert evidence--Findings of Courts below set aside and case remanded for disposal in accordance with law. **1987 M L D 2065**

Principal and agent, relationship of - Agent is the connecting link between the principal and third person; a sort of conduit pipe or an intermediary who has the powers to create legal relationship between the principal and third party - Agent has competence to make the principal responsible to the third person and is an imperative bridge by crossing which, the third person can reach the principal to enforce his legal right or nice versa - Principal is liable to the third person for all the acts and deeds performed, within the authority of agency, by his agent, as if those were personally performed by him - Agent necessarily and the principal in certain circumstances are liable to each other for accounts - Where a person is not liable to the principal for the submission of accounts, such as the profit and loss, such person cannot be termed as agent. **2002 CLC 77**

Termination of contract-- Plea raised by the respondent was that there was a relationship of the principal and agent as the appellant was owner of the trade mark and on account of the principle of vicarious liability was liable, to the third party, therefore, the agency stood created - Validity - Respondent used to purchase raw material from the appellant against price and property in the goods used to pass on to the respondent on the delivery - Respondent was not liable for accounts to the appellant and the product was being sold in Pakistan by the respondent as its own property, for the price fixed by the respondent, without any control of the appellant-Respondent was solely entitled to the profit and incurred loss if any and did not receive any commission from the appellant on account of the sale of the product - Respondent in no manner acted as intermediary or a conduit pipe between the appellant and the third person - Respondent was not an agent of the appellant within the purview of law of agency, in circumstances. **2002 CLC 77**

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

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

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

186. Agent's authority may be expressed or implied. The authority of an agent may be expressed or implied.

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

Illustration

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

Court Decisions

Authority of agent to enter into compromise. Authority of agent to enter into a compromise "is" suit to extent of surrendering a big chunk of Land for a nominal consideration, was unwarranted. Agent appellant had no right of his own in land and his act of surrendering right of his principal's land without due recourse of its bye-laws was not Justified. **P.L.J.1996 SC 161 = 1996 SCMR 193.**

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

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

Illustrations

(a) A is employed by B residing in London, to recover at Karachi a debt due to B. A may adopt any legal process necessary for the .purpose of recovering the debt, and may give a valid discharge for the same.

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

Court Decisions

Extent of agent's authority-Power of attorney holder acquires double capacity or double personality; one being as his person and the other as attorney-Both the said positions cannot be intermingled by executing any document in his own favour-Double capacity and double personality discussed and differentiated. **PLD 2003 Azad J&K 16**

Duty of agent-Appointment of a general attorney is a matter of routine as well as requirement of principal and is never indicative by itself of a sale or absolute sale on behalf of principal; much less a sale in favour of agent himself-General attorney must take special permission from principal while transferring his principal's property in his own name or in the name of his close fiduciary relations. **PLD 2003 SC 494**

Power given to joint agents:-- Object of appointing agents or attorneys is that a specified person is authorized by the executant to act for and in the name of the person executing it –Where a power is delegated by a principal jointly to more than one agent for performance of the acts on his behalf, then single agent cannot do any act without joining the other-Where a power is given to joint agents, presumption is that such power has been granted on the consideration of the personal nature and their act can bind the principal only if the agents act jointly-When the attorneys, so appointed intend to deviate from the authority given in a power of attorney then they have to comply with Ss. 214 & 215 of the Contract Act, 1872-Where one of the joint agent, he had to prove through cogent evidence that such act was consented to by the principal. **PLD 2003 Azad j &K 16**

Relationship of Principal and Agent on basis of power of attorney. Power of attorney executed by specified respondents in favour of accused respondent did not authorise such respondent to receive compensation on behalf of other respondent, and to deposit the came in his own account. Such fraud had been committed by accused respondent with active connivance of petitioner Bank. Wafaqi Mohtasib on complaint of aggrieved respondents had taken lot of pair after providing sufficient opportunities to petitioner to come to soirp comprcnuse as fraud had been committed with aggrieved respondents wis.^ active connivance of specified Bank Manager of petitioners. Wafaqi Mohtasib's verdict having not been set aside by President, same would be executable. Transaction was made by petitioner Bank in violation of Banking instructions as huge amount was withdrawn without seven day's notice which was precondition to withdraw amount

exceeding specified amount from PLS Account coupled with the fact that Banking inquiry by specified officer of the Bank and opinion of standing counsel of Bank whereby they took the stand that general power of attorney did not authorise attorney to open account in question in his own name was rejected by Bank officials. Constitutional Jurisdiction being discretionary in nature High Court was not inclined to interfere with order of Wafaqi Mohtasib who had done substantial Justice(in favour of aggrieved respondents by ordering petitioner to pay them back their money of which they had been deprived by Bank's active connivance.-**P.L.J. 2000 Lah. 1130.**

Power of attorney has to be strictly construed-Person authorised to do any particular act would do only that specific act and would not travel beyond the authority vested in him-Judicial proceedings launched in a manner not authorised by power of attorney executed in favour of a person would be a nullity in the eye of law. **1995 M L D 45** Abu Bakar Saleh v. Abbot Laboratories 19,87 CLC 367; Muhammad Afsar Khan and others v. Khadim Hussain etc. PLD 1978 SC (AJ&K) 143; Gul Taj Begum v. Lal Hussain etc. PLD 1980 SC (AJ&K) 60; Muhammad Hussain v. Bashir Ahmad etc. PLD 1987 Lah. 392 and Central Bank of India v. Taj-ud--Din Abdur Rauf etc. 1992 SCMR 846 ref.

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

Illustrations

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

(b) A consigns provisions to B at Karachi with directions to send them immediately to C at Quetta. B may sell the provisions at Karachi if they will not bear the journey to Quetta without spoiling.

Sub-agents

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

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

Court Decisions

Appointment of a sub-agent. Status. Whenever Government entered into any agreement with a party which involved appointing a sub-agent by said other party, Government invariably and rightly so reserved right to approve or not to approve appointment of such sub-agent which was done often for security reasons and also for keeping undesirable elements away from any direct dealing with Government. Reservation of such right or enforcing same would not entail or constitute an approval of sub-agent's work itself or creating any contractual or quasi-contractual relationship between Government and such sub-agent. **P.L.J. 2000 Kar. 188 = PLD 2000 Kar. 22**.

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

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

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

193. Agent's responsibility for sub-agent appointed without authority. Where an agent, without having authority to do so has appointed a person to act a sub-agent, the gent stands towards such person in the relation of principal and to third person; the principal is represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

194. Relation between principal and parson duly appointed by agent to act in business of agency. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted him.

Illustrations

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

(b) A authorises B, a merchant in Karachi, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

195. Agent's duty in naming such person. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principals for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Ratification

196. Right of person as to acts done for him without his authority, Effect of ratification. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority.

Court Decisions

Doctrine of ratification :-- One Co-Sharer entered into the agreement with the plaintiff, regarding his share as well as on behalf of the other Co-Sharers - Such agreement was executed without the consent and knowledge of the other Co-Sharers - Executant was not acting as attorney for the other Co-Sharers, while executing the agreement - Trial Court dismissed the suit to the extent of specific performance whereas the lower Appellate Court allowed the appeal arid decreed the suit - Validity - Where the executant was not acting as attorney and the other Co-Sharers were not aware of the agreement on their behalf, doctrine of ratification was inapplicable - Lower Appellate Court failed to take into consideration the essentials of the provisions of S.196 of Contract Act, 1872, but had restricted itself to draw inferences which were not Justified on the basis of evidence adduced by the plaintiff-Judgment and decree of the Lower Appellate Court were set aside and that of the Trial Court were upheld. **2001 CLC 595** Abdul Majid and 2 others v. Waris Ali and another 1999 YLR 1668; Imperial Bank of Canada v. Mary Victoria Begley AIR 1936 PC 193; Halsbury's Laws of England, 2nd Edn., p.231; Health v. Chilton (1844) 12 M&W 632 and Easten Construction Co. v. National Trust Co., 1914 AC 197 ref.

Ratification, principle of - Act done by one person on behalf of another - Provision of S.196, Contract Act, 1872 - Applicability - Pre-requisites - Act should have been performed by a person acting for the other but without the knowledge of the other - Before ratifying unauthorised act of agent, the principal must be proved to have the knowledge of the action he is approving so that the principal can exercise the option of ratifying or disowning - Person ratifying the contract must know fully all the material circumstances, under which the act is so done - Act cited to be ratified must not be a void act. **2001 CLC 595**

197. Ratification may be expressed or implied. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account. B's conduct implies a ratification of the purchase made for him by A.

(b) A without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

198. Knowledge requisite for valid ratifications. No valid ratification can be made by a person whose knowledge of the fact of the case is materially defective.

199. Effect of ratifying unauthorised act forming part of a transaction. A person ratifying any unauthorised acts done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorised act cannot injure third person. An act done by one person on behalf of another, without such other person's authority which, is done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) A not being authorised thereto by B, demands on behalf of B the delivery of a chattel, the property of B from C who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B terminable on three months' notice. C, an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Revocation of Authority

201. Termination of agency. An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the

principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

202. Termination of agency where agent has an interest in subject-matter. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority nor can it be; terminated by his insanity or death.

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

Court Decisions

Applicability - Where there was no agency relationship, S.202 of Contract Act, 1872, would have no application, **2002 CLC 77** Muhammad Aref Effendi v. Egypt Air 1980 SCMR 580 distinguished.

Object and scope - Franchise agreement when entered into between private individuals, is a licence, which means a personal privilege granted by one person to another without creating any legal right in the property subject-matter of franchise - Such an agreement is a permission by the competent person/authority to another, to do an act which, without the permission, would be illegal - Same is true for the grant of franchise for the purpose of trade, business or calling and is revocable at the will of the grantor, **2002 CLC 77**

Irrevocable power of attorney:-- In absence of any evidence that the attorney had interest in property forming subject-matter of' the agency/any clause in the power of attorney would not be a bar to the revocation of the agency, **2001 MLD 1617**

Agency coupled with an interest:--Stipulation in contract as to payment of remuneration /commission would not be an interest in property - Interest of agent forming subject-matter of agency had to be some sort of adverse nature qua principal according to construction and scope of S. 202 of the Contract Act. Agency could continue by such power coupled with interest, where authority of agent was given for purpose of effectuating security or to secure interest of agent. Section 202 of the Contract Act would not be attracted merely because agent had acquired substantial interest in return arising from agency. **PLD 2003 Kar. 16** When owner of certain goods appoints his creditor as agent to sell goods and recover amount advanced or where owner of immovable property, having agreed to transfer such property appoints vendee as his agent to manage property. In such cases interest in property has already been created in favour of another who is appointed agent primarily to secure such interest. Principal is precluded from revoking authority of such agent unless otherwise substantial interest in returns arising from agency. This section applies only where an agent has a special kind of interest i.e. a pre-existing interest in subject matter of agency. Under section 206 of Contract Act, when the Contract does not contain a specific stipulation as to termination, it may be terminated upon reasonable notice. Making of substantial investments in business of agency would not make the agency irrevocable.-**P.L.J.1997 Kar. 1149 = 1997 CLC 1903**. **Grant of temporary injunction**:-- Question of grant of temporary injunction is to be decided on its own merits independently of question of application of Section 202 Contract Act. No hard and fast rules has been laid down for grant or refusal injunction. In a fit case an interim injunction may be granted even if case'does not fall within four corners of O. 39 R- 1 & 2 CPC in order to foster cause of Justice. Counsel for plaintiff admitted that certain sums of money were payable to defendants. It was also admitted that plaintiff had borrowed some money from bank in respect whereof defendant had furnished guarantee. Even if plaintiffs have made out a prima facie case they are not entitled to interim injunction. Even if there has been a premature or illegal termination of contract of agency it can be compensated in money terms. It would not be Just and equitable to force a relationship upon defendant who might have to incur further financial liabilities on account of same. **P.L.J.1997 Kar. 1149 = 1997CLC 1903**.

Suit for perpetual injunction. There is no express term or condition of any agreement between parties. In such circumstances creation of agency by implied terms is to be inferred from facts of case, conduct of parties and ordinary course of dealing and transaction between them. All such ingredients which may lead to infer existence of agency are absent. It is not case of plaintiff that

it was acting as an agent of defendant. Any investment made or construction of any structure of permanent nature by plaintiff did not amount " to show existence of an agency contract. Plaintiff does not have a good prima facie case. His case also suffers from laches. He cannot, with any Justification argue that if injunction is not granted, he would suffer irreparable loss.-**P.L.J.1997 Kar. 364 = 1997 CLC 520**.

203. When principal may revoke agent's authority. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

204. Revocation where authority has been partly exercised. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

205. Compensation for revocation by principal or renunciation by agent. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent, or the agent to the principal, as the case may be for any previous revocation or renunciation of the agency without sufficient cause.

206. Notice of revocation or renunciation. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and renunciation may be expressed or implied. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to led A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

208. When termination of agent's authority takes effect as to agent, and as to third persons. The termination of the authority of an agent does not, so far as regard the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B 5 per cent commission on the price fetched by file goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A and B is entitled to five rupees as his commission.

(b) A at Quetta, by letter, directs B to sell for him some cotton lying in a warehouse in Karachi, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Quetta. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C, A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

209. Agent's duty on termination of agency by principal's death or insanity. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to

take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

210. Termination of sub-agent's authority. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's Duty to Principal

211. Agent's duty in conducting principal's business. An agent is bound to conduct the business of his principal according to the directions given by the principal, or in the absence of any such directions, according to custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations

(a) A, an agent engaged in carrying on for B, a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investments. A must make good to B the interest usually obtained by such investments.

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

Court Decisions

Agent's duty in conducting principal's business:-- Agent, in the present case, had been authorised to deal with the affairs of the property including the financial powers and if he wanted to transfer the land in respect where of Principal had allegedly appointed him as attorney to deal with his property, it was incumbent upon him to have sought prior approval of the Principal before transferring the land in the name of his brother being the close relative of the attorney, in order to make the transaction a valid one in terms of S. 211 read with S. 215, Contract Act, 1872. **PLD 2003 SC 31**

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

Illustrations

(a) A, a merchant in Islamabad, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss---as e.g., by variation of rate of exchange--but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual inquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Karachi who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival, the price of cotton rises. B is bound to make good to A, the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

213. Agent's accounts. An agent is bound to render proper accounts of his principal on demand.

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

215. Right of principal when agent deals on his own account, in business of agency without principal's consent. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transition, if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Court Decisions

Where an agent executes an agreement in his own favour or in favour of any of his associates without consent of the principal then the principal has a right to repudiate the transaction.**PLD 2003 Azad J & K 16**

216. Principal's right to benefit gained by agent dealing on his own account in business of agency. If an agent without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction,

Illustration

A directs B his agent, to buy a certain house for him. B tells A, it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

217. Agent's right of retainer out of sums received on principal's account. An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

218. Agent's duty to pay sums received for principal. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

219. When agent's remuneration becomes due. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

220. Agent not entitled to remuneration for business misconducted. An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) A employs B to recover 100,000 rupees from C and to lay it out on good security. B recovers the 100,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to

remuneration for recovering the 100,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B [sic in the Act, but it should obviously be A.]

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

221. Agent's lien on principal's property. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Principal's Duty to Agent

222. Agent to be indemnified against consequences of lawful acts. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) B, at Singapore, under instructions from A, of Quetta, contracts with C to deliver certain goods to him. A does not send the goods to B and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs and incurs expenses. A is liable to B for such damages, costs, and expenses.

(b) B, a broker at Quetta by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contracts altogether. B defends, but unsuccessfully and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.

223. Agent to be indemnified against consequences of acts done in good faith. Where one person employs another to do an act and the agent does the act in good faith the employer is liable to indemnify the agent against the consequences of the act, though it causes an injury to the rights of third persons.

Illustrations

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

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

224. Non-liability of employer of agent to do a criminal act. here one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a liable upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C, and has to pay damages, and also incures expenses. A is not liable to B upon the indemnity.

225. Compensation to agent for injury caused by principal's neglect. The principal must make a compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration

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

Effect of Agency on Contracts with third persons

226. Enforcement and consequences of agent's contract. Contracts entered into through an agent, and obligations arising from acts done by an agent may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Illustrations

(a) A buys goods from B knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

227. Principal how for bound when agent exceeds authority. When an agent does more than he is authorised to do, and when the part of what he does, which is with his authority can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Illustration

A being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Court Decisions

Scope-Power of attorney which had empowered attorney to sell whole of the land in favour of the purchaser, had to be strictly construed and its recitals could not be utilized by attorney for partial sale of land in favour of the original purchaser or after his death in favour of his successors, **2001 MLD 988**

228. Principal not bound when excess of agent's authority is not separable. Where an agent does more than he is authoised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration

A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

229. Consequences of notice given to agent. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal

Illustrations

(a) A is employed by B to buy from C certain goods of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to B, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to contrary. Such a contract shall be presumed to exist in the following cases:-

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

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

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

231. Rights of parties to a contract made by agent not disclosed. If an agent makes a contract with a person who neither knows nor has reason to suspect, that he is an agent, his principal my require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in he contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

232. Performance of contract with agent supposed to be principal. Where one man makes a contract with another, neither knowing, nor having reasonable ground to suspect that the other is an agent, the principal if he requires the performance of the contract, can only obtain such performance subject, to be rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees, worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

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

Illustration

A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C or both, for the price of the cotton.

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable. Where a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

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

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

237. Liability of principal inducing belief that agent's unauthorised acts were authorised. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third person to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments indorsed in blank B. sells them to C in violation of private orders from A. The sale is good.

238. Effect, on agreement of misrepresentation or fraud by agent. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; buy misrepresentations made or frauds committed by agent, in matters which do not fall within their authority, do not affect their principals.

Illustrations

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

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

CHAPTER XI
OF PARTNERSHIP

Repealed by the Partnership Act, 1932 (IX of 1932), S. 73 and Schedule II

SCHEDULE

Enactments Repealed
Repealed by the Repealing and Amending Act, 1914 S. 3 and Schedule II