

## Offer and Invitation to Treat

### (8) Offer and Invitation to Treat (Offer)

An 'offer' is the final expression of willingness by the offerer to be bound by his offer. Sometimes a person may not offer to sell his goods, but make some statement or give some information with a view to inviting others to make offers on that basis. Where a party, without expressing his final willingness proposes certain terms on which he is willing to negotiate, he does *not make* an offer but merely 'invites' the other party to make an offer on those terms. For example, a book-seller sends catalogue of books indicating price of various books to many persons. This is an 'invitation to treat'. The interested party may make an offer and the book-seller may accept or reject the offer.

Similarly, advertisements for bids/ tenders are only 'invitation to offer' the bid/tender constitutes the offer which can be accepted or rejected. An auctioneer is not bound to accept even the highest bid (offer). Where an auctioned sale was cancelled, the plaintiff cannot recover travel expenses as there was no contract. An offer can be withdrawn before it is accepted [*Harris Verses Nickerson*].

Likewise, an inducement of special discount by a shopkeeper is a "commercial puff" or an invitation to treat and not an offer. A banker's catalogue of charges or a prospectus of a company inviting applications for job is also not an offer. A quotation of prices is not an offer. In *Grainger & Sons Verses Gough*, it was held that, "The transmission of a price list does not amount to an offer to supply an unlimited quantity of the wine described at the price named."

In *Bank of India Verses O. P. Swarankar*, it has been held that a contract of employment is governed by the Contract Act. Announcement of Voluntary Retirement Scheme by a nationalized bank is *not* an offer. The employee offering to retire makes an offer and the same becomes effective when the written request of retirement is accepted. An employee who has offered to retire under the scheme can withdraw before his request is accepted.

In *Ghaziabad Dev. Authority Verses UOI*, the court observed that when a development authority announces a scheme for allotment of plots, the brochure issued by it for public information is an invitation to offer. Several members of public may make applications for availing benefit of the scheme. Such applications are offers. Some of the offers having been accepted subject to the rules of priority/preference laid down by the authority result into a contract between the applicant and the authority.

In *McPherson Verses Appana*, it was held that mere statement of the lowest price at which the offerer would sell contains no implied contract to sell at that price to the person making the inquiry. The plaintiff offered to purchase the lodge owned by the defendant for Rupees 6,000. He wrote the defendant's agent asking whether his offer had been accepted and saying that he was prepared to accept any higher price if found reasonable. The agent replied, "Won't accept less than Rupees 10,000." The plaintiff accepted this and brought a suit for specific performance. Held that the defendant did not make any offer or counter offer but was merely inviting offers. There was no assent to the plaintiff's offer to buy at Rupees and, therefore, no concluded contract.

The Supreme Court relied on the principle enunciated in *Harvey Verses Facey*, In that case the plaintiffs telegraphed to the defendants, writing, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price". The defendants replied, also by a telegram, "Lowest price for Pen, £ 900". The plaintiffs immediately sent their last telegram stating, "We agree to buy Pen for £ 900 asked by you". The defendants, however, refused to sell the plot of land at that price. The court observed that the defendants gave only the lowest price and did not express their willingness to sell. Thus they had made no offer. The plaintiffs' last telegram was an offer to buy, but that was never accepted by the defendants.

Where a proposer, in response to a proposal to purchase his land, asked for a higher price and also some advance with acceptance, it was held that the proposer accepting the same along with an advance payment amounted to a contract, although the letter of acceptance came back being refused [*Byomkesh Verses Nani Gopal*].

## Acceptance

### Essential Requirements of a Valid Acceptance

A proposal when accepted, results in an agreement. It is only after the acceptance of the proposal that a contract between the two parties can arise. When the person to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted [Section 2(b)]. Thus, acceptance is the assent given to a proposal.

There are two essential requirements of a valid acceptance, *firstly*, acceptance should be communicated by the offeree to the offeror. *Secondly*, acceptance should be absolute and unqualified.

#### (A) Communication of Acceptance

(1) *Acceptance express or implied* - Acceptance may be in the form of express words (written or spoken) or may be signified through conduct. In every case, there should be some external manifestation or overt act of acceptance (that is fall of hammer in auction sale). A mere mental determination (or intent) to accept is not enough (that is keeping agreement in a drawer).

(2) *When communication not necessary* - In all cases of general offers (unilateral contracts), the acceptance is usually by conduct. Section 8 provides that performance of the condition of a proposal is an acceptance of proposal (*Car/ill Verses Carboic Smoke Ball Co.*). In such cases, communication of acceptance is not necessary.

(3) *Communication to offeror himself* - A communication to any other person is no communication in the eyes of law [as per *Felthouse Verses Bindley*].

(4) *Communication by acceptor himself* - Information received from an unauthorized person is ineffective as it is like overhearing from behind the door [*Powell Verses Lee*].

(5) *Mode of communication* - Section 7 provides that acceptance has to be made in the manner prescribed by the proposer (if not prescribed, then in some usual and reasonable manner). Further, a duty is cast on the offeror to reject such acceptance within reasonable time and if he fails to do so, the contract is concluded.

(6) *When communication of acceptance complete* - When the parties are in the presence of each other, the contract is concluded when acceptance is communicated to the proposer. When the parties are at a distance and are contracting through post or by messengers, the *proposer* become bound as soon as the acceptance is put in the course of transmission to him (that is when letter of acceptance posted by acceptor)./But the *acceptor* will become bound only when the communication of acceptance is received by the proposer (Section 4). When the acceptance is by telephone or telex (that is direct communication), the contract is complete only when the acceptance is received by the offeror (*Bhagwandas Kedia Verses Girdharilal & Co.*).

#### (B) Absolute and Unqualified Acceptance

Section 7 provides that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified that is without any qualification or condition. For a valid acceptance, there must be an *ad idem* "concurrence of mind"<sup>1</sup> that is agreeing on the same thing in the same course/ sense and at the same time.

(1) *Counter proposals* - An acceptance with a variation (that is introduction of new terms) is no acceptance, it is simply a counter proposal, which must be accepted by the original promisor before a contract is made. A counter offer implies the stage of negotiation has not yet passed. A counter offer puts an end to the original offer and it cannot be revived by subsequent acceptance by the acceptor,

(2) *Provisional acceptance* - An acceptance made subject to the approval is called provisional acceptance. It does not ordinarily bind either party until the final approval is given. Meanwhile the offeror is at liberty to cancel his offer unless there is a contrary condition supported by consideration.

## Doctrine of Contract

### Privity of Contract

The doctrine of privity of contract means that a contract is a contract between the parties only and no third party (that is stranger to contract) can sue upon it even if it is avowedly made for his benefit. Similarly, the third person is not bound by the contract as there is no mutuality (doctrine of mutuality). The doctrine is rooted in the English common law especially in the famous case of *Tweddle Verses Atkinson*, and *Dunlop Pneumatic Tyre Company Limited Verses Selfridge & Co.*. In the latter case, the plaintiff (Dunlop Co.) sold goods to one Dew & Co. and secured an agreement from them not to sell goods below the list price and if they sold goods to another trader they would obtain from him a similar undertaking to maintain the price list. Dew & Co. sold goods to the defendants (Selfridge & Co.) who agreed not to sell goods at less than list price. On their not doing so, the plaintiffs sued them for the breach of contract. It was held that assuming that the plaintiffs were undisclosed principals, no consideration moved from them to the defendants and that the contract was unenforceable by them.

The rule of privity of contract has been generally criticized. One of the criticism is that the general rule that 'no third person can sue' is only a rule of procedure. It goes to the form of remedy, not to the underlying right. In *Beswick Verses Beswick*, Lord Denning concluded that where a contract is made for the benefit of the third person who has a legitimate interest to enforce it, it can be enforced by the third person. It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in *Dunlop Co.* case. But the House of Lords showed no preference for Lord Denning's approach and emphasised that if the principle of *jus quaesitum tertio* (that is right conferred by way of property, as for example, under a trust) is to be introduced into our law, it must be done by Parliament.

### Position in India

Even though under the Indian Contract Act the definition of consideration is wider than under English law, yet the common law principle of doctrine of privity of contract is generally applicable in India. It is important to note that Indian law expressly negatives the English doctrine of 'privity of consideration.' However, there is no provision in the Indian Contract Act either for or against the rule of 'privity of contract.'

The authority for the application of the rule in India is the decision of the Privy Council in *Jamna Das Verses Ram Avtar*. In that case, A had mortgaged some property to X. A then sold this property to B, B having agreed with A to pay off the mortgaged debt to X. X brought an action against B to recover. Held that since there was no contract between X and B, X could not enforce the contract with mortgagee and the purchaser is not personally bound to pay the mortgage debt. In *Iswaram Pillai Verses Sonivaveru*, A mortgaged his lands to B and part of the consideration was B's promise to discharge A's debt to C. C sued B but C was held to be a stranger to the contract. Likewise, in *Subbu Chetti Verses Arunachalam Chettiar*, held that "where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie". In a sale-deed between A and B, the stipulation to pay a certain sum to C cannot be enforced by C.

In *Krishna Lal Verses Promila Bala*, the court observed that the whole scheme of Section 2 of the Contract Act is that a promise comes into existence when one person signifies to another his willingness to do and the person making the proposal is the *promisor*, the

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person accepting the proposal is the *promisee* and every promise forming the consideration for each other is an agreement between those two persons. Thus, it is wrong to say that there is no provision in Indian law in support of this principle.

The Supreme Court of India has approved the rule of privity of contract in *M.C. Chacko Verses State Bank of Travancore*, where the Highland Bank was indebted to the State Bank of Travancore under an overdraft. One M was the manager of the Highland Bank and his father K had guaranteed the repayment of the overdraft. K gifted his properties to the members of his family. The gift deed provided that the liability, if any, under the guarantee should be met by M either from the bank or from the share of property gifted to him. The State Bank attempted to hold M liable under this provision of the deed. The Supreme Court, however, held that the State Bank not being a party to the deed could not enforce its covenants.

In *M. K Shankar Bhat Verses Claude Pinto (Deceased) by LRs*, it was held that an agreement subject to ratification by others who are not parties to it is *not* a conclusive contract. In *Aries Advertising Bureau Verses C.T. Devara*, a circus owner placed order with the plaintiff for making advertisements for circus. The plaintiff-advertiser did not make any agreement with the financier of circus. The advertiser was not a party to the contract between financier and the circus owner. There being *no* privity of contract between the advertiser and the financier, the suit by the advertiser against the financier was, therefore, dismissed.

In a landmark decision of the Delhi High Court [*Klaus Mittelbachert Verses East India Hotels Ltd*], however, such an action was allowed under 'exception to the privity rule'. In this case, there was a contract between Lufthansa (a German Airline) and Hotel Oberoi Inter-continental that crew of Lufthansa will stay in the latter's hotel. The plaintiff, a co-pilot of the Airline, who stayed in said 5-star hotel got serious head injuries due to defective structure of the hotel's swimming pool. He succeeded in an action against the hotel although he himself did not make any contract for stay in the hotel. He was held to be *beneficiary* to the contract between the Airline and the hotel.

### **Exceptions to Privity Rule**

In the course of time, the courts have introduced a number of exceptions in which the rule of privity of contract does *not* prevent a person from enforcing a contract, which has been made for his *benefit* but without his being a party to it [*Beswick Verses Beswick*].

(1) *Trust or Charge* - A person (beneficiary) in whose favour a charge or other interest in some specific property has been created may enforce it. In *Khwaja Muhammad Khan Verses Hussaini Begum*, there was an agreement between the lady's father-in-law and her father that in consideration of her marriage with his son, he would pay to her Rupees five hundred per month in perpetuity for the betel-leaf expenses (*Kharch-i-Pandari*). Some immovable property was specifically charged for the payment of these expenses. A suit was brought by the wife for the recovery of arrears of annuity. Held that the wife, although not a party to the agreement, was entitled to enforce her claim as the contract had been entered into for her benefit and certain immovable properties had been specifically charged for the allowance. Further, among Mohammedans, where marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts. Thus, the rule laid down in *Tweddle Verses Atkinson* had no application to the circumstances of the case.

A *trust* is the property held and managed by one or more persons for another's benefit (as per *Chinnaya* case). In *Rana Uma Nath Bakhsh Singh Verses Jang Bahadur*, was

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appointed by his father as his successor and put in possession of estate. In consideration thereof A agreed to pay a sum and to give a village to B, the illegitimate son of his father, on his attaining majority. Held that trust was created in favour of B for the specific amount and the village, thus he (B) is entitled to sue. In an English case, A was indebted to both B and C. A assigned all his property to B in satisfaction of his debt and B promised to pay A's debt to C. He failed to pay. But he was held liable to pay C in terms of his promise with A.

In *M.C. Chacko Verses State Bank of Travancore*, the court said that in order to create charge, there must be evidence of intention disclosed by deed that a specific property or fund intended to be made liable to satisfy debt. The recitals in the deed (in the present case) do not evidence any intention of the donor to create a charge in favour of the State Bank ... it was merely an arrangement between donor and his family members. The covenant that M.C. Chacko will either personally or out of the properties given to him satisfy the debts is intended to confer a right of indemnity upon the members of the family, if the State Bank enforced the liability against them, but created no charge in favour of the Bank. Even if it is granted that there was an intention to create a charge, the State Bank not being a party to the deed cannot enforce the deed as it was not a beneficiary under the terms of the contract (as per above).

(2) *Marriage settlement, Partition or other Family arrangements*-Where a girl's father entered into an agreement for her marriage with the defendant, it was held that the girl could sue the defendant for damages for the breach of the promise of marriage even though she was not a party to the agreement (*Rose Verses Joseph*). Where two brothers, on a partition of joint properties, agreed to maintain their mother, she was held entitled to sue [*Shuppu Ammal Verses Siibramaniyam JLR*].

Where the defendant executed an agreement with his father-in-law to pay his wife monthly maintenance (in case she is ill-treated and driven out), she was held entitled to enforce the promise [*Daropti Verses Jaspal Rai*]. Similarly, an agreement between male members of a Hindu Undivided Family to provide for the marriage expenses of a female member at the time of partition was held to be enforceable [*Sundaraja Aiyangar Verses Lakshmi Animal*,].

(3) *Acknowledgement or Estoppel* - Whereby the terms of a contract a party is required to make a payment to a third person and he acknowledges it to that third person (that is while making a part-payment), a binding obligation is thereby incurred towards him. Acknowledgement can be express or implied. Thus, in *Devaraja Urs Verses Ram Krishniah*, A sold his house to B and left a part of the sale-price in his hands desiring him to pay this amount to C. Subsequently B made part payments to C, but failed to remit the balance. B while making part payments had informed C that they were out of the sale price left with him and the balance would be remitted soon. Held that though originally there was no privity of contract between B and C, B having subsequently acknowledged his liability, C was entitled to sue him.

(4) *Covenants running with land* - A person who purchases a land with notice that the owner of the land is bound by certain duties created by an agreement or covenant affecting the land, shall be bound by them although he was not a party to the agreement [*Tulk Verses Moxhay*].

(5) *Assignee in insurance policy* - The assignee of an insurance policy (that is a wife in case of husband or vice versa) is entitled to sue on the contract made between the insured and the insurer (insurance company).

### Exceptions of Consideration

#### Exceptions to the rule "No consideration, no contract"

Section 25 provides that an agreement made without consideration is void. A promises for no consideration to give B Rupees one thousand. This is a void agreement. But the same Section lays down a few exceptions which are as follows,

**1. Promise made on account of natural love and affection,** Section 25(1) provides that an agreement without consideration is void unless "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 the parties standing in near relation to each other". **For example,** A for natural love and affection promises to give his son, Rupees one thousand. A puts his promise to B into writing and registers it. This is a contract. Thus Section 25(1) lays down the following four requirements for the validity of an agreement made without consideration. They are as follows,

- (a) The agreement must be in writing.
- (b) The agreement must be registered.
- (c) The agreement must be made on account of natural love and affection.
- (d) The agreement must be between the parties standing in a near relation to each other.

The expression "**the parties standing in near relation to each other**" means parties related by blood or marriage. Nearness of relationship does not necessarily imply natural love and affection. In **Rajlukhy Dabee Verses Bhootnath Mookerjee**, the defendant promised to pay his wife a fixed sum of money every month for her separate residence and maintenance. The agreement was contained in a registered document which mentioned certain quarrels between the two. The court held that the case was not covered by the exception because the agreement was made not on account of natural love and affection.

In **Bhiwa Verses Shivaram**, A sued B, his brother, for a share in certain lands. But the suit was dismissed as the property was not ancestral. B then agreed by registered agreement to give A one half of the same property. It was held that the agreement was enforceable under Section 25(1). The court said, "The defendant (B) had such natural love and affection for his brother (A) that in order to be reconciled to him he was willing to give him his property". In **Venkataswamy Verses Rangaswami**, a person promised to discharge the debts of his brother by a registered agreement. It was held that the latter was entitled to sue the former in case of breach of agreement.

**2. Promise to compensate for past voluntary service,\*** Section 25(2) provides that a "promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do" is enforceable although made without consideration. **For example,** A finds B's purse and gives it to him. B promises to give A Rupees 50. This is a contract. **Similarly** if A supports B's infant son. B promises to compensate A's expenses in so doing. That is a contract.

The followings conditions must be satisfied for the application of this clause,

- (a) The act must have been done voluntarily and not at request. If the act is done at request it comes under Section 2(d) amounting to past consideration.

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(b) The act must have been done for the promisor. If it is done for any other person the promise does not come within the provision of Section 25(2). as it is done is per, *Durga Prasad Verses Baldeo case*.

(c) The act must have been done for a promisor who was in existence at the time when the act was done. The work done by a promoter of a company before its formation cannot be said to have been done for the company.

(d) According to Pollock and Mulla (10th Edition page 301) "The act done must have been done for a promisor who is competent to contract at the time when the act was done. Hence a promise by a person on attaining majority to repay money lent and advanced to him during his minority does not come within the exception, the promisor not being competent to contract when the loan was made to him". It has been so held by Madras High Court in **Indran Ramaswami Verses Anthappa Chettian** and Allahabad High Court in **Suraj Narain Verses Suraj Ahir** . But a different view has been taken by Calcutta High Court in **Musammat Kundan Bibi Verses Sree Narain** and Punjab High Court in **Karam Chand Verses Basant Kuar**.

(e) The intention of the promisor should be to compensate the promisee. If the intention is not to compensate, the promise will not come within this clause. **Abdulla Khan Verses Purshottam**, a person, who was highly indebted transferred some immovable property to his son in consideration of the son having sent money to him from time to time, not intending to make a loan. The transaction was held not to fall within this exception as the real intention was not to compensate the son but to defraud the creditors of the father.

(f) The service rendered must be legal. In **Alice Verses William**, it was held that a promise to pay for past cohabitation with a woman whose husband is alive is adulterous. But divergent views are held by High Courts in India on the question whether the same principle could be applied to a promise to pay a woman for past cohabitation which is not an infringement of the penal law.

**3. Promise to pay a time-barred debt**, Section 25(3) provides that "a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits" is enforceable. For example, A owes B Rupees one thousand, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rupees five hundred on account of the debt. This promise is enforceable under this clause. The following are the requirements for application of Section 25(3),

(a) The debt must be such of which the creditor might have enforced payment but for the law of limitation of suits.

(b) A mere acknowledgement of the debt is not sufficient. There must be promise to pay the debt.

(c) The promise must be in writing and signed by the debtor or his authorised agent.

(d) The promise must be given by the person to be charged therewith and not by any third party.

A promise made by a person who is under no obligation to pay the debts of another does not fall within the clause. But Madras High Court in **P. Govinda Nair Verses P. Achutan Nair**, held that the words "by the person to be charged therewith" in Section 25(3) are wide enough to include the case of a person who agrees to become liable for the payment of a debt due by another and need not be limited to the person who was indebted from the beginning.

**4. Gift actually made,** Explanation I attached to section 25 provides that absence of consideration shall not affect the validity, as between the donor and donee, of any gifts actually made.

**5. Creation of agency,** Section 185 of the Indian Contract Act provides that "no consideration is necessary to create an agency".

### **Executed Verses Executory Consideration**

#### ***Executed Consideration***

In case of executed consideration, the consideration is provided *simultaneously* along with the making of the contract. It is the *act* which forms the consideration. For example, A makes an offer of reward of Rupees 100 to anyone who finds out his lost dog. When B finds the lost dog, that constitutes not only the acceptance of the offer but that also provides the consideration in respect of the contract. In the case of past consideration, on the other hand, consideration is provided *prior* to the making of the contract.

#### ***Executory Consideration***<sup>6\*</sup>

There may be a simple exchange of promises and each *promise* is a consideration for the other. In other words, the consideration is 'a promise for a promise.' For example, A agrees to sell and B to buy a quantity of goods. In other words, A has promised to sell and B has promised to pay. Thus, in mercantile contracts, executory consideration is usually given. Unlike 'executed' consideration (where liability is outstanding on one side only), in 'executory' consideration, the liability is outstanding on both sides.



### Liability For Necessaries Supplied to The Minor

**6. Liability for necessaries**, With regard to minor's liability for necessaries supplied to him the Privy Council in **Mohiri Bibee Verses Dharam Das Ghose** observed that, "It is clear from the Act that the (minor) is not to be liable even for necessaries, and that no demand in respect thereof is enforceable against him by law, though a Statutory claim is created against his property". Section 68 of the Act provides, "*If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person 'with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person'*".

Thus a minor is **not personally liable** even for necessaries. The supplier can claim reimbursement out of property of the minor for necessaries supplied to an incapable person. Therefore a minor cannot be declared insolvent.

The term "necessaries" in the first place include those things without which an individual cannot reasonably exist, for example food, clothing and lodging. It also includes all such things which can reasonably be considered as necessaries in the class of society of which the minor belongs. Thus it is to be determined with reference to fortune and circumstances of the particular minor. Thus "necessaries" for this purpose mean goods suitable to the condition in life of the minor and to his actual requirement at the time of the sale and delivery. It was held in **Nash Verses Inman**, *that in an action against an infant for necessaries, the onus is on the plaintiff to prove, not only that the goods were suitable to the condition in life for the infant, but also that he was not sufficiently supplied with the goods of that class at the time of sale and delivery*. In this case plaintiff sued the defendant for £ 145 for clothes supplied to him when he was an undergraduate at Trinity College, Cambridge. The defendant, who was a minor at the time of sale and delivery, was the son of an architect of good position with a town house and a country establishment. The clothes supplied included eleven fancy waistcoats. The minor's father was called and gave evidence that his son was **amply supplied with proper clothes** according to his position at the time of the sale. The action failed as the minor was amply supplied with proper clothes suited to his position at the time of sale. In **Chappel Verses Cooper**, it was held that the funeral expenses of the defendant's husband were necessaries for the infant widow.

#### Liability for Necessaries of Life (Section 68)

Minor's agreement being void *ab initio*, he cannot therefore, as a general rule, be asked to pay for the services rendered or goods supplied to him. Section 68, however, permits reimbursement to a person, who supplies "necessaries" to a minor or a lunatic person. Such duty to reimburse is not there because of any valid contract with the minor, etc. but because the law recognises this to be a 'quasi-contractual' obligation (similarly recognized in English law).

Section 68 permits reimbursement if,

- (1) necessaries are supplied,
- (2) to a person who is incapable of making a contract (that is a minor or a lunatic), or,

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- (3) to a person who is dependent upon such person incapable of making contract (that is wife and children of a lunatic) that is a person whom the incapable person is legally bound to support,
- (4) Suited to that person's conditions in life.

### **Illustrations**

- (a) A supplies B, a lunatic, with necessaries suited to his conditions in life. A is entitled to be reimbursed from B's property.
- (b) A supplies the wife and children of B, with necessaries suited to their conditions in life. A is entitled to be reimbursed from B's property.
- For reimbursement no personal action can lie against the minor, etc., but reimbursement is permitted from the property or estate of such incapable person.

### **What are Necessaries?**

Necessaries does not mean bare necessities of life (that is food, cloth, shelter, etc.), but means such things as may be necessary to maintain a person 'according to his conditions in life' (that is his status and requirements). Thus it is to be determined with reference to fortune and circumstances of the particular minor. As the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral and religious education may be necessary also. Articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. Further, what are 'necessaries' may depend upon the status of a person, and also his requirements at the time of actual delivery of the goods [*Chappel Verses Cooper*].

To render an infant's estate liable for necessaries, two conditions must be satisfied (the onus is on the plaintiff to prove them), (1) the contract must be for goods reasonably necessary for his support in his station in life, and (2) he must not have already a sufficient supply of these necessaries at the time of sale and delivery [*Nash Verses Inman*]. In this case, a minor who was amply supplied with proper clothes according to his position, was supplied by the plaintiff with a number of dresses, including fancy waist coats. Held, that the plaintiff cannot recover price of dresses. However, in *Peters Verses Fleming*, it was observed that an undergraduate at a college should have a watch.

The following have been held to be 'necessaries',

- Supply of racing cycle for an infant apprentice.
- Debt incurred for performing the funeral rites of minor's father.
- Funeral expenses of the husband by the infant widow [*Chappel Verses Cooper*].
- House given to a minor on rent for living and continuing his studies.
- Wedding presents for a bride of minor.
- Money advanced for defending criminal proceedings.
- Loan given to a minor on the mortgage of his property with a view to save that minor's property from the execution of a decree.

But where a minor is engaged in trade, contracts entered into by him for trading purposes are not for necessaries and are *not* binding on him. It may be noted that the necessaries may be supplied to someone whom the minor is legally bound to support, such as his wife and children.

Ornamental articles and diamonds are usually *not* considered necessaries even if the minor moves in a high society, unless the articles are especially necessary for the minor [*Ryder Verses Wombell*]. Further, certain things like ear rings for a male, spectacles for a blind person, or a wild animal, cannot be considered as necessaries.

### **Nature of Liability of Minor's Estate for Necessaries**

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The liability does not depend upon the minor's consent. It arises because the necessities have been supplied to him and is, therefore, quasi-contractual in nature. The real foundation is an obligation, which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words, the obligation arises *re* and not *consensu*. Further, the liability is not personal, but is only that of the minor's estate. Thus it has a little contractual element. Another view is that the liability is contractual. A contract for necessities is just one of those categories of contracts which the minor is permitted to make.

### Liability to Pay for Non-Gratuitous Act (Section 70)

#### Liability to Pay for Non-Gratuitous Act (Section 70)

Three conditions must be satisfied before Section 70 can be invoked,

- (1) a person should lawfully do something for another person or deliver something to him,
- (2) in doing the said thing or delivering the said thing he must not intend to act gratuitously, and
- (3) the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

#### **Illustrations,**

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

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

Similarly, where a coolie takes the luggage at the railway station without being asked by the passenger or a shoe-shiner starts shining shoes of the passenger without being asked to do so, and if the passenger does not object to that, then he is bound to pay reasonably for the same as the work was not intended to be gratuitous.

In cases falling under Section 70, the person doing something for another cannot sue for specific performance, nor ask for damages for breach, as there is no contract between the parties. All that Section 70 provides for is that if the services or goods are accepted a liability to pay arises. Thus, *one* of the purposes of the section is to assure payment to a person who has done something for another voluntarily and yet with the thought of being paid (it does not matter that he is personally interested in the work). He should have contemplated being paid from the very beginning. The Municipal Council, which constructed and maintained a bus stand was allowed to recover some charges from bus operators who used the stand though there was no agreement to that effect.

*Secondly*, the person for whom the act is done is not bound to pay unless he had the choice to reject the services. Section 70 would not encourage officious interference in the affairs of others. It is only where a person voluntarily accepts the thing or enjoys the work done that the liability under Section 70 arises. The court will not compel a person to pay for services which have been thrust upon him against his will.

*Thirdly*, it is necessary that services should have been rendered without any request. However, reasonable compensation may be recovered for services rendered at request.

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*Fourthly*, services should have been rendered lawfully. Payment for extra work done in connection with a contract without any agreement has been allowed to be recovered under this section. The lawful relationship should arise by reason of the fact that what has been done by the plaintiff has been accepted and enjoyed by the defendant. When a practising advocate is appointed to act as Astt. Government Council and she renders those services, she will be entitled to claim the fees for those services, even if her appointment is void under the law (*Indu Mehta Verses State of U.P.*). Similarly, where a candidate who is selected in Forest Department gets the necessary training, but later he refused to join the service, the Government was allowed to recover cost of training (*P.C. Wadhwa Verses State of Punjab*). *Lastly*, the defendant must have derived a direct benefit from the payment or services. Where the works done by a railway company developed the adjoining lands and consequently the municipality received more taxes, this was held to be not a sufficient benefit to enable the railway company to recover compensation from the municipality. Services rendered to a person incompetent to contract (that is minor) at the time cannot be made the basis of an action under this section. Even where the party making payment or rendering services is personally interested in the matter, he can recover proportional contribution from those who have enjoyed the benefits of his services [*Darnodara Mudaliar Verses Secretary, of State, India*].

Section 70 applies even if there is a non-compliance of constitutional requirement of contracting with the State (that is Article 299 of the Constitution). Thus in *State of West. Bangal Verses B.K. Mondal & Som*, the plaintiff made certain constructions at the request of an officer of State. The State accepted the work but refused to pay pleading that there was no valid contract. The court held in favour of the plaintiff.

### Finder of Goods

#### Finder of Goods (Section 71)

Section 71 reads, "A person, who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee."

A bailee is bound to take as much care of the goods as a man of ordinary prudence would, under similar circumstances, take of his own goods. To avoid liability for criminal misappropriation of property, the finder must try to find out the real owner of the goods and must not appropriate the property to his own use (Section 151, Contract Act).

## Free Consent

### Consent and Free Consent

A mere consent is not enough for a valid contract. One of the essentials of a valid contract mentioned in Section 10 is that the parties should enter into the contract with *their free* consent. Section 13 defines consent as, 'Two or more persons are said to consent when they agree upon the same thing in the same sense' that is *consensus ad idem*. In other words, there must be real consent, in the absence of which there is no contract formed. When there is no consent, the agreement is void.

However, in certain cases there is real consent, but one of the parties has given his consent not out of his free will but due to factors in the absence of which he might not have given his consent. Consent so given is said to be not free. In such cases, the contract is voidable.

According to Section 14, consent is said to be free when it is *not* caused by-

- (1) coercion (Section 15), or
- (2) undue influence (Section 16), or
- (3) fraud (Section 17), or
- (4) misrepresentation (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.

Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract *voidable* at the option of the party whose consent was so caused. If, for example, a person is induced to sign an agreement by fraud, he may, on discovering the truth, either uphold the contract or reject it. Where consent is caused by mistake, the agreement is *void*. A void agreement is not enforceable at the option of either party.

### **Examples of No free consent**

- (1) A threatens to shoot B, if B does not agree to sell his property to A at a stated price. B's consent has been obtained by *coercion*.
- (2) 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*.
- (3) A husband persuaded his illiterate wife to sign certain documents telling her that by them he was going to mortgage her two lands to secure his indebtedness and in fact mortgaged four lands belonging to her. This was an act done with the intention of deceiving her that is a case of *fraud*.

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(4) The Government auctioned certain forest coupes. A part of the land was occupied by tenants. The Forest Department knew this fact but did not disclose to the purchaser. The contract is vitiated by *misrepresentation*.

(5) 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 on account of *mistake*.

### Definition of Undue Influence

#### Elements of undue influence

Section 16(1) gives the following two elements of undue influence,

1. The relationship subsisting between the parties is such that one is in a position to dominate the will of the other, and
2. He uses that position to obtain an unfair advantage over the other.

The party who wants to rescind the contract on the ground of undue influence ordinarily must prove both the conditions laid down in Section 16(1). It *must be proved first of all that the other party was in a position to dominate the will of the aggrieved party. It is only after this that the question arises regarding the second element of undue influence.*

In **Smt. Chinnamma Verses Devanga Sangha**, it was held that it is not necessary that the person in a position of domination must benefit himself. **A benefit to a third party may be sufficient.** In this case undue influence by office bearers of a society benefiting the society was held to be sufficient to avoid the contract.

In **Subhash Chandra Das Verses Ganga Prasad Das**, the Court held that, "it is well settled that the law relating to undue influence is the same in the case of a gift *inter vivos* (from one living person to another) as in the case of contract. "The Court trying a case of undue influence must consider two things to start with namely,

- (1) are the relations between the donor and the donee such that the donee is in a position to dominate the will of the donor
- (2) has the donee used that position to obtain unfair advantage over the donor"

*A contract cannot be set aside on the ground of undue influence when one of the parties is not a position to dominate the will of the other, that is., when the parties are on equal footing.* Illustration (d) appended to the Section makes the point clear, A applies to a banker for a loan at a time when there is stringency in the market. The banker declines to make 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.

In **Shrimati Verses Sudhakar**, AIR Bom 122, the Court said, "Influence in the eye of law has to be contra distinguished with persuasion. Any and every persuasion by one party to the other to contract cannot lead to the inference/conclusion that such party has influenced the other party. One may by his act or conduct convince and persuade the other party to do a particular act and if the other party does such an act freely and of own volition (may be to his/her disadvantage or even to his/ her peril), it cannot be said that such act was influenced by the other." In the present case the gift was not held to be

induced by undue influence as the gift deed was made by a woman, though illiterate, was intelligent enough to manage her properties and was getting agricultural land cultivated from various persons from time to time for about two decades. **Different forms of influence and presumption of domination of will**

Section 16(2) provides that 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 (b) where he stands in a fiduciary relation to another or (c) where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, mental or bodily distress. These three cases are discussed below,

(a) *Real or apparent authority*

The following persons, *inter alia*, being *impositions of authority* are said to be in a position to dominate the will of the other,

- (1) an income-tax officer in relation to an assessee,
- (2) a magistrate or police officer in relation to an accused,
- (3) superior in relation to a subordinate.

(b) *Fiduciary relationship*

In the following cases fiduciary relationships or a relationship of mutual trust and confidence is said to exist,

- (1) parent and child,
- (2) guardian and ward,
- (3) trustee and beneficiary,
- (4) solicitor and client,
- (5) doctor and patient,
- (6) spiritual advisor and his devotee or disciple,
- (7) woman and her confidential managing agent.

In such cases it is essential to show that one party relies on the other to such an extent that complete trust and confidence is placed in the other enabling him to influence the former.

**Thus the parties need not be related by blood, marriage or adoption.** What is necessary to establish the presumption is that their relations are such that one is in a superior position over the other.

According to illustration (a) appended to the Section 16, 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 advance. A employs undue influence.

### Circumstances In Which Agreements Become Void

**Void Agreement**, According to Section 2(g) "*An agreement not enforceable by law is said to be void*". Thus a void agreement is void from the very beginning, *that is*, void *ab-initio*. It is a nullity from the beginning. **For example**, an agreement which does not create legal obligation or an agreement with a minor, or an agreement where both the parties are under a mistake of fact essential to the agreement, or an illegal agreement or an agreement in restraint of marriage, or an agreement in restraint of trade, or an agreement in restraint of legal proceedings, or uncertain agreement or wagering agreement or any agreement to do an impossible act, is void.

**A contract which has become void (Void contract)**, "*A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable*" [S 2 (j)]. Thus in this case the contract is valid when originally made but subsequently becomes void due to certain circumstances. **For example**, under Section 56 "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. Illustration (d) appended to Section 56 says that if A contracts to take in cargo for B at a foreign port and A's Government afterwards declares war against the country in which the port is situated the contract become void when war is declared.

Section 65 lays down that "*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*". This Section does not apply to minor's agreement. A contract or an agreement which the parties know at the time of entering into it as void would not fall under Section 65. The words, "discovered to be void" comprehend a situation in which the parties were suffering from a mistake of fact from the very beginning but had not realised, at the time of entering into the agreement or signing of the document that they were suffering from any such mistake and had therefore, acted on such agreement. The agreement in such a case would be void from its inception, though discovered to be so at much later stage.



## Frustration

"Frustration of the contract" means "occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the contract, and as entirely beyond what was contemplated by the parties when they entered into the contract". The word "frustration" is a sort of shorthand, it means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It is not that the contract has been frustrated, but that there has been a failure of what in the contemplation of both parties would be the essential condition or purpose of the performance (*Twentsche Overseas Trading Company Limited Verses Uganda Sugar Factory Limited.*).

"The essential idea upon which the doctrine (of frustration) is based is that of impossibility of performance of the contract<sup>2</sup>, in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The *doctrine of frustration* is really *an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done* ' and hence comes within the purview of Section 56 of the Contract Act" (*Satyabrata Ghose Case*).

The doctrine of supervening impossibility comes into play in two types of situations,<sup>3</sup>

(1) Where the performance becomes *physically* impossible because of disappearance of the subject matter. Thus in *Taylor Verses Caldwell*, QB, a contract was entered into for the use of a musical hall for concert purpose, but before the day of the concert, the hall was destroyed by fire, held that the performance becomes impossible.

(2) Where the *object* the parties had in mind failed to materialize. The performance of an act may not be literally (or physically) or legally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view. Thus in *Krell Verses Henry*, where a flat was hired only for viewing a coronation procession but the procession having been cancelled due to king's illness, it was held that the taking place of procession was the foundation of the contract. The object of the contract was frustrated by non-happening of the coronation.

### **Effects of Frustration**

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automatically, it does not depend on the choice or election of either party (as in the case of novation or rescission of contract) or on their intention or the opinion or even knowledge as to the event. A very important principle follows from this, that frustration should not be due to the act of a party to the contract that is self-induced. Thus in *Maritime National Fish Limited. Verses Ocean Trawlers Limited*, trawlers were allowed to fish only after obtaining a licence from the government. The applicants had hired a trawler and by their own election did not obtain a licence for its operation. They were not allowed to plead frustration in payment of rent to the trawler owner.

Para 3 of Section 56 deals with situation where one party knew about the impossibility of performance of the contract, but the other didn't. *Illustration (c)* reads, A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

### **Specific Grounds of Frustration**

The principle of frustration of contract, or of impossibility of performance is applicable to a great variety of contracts. The following grounds of frustration, however, have become well established.

#### **(1) Destruction of the Subject-matter**

*Taylor Verses Caldwell* is the best example of this class. There a promise to let out a music hall was held to have frustrated on the destruction of the hall-The court held that where the parties have contemplated that their contract could not be fulfilled unless some particular specified thing continued to exist when the time for the fulfillment of the contract arrived, then such a contract must be regarded as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible from perishing of the thing without the default of the contractor. Similarly, in *Howell Verses Coupland*, the defendant was not held liable when he contracted to sell a specified quantity of potatoes to be grown on his farm, but failed to supply them as the crop was destroyed by a disease.

#### **(2) Change of Circumstances**

The change of circumstances must be such as to make performance of the contract impossible or even extremely difficult in the manner and at the time contemplated, and thus upset altogether the purpose of the contract.

*Illustration (b)*, Section 56 reads, 'A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.'

### **Commercial Hardship**

The alteration of the circumstances must be such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs and the contract would not be frustrated merely because, on account of an unanticipated turn of events, the performance of the contract may become onerous (or difficult). A situation like this has been described as one of "commercial hardship" which may make the performance unprofitable or more expensive or dilatory, but it is not sufficient to excuse performance, for it does "not bring about a fundamentally different situation such as to

frustrate the venture." The nature and terms of the contract may help in deciding whether the performance has become impossible, or merely commercially difficult.

### Supervening Impossibility of Performance

#### **(3) Non-occurrence of a Contemplated Event**

Sometimes the performance of a contract remains possible, but owing to the non-occurrence of a contemplated event as the reason for the contract, the value of the performance is destroyed. Thus in *Parshotam Das Verses Batala Municipal Committee*, the Municipal Committee leased out certain tonga stands to the plaintiff for Rupees five thousand, but no tonga driver used the stands throughout the year. It was held that the lease was granted on the assumption that the tonga stands would be used by the drivers and the plaintiff would recover fees from them. The contemplated event not having occurred, the doctrine of frustration applied.

#### **(4) Death or Incapacity of Party**

Where the nature or terms of a contract require *personal performance* by the promisor, his death or incapacity puts an end to the contract. The performance of the contract depends upon the existence of good health of the promisor in such cases that is to paint a picture, to play piano, to sing in a concert, etc. *Illustration (e)*, Section 56 reads, '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.'

#### **(5) Government or Legislative Intervention**

A contract will be dissolved when legislative or administrative intervention has so directly operated upon the fulfillment of the contract of a specific work so as to transform the contemplated conditions of performance (that is when resumed, a *different* contract from the contract when broken-off). Thus where a vendor of land could not execute the sale-deed because he ceased to be the owner by operation of law, held that the contract had become impossible of performance.<sup>9</sup> The following cases explain the effect of Government or Legislative intervention,

6) *Intervention of War*

Intervention of war or warlike conditions in the performance of a contract has often created difficult questions (*as per* under the Questions Section).

Discharge by Agreement

**Cases Not Covered by Doctrine of Frustration**

Impossibility of performance is, as a rule, not an excuse for non-performance of a contract'. Some of the cases where impossibility of performance is *not* an excuse are,

(1) *Commercial hardship or difficulty*- discussed earlier.

(2) *Self-induced*- The doctrine of frustration does not apply to cases of non-performance of the contract due to the events happening because of the default of the contracting party himself (as per *Maritime National Fish \ Ocean Trawler Limited*. under the heading 'Frustration').

For example, if the intervention of war is due to the delay caused by the negligence of a party, the principle of frustration cannot be relied upon (*Gambhirmal Verses Indian Bank Ltd.*).

(3) *Act of third person*- The principle of supervening impossibility does not extend to case of a third person on whose work the promisor relied (as per *Ganga Saran Verses Ram Charan Gopal* above).

(4) *Failure of one of the objects*- When there are several purposes for I which the contract is entered into, failure of one of the objects does not terminate the contract. Thus where a ship was chartered by the defendant for two days for the purpose of viewing the naval review and for a day's cruise round the fleet, but the review was cancelled, the defendant was held liable to pay the hire amount [*Herne Bay Steam Boat Co. Verses Mutton*].

(5) *Completed transfers or Executed contracts*- Section 56 covers cases j of *executory* (future) contracts only, and does not apply to executed (present) contracts. Thus in *Raja Dhruv Dev Verses Raja Harmohinder Singh* where there was a lease of land for one year and the lessee was given possession, the fact that the lessee could not work the land (for any crops) due to partition of the country was held not to attract Section 56, as it was the case of a completed transfer The lessee's action for the refund of the rent was thus dismissed. The court observed that there was no agreement, express or implied, that the

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rent was payable only if lessee was able to perform agricultural operations. The court also observed that Section 56 is not applicable when the rights and obligations of the parties arise under a transfer of property under a *lease*.

On the other hand, where on account of an event beyond the parties' control, the lessor is not able to transfer possession to the lessee, the lessee would be entitled to take back his rent (*Gurdashan Singh Verses Bishen Singh*). Similarly, in *Sushila Devi Verses Hari Singh*, the frustration of contract occurs as the parties could not go to Pakistan to give or take possession. Thus if the transfer of lease has not been made complete, the doctrine of frustration applies. In other words, a *lease* (completed transfer) is outside Section 56, but an *agreement of lease* may come to an end by frustration.

In *Raja Dhruv Dev case*, regarding the question of applicability of doctrine of frustration to a lease, Shah J. observed, "Under a lease of land, there is a transfer of right to enjoy that land. If any material part of property is destroyed or rendered unfit for the purpose for which it was let out because of fire, floods, violence, or other irresistible forces, the lease may at the option of lessee be avoided [Section 108(c), Transfer of Property Act]. Where the leased property is not destroyed or rendered unfit, the lessee cannot avoid the lease only because he does not or is unable to use the land for purpose for which it is let out to him".

Under English law also, a lease is more than a contract and amounts to estate that is created in the lessee a vested estate or interest and, therefore, it can never end prematurely by frustration that is when one party or the other unable to carry out some of its obligations as landlord and tenant because of change of circumstances. The lease would remain or interest continues to be vested in the lessee.

In *Amir Chand Verses Chwni Lal*, it was held that the doctrine of frustration does not apply to contracts creating estates or interests in land, which had already occurred. In this case, the tenant of a house was evicted in terms of a decree but later possession was granted to him. The landlord contended that as the rented building had been demolished by the municipality leaving only a vacant land, the tenant was not entitled to the land. Held that the contract of lease had not become impossible of performance because the landlord could reconstruct the premises.

In *Karuna Ram Medhi Verses Kamakhya Prasad Baruah*, under the terms of the contract of tenancy, the tenant was entitled to built a permanent structure on the land of tenancy for residential/commercial purposes, within five years from the date of contract. The tenant did so with the knowledge and acquiescence of the landlord. However, the structure was destroyed by fire. The landlord sought ejectment of the tenant, pleading discharge of the contract on account of act of God. It was held that where the permanent structure was constructed within the said period of five years, the mere fact that the structure was destroyed by fire would not disentitle the tenant to the protection from ejectment.

In *K. J. Coal Company Limited Verses Mercantile Bank*, the Mercantile Bank had advanced a huge amount of money to K. J. Coal Co. through overdraft. Thereafter the coal company was nationalized. In an action to recover back the loan, the company pleaded non-liability to pay on the ground of frustration of contract in view of nationalization of company. Held that such change in the management *simpliciter* cannot amount to supervening of an event frustrating the contract.

### Damages

The facts of major English cases could be summarized as below, -

1. In *Hadley Verses Baxendale*, the plaintiffs mill had been stopped due to the breakage of a crankshaft. The defendants, a firm of carriers, were engaged to carry the shaft to the manufacturers as a pattern for a new one. The plaintiffs servant told the defendants that the mill was stopped, and that the shaft must be sent immediately. But the defendants delayed the delivery by some neglect, thus the mill remained stopped for a longer time than it would have been. The action was brought for the loss of profits arising out of the delay. The defendants were held *not* liable for the loss of profits, because in the great multitude of cases of millers sending off broken shafts for repair, it does not following the ordinary circumstances that the mill is stopped (as the millers might have another shaft in reserve). The fact that the mill was out of action for the want of shaft was a 'special circumstance' affecting the plaintiffs mill and the same should have been pointed out to the defendants in clear terms.

## Types of Damages

### Section 73, Contract Act

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

Thus, Section 73 is declaratory of the common law as to damages (that is rule of *Hadley Verses Baxenda/e*). In *Hadley* case, Alderson, J. laid down the following rule, "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in the respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally that is according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Section 73 also provides that the same principles will apply in relation to breach of a quasi-contract.

#### *Illustration*

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

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entitled to profit as A has brought to the knowledge of B the 'special circumstance' affecting him that his mill is stopped for want of machine. A is not entitled to loss sustained through the loss of Government contract as this fact was not brought to the knowledge of B).

In *Madras Railway Co. v. Govinda Ran*, the plaintiff, a tailor, delivered a sewing machine and some cloth to the defendant railway company to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. The goods were delayed due to company's negligence and were delivered after the conclusion of festival. The plaintiff claimed damages for the expenses of travelling up to the place of festival and of staying there and the loss of profits, which he would have earned. The court held that the damages claimed were too remote. All of these were due to the frustration of the 'special purpose' and that was not known to the company. A similar case is - *Faial Illahi v. East Indian Railway Co.*

In *Dominion of India v. All India Reporter Limited.*, the loss by railways of three volumes of a set of books without which the set of 8 volumes became useless, recovery allowed only for the lost volumes. Since the fact that the loss of three volumes would render the whole set useless was not brought to the knowledge of the defendant, the value of whole set could not be claimed.

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

*Illustration (n)* to Section 73 reads, A contracts to pay a sum of money to B on a specific day. A does not pay money on that day. B. in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the date of payment.

In *Union of India v. Steel Stock Holder's Syndicate, Poona*, a consignment of goods with the railways reached its destination after inordinate delay of seven months. The plaintiff's money remained blocked for the period. He was allowed to recover interest on the money by way of damages for the loss.

In *Dwarka Das v. State of M.P.*, a works contract was rescinded on the ground that the contractor had not completed within the stipulated time even ten percent of the works. But evidence showed that the contract was improperly rescinded and, therefore, it amounted to a breach of contract. The contractor claimed Rupees twenty thousand as compensation, being ten percent of the value of the contract. The court said that the contractor was entitled to claim damages for loss of profit which he *expected* from the project. His claim was held to be fully justified. The High Court erred in holding that the claim should've been based on actual loss suffered.

### **Loss of Profits is a Special Loss**

The loss of profits, which were to accrue upon resale, cannot be recovered unless it is communicated to the other party that the goods are for resale upon a special contract.

*Illustration (J) (know/edge of resale, loss of profit)*- A, having contracted with B to supply B with one thousand tons of iron at one hundred Rupees per ton, to be delivered at a stated time, contracts with C for the purchase of one thousand tons of iron at eighty Rupees per ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B in consequence, rescinds the contract. C must pay to A Rupees one thousand, being the profit, which A would have made by the performance of his contract with B.



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*Illustration (k) (Where no knowledge of resale agreement, no more than market difference recoverable)* - A contracts with B to deliver to B, by a fixed day, for a specified price, a machinery. On A's failure to do so, B is obliged to procure another piece at a higher price, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.