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Effect of Neglect of Promisee to Afford Promisor Reasonable Facilities for Performance

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*Section 67 of the Indian Contract Act 1872 states that “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.”¹ This section is founded on the case of *Makin v Watkinson*². Notice is not necessary, unless where the parties expressly contract to give notice, or where it must be necessarily implied that notice is to be given because it is not possible for the obligor to know or ascertain, from the nature of the thing, whether the act has been done or not. Thus, a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given even when not expressly stipulated for. It can be said that the relation between the parties, specifically between a master and a servant, affects the application of this principle. However, such application varies with the facts and circumstances of each case.*

Keywords: *promise, contract, performance.*

¹ Indian Contract Act 1872

² *Makin v Watkinson* [2014] EWCA Civ 1472

INTRODUCTION

The provision for the effect of neglect of promisee to afford promisor reasonable facilities for performance is contained in Section 67 of the Indian Contract Act 1872. It states that “*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.*”³

For instance, if under the terms of a contract for the delivery of goods, the plaintiffs were to procure priority certificates, a failure on their part to do so would absolve the defendants from liability.⁴ Also, where the defendants had practically repudiated the terms of the contract, it is not necessary that any actual tender should have been made to them and it is sufficient for the plaintiffs to show their readiness to pay the money.⁵

This section is founded on the case of *Makin v Watkinson*⁶. The lessors (defendant) had covenanted with the lessee (plaintiff) that at all times during the demise, they would, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition at their own expense. The plaintiff did not give any notice to the lessors of any want of repair in the main walls, main timbers, and roofs when they were not in good and substantial order and condition. It was held that their covenant required a notice to be given for the repairs. It was observed that the lessee cannot charge the lessor for breach of repairs without notice for the lessor may not know that repairs are necessary. The lessor cannot be expected to know the condition of the inner parts of the premises.

The judges relied upon the principle laid down in *Vyse v Wakefield*⁷. At the request of the plaintiff, the defendant appeared at the Rock Life Assurance Office and answered certain questions put to him. The plaintiff contended that by this conduct, he should have informed himself of the fact of the insurance having been affected and of the terms and conditions of it. The declaration was sufficient and it was not necessary to allege any notice to the defendant. There was nothing in

³ Indian Contract Act 1872

⁴ *Basanta Mal Devi Dayal v Uma Dayal* [1968] 4 DLT 429

⁵ *Municipal Corporation Chandigarh v Shantikunj Investment Pvt Ltd* [2006] SC 1270

⁶ *Makin v Watkinson* [2014] EWCA Civ 1472

⁷ *Vyse v Wakefield* [1835-42] All ER Rep 294

the covenant which required him to give any notice as the general rule is that a party is not bound to do more than the terms of his contract obliging him to do.⁸ Several cases were relied upon and the principle established was that where the action is to be done by a stranger, no notice is necessary because the fact is as much within the knowledge of the one party as the other, but where the action is to be done by the plaintiff himself, notice must be given. Justice Parke identified two classes of cases on this subject. One is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite, the right of the defendant to notice before he can be called on to pay, is implied by law from the construction of the contract. On the other hand, no notice is required when a specific action is to be done by a third party named, or even by the promisee himself. The case was held in favor of the defendant and an averment of notice to the defendant that the policy had been affected was necessary to make the declaration good.

The general rule is, that a party is not entitled to notice unless he had specified for it. However, the law might require notice to be given in certain cases depending on the nature of the transaction. In certain cases, no notice is required to be given when the promisor has taken upon his peril to perform the act. In *Rex v Holland*⁹, a public officer was charged with a breach of duty, which arose from certain acts within the limits of his government. It was held that he had notice of those acts, as he is presumed from his situation to know them. Wood justified his objection to want of notice by saying, “*Notice here merely means knowledge and when the matter is as much in the knowledge of the defendant, or more than of any other person, the law presumes that he knew*”.¹⁰

The case of *Fletcher v Pynsett* seems to be suggesting that when the engagement is conditional upon the doing of an act by a third person, notice must be taken from that person. In this case, the defendant had covenanted with the plaintiff that if he marries the defendant's daughter, the defendant would assure him a certain copyhold. The court held that the plaintiff didn't need to give notice of the marriage to sue. It was observed that in the case of a promise to pay as much for goods, the promisee should be less bound to give notice, or the obligor more bound to take

⁸ *Ibid*

⁹ *Rex v Holland* [2013] NBCA 69

¹⁰ *Ibid*

notice of the act of a stranger than of the act of the promisee himself. The reasoning given was that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant and he can only guess the matter, then notice is mandatory.

A general rule was laid down in *Mackay v. Dick*¹¹. It provided that where in a contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the consideration is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. The part of each party depends on the circumstances. The two parties entered into a contract for the sale of a steam excavator. Mr. John Mackay (appellant) agreed to buy from Messrs. Dick & Stevenson (respondents) if the machine fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in “a fixed time on a properly opened-up face at the railway cutting”¹². The machine couldn’t excavate the essential quantity at another cutting. It also failed on being removed to the railway cutting and tried at a face not a “properly opened-up” one. It broke down after a few days of work. The appellant refused to give it any further trial or to pay the price of the machine. It was held that if in the case of a contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied. In such case, the contract is taken as satisfied and the promisor can sue for the full remuneration or price.

The case of *Stanton v Austin*¹³ laid down that when a person promises to do a thing on the happening of a certain event with which he can make himself acquainted, he is not entitled to any notice unless it has been stipulated by him. It also provided that when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him. This was an action by a ship-owner against the charterers for not loading a cargo of coals according to a charter party by the terms of which the owner engaged the vessel. The defendants did not load the cargo within a reasonable time as aforesaid, but made great delay in so doing,

¹¹ *Mackay v Dick* 6 [1881] UKHL 387

¹² *Ibid*

¹³ *Stanton v Austin* (1871-72) 7 LR 651

whereby the plaintiff suffered damage. The defendants pleaded that they did not have any notice of the ship having proceeded to and having arrived at the South Dock and of her being ready to receive cargo. Thus, could not load. The case was decided in favor of the defendants as, without notice from the plaintiff, the defendants would not have fair means of knowing that the ship had arrived and was ready.

A similar case was that of *Stewart v Rogerson*¹⁴. This was an action brought by the plaintiff, who was the sole registered owner of the ship “*Schiedam*”, against the defendant, to recover freight and demurrage according to a charter party. The plaintiff performed his contract so far as he could do so but for the refusal of the consignees to allow him to perform it. The plaintiff could have employed the vessel somewhere else had the cargo been removed. The plaintiff was entitled to recover, as damages for the refusal to name a wharf and refusing to accept the cargo, the amount he would have received as freight if the cargo had been duly delivered. It was contended that the owner should at least be entitled to a reasonable time to see whether the consignees would name a wharf before they unloaded. The fair inference from this is that the consignees declined to take the cargo, which was a breach of duty. The defendant had to excuse himself for the repercussions of the breach as he was the wrongdoer. The defendant couldn’t earn freight because of his wrongful act. The measure of damages, therefore, will be the sum that the plaintiff has been prevented from earning. The court gave a decision in the plaintiff’s favor.

CONTRACTS BETWEEN MASTER AND SERVANT

The rules governing contracts between a master and servant are somewhat different from other forms of contracts. It was contended in the case of *Raymond v Minto* that the covenants in an apprenticeship deed are independent and the non-performance of his duty by the apprentice may give a right of action to the master but does not discharge him from the obligation to perform his duty. However, it was observed that a master cannot be held liable for not teaching if the apprentice would not learn.¹⁵ This was an action of covenant against the master for not

¹⁴ *Ibid*

¹⁵ *Mackay v Dick* [1881] 6 UKHL 387

teaching his apprentice. It was contended that by his wilful acts, the apprentice hindered and prevented the defendant from teaching him in the said art and by his said acts, caused the breach pleaded to. However, keeping in mind that the willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him, it was held that the master cannot be liable for not teaching the apprentice. The ratio decidendi of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the articles, but because the apprentice by his acts has put it out of the power of the master to carry out what he had contracted to do.

Conversely, it was observed in *Ellen v Topp* that if a master undertakes to teach several trades and gives up one of them, the apprentice need not stay with him. The apprentice is not bound to serve if the master is not ready to teach in the very trade that he has stipulated to teach. In this case, an infant was placed by his father as an apprentice to a master, described in the indenture as "*an auctioneer, appraiser, and corn factor,*" to learn his art. The master wholly relinquished the trade of corn factor after the making of the indenture and the commencement of the apprenticeship. Consequently, the apprentice unlawfully absented himself from the service of the plaintiff, contrary to the tenor and effect of the said indenture. It was contended that the plaintiff has by his act incurred a disability in a material part of the contract, whereby he has rendered it impossible for himself or the apprentice to perform it. By giving up one out of the three trades, the master has incapacitated himself from instructing the apprentice and thus, the apprentice cannot serve the master. For it is only by his exercising the trades and the apprentice is engaged in the daily and ordinary use of them, that the latter can gain such efficient practical instruction, as he was entitled to expect and had contracted to receive. The chief tests applied to appear to be the materiality and importance of the covenants broken and the difficulty of assessing damages thereupon. The Court strictly enforced the duties of a master towards his apprentice and the chief of which is to give that instruction and that opportunity of advancement in practice and experience, which the master, by the terms of his covenant and by the receipt of the money advanced upon the faith that he would fulfill it, has contracted to bestow. The case was decided in favor of the defendant.

In the case of *Planche v Colbourn*¹⁶, it was observed that the author might recover upon the quantum meruit without tendering the treatise when the work was abandoned for which a treatise had been written. The defendants engaged the plaintiff to write a treatise for a periodical publication. The plaintiff commenced the treatise, but before he could complete it, the defendants abandoned the periodical publication. The court held that the plaintiff could litigate for compensation, without the treatise being tendered or delivered.

In the case of *Learoyd v Brook*¹⁷, it was observed that it is a good defense for a breach of a covenant in an apprenticeship deed by the master to keep, teach, and maintain his apprentice, that the apprentice, while in his master's service, was a habitual thief. During the term the plaintiff was bound, among other things, to order and behave himself as a true and faithful apprentice and not to waste his master's goods. However, his conduct was bad. Being young, he frequently visited singing rooms and theatres, smoked cigars, and stayed out till late hours of the night. The defendant repeatedly threatened to lock him out if he did not mend his ways. He, however, persisted in his conduct, despite the efforts of the defendant. It was proved that the plaintiff was a habitual thief. It was contended that in an ordinary apprenticeship deed, the covenants by the master are independent, the performance of which does not depend upon the performance by the apprentice on his part of the obligations imposed upon him by the deed. The case was decided in favor of the defendant (master).

In the case of *Waterman v Fryer*¹⁸, it was found that the apprentice, wishing to put an end to the apprenticeship, so deliberately misconducted himself that in a business sense the relationship of master and apprentice couldn't continue and that his conduct before the dismissal amounted to a repudiation of the agreement. It was held that the apprentice could not repudiate the agreement unless repudiation was for his benefit. The plaintiff, by his father as his next friend, brought an action against his master and claimed damages, first, for breach of his agreement to teach and secondly, for wrongfully dismissing the plaintiff, that is, terminating the contract of apprenticeship. The plaintiff decided not to serve the full time and

¹⁶ *Planche v Colbourn* [1831] 8 Bingham 14

¹⁷ *Learoyd v Brook* [1891] 1 QB 431

¹⁸ *Waterman v Fryer* [1922] 1 KB 499

conducted himself in a manner altogether incompatible with satisfactory relations between master and apprentice. The result was that his conduct not only prevented the defendant from carrying out the contract to teach him but became such as no employer in the defendant's position could be expected to tolerate it. The plaintiff's conduct amounted to deliberate and advised repudiation. It was contended that the covenants of master and apprentice in an apprenticeship deed are independent, and the apprentice's refusal to obey orders does not justify the master dismissing him. There is no case showing that inattention to work, rudeness, or conduct of that kind will justify dismissal by the master, though it might be an answer to an action for failure to teach. Thus, the appeal was allowed.

CONCLUSION

It would be prudent to conclude that notice is not necessary, unless where the parties expressly contract to give notice, or where it must be necessarily implied that notice is to be given because it is not possible for the obligor to know or ascertain, from the nature of the thing, whether the act has been done or not. Thus, a party is not entitled to notice, unless he has stipulated for it; but there are certain cases where, from the very nature of the transaction, the law requires notice to be given even when not expressly stipulated for. When a thing is in the knowledge of the promisee, but cannot be in the knowledge of the promisor, but the promisor can only guess or speculate about the matter, then notice is required to be given. When a person promises to do a thing on the happening of a certain event with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it. Thus, it is necessary to give notice only if the promisor does not have the means of informing himself. In certain cases, no notice is required to be given when the promisor has taken upon his peril to perform the act. Notice has to be given when it pertains to a thing that lies within the peculiar knowledge of the opposite party. When the contract is provisional upon an act of a third person, notice must be taken from that person.

It can be said that the relation between the parties, specifically between a master and a servant, affects the application of this principle. Certain general principles have been laid down in various cases. For instance, the master won't be liable if the apprentice by his acts has put it out of the power of the master to carry out what he had contracted to do. The apprentice will not be

bound to serve if the master is not ready to teach in the very trade that he has stipulated to teach. It was also observed that the apprentice could not repudiate the agreement unless repudiation was for his benefit. However, such application varies with the facts and circumstances of each case.