

(1958) 11 MP CK 0014

In the Madhya Pradesh High Court

Case No : Civil Special Appeal No. 5 of 1949

Gulabchand Gambhirmal

APPELLANT

Vs

Kudilal Govindram and Another

RESPONDENT

Date of Decision : 24-11-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4, 100
Contract Act, 1872 — Section 10, 23
Evidence Act, 1872 — Section 101, 102, 103, 104, 3
Madhya Bharat High Court of Judicature Act, 1949 — Section 25, 25(1)
Transfer of Property Act, 1882 — Section 8

Citation : AIR 1959 MP 151 : (1960) 5 MPLJ 334

Hon'ble Judges : T.C. Shrivastava, J;P.V. Dixit, J;A.H. Khan, J

Bench : Full Bench

Advocate : N.P. Engineer, M. Adhikari and J.D. Patel, for the Appellant; M.P. Amin, C.B. Sanghi and N.H. Dravid, for the Respondent

Final Decision : Dismissed

Judgement

P.V. Dixit, J.

This appeal by the plaintiff is from a judgment and decree of a Division Bench of the Madhya Bharat High Court dated 2nd December 1948. It was filed in the Madhya Bharat High Court u/s 25 of the Madhya Bharat High Court of Judicature Act 1949 as it stood before it was amended by Madhaya Bharat Act No. 3 of 1950.

The suit out of which this appeal arises was instituted on 6th November 1947 by Gulabchand Tongya against the heirs and legal representatives of Govindram Seksaria on the Original Side of the High Court of the former Indore State for specific performance of an agreement whereby, it is said, Govindram Seksaria agreed to sell to the appellant his share in a firm the business of which was to act as managing agents of the Indore Malwa United Mills Ltd., Indore.

The suit was tried by Sanghi J., who on 11th June 1948 made a decree in favour of the plaintiff directing that on payment by the plaintiff to the defendant of 5/32

of the capital deed of assigning a two and a half anna share in a rupee out of their share in the aforesaid partnership and declaring that "by virtue thereof the plaintiff shall become entitled to the rights and be subject to the liabilities as against the defendants of sleeping partners in the aforesaid Managing and Selling Agency with effect from 5th November 1947".

Against this decision, the defendants filed an appeal to a Division Bench of the Madhya Bharat High Court on 24th August 1948. The plaintiff also preferred on 7th September 1948 a cross-appeal against the decision of the trial Judge claiming that he was entitled to 3 share in the profits of the partnership since 8th March 1941.

The Division Bench of the Madhya Bharat High Court, accepting the defendants' appeal reversed the judgment and decree of Sanghi J., and dismissed the plaintiff's suit as well as his cross-appeal. Thereafter the plaintiff filed this appeal. When the appeal came up for hearing before a Full Bench of the Madhya Bharat High Court, a preliminary objection as to the competency of the appeal was raised on behalf of the defendant-respondents.

The objection was that as the judgment and decree appealed from were passed by a Division Bench of the Madhya Bharat High Court on 2nd December 1948, that is before the Madhya Bharat High Court of Judicature Act 1949 came into force, and as Section 25 of the Act was not retrospective, the appeal was incompetent. This objection was upheld and the appeal was dismissed by the Full Bench.

The plaintiff then appealed to the Supreme Court after obtaining leave. On 28th March 1958 the Supreme Court allowed the plaintiff's appeal holding that the plaintiff's appeal from the Division Bench of the Madhya Bharat High Court was competent u/s 25 of the Madhya Bharat High Court of Judicature Act 1949 and remitting the case to this Court for decision on merits.

The facts giving rise to this appeal are these. Govindram Seksaria, Brijlal Ramjidas, Balasari Ju-harmal and four other persons entered into a deed of partnership (Ex. No. 1, Part-I, Page-23 of the printed Paper-Book) on 17th July 1935 for carrying on the business of "acting as managing agents and selling agents of the Indore Malwa United Mills, Ltd.," a company owning a textile mill in Indore.

Towards the end of 1940 serious disputes arose between two groups of partners one headed by Govindram Seksaria and another by Brijlal and Bilasrai, which it appears became a subject-matter of public discussion, leaflets, pamphlets, propaganda and counter-propaganda. On 21-11-1940, the Board of Directors of the Malwa Mills appointed a committee to enquire into certain allegations against Govindram Seksaria, Brijlal and Bilasrai.

The committee consisted of Mr. R. C. Jail as Chairman, and Seth Hiralal and the plaintiff Gulabchand as members. The disputes between the partners continued

and came to a head. The groups continued and it became apparent that nothing short of retirement of one of the groups would end the trouble. The partners then referred their differences to the arbitration of Col. Dinanath, the Prime Minister of the former Holkar State.

On 8-2-1941, the arbitrator made an award deciding that Govindram Seksaria should buy up the five annas share of Brijlal Ramjidas and Bilsrai Juharmal at par and that the latter should sell their respective shares of annas two and a half each in the rupee at par and also sell the debentures held by them to Govindram Seksaria at par.

The award further provided that the outgoing partners in the managing agency would be entitled to the managing agency and selling agency commission and also interest on their invested capital excluding the debentures till the day of payment of the invested capital which was to be paid within one month; and further that the outgoing partners would be liable for all acts or defaults which they might have previously committed as members of the managing agency of the Indore Malwa United Mills.

On 12th February 1941 Brijlal and Bilasrai instituted a suit in the Bombay High Court against Govindram and other partners of the Managing agency contesting the validity of the award made by Col. Dinanath and asking for a declaration that the award was invalid and that they continued to be the partners in the firm, and for consequential relief.

On 25th February 1941, Govindram Seksaria made an application to the District Court at Indore for the award being filed. That application was subsequently transferred to the Indore High Court and the award was upheld and made a rule of the Court by a learned Judge of the Indore High Court on 29th October 1941.

The suit instituted in the Bombay High Court was dismissed by Chagla J. (as he then was) on the ground that the real substance of the dispute between the parties had been determined by a decision of the Indore High Court upholding the award which was binding between the parties in the suit before him u/s 13 C.P. C. The decision of the learned Single Judge was upheld in appeal by a Division Bench of the Bombay High Court and ultimately also by the Privy Council on 2nd July 1947.

On 11th September 1942 Govindram Seksaria filed an application in the Indore High Court for the execution of the award. Those proceedings were kept pending till the disposal of the appeal preferred by Brijlal and Bilasrai to the Privy Council. When that appeal was dismissed, the proceedings for execution of the award were resumed and ultimately on 5th November 1947, a deed of assignment of the four-annas share of Brijlal and Bilasrai was executed in favour of the defendants as legal representatives of Govindram who in the meantime died in May 1946.

It must be mentioned that though the award made by Col. Dinanath stated the

share of Brijlal and Bilasrai as five annas, actually their share was four-annas only as they had already transferred one-anna share out of their five annas share. On the very next day, that is on 6th November 1947, the appellant Gulabchand instituted the suit leading to this appeal.

The nature of the plaintiff's case, briefly stated, is thus : Govindram Seksaria wanted a local man with ability as a partner to look after the management of the mills. He, therefore, approached the plaintiff a few days after the making of the award by the Prime Minister of the former Holkar State and offered to sell him two and a half annas share out of four-anna share given to him by the award and make him a partner in the firm, which offer he accepted.

On 28th February 1941 an agreement for the sale of this share on the terms stated therein was executed between the plaintiff and Govindram. According to the plaintiff, he asked Govindram Seksaria on several occasions and even sometime before his death in May 1946 to fulfil the agreement, but each time Govindram replied that it would be done after the litigation that Brijlal and Bilasrai had started in the Bombay High Court had ended finally; that he also wrote to Govindram a letter on 8th May 1946 reminding him of his obligations under the agreement but Govindram sent no reply; that after the death of Govindram on or about 25th May 1946, as his son the respondent Kudilal became a partner in place of Govindram in the firm of managing agent under the terms of the agreement of partnership (Ex. P/1, Part-I, page-23 of the printed Paper-Book), he drew the attention of Govindram's heirs of their obligations under the agreement dated 28th February 1941 as heirs of Govindram and also gave them a notice to that effect and eventually inconclusive correspondence between the solicitors of the parties followed in which the defendants while neither repudiating the contract nor stating any ground for avoiding its performance declined to transfer to the plaintiff two and a half annas share according to the agreement.

The plaintiff further averred that he was always ready and willing to perform his part of the contract and to pay the value of two and half annas share and purebase debentures according to the terms of the agreement dated 28th February 1941. He claimed that he was entitled to an assignment of two and half annas share out of the share of Brijlal and Bilasrai with all the benefits accruing therefrom as founded on the award dated the 8th February 1941.

The plaintiff sought the relief of a decree against the defendants for specific performance of the agreement dated 28th February 1941 compelling them to execute an assignment in his favour of the two and half annas share with all the benefits accruing in respect thereof after 28th February 1941 and for an account of the amount that might have become due and payable to him under the said agreement. In the alternative, he also claimed compensation by way of damages on the basis of the profits accruing on two and half annas share from 28th February 1941 upto the date of the suit and on the basis of the average benefit further damages for the unexpired period of the managing agency.

By their defence, the defendants denied the execution of the agreement (Ex. P/1) by Govindram. They pleaded that the alleged agreement was repugnant to the terms and provisions of the partnership agreement between Govindram, Bilasrai, Brijlal and other persons; that under the award dated 8th February 1941 Govindram was to purchase the collective share of Brijlal and Bilasrai as representing the Bombay firm and that, therefore, he had no right or authority to sell two and half annas share out of the said collective share of five annas to the plaintiff without the consent or authority of the other partners both of the Bombay as well as of the Indore firms; that the agreement did not constitute a valid, binding and a complete agreement and was not intended to be acted upon and never came into operation and effect; and that the suit was barred by limitation.

The other pleas of the defendants which are material in this appeal were: first that the alleged agreement failed to fix a price of two and half annas share which Govindram was to sell to the plaintiff; that under the said agreement the plaintiff was to contribute capital in respect of the said two and half annas share in such amount and in such manner as Govindram determined; that, therefore, the agreement was vague, ambiguous and uncertain-and not enforceable in law; and secondly that the agreement was concluded at a time when the work of the Enquiry Committee, which was appointed by the Board of Directors of the Indore Malwa United Mills to investigate into the various allegations against Govindram Bilasrai and Brijlal with regard to the management of the mills, was in full swing and when the Committee had yet to make a final report which was ultimately given on 7th April 1941; that the Chairman of the Committee Mr. Jail was known to be an honest and impartial person expected to decide in favour of Govindram who was in the right, while Seth Hiralal the other member of the Committee was openly known as a friend and supporter of Brijlal and Bilasrai; that the plaintiff, therefore, held the balance and because of this position he obtained the said agreement from Govindram as a sort of inducement or bribe for him to decide the allegations against Govindram in his favour; and that, therefore, the consideration for the agreement was fraudulent, immoral and opposed to public policy and the agreement was, therefore, void and inoperative in law.

The learned trial Judge held that the agreement (Ex. P/I) was executed by Govindram; that Clauses 10 and 14 of the partnership agreement did not in any manner affect the validity of the agreement; that there was no uncertainty as regards the price at which the two and half annas share was to be sold and transferred to the plaintiff; that the consideration for the contract was neither illegal nor immoral; that the principle of public policy was not applicable to the case as the object of the contract was not opposed to public policy.

He found that the performance of the contract was postponed by the parties till the termination of the litigation commenced by Brijlal and Bilasrai which came to an end on 5th November 1947 when the assignment by Brijlal and Bilasrai was executed in favour of the defendants and consequently the plaintiff's suit filed on

6th November 1957 was within time.

The learned Judge further held that as there was no proof as to the terms on which the performance of the contract was postponed till 5th November 1947, the plaintiff would be entitled to the benefit under the agreement from 5th November 1947 and not from 28th February 1941, the date of the agreement Ex. P/1. On appeal, the learned Judges of the Madhya Bharat High Court also found that [he agreement was duly executed by Govindram in favour of the plaintiff and that the suit was within time.

But they took the view that the agreement was void for uncertainty owing to its meaning being uncertain on a material point relating to the agreement, namely, the price payable by Gulabchand and that it was also void inasmuch it was entered into with corrupt motives and the consideration for it was of an immoral character and it was also against the public policy in view of its tendency to create a conflict between the plaintiff's duty and interest.

The learned Judges also held that though the agreement Ex. P/1 was not according to the provisions of the partnership agreement it would have a limited operation according to the provisions of Section 29 of the Partnership Act. On these findings, the Division Bench of the Madhya Bharat High Court allowing the defendants' appeal dismissed the plaintiffs suit.

On the grounds taken in the memorandum of appeal and the contentions, which Mr. Engineer, learned counsel appearing for the appellant, outlined at the commencement of his arguments, Mr. Amin, learned counsel for the respondents, took the preliminary objection that the appeal was not competent. The main contentions of the appellant are that the conclusion arrived at by the Division Bench on a construction of the agreement Ex. P/1 dated 28th February 1941 that it was uncertain as regards the price to be paid by the plaintiff for the transfer of two and half annas share to him was erroneous and that there was no evidence to support the finding that the consideration for the agreement was immoral or that the agreement was an inducement or bribe for the plaintiff to make a report favouring Govindram or that it was entered into by the parties with corrupt motives or that it had a tendency to create a conflict between the plaintiffs duty and interest and was, therefore, against public policy. Section 25(1) of the Madhya Bharat High Court of Judicature Act 1949, on the wording of which Mr. Amin's objection rests, ran as follows at the time of the filing of the appeal.

"Special appeal shall lie to the Full Bench of the High Court from

a decree or an appealable order passed by the Divisional Bench of two judges of the High Court in the exercise of extra-ordinary or appellate civil jurisdiction.

Provided that such appeal) shall lie only in the case where the value of the suit in the court of the first instance is Rupees ten thousand or upwards and the value of the subject matter in dispute in appeal also is Rupees ten thousand or upwards.

Provided further that the appeals involve some question of principle pertaining to law.

It was argued by Mr. Amin that u/s 25(1) of the Act an appeal was competent only if besides satisfying the condition as regards the pecuniary valuation it involved "some question of principle pertaining to law"; that there was a distinction between a question of law and a question of "principle pertaining to law"; that questions of fact or law were not open to appeal u/s 25(1) of the Act; & that in the instant case there was no question of any principle pertaining to law and the appellant was only seeking to canvass questions of fact which this Court could not in a second appeal review or disturb. Learned counsel relied on *Mussummat Durga Choudhrai v. Jawahir Singh Choudhri* : 17 IA 122 (PC).

In reply Mr. Engineer said that Section 25(1) of the Act conferred a right of appeal from a decision of the Divisional Bench if it fulfilled the requirements stated in the provisos to Section 25(1); that Section 25(1) nowhere said that an appeal to a Full Bench would lie only on certain specific grounds; and that this section served out its purpose when the appeal was admitted and thereafter it was open to the appellant to raise in the appeal questions of law as well as of facts though this Court might not, as a matter of practice, disturb findings of fact except in exceptional circumstances to avoid a miscarriage of justice. Reliance was placed on *Central Glass Industries Ltd. Vs. Abdul Hossain*,

In our opinion, the preliminary objection must be overruled. An appeal u/s 25(1) of the Madhya Bharat High Court of Judicature Act 1949 being an appeal created by that special provision, Section 100 C.P.C., which deals with second appeals to the High Court from every decree passed in appeal by any Court subordinate to the High Court, has no applicability here and the decision reported in 17 I A 122 (PC), which dealt with Section 584 of the old CPC is not in point here.

Now, Section 25(1) of the Madhya Bharat High Court of Judicature Act 1949 is differently worded from Section 100 C.P.C. An appeal u/s 25 of the Act is not limited to questions of law or any other particular questions. The words "special appeal shall lie to the Full Bench of the High Court" as used in Section 25(1) mean, in the context of that provision, no more than this; that a person can go to the Full Bench in appeal from a decision of a Division Bench if the appeal satisfies the requirements stated in the two provisos to Section 25(1) of the Act and the Full Bench shall have jurisdiction to entertain the appeal.

That provision does not deal with the powers which the High Court can exercise in an appeal under that section and does not in any way limit them. If, therefore, an appeal involves some question of principle pertaining to law and it is admitted, then it is open to the appellant to urge questions of law as well as of facts.

The question whether in an appeal u/s 25(1) the High Court should disturb a finding of fact" and, if so, under what conditions, is entirely different and does not in any way affect the competency of the appeal. In this connection, it is

helpful to compare the language of Section 25(1) of the Madhya Bharat High Court of Judicature Act 1949 with that of Section 30(1) of the Workmen's Compensation Act, 1923, which provides for an appeal to the High Court from certain order of the Commissioner, if the order satisfies the conditions mentioned in the first two provisos to Section 30(1).

The first proviso lays down that no appeal shall lie against any order unless a substantial question of law is involved in the appeal. In *Central Glass Industries Ltd. Vs. Abdul Hossain*, the scope of an appeal u/s 30(1) of the Workmen's Compensation Act 1923 was considered and it was observed that

"Section 30 of the Act gives an appeal to the High Court if a substantial question of law is involved but once that condition is satisfied the High Court is entitled to consider the whole case, and for that purpose to review the evidence on the record and to decide questions of fact." This decision of the Calcutta High Court lends support to the view that an appeal u/s 25(1) of the Madhya Bharat High Court of Judicature Act 1949 cannot be confined to questions of law or "principles pertaining to law".

Mr. Amin was no doubt right in making a distinction between a question of law and "a question of principle pertaining to law". A principle of law means a rule or axiom of law, while a question of law is one which arises when a conclusion is reached on the application of the rules and principles of law to certain proved facts and circumstances.

In the determination of cases, it is not the function of the Court to decide principles of law in abstract. They are considered when the question of their applicability to the facts and circumstances proved arises. For instance, the rules of Hindu law relating to alienation by a widow for legal necessity are principles of law. The fact of alienation by a widow and the circumstances in which it was made are questions of fact.

It is on the application of the rules of Hindu law about alienation by a widow for legal necessity to the facts regarding alienation that the question of legal necessity for it is determined. Consequently, the question of legal necessity for an alienation becomes a question of law. Bearing in mind this distinction between a principle of law and a question of law, it will be seen that the expression "if the appeal involves some question of principle pertaining to law" in the second proviso to Section 25 (1) of the Madhya Bharat High Court of Judicature Act 1949 far from curtailing the right of appeal, makes it more liberal than in a case where it is provided that no appeal shall lie against any decree or order unless a substantial question of law is involved in the appeal.

For, where the existence of a substantial question of law is required for an appeal, the application of well-defined legal principles to a particular set of facts is not a question of law which can fairly be described as substantial, whereas under the second proviso to Section 25(1) all that is necessary is that the appeal should "involve some question of principle pertaining to law" no matter whether

the principle of law is elementary and well-established or whether it is one lying in the field of divided and controversial opinion.

As will be shown later on, the present appeal does involve a consideration of the principles as regards construction of documents and of the principles embodied in and underlying Section 23 of the Contract Act. The contention raised by the learned counsel for the respondents as to the competency of the appeal must, therefore, be rejected.

That apart, we do not think it is now open to the respondents to raise the objection as to the competency of the appeal, when they did not raise it before the Full Bench of the Madhya Bharat High Court at the time when they successfully challenged the competency of the appeal and when the Supreme Court has now remitted the case to this court for disposal on merits holding the appeal to be competent.

As to the scope of this appeal, we are clearly of the view that it is open to the appellant to raise questions of law as well as of facts. In dealing with questions of fact in an appeal u/s 25(1) of the Madhya Bharat High Court of Judicature Act .1949, it would be proper to follow the practice always acted upon by the Privy Council in regard to findings of fact. It is in the light of this practice that we will consider at the later stage whether there is any justification for interfering with any finding of fact of the first appellate Court challenged by the appellant.

Coming now to the merits of the appeal, it was not disputed before us and indeed it could not be that on 28-2-1941 Govindram entered into an agreement with the plaintiff for the sale to him of two and half annas share out of the four annas share given to him under the award dated 8-2-1941.

It will be convenient to consider the points arising in the appeal in the order in which they were dealt with by Mr. Engineer learned counsel for the appellant. He first assailed the conclusion of the Division Bench that the agreement was uncertain as to the price payable by Gulabchand for the purchase of two and half annas share and was, therefore, void.

The decision on the point involves a consideration in some detail of the agreement Ex. P/I page 1, Part--II of the printed Paper-Book). The agreement commences with a recital of the existence of a dispute between the partners of the managing agency firm and its reference to the arbitration of the Prime Minister of the former Holkar State.

It then refers to the award made by the Prime Minister saying that under the award Govindram Seksaria is to buy up four annas share of Brijlal Ramjidas and Bilasrai Juharmal. Then follows the clause whereby Govindram Seksaria agreed "to give (sell) to or get transferred to the name of Gulabchand Gambhirmal a share of two and half annas out of the aforesaid share of four annas".

By the next clause, the plaintiff Gulabchand agreed to purchase first debentures of the Indore Malwa United Mills Ltd., "in proportion to his share worth Rs.

3,12,500/- at the rate of Rs. 100/-". The penultimate clause contains an undertaking on the part of Govindram to have a fresh agreement of partnership executed with the remaining partners of the managing agency firm so as to include the plaintiff Gulabchand or "any other person designated by him or both" as partner or partners. It is the concluding clause which has given rise to much controversy and it is necessary to reproduce it as it stands in the original document, which is in Hindi. It is as follows:

^ikrh ds :i;s tks nsuk iMsxs os :i;k xksfcanjket dh bRryk feyrs gh xqykcpUnz xEHkhjey ftl :i esa nsuk iMsxs mlh :i eSa ns nsaxsA dksbZ Hkh dkj.ko"nksuksa dh ikrh xksfoUnjke lsDlfj;k dks ugha feys rks og ikrh nksuksa dks cU/kaudrkZ ugha gSA**

In the plaint, the plaintiff claimed that he was entitled to an "assignment of two and half annas-share out of the share of Messrs. Brijlal and Bilasrai with all the benefits accruing therefrom as founded on the award dated 8-2-1941" and he valued the two and half annas share proportionately on the valuation of the five annas share belonging to Brijlal and Bilasrai entered in the deed of assignment dated 5-11-1947 (Ex. P/30) Page 35 Part-II of the printed Paper-Book) by which Govindram purchased the share of Brijlal and Bilasrai.

The defendants contended that the agreement failed to fix a price for the two and half annas share which Govindram was to sell to the plaintiff and that the amount which the plaintiff was required to pay and the form in which the payment was to be made were both left to Govindram for determination at his will and discretion. The learned trial Judge took the view that under the agreement the plaintiff was to take upon himself the liability of the partners to the extent of 5/32 of the share he was to purchase; that the liabilities of the partners under the agreement entered into by the managing agents with the Mills (Ex. P/27, page-73, Part-II of the printed Paper-Book) were, first to advance Rs. 20 lakhs on first debentures and secondly to pay Rs. 24 lakhs otherwise to pay off the deposits; that by the fourth clause of the agreement (Ex. P/I) the plaintiff had agreed to purchase at par first debentures in proportion to his two and half annas share the value of which debentures was Rs. 3,12,500/-; that the price to be paid by the plaintiff Gulabchand had, therefore, an obvious reference to a "proportionate share of the money that at any relevant time may be found to have been invested by the partners"; that the figure of this proportionate share which the plaintiff had to pay for purchasing two and half annas share was within the knowledge of Govindram and was a certain sum; and further that it was to be paid by the plaintiff under the last clause of the agreement at the time and in the mode to be intimated by Govindram.

The learned Judges of the Division Bench did not find themselves in agreement with the construction put by the learned trial Judge on Ex. P/I. According to them, if the intention of the parties was that the plaintiff should pay a proportionate share of the capital invested as the price of the two and half annas share, this should have been stated in clear terms as was done in the case of

debentures) which the plaintiff was to purchase, and that even if the exact amount of the capital invested was not known at the time the agreement was signed, it could have been stated in the agreement that the plaintiff was to pay this proportionate share of the capital and that the exact amount was to be ascertained by Govindram and communicated to the plaintiff.

The learned Judges observed that there was no such reference to the invested capital and the amount to be paid for the two and a half annas share was left in vague terms to be communicated by Govindram. They were inclined to regard the last clause of the agreement as dealing with the price to be paid by the plaintiff and found it vague and uncertain, leaving the price to be paid for two and half annas share by the plaintiff to the sweet will of Govindram. The learned Judges of the Division Bench concluded their consideration of this question by making the following observations as regards the last clause of the agreement:

"It will thus appear that the language of the provision in question is not at all clear and its interpretation is, therefore, uncertain. Different interpretations have been suggested, but they are no more than surmises and there is nothing in the agreement to indicate its precise meaning. Govindram was apparently a shrewd man of business and he may have deliberately left the wording vague to enable him to demand a price from the plaintiff according to circumstances. It is possible that he may have intended to demand a higher price for the two and half annas share, if the profits of the Mill increased; as the value of the share in the partnership would also have been in that case, proportionately higher. It is equally possible that he may have intended to include a proportionate cost of the litigation in the price of the two and half anna share. It is, therefore, impossible to say in what manner Govindram would have determined the price to be paid by the plaintiff. As Govindram is dead and there is nothing to enable the court now to find out with any certainty the price which was intended to be paid for the two and half anna share, the contract must, in my opinion, be held to be "void" for uncertainty (see Section 29 of the Contract Act)".

Learned counsel for the appellant argued that in reaching the above conclusion the Division Bench did not give any consideration to the circumstances surrounding the creation of the agreement and the subject-matter of it, overlooked the fact that the agreement concluded between the parses on 28-2-1941 was in the nature of a mercantile document and that the parties, who were both shrewd and experienced businessmen and who intended to enter into a binding agreement, could not have possibly left the price to be paid for the purchase of two and half annas share by the plaintiff undetermined.

Learned Counsel also complained that the learned Judges of the Division Bench ignored altogether Clause 2 of the agreement which was really the clause fixing the price. According to him the reference to the award in the agreement and the use of the words "Govindram Gordhandas will get transferred to the name of Gulabchand Gambhirmal a share of two and half annas out of the aforesaid share of four annas" indicated that the price payable by the plaintiff for the purchase of

two and half annas share was to be fixed proportionately according to what Govindram himself would be required to pay for the purchase of the share of Brijlal and Bilasrai and that the last clause was merely concerned with time and more of the payment at the price by Gulabchand.

Learned counsel laid emphasis on the words "the price was already fixed" in the last clause of the agreement and said that they implied that the price was already fixed. In support of his contention that the agreement embodied in Ex. P/1 should be construed having regard to the circumstances in which the agreement was made and the subject-matter of it and to the presumption that when businessmen enter into a contract of mercantile nature they act in a businesslike way and do not do anything absurd. Learned counsel referred us to *Antonio Dimech v. Thomas Corlett* (1358) 12 Moo PC 199; 14 ER 887; *Tillmanns and Co. v. S. S. Knutsford, Ltd.* (1908) K B 385; *Stewart v. Merchants Marine Insurance Co. Ltd.* (1885) 16 Q B 619 and to *Halsbury's Laws of England* (Vol. VIII), Simond's edition, paragraph 144. Reference was also made to the observations at pages 35 and 36 in "Pollock on Contract" (Twelfth edition).

On this point, the argument put forward by Mr. Amin on behalf of the respondents was that the agreement must be construed on its own language and not with reference to the award made by the Prime Minister of the Holkar state on 8-2-1941, which was an adjudication between different parties; that the material clause in the agreement dealing with the price to be paid by the plaintiff for the purchase of two and half annas share was the last clause, and the plain meaning of that clause was that the plaintiff would pay for the purchase of two and half annas share whatever price Govindram demanded and would pay it at the time and in the form Govindram may intimate; and that, therefore, there was no agreement between the parties as to a definite and certain price to be paid by the plaintiff and the agreement was, therefore, void for uncertainty. Learned counsel said that the observations of the Privy Council in (1858) 12 Moo. P. C. 199 at p. 224, namely, that--

"It is important not to give to mercantile instruments, such as this, an unnecessarily strict construction, but such a one as, with reference to the contest, and the object of the contract, will best effectuate the obvious and expressed intent of the parties"

could be of no assistance to the plaintiff here when "the expressed intent of the parties" was not obvious from the agreement: that the decision in (1885) 16 QB 619 was distinguishable on the terms and the nature of the contract considered in that case: and that the observations of Farwell L. J. in (1908) 2 KB 385 at page 402 on which the appellant relied, namely, "In a mercantile document or a statute there is a presumption that businessmen do not intend to do anything absurd, which is some slight guide" were made with reference to the question *ejus-dem generis*. Learned counsel proceeded to point out that, here, the question was whether the document Ex. P/1 embodied any agreement at all of the parties as regards the price to be paid by Gulabchand and not whether the

agreement was silent as to some unspecified details of the price to be paid on which the parties were in complete agreement.

In our judgment, the learned judges of the Division Bench took a wrong view when they decided that the contract in question was vague and uncertain as to the price to be paid by the plaintiff for the purchase of two and half annas share. It is true that the deed Ex. P/1 nowhere expressly provides that the price shall be a particular specific amount or that it shall be determined in a particular manner.

Indeed, if there had been such a provision in the agreement, the controversy as to the price payable would not have arisen. But though there is no such express provision in the contract, there is sufficient indication in the document Ex. P/1 itself that there was an agreement between the parties as to the price, and the price at which the share was to be transferred to the plaintiff was a "certain" price already settled between the parties.

The third clause of the agreement Ex. P/1 was intended to cover this very question of price. It first refers to the devolution in accordance with the terms of the award of the four annas share of Brijlal and Bilasrai on Govindram and then proceeds to say that "in regard to it" it has been settled between the parties that Govindram "will give (sell) to or get transferred to the name of Gulabchand Gambhirmal a share of two and half annas out of the aforesaid share of four annas".

What, therefore, was to be transferred by Govindram under this clause was two and half annas share out of that share of four annas of Brijlal and Bilasrai, which he got in accordance with the award. Now the word "transferred" used in the third clause of the agreement is very significant. In the context of that clause it conveys the idea that Govindram was to make over or pass on the right in two and half annas share out of the four annas share which he got under and in accordance with the award to the plaintiff on the same terms on which he himself got it.

The general meaning of the word "transferred" has not been restricted or limited by anything accompanying the words "get transferred to the name of Gulabchand" so as to suggest that the transfer of two and half annas share by Govindram to the plaintiff was to be on terms different from those on which Govindram himself had acquired that share. The use of the words "in accordance with the award", in regard to it, "get transferred two and half annas out of the aforesaid share of four annas," all indicate that the parties intended and were agreed that the share to be transferred to the plaintiff shall be sold to him on the same terms on which Govindram would purchase the share of Brijlal and Bilasrai under the award.

If the parties had a different intention, then it is difficult to understand the use of the words and expressions referred to above in the clause. The fact that the parties had come to an agreement as to a certain price payable by the plaintiff for the two and half annas share is also supported by the fifth clause of the

agreement. That clause in the contract was regarded by the Division Bench as one dealing with the question of the fixation of the price.

That is not so. That clause is only concerned with the time and mode of payment of the price by Gulabchand in respect of the two and half annas share. The important words in that clause are *^akarh ds :i;s tks nsuk iMs+xs***. Their correct rendering in English would be "the amount payable in respect of two and half annas share" and not "the money that may have to be paid for the two and half annas share" as given in the English translation of the agreement in the printed paper-book.

It is also significant that this clause also uses the word *^b?kyk*** (intimate) and not the word *^eqdjZj*** (fix). The last clause, therefore, is to the effect that the amount payable by the plaintiff in respect of the two and half annas share shall be paid by him at the time and in the mode Govindram may intimate. The words *^akarh ds :i;s tks nsuk iMs+xs*** (the amount payable in respect of the two and half annas share) clearly visualise the obligation of the plaintiff to pay a certain amount already determined.

The word "payable" imports express promise to pay that amount to which one has already agreed. This construction of the words *^akarh ds :i;s tks nsuk iMs+xs*** does not make the last clause purposeless. On the other hand it is consistent with its object, which is to fix the time and mode of payment.

There was some discussion before the Division Bench and before us also as to why the mode of payment should have received a specific mention in the contract. Various theories were suggested and it was said that Govindram desired to receive payment in such a manner as to keep it secret and protected against any attachment of freezing order.

The question whether Govindram desired payment by cheque or in cash or in gold or in any other form, is however, not material to the question of an agreement between the parties as to the price to be paid for two and half annas share. Whatever might have been the idea of Govindram in receiving the payment in a certain form, the fact remains that the last clause is one dealing essentially with the payment by the plaintiff of an amount already agreed to by him on receiving intimation from Govindram! about the time and manner of payment.

The conclusion that the price was agreed between the parties based on the above construction, of the third and fifth clauses of the agreement is consistent with the circumstances in which the agreement Ex. P/1 was concluded between the parties and the subject-matter of it, to which it would be legitimate to have regard, if the true meaning of the clauses referred to above is regarded as doubtful.

The Privy Council observed in *Vatsavaya Venkata Subhadrayamma v. Sri Poosapati Venkatapati Raju Garu* AIR 1924 P. C. 162 that in the construction of

written or printed documents, it is legitimate in order to ascertain their true meaning if that be doubtful, to have regard to the circumstances surrounding their creation and the subject-matter to which it was designed and intended they should apply.

Similarly in *Royal Bank of Canada v. Joseph Salvatori* AIR 1927 P. C. 272 also it was said that in construing instruments in writing, it must be seen what is the intention expressed by the words used; but where the language is imperfect, and it is impossible to know what the intention is without enquiring further the circumstances with reference to which the words were used should be looked to.

Now, the contract in question was entered into a few days after the making of the award by the Prime Minister of the Holkar State on 8-2-1941. According to the plaintiff Gulabchand, sometime a few days after the award was delivered, Govindram approached him with an offer to make him a partner in the managing agency firm by assigning to him two and half annas share out of the share of Bilasrai and Brijlal which he was to get under the award.

The plaintiff took time to consider the offer, and after some discussion and negotiations a draft of the agreement was got ready on 28-2-1941. It was read out by the plaintiff to Govindram. Some changes and additions were suggested in the draft by Govindram and the last clause in the agreement was written out by the plaintiff himself on the suggestion of Govindram and the agreement was finally signed on 28-2-1941.

The agreement Ex. P/1 is a composite agreement dealing with several matters, namely, the transfer of two and half annas share to Gulabchand, the purchase by the plaintiff of first debentures of the Mills worth Rs. 3,12,500/-, the undertaking of Govindram to get a fresh agreement of partnership executed with the remaining partners of the managing agency firm so as to include Gulabchand or his nominee or both as partner or partners, and with the time and mode of the amount payable by Gulabchand in respect of the two and half annas share.

It also provided that the agreement would go through only on the condition of Govindram getting the share of Brijlal and Bilasrai under the award. It is in evidence that both Govindram and the plain-tiff Gulabchand were persons of considerable experience and intelligence in their own lines of business. The presumption would be that they acted in a businesslike and not in an absurd manner, and it is difficult to conceive that they left the question of the price to be paid for the two and half annas share, which was one of the essentials of the transfer, undetermined when the negotiations leading to the agreement went on for some days, when the draft agreement was carefully scrutinised on 28th February 1941 and last minute additions as regards the minor details of the plaintiff helping Govindram in the management of the Mills and about the mode of the payment were made before the agreement was signed and when the agreement contained a provision also for the dissolution of the contract.

The parties clearly intended to enter into a binding contract and it is highly

unlikely that they would have left undetermined the question of the price, which was the critical part of the contract. It will be seen that, as the plaintiff Gulabchand deposed, the assignment of two and half annas share to him was for the purpose of making him a partner in the firm of the managing agency.

While dealing with the question of an agreement between the parties as to the price, it is not necessary to consider the motive with which Govindram offered to make the plaintiff a partner. Leaving aside that question for the time being, it is clear that the provision in the agreement about the transfer of two and half annas share to the plaintiff, the purchase by him of first debentures worth Rs. 3,12,500/-and about the undertaking by Govindram to have a fresh deed of partnership executed with the other partners so as to secure the admission of the plaintiff or his nominee or both as partner or partners, are all related, and the sale of two and half annas share to the plaintiff the purchase of debentures by him were for the purpose of facilitating the plaintiffs admission into the partnership.

That being so, it is reasonable to think that the plaintiff's intended entry into the firm of managing agency was to be on the same terms on which Govindram and other partners had become partners of the firm, namely, on the plaintiffs furnishing the proportionate share of the capital invested by the partners in the business at the material time. If, as the learned Judges of the Division Bench have found, the contract was as an inducement to the plaintiff to make a report favouring Govindram, then it is highly unlikely that the plaintiff would have agreed to do a favour to Govindram and also pay him whatever he demanded for the sale of two and half annas share.

We are, therefore, of the opinion that the learned trial judge was right in holding that there was no uncertainty in the contract as regards the price to be paid by the plaintiff for the two and half annas share and that the price to be paid was his proportionate share of the capital invested by the partners in the business on the date the contract was performed. In other words, under the agreement the price to be paid by the plaintiff for two and half annas share was to be proportionate to the price which Govindram himself paid for the assignment in his favour of four annas share of Brijlal and Bilasrai under the award.

In reaching the conclusion that they did on the question of price, the learned judges of the Division Bench laid all emphasis on the last clause of the agreement to the exclusion of other clauses and gave little consideration to the state of things out of which the deed of contract Ex. P/1 sprung. But the contract must be construed as a whole and the intent of the parties must be ascertained from the document as a whole.

If the parties obviously intended to enter into a binding contract, and if the learned Judges of the Division Bench thought that it did not contain any "certain term" as regards price, then it was necessary to consider further whether an agreement between the parties as to the price could be ascertained by

implication. In regard to implied terms and contracts, Bowe, L. J. said in *The Moorcock* (1889) 14 P. D. 64 (at page 68) --

"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men;"

So also it has been stated in Halsbury's Laws of England, Volume-8, para-144, page 83 (Simond's edition) on the authority of *Hillas & Co., Ltd. v. Arcos, Ltd.* (1932) 147 L. T. 503 and other cases that a contract which is intended to be binding may, however, be enforceable even though certain terms have not been precisely agreed, if the nature of the terms can be ascertained by implication. To the same effect are the decisions cited by the learned counsel for the appellant.

Mr. Amin, learned counsel for the respondents, sought to distinguish these authorities by saying that all related to another subject-matter. It is no doubt true that a decision upon the construction of one contract cannot be regarded as an authority upon the construction of another contract in different words and entered into in different circumstances and that each case must be decided on the construction of the particular document.

But it seems to us that the general principle underlying each of the cases cited by the learned counsel for the appellant is the same and it is this; that documents embodying a business agreement should be construed fairly and broadly and there must be implied in such documents a term which will give such business efficacy to the transaction as must have been intended by the parties.

No doubt, one cannot add to a contract an implied term inconsistent with or which contradicts the express terms of the contract. But in a suitable case one can imply a term, if it is necessary to give it business efficacy. The authorities to which the learned counsel for the appellant referred are, therefore, not weakened in their application to the present case because their subject-matter is not the same as here.

On a construction of the document as a whole, and regard being had to the surrounding circumstances creating the contract and its subject-matter, we have come to the conclusion we have stated. It must be added that the conclusion does not involve a disturbance of any finding of fact arrived at by the Division Bench.

The finding of the Division Bench that the agreement dated 28th February 1941 is void for uncertainty as regards price is based solely on the construction of the last clause itself of the agreement which, as we have endeavoured to show, has been misconstrued by the learned Judges of the Division Bench. The construction put by the Division Bench did not depend on any surrounding circumstances or extraneous evidence or on any meaning of a term as understood in common language.

What we have done is to construe the deed as a whole and to consider the legal effect of certain terms and expressions used therein. It cannot, therefore, be argued that the construction of the agreement having been decided by the Division Bench on the document together with other circumstances or extraneous evidence and on what they meant by certain terms and words used in the last clause of the agreement, the question as to its construction is one of fact and not of law and no question arises of legal problems bearing on the construction of the document.

Learned counsel for the appellant next assailed the finding of the Division Bench as to the illegality of the contract between the parties. Before the Division Bench the defendants put their case on this point in two ways. First of all they said that the two and half annas share offered to the plaintiff was in the nature of a bribe and the consideration being illegal or immoral, the contract was void.

While dealing with this contention, the learned judges of the Division Bench first reflected as unreliable the evidence of Sitaram Sigatya and Bhagwandas Kariwala, two of the defendants' witnesses, who sought to give some direct evidence to the effect that the offer of two and half annas share to the plaintiff Gulabchand was as a bribe for a report favourable to Govindram.

They then observed that reliable oral evidence was scarcely to be expected in cases of bribery, and proceeded to discuss and consider the circumstantial evidence on which stress was laid before them by the learned counsel appearing for the defendants. On the basis of certain proved facts & circumstances, the learned judges formed the view that they unmistakably pointed to the conclusion that "the transaction in question was not an ordinary business transaction but had been entered into by the parties out of corrupt motives" and thus drew the inference that the transaction with regard to the sale of two and half annas share to Gulabchand was as a bribe to him for making report favourable to Govindram and the consideration for it was, therefore, of an immoral character.

The second way the matter was put by the defendants was that even if it be not proved definitely that the offer of the two and half annas share was in the nature of a bribe, it certainly had a tendency to create a conflict between the duty of the plaintiff as a member of the Enquiry Committee appointed by the Board of Directors to investigate into the charges against Govindram and the interest he was to acquire in the firm of the managing agents as a partner by the transfer of two and half annas share in the partnership to him and therefore the contract

was against public policy and as such void u/s 23 of the Contract Act.

The learned judges of the Division Bench held that the agreement was against public policy in view of its tendency to create a conflict between the plaintiff's duty and interest inasmuch as the plaintiff was a member of the Enquiry Committee and as such it was his duty to inquire into and report impartially on the charges brought against Govindram; but that in view of the interest in the partnership created in the agreement he became interested in supporting Govindram. They observed that if the charges against Govindram were held to be proved, Govindram would have been liable to be removed from the managing agency and consequently the plaintiff's own interest would have suffered.

It was argued by Mr. Engineer that the finding of the Division Bench that the intended sale of two and half annas share to the plaintiff was as a bribe to induce him to make a report favouring Govindram was not based on any evidence, but on surmises, speculation, suspicion and conjectures; that having rejected the direct testimony of Sitaram and Bhagwandas, the learned judges were not justified in looking into the circumstantial evidence for any proof of the bribe; that there was a presumption in favour of honest dealing; that circumstantial evidence should not merely point to the inference drawn but that this evidence must be of such a nature that it could possibly lead to no other inference; and that the defendants on whom lay the burden, of proving that the transaction was by way of bribe to the plaintiff could not be said to have discharged their burden when the facts and circumstances relied on by the Division Bench were such as to be equally consistent with Govindram taking the plaintiff honestly in the partnership for the management of the Mills by offering to sell him two and half annas share as with the suggestion that the offer was an inducement to the plaintiff to make a report favourable to Govindram. Learned counsel proceeded to urge that the defendants had never pleaded that the contract was against public policy as it tended to create a conflict between the plaintiff's duty and interest and that, therefore, no amount of evidence could be looked into upon that plea, which was never put forward but was urged at the time of the arguments; that the mere circumstance that the plaintiff was a member of the Enquiry Committee which had to investigate into certain allegations against Govindram, Brijlal and Bilasrai and that the agreement was concluded when the enquiry was pending and the Committee had yet to make its final report and thus tended to create a conflict between the plaintiff's duty and interest was not sufficient to regard the contract as contrary to public policy, when it had no tendency to injure or affect adversely the interest of the public as a whole or to introduce corruption in public affairs, Learned counsel cited several authorities to which a reference will be made in their appropriate context at a later stage.

In connection with the challenge to the finding that the agreement in regard to the sale of two and half annas share to the plaintiff was a bribe to him, the appellant is at once faced with the judgment of the Division Bench on a pure

question of fact, which cannot be interfered with in this appeal unless there are special circumstances which would justify such a course.

Learned counsel for the respondents, therefore, rightly took the objection that the finding should be accepted without further enquiry. The finding that the contract to sell two and half annas share to the plaintiff was as a bribe to him is no doubt an inference from certain primary facts and circumstances specifically found but that does not make it any the less a finding of fact.

As pointed out by the Supreme Court in *Sree Meenakshi Mills Ltd. v. Commissioner of Income tax, Madras*, (S). AIR 1957 S. C. 49, where the finding is one of fact, then the fact that it is in itself an inference from other basic facts will not alter its character as one of fact. But the appellant contends that the finding can be attacked as erroneous in law as it is not supported by any evidence, and the evidence on which the learned Judges of the Division Bench drew the inference of bribe could not in law be taken into account when the direct evidence on the question of bribe was rejected.

There can be no doubt that a decision that there is no evidence to support a finding or that it is based on evidence which could not in law be considered is a decision of law. That being so, it is necessary to examine how far the criticism made by the learned counsel for the appellant of the finding of the Division Bench is justified.

Before referring to the evidence relied on by the learned Judges of the Division Bench in support of the finding under consideration, it is necessary to say that we are unable to accept the argument that in this case on the rejection of the direct evidence of Sitaram and Bhagwandas the circumstantial evidence on the point should not have been considered.

There is no rule of evidence that if direct evidence on a fact is rejected, then the circumstantial evidence bearing upon that fact must be ignored; and indeed there could not be if one remembers that "the circumstantial evidence is merely a direct evidence indirectly applied, and direct evidence when closely analysed is found to possess the inferential quality". A fact has to be determined on the basis of such direct and circumstantial evidence as may be on record. No doubt when a party produces some false evidence for the purpose of supporting a concocted version, that may affect the mind of the Court as to the rest of the evidence produced by him. But this does not mean that when the direct evidence led by a party to prove a fact is found to be unreliable, the circumstantial evidence bearing upon that fact cannot be looked into.

The decision of the Privy Council in *Madhu Sudan v. Mst. Chandrabati* AIR 1917 P. C. 30 relied on by the learned counsel for the appellant is of no assistance to the appellant. In that case, a question arose whether certain property was sold to the plaintiff in execution of a decree in accordance with the provisions of the Code of Civil Procedure.

The defendants contended that no sale proclamation was issued, none was served on any Mouza, the return of the service filed in the Court was filed in collusion with the plaintiff, and that the sale was accordingly concluded at a price far below the real value, a result induced by the collusion of the process-server with the plaintiff. The defendants gave evidence of a negative character.

But the plaintiffs called a large body of evidence to establish the strict regularity of all the proceedings. They examined the Court-peon, whose duty it was to make proclamations and affix the official notice on the properties that were to be sold, and a number of Chowkidars resident in the village to show that the proclamations were made and duly affixed. The plaintiffs' evidence was accepted by the Subordinate judge, who held that the sale was with due regard to all the necessary formalities.

But in appeal the Calcutta High Court found on an examination of the sale proclamations which were said to have been affixed that they bore no sign whatever of exposure either to Sun or rain and that it was impossible to reconcile the condition in which the documents then were with the statement of the witnesses that they had been affixed to a house, fastened to various trees, and exhibited in the manner sworn to by the witnesses. The proclamations which were produced thus completely destroyed the plaintiffs' version of the sale having been conducted with all the necessary formalities. It was on these facts that the Privy Council observed: .

"If these documents never had been affixed then the whole story of the service of these proclamations completely broke down. It was not merely inaccurate evidence where the inaccuracy might be regarded as due to mistake or forgetfulness it becomes a series of connected falsehoods, carefully prepared and put together for the deliberate purpose of misleading the Court. It is true that the actual documents themselves only affected nine villages, but the complete destruction of the evidence in these particulars did not leave the other cases unaffected, but destroyed the whole fabric of the story put forward by "the appellants in support of their case. In these circumstances it is, in their Lordships' opinion, only right that the appellants on whose behalf this evidence had been prepared should be associated with the scheme of deceit which it was designed to carry out, and that such association should be regarded as an important element in determining whether their defence was honest and just."

These observations only lay down that if certain evidence produced by a party is false which completely destroys the core of his plea, then the circumstance that the party was associated in producing false evidence must necessarily affect the question whether his plea is honest and just.

It does not by down the proposition that whenever direct evidence produced to prove a fact is found to be unreliable, the circumstantial evidence bearing on it must also be rejected. Here, the Division Bench did not characterise the evidence of Sitaram and Bhagwandas as totally false and did not take the view that their

evidence completely destroyed the plea of bribe put forward by the defendants.

All that they said was that the evidence of these witnesses was unreliable. The facts and circumstances on which the learned judges of the Division Bench drew the inference of bribe were none other than those deposed to by the plaintiff and his witnesses. They cannot clearly be ignored because the direct evidence which the defendants led to prove the transaction being in the nature of a bribe was found to be unreliable.

Here, we must refer to the evidence which Seth Hiralal gave as a witness of the defendants. He stated that after the award was made Gulabchand one day came to him to make enquiries about his health as he had then undergone an operation. At this meeting, there was a talk about the Enquiry Committee proceedings. During the course of this¹ talk according to Seth Harilal when he told the plaintiff that he was opposing him in the Enquiry Committee and that he should have taken an impartial attitude Gulabchand replied that he could not go against Govindram as there was some settlement between him and Govindram.

In his cross-examination he put the date of this meeting about 10-2-1941. But in his re-examination, Hiralal said Gulabchand might have seen him five or six days and not two or three days after the award was made, but he was certain he saw him. The learned trial judge dismissed Hiralal's statement by remarking; "Seth Hiralal is too human not to forget how he was left alone in the championship of the cause of Messrs. Brijlal and Bilasrai. I do not believe them (i. e. Sigatia and Hiralal) because the plaintiff has not, certainly, impressed me as being a simpleton who would make damaging admission without a compelling necessity". The learned judges of the Division Bench omitted to consider the evidence of Hiralal. They made no comment on it and did not even refer to it. They no doubt observed; "The oral evidence is thus worthless" (page 169, line-40 of the printed Paper-Book).

But this observation was made while discussing the evidence of Sitaram and Bhagwandas, and cannot be read as indicating that the learned judges regarded Hiralal's evidence also as worthless. The learned judges should have strictly scrutinised Hiralal's evidence and attached such value as the evidence warranted. To us it appears that the learned trial judge rejected Hiralal's evidence on a totally inadequate ground.

He rejected the evidence not because of any inherent improbability in it or because of any material contradictions and discrepancies rendering the statement unacceptable. The evidence was rejected mainly for the reason that Hiralal being the champion of the cause of Messrs. Brijlal and Bilasrai could not be relied on.

The learned trial judge overlooked that even if Hiralal was a champion of Brijlal and Bilasrai, that could not have prompted him to make a statement favouring the legal representatives of Govindram with whom Brijlal and Bilasrai had serious disputes and differences, Hiralal deposed in positive terms that after the award

the plaintiff saw him and told him that there was some settlement between him and Govindram.

There is nothing improbable in the plaintiff making such a statement to Hiralal, who is his brother-in-law. Seth Hiralal was no doubt not certain as to the precise date on which the plaintiff saw him. He made varying statements on it. But if this vague recollection of the day of meeting Gulabchand could be attributed to the weakness of his memory on account of illness and the operation tie had then undergone, his evidence cannot be rejected as valueless.

In this connection it would be pertinent to refer to certain observations of the Privy Council in AIR 1949 207 (Privy Council) In that case, the trial judge had rejected the evidence of two witnesses. The Chief Court of Oudh accepted their testimony.

The question then was raised before the Privy Council whether the appellate Court was right in placing reliance on the evidence of these witnesses. The Privy Council observed that the application of the principle that a conclusion on a question of fact arrived at by the trial judge, who had the advantage of hearing and seeing the witness should not be lightly set aside depends upon the special circumstances of each case.

Their Lordships of the Privy Council quoted with approval the observations of the Chief Judge of Oudh. on the question of the appreciation of the evidence of the particular witnesses and said that those observations showed that the principle was not absent from the mind of the appellate tribunal. The observations of the Chief Judge with which the Privy Council agreed were:

"It does not appear that the learned judge rejected the evidence of the above two witnesses on the ground that the evidence they gave was so inherently improbable or that there were such contradictions and discrepancies as to render their statements unacceptable, but it seems mainly for the reason, that having come to the conclusion that because there was violent hatred between the Raja and the Rani it was impossible for the Raja to have written the letters and therefore any evidence to the contrary was unacceptable. As a rule great weight is to be attached to the opinion of a trial judge who has had the advantage of seeing the witnesses and observing their demeanour but where a judge rejects an evidence not because he is dissatisfied with the manner in which it has been given but because he has made certain assumption or drawn inferences from circumstances not directly connected with the evidence of that witness, it is incumbent upon the court of appeal to strictly scrutinize the evidence for itself and attach such value as the evidence warrants. Upon my finding that it has not been established that there was ill-feeling or hatred between the Raja and the Rani at the time when the disputed letters were said to have been written, I find nothing in the evidence of the two witnesses which will warrant its rejection. I am not prepared to hold that their testimony is based on inferences or is of inconclusive character."

The evidence of Hiralal, if acted upon, would go to show that after the award was made and the plaintiff had accepted the offer of Govindram, and because of it, the plaintiff was inclined to do favour to Govindram.

25 to 28. We do not, however, propose to rest on Hiralal's evidence our conclusion that the transaction in question was in the nature of a bribe to the plaintiff. Even without Hiralal's evidence that conclusion follows from the facts and circumstances which the learned judges of the Division Bench have considered.

(His Lordship considered the evidence and proceeded).

These considerations, on which the learned counsel for the appellant relied, do not, in our opinion displace the finding of the learned judges of the Division Bench that the offer of sale of two and half annas share by Govindram to the plaintiff was as a bribe to induce the plaintiff to make report favourable to Govindram and was accepted as such by the plaintiff.

It will be observed from the terms of the managing agency agreement of 14-11-1934 (Page 73, Part II of the printed Paper-Book) concluded between the Mills and the firm of the Managing Agents, the scheme of reconstruction of the Mills (p. 83 Part II of the printed Paper-Book), and the annual reports for the years 1939, 1940, 1941 of the working of the Mills (Exihibits P/18-19-20, at pages 89 to 103, Part II of the printed Paper-Book) that at the time the agreement was concluded between the parties a two and half annas share in the managing agency firm was a very profitable and safe investment for anyone having the necessary money to purchase the debentures of the requisite value and to furnish proportionate share of the capital.

The plaintiff accepted Govindram's offer the very next day after it was made. Mr. Bhamcha regarded it as a good investment and accepted the plaintiff's offer to make him a sub-partner the moment it was made. Seth Hukumchand, though he said that in the beginning he was not attracted by a share in the managing agency firm as the condition of the Mill was not good, became, within two months of this disinterestedness, so anxious to have a share that he pressed Govindram several times to give him a share and take him as a partner if "no writing had been executed and completed" between Govindram and the plaintiff.

Brijlal and Bilasrai litigated with Govindram and other partners right up to the Privy Council to retain their share. The terms of the partnership of the managing agency firm (page 23, Part 1 of the printed Paper-Book) disclose the importance the partners attached to the question of the assignment of the share of any partner to anyone and, their keenness to retain all interest in the partnership within their own charmed circle.

A share in the managing agency partnership of the Mills was, therefore, not one which could be parted away easily by a partner or could be had by anyone for the mere asking and readiness to furnish the necessary proportionate capital and

to purchase the debentures of the required amount, without any more.

That "any more" in the present case is, as the learned judges of the Division Bench have suggested nothing else than the anxiety of Govindram to get a favourable report from the Enquiry Committee and the willingness of the plaintiff to oblige him by making a favourable report. Taking into consideration the facts and circumstances narrated in the judgment of the Division Bench at pages 170 to 173 of the printed paper-book, and those summarised above, the conclusion at which the learned judges arrived that the transaction was in the nature of a bribe to the plaintiff appears to us to have all the commendation which commonsense and the realities of the case can give it.

It is one which legitimately can be drawn from the facts and circumstances proved in the case and in accordance with the probabilities of the case. It cannot, therefore, be maintained that the defendants have not discharged the burden of proof that lay on them of establishing the plea of bribe. They were not required to prove that fact beyond reasonable doubt as in a criminal case.

"The probative effects of evidence in civil and criminal cases are not, however, always the same. In civil cases, the preponderance of probability constitutes a sufficient ground for a decision but in criminal cases the prosecution has to prove the charge beyond reasonable doubt" (see Sarkar's Evidence Act, 10th edition, Volume-1 page 130). Of course, if the facts and circumstances are such that no reasonable man would draw a particular inference from them or if the degree of probability in the case is such as to include any other hypothesis besides the one proposed to be proved, then the party who relies on a particular theory cannot be said to have discharged the onus of proof of establishing that theory.

But if there is evidence strongly preponderating in favour of anyone of the theories set up, the Court is entitled to act upon it. In the instant case, the facts and circumstances proved strongly preponderate in favour of the transaction being a bribe to the plaintiff. Therefore, the conclusion reached by the learned judges of the Division Bench is not one with which we should, even if we could, interfere. There is ample evidence and material to support it and we do not think we ought to disturb it.

Having found that the making of a favourable report was a matter of bargain between the parties and a part of the quid pro quo for the agreement and that, therefore, the consideration being immoral, the contract was void, it is strictly unnecessary for us to consider whether the object of the contract was one, which u/s 23 of the Contract Act the Court could regard as opposed to public policy.

But since the point has been decided by the Division Bench and has been debated before us, we must record our view on it u/s 10 of the Contract Act, an agreement becomes an enforceable contract only if it is made for a lawful consideration and with a lawful object. If the object or consideration is unlawful for any of the reasons specified in Section 23, the agreement is void.

Section 23 of the Contract Act inter alia says that the consideration or object of an agreement is lawful, unless the court regards it as immoral or opposed to public policy. The word "object" in Section 23 of the Contract Act has not been used in the same sense as "consideration" which has been used to distinguish it from "consideration" and means "purpose" or "design" (see *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* ILR Cal 702, which was upheld in appeal in *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* ILR Cal 289 and *Sabava Yellappa Vs. Yamanappa Sabu*,

It seems to imply manifestation of intention in an overt act or the end aimed at. The object of a contract is the ultimate purpose which the contract subserves. In this sense, it has nothing to do with consideration. Thus where one hires a house for use as a gaming house, the object of the contract is to run a gaming house, or again, if a person, while in insolvent circumstances, assigns to another for consideration, some property with the object of defrauding his creditors, the consideration of the contract of assignment is lawful but its object is unlawful (see ILR Cal 289).

The motive which has prompted a party to enter into an agreement is not the object of the agreement, Nor is the subject matter of the agreement its object. It is the object of the agreement and not the object, that is motive, of one or other of the parties to it that has to be considered u/s 23 of the Contract Act (see AIR 1943 129 (Nagpur)). Now, it is plain that if the making of a favourable report was a part of the consideration for the contract between the parties, then its object was to reward Gulabchand by making him a partner in the managing agency firm.

But the learned judges of the Division Bench considered the question of the object of the contract being against public policy in the alternative on the supposition that there was no sufficient evidence on record to establish positively the fact that the offer of two and half annas share by Govindram to the plaintiff was in the nature of a bribe, and the admission of the plaintiff Gulabchand as a partner in the firm of the managing agency was the object of the agreement.

If this object was opposed to public policy, then if the object of the contract was to make Gulabchand a partner in the managing agency firm as a reward for him for the favour shown to Govindram, that object would a fortiori be against public policy. Now, if the object of the agreement was to make Gulabchand a partner in the firm, then that object is in itself normal.

But it is clear enough that the object of an agreement though lawful in itself would be unlawful if it cannot be achieved without violation of law or without doing something immoral or opposed to public policy. A contract to do a thing which cannot be performed without violation of law is void, whether the parties knew the law or not, (see *Waugh v. Morris* (1873) 8 Q B 202, 208; *Nash v. Stevenson Transport, Ltd.* (1936) 2 K B 128, 123; *Hindley and Co v. General Fibre Co.* (1940) 2 K B 517; and *Reagazzoni v. K. C. Sethia Ltd* (1956) 2 MI E R 487)

Likewise, the object of the contract may be lawful in itself, but its fulfilment may offend against the well-settled notions of public policy. The real question that, therefore, arises for determination is whether the carrying out of the object of taking Gulabchand as a partner in the managing agency firm necessarily involved something which was contrary to public policy.

Now, the law relating to "public policy" is so well-settled that it seems to us unnecessary to discuss the various Indian and English authorities cited by the learned counsel for the parties in which the meaning, scope and limitations of the doctrine of public policy as invalidating a contract have been explained. The matter has been neatly put in paragraphs 917 and 918 at pages 480 and 481) of Chitty "On Contracts" (21st edition).

Certain classes of contracts have been ruled by authorities as contrary to public policy. The recognised classes are: (i) agreements which injure the State in its relation with other States, (ii) agreement tending to injure the public service, (iii) agreements which tend to prevent the course of justice, (iv) agreements which tend to abuse legal process, (v) agreements which affect the freedom or security of marriage or interfere with duties incumbent on individuals, and (vi) agreements which are contrary to morals.

The courts have been opposed to rely on public policy as a ground for diminishing freedom of contract and have again and again said that where a contract does not fit into one or other of these classifications but lies outside it, the Court should use extreme reserve in holding a contract to be void as against public policy and should only do so when the contract is incontestable and on any view inimical to the public interest.

In *Fender v. St. John Mildmay* 1938 AC 1: 1937 3 All E R 402, Lord Atkin, while commenting on the statement of the Earl of Halsbury L. C. in *Janson v. Driefontein Consolidated Mines Ltd.* 1902 AC 484 that the principle should not be invoked anew unless the case could be brought within some principle of public policy already recognised by law, as too rigid, uttered a warning that "the doctrine should be invoked only in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds".

In that case, Lord Atkin also observed that the doctrine did not extend only to "harmful acts", it had to be applied to harmful tendencies and there the ground was "still less safe and more treacherous." As to this observation of Lord Atkin, a Division Bench of this court in their order of reference to a Full Bench in *Kashinath v. Bapurao* AIR 1940 Nag SOS : ILR 1940 Nag. 573, doubted whether this was the law in India where the question of public policy was governed by Section 23 of the Contract Act and said that even if it be so, Lord Atkin had pointed out the limitations even of this extension when he said that "here the ground is still less safe and more treacherous."

It is unnecessary to consider here whether the doctrine can be applied to harmful

tendencies. For the present contract does seem to us to fall under the traditional classification of agreements tending to create interest against duty. But it must be said that the question where the doctrine should or should not be applied to harmful tendencies does not depend on Section 23 of the Contract Act,

If the Courts come to regard the doctrine of public policy as extending not only to harmful acts but also to harmful tendencies, then if the object of any contract has harmful tendencies the contract would be void as contrary to public policy within the meaning of Section 23 of the Contract Act. Be that as it may, here, even if it is taken that the object of the contract was to take Gulabchand as a partner, the object would be one tending to create interest against duty and would, therefore, be opposed to public policy.

It is not disputed that agreements tending to create interest against duty fall under a recognised category of public policy. What is disputed is that the object of the agreement did not in any way tend to create a conflict between the plaintiff's interest and duty. We do not agree. It is true that the object itself of the agreement is not unlawful. But it is easy to see that the object could not be carried out without the plaintiff becoming interested in supporting Govindram in the enquiry which he was conducting along with two other members and without being influenced in that enquiry by his personal interest created by the contract, namely, the interest of becoming a partner in the firm of managing agency.

As the learned judges of the Division Bench have remarked, "If the charges against Govindram were held to be proved Govindram would have been liable to be removed from the managing agency and consequently the plaintiff's own interest would have suffered". As a member of the Enquiry Committee, a duty was cast on the plaintiff to enquire into and report impartially and honestly on the charges brought against Govindram.

But by the contract the object of which was to make him a partner in the firm of managing agents, the plaintiff became interested in protecting Govindram and in safeguarding through him his own personal interest created by the contract and was prevented from doing that which was his duty to do as a member of the Enquiry Committee.

It cannot, therefore, be denied that the object of the agreement was unlawful in that it involved in its fulfilment a tendency to create a conflict between the plaintiff's duty and interest. In our judgment, the learned judges of the Division Bench were right in concluding, that the agreement was against public policy in view of its tendency to create a conflict between the plaintiff's duty and interest.

The authorities noticed in the judgment of the Division Bench and relied on by the learned counsel for the parties all recognised the principle that an agreement tending to create an interest against duty is void as contrary to public policy. But in some of those cases, it was held on facts that the contract challenged in the particular case did not have any such tendency and was, therefore, not void.

The decisions in *Musammatt Bhagwan Dei Vs. Pandit Murari Lal and Others*, and the *Dharwar Bank Ltd. Vs. Mahomed Hayat*, related to the purchase of property by a public servant in contravention of the departmental rules. In those cases, the distinction between conduct or the motive of the party entering into the contract, and the consideration and object of the agreement was emphasized and it was held on facts that the contract for the sale of the property was not void on the ground of public policy.

The principle that an agreement tending to create an interest against duty is void as contrary to public policy was, however, not doubted. A contrary view was taken in *Abdul Rahman v. Ghulam Muhammad* AIR 1927 Lah 18 where a Patwari acquired some land in his circle in contravention of the departmental rules.

It was held that the contract to purchase by the Patwari created a possibility of a conflict between his duties and interest and that, therefore, it was void as opposed to public policy. In *Surya-narayana v. Subbayya* ILR Mad 471: AIR 1918 Mad 504 (1) (FB)) a contract of remuneration between a lawyer's clerk and a client whereby the clerk stipulated that he would see that the lawyer gave special attention to his case was on the same principle held to be contrary to public policy and void. In *Vinayakarv Ganpatrao v. Ransordas "Pranji-vandas"* 7 Bom H.C. O.C. 90 a servant without the knowledge of his master agreed with his master's brokers to receive a percentage on the brokerage earned by the brokers in respect of the transactions carried out through them by the master.

No express consideration was alleged or proved by the servant. The Court refused to imply as a consideration an agreement by the servant to induce his master to carry on business through the brokers as, in its opinion, such an agreement would be inconsistent with the relation of master and servant and, therefore, void. The rule that an agreement tending to create interest against duty is void is also illustrated by the decision in *Sitarampur Coal Co., Ltd., v. T. H. Colley* 13 C WN 59 where the manager of a company had purchased two secondhand boilers from an Inspector of Boilers employed by the Government of Bengal.

One of the boilers was found to be defective and unserviceable. The Company, therefore, filed a suit against the Inspector for damages. The Calcutta High Court held that the contract was void as it created a conflict between interest and the duties of the Boiler Inspector. In this case, some importance was attached to the fact that while entering into the contract with the Boiler Inspector the Company had the knowledge that the contract might cast upon the Boiler Inspector obligations inconsistent with his duties.

But, as has been rightly pointed out in Mulla's Contract Act, at page 196, it is not easy to see what the party's knowledge has to do with it, as the rule that an agreement tending to create interest against duty is void is for the protection of the public interest. The case of *Kerakoose v. Serle* 3 Moo Ind App 329 (PC) which was cited by the learned counsel for the respondents is relevant only in so far as

it stresses the principle that no officer of a Court of justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by any personal consideration; and that though the proceeding may not have been actually affected by such considerations, "yet when there is room for the operation of sinister motives, the plea of their operation can hardly be excluded from the minds of the parties."

The case that is sufficiently near to the present case is *Neville v. Dominion of Canada New Co. Ltd.* (1915) 3 K.B. 556. That was a case where the plaintiff, who was a director of a company, which was engaged in selling land in Canada, concluded a contract with the proprietors of a weekly newspaper for scaling down from ₹ 1490 to ₹.750 the amount of debt which the defendants owed to the plaintiff.

One of the terms of the contract was that the defendants should not comment upon the plaintiff's land company, its directors, business or land. The defendant committed a breach of this term. Thereupon, the plaintiff brought an action under the agreement to recover the balance of the whole ₹. 1490. It was held by the Court of appeal that the agreement was unenforceable because the term about refraining from comments was void as being against public policy inasmuch as it was not consistent with the proper conduct of the newspaper in the public interest. Warrington L.J. treated the matter thus--

"The newspaper has assumed a position of giving honest advice to persons concerned in such matters. Let us assume that the land company in which the plaintiff is concerned, or some company with which that company is connected, propounds some fraudulent scheme, and the editor of the paper knows it. By this stipulation he is bound to refrain from making any comment on that fraudulent scheme, and it seems to me that by so abstaining he may actually and actively mislead his public into supposing that there is nothing in the suggestion that the particular scheme is a fraudulent scheme. In other words, he has, I think, accepted a bribe the tendency of which is to prevent him from doing that which under certain circumstances, and having regard to his own conduct, it may be his duty to do."

The present case is stronger. The duty which was cast on the plaintiff as a member of the Enquiry Committee to give an honest report was one which was expressly imposed on him when the Board of the Directors of the Company appointed him as a member of the Committee and was not one which he assumed for himself.

The main argument on this point of the learned Counsel for the appellant was that the presumption being in favour of the legality of the contract, the burden of proving that the consideration and object of the agreement was unlawful within the meaning of Section 23 of the Contract Act lay on the defendants; that the contract Ex. P/1 was not *ex facie* illegal and the defendants had nowhere pleaded that the object of the agreement was opposed to public policy in that it

created a conflict between the plaintiff's duty and interest, or averred and proved in what manner the public interest suffered; and that in the absence of any such pleading, the question of the agreement being contrary to public policy should not have been considered.

To fortify his argument, learned Counsel relied on *Mogul Steamship Co. v. McGregor, Gow and Co.* 1892 AC 25 at D. 45, *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.* 1914 AC 461, *Edler v. Auerbach* (1950) 1 KB 359; and *Rawlings v. General Trading Co.* (1921) 1 KB 635. In 1892 AC 25 at p. 45, Lord Bramwell observed that a judge cannot without any evidence as to the effect and consequences of a thing say whether it is against public policy. In 1914 AC 461, Viscount Haldane L. C. expressed himself thus on the matter of pleadings in regard to public policy :

"It is no doubt true that where on the plaintiffs' case it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which on the face of it ought not to be enforced, then, as I have already said, the court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

In (1950) 1 KB 359, *Devlin, J.*, while accepting the submission of the counsel for the defendant in that case that the illegality which he had found depended on the knowledge or intention of the defendant, that it was not pleaded and that it ought to have been pleaded, it was to be relied on, said in regard to 1914 AC 461, that it authorised four propositions. He said :

"That case, I think, authorises four propositions; first that, where a contract is *ex facie* illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly that, where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the Court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

In 1921 1 KB 635, the question was whether a certain agreement was void as being in restraint of trade. The agreement was not *ex facie* illegal; as between the parties it appeared to be plainly reasonable. Atkin L. J. observed in that case that if the defendant wished to establish that the public interest suffered, he should have so pleaded as to give the plaintiff notice so as to have all the necessary facts before the court.

It is no doubt true that here the defendants did not plead that the agreement was opposed to public policy and void u/s 23 of the Contract Act inasmuch as it had a tendency to create a conflict between the plaintiff's duty and interest. But the present case is one to which the last proposition narrated by Devlin, J., applies.

As will be presently shown, this is a case which has been completely presented and the illegality has been brought to the notice of the Court. In such a case, having regard to the words of Section 23 of the Contract Act, namely, "the object of any agreement is lawful unless ... The court regards it... opposed to public policy," it is the duty of the court to give effect to the fact thus brought to its notice although the illegality is not raised in the pleadings. In *Scott v. Brown, Doering, McNab and Co.* 11892 2 QB 724, Lindley L. J. said :

"*Ex turpi causa non oritur actio*. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

This case was followed in *Gedge v. Royal Exchange Assurance Corporation* (1900) 20 B 214, where Kennedy, J. refused to enforce an agreement which was illegal although illegality of it had not been pleaded. To the same effect is the decision in *Alice Mary Hill V. Willaim Clarke* ILR All 226. Now, the proved facts before us are that the plaintiff Gullabchand was a member of the Committee appointed by the Board of Directors of the Mills to enquire into certain very serious allegations against Govindram; Govindram was vitally interested in securing a report favourable to him so as to maintain his position as managing agents of the Mills; "and the contract in question which created a personal interest in favour of the plaintiff was concluded before the Committee had made its final report.

That as a member of the Enquiry Committee there was a duty on the plaintiff to investigate into the allegations against Govindram and report on them impartially and honestly is a proposition which does not require any pleading or evidence to prove it. Equally no pleading or evidence is required to show that by the interest created under the contract the plaintiff was not in a position to do that which it

was his duty to do as a member of the Committee.

It is necessary to prove that the plaintiff had been actually influenced by the personal interest created in the contract in giving his report on the allegations enquired into by the Committee. For de-claring the contract as opposed to public policy and void, it is sufficient to show that the personal inte-rest created by the contract had a tendency to pre-vent the plaintiff from discharging his duties as a member of the Committee faithfully and honestly.

The plaintiff may not have been actually influenced by personal considerations while reporting on tlie allegations against Govindram, yet when therei was room for the operation of any personal interest, the tendency to prevent the plaintiff from discharging his duties a? a member of the Committee could not be said to be absent.

But the learned counsel for the appellant, relying on 1921 1 KB 635 and on the observations of Lord Haldane in Rodriguez''v. Speyer Brothers 1919 AC 59 at p. 77 that the rule of public policy "does, not apply to a particular instance if that instance discloses no mischief from the point of view of public policy", argued that it was essential for the defendants to make a pleading and to prove that by the contract in question some public interest suffered.

We are unable to accede to this contention. The fallacy in the argument lies in assuming that the interest of a large number of share-holders of a public company are not the interests of the public as a whole and that there is nothing wrong in a person, placed in the position in which the plaintiff was, deciding a matter in which he has direct or indirect interest.

No doubt, the doctrine of public policy is founded on current needs of the community and "is based upon the necessity in certain cases of prefer-ring the good of the general public to an absolute unfettered freedom of contract on the part of individuals" (see Wilson v. Carnley 1908 1 KB 729 or as was said by Lord Truro in Egerton v. Brownlow.(1853) 4 HLC 1 at p. 196 :

"Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good."

But whenever the issue of public policy and of any contract being injurious or having a tendency to injure public interest is laised, it is not essential to prove the element of injury with reference to the general public. The issue is always raised with re-ference to the interests of a section of the commu-nity and it is sufficient to show that the interests of the community are the interest of the public. It has been stated in Pollock "On Contract" (12th edition) at page 290 :

"Frequently in considering the interests of the public as a whole, the interests of a section of it have been taken into account in actual decisions in which the question of public policy has been raised; but the seeming paradox is explained by the fact that, although these decisions may relate primarily to sectional

interests (e.g. those of traders), they nevertheless reckon with the interests of the community at large."

No satisfactory definition can be given of what is public interest and what is not. The public is composed of individuals. On principle, it seems to us that if a section" of the community is composed of individuals, not numerically negligible and the members of the community are distinguishable from other members of the general public by some characteristics which are not personal or individual, then the section of the community would be public and its interest would be public interest.

On the other hand, if the quality which differentiates them from other members of the public depends on some personal or individual characteristic, the interest of the section would not be the interest of the public. The question whether a section of the community is or is not public and whether its interests are public interests thus depends on the attribute by which the section of the community is determined. Here, the tendency to injury is to the interests of the share-holders.

But the share-holders were share-holders of a public company, the shares of which were quoted and could be transferred to the public and in which the investing public was interested. The body of share-holders could not, therefore, be regarded as a collection of persons without public significance. It was a section of the public and any tendency to injure their interests would be a tendency injurious to the public.

As to the tendency of injury to the interests of the share-holders by the contract in question, we should have thought it obvious enough without any evidence to prove it. It flows from the fundamental principle of natural justice that no man should be a Judge in his own cause. It is not confined to a cause in which he is a party, but applies to a case in which he has a direct or indirect interest.

If, therefore, as we think, by the personal interest created by the contract in question the plaintiff subjected his independence, freedom and judgment in the matter he had to investigate according to his own conscience and convictions, to the personal interest created, it is futile to say that the contract had no tendency to injure the interests of the shareholders who had appointed the Committee of Enquiry.

That if a contract of this nature had been concluded between a Judge and a litigant in relation to a matter sub judice before him, it would have been void as opposed to public policy is not open to doubt. The contract would have had a tendency to divert the course of justice and create a conflict between duty and interest.

We do not see why this principle should not be applied with equal force to the functioning of a mere fact-finding body of trusted men appointed by the competent authority to investigate into certain matters of public importance, even if it be not a judicial or quasi-judicial body.

In these cases, indeed, adhesion to the principle is of value all the greater because its violation might be conducted in secret. It needs little imagination to visualise the danger in which company administration would stand, if by contracts of this nature, the interests of the share-holders, that is to say the public well-being, were liable to be betrayed for the advantage of a person or persons entrusted with certain duties by the share-holders.

In our opinion, the learned Judges of the Division Bench were right in holding that the principle of public policy applied in this case as the interests of a large number of share-holders in the company were involved and the result of the enquiry was of interest to the general public also.

Lastly, the two further points raised in this appeal were, first, whether Govindram could transfer the two and half annas share to the plaintiff at all without first offering it to the other partners as required by Clause; (14) of the partnership agreement of 1935 and whether for that reason the agreement was unenforceable; and secondly whether the plaintiff was entitled to a share in the profits of the managing agency firm from the date of the agreement Ex. P/1. In the view we have taken of the matter, these points do not in any way affect our conclusion as to the result of the appeal.

It is, therefore, not necessary to consider them in detail. We agree with the learned Judges of the Division Bench that Clause 14 of the partnership agreement does not in any way affect the validity of the agreement. On the question of the date from which the plaintiff would have been entitled to a share in the profits of the managing agency firm, the learned Judges of the Division Bench, did not express any opinion.

It was not necessary for them to do so. It is sufficient for us to say that the agreement did not itself specify the date for the performance of the contract and as the learned trial Judge rightly found, the parties acquiesced in the postponement of the performance of the agreement till the termination of the litigation started by Brijlal and Bilasrai. Therefore on no principle the plaintiff could claim that he was entitled to a share in the profits of the managing agency firm from the date of the agreement.

If the plaintiff had succeeded on other point in the case, he would have been entitled to claim a share in the profits of the firm from 5-11-1947, the date on which Brijlal and Bilasrai assigned their share to Govindram.

For the foregoing reasons, we are of the opinion that the learned Judges of the Division Bench were right in dismissing the plaintiff's suit and that, this appeal must be, and is, dismissed with costs.

T.C. Shrivastava, J.

I agree.

A.H. Khan, J.

I agree.