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15th, 26th, Nov. 2018	Monday to Saturday	8:30am to 12:30 pm 3:00pm to 6:30 pm
10th, 17th, 24th, Dec. 2018	Monday to Saturday	8:30am to 12:30 pm 3:00pm to 6:30 pm
7th, 21st, 28th, Jan. 2019	Monday to Saturday	8:30am to 12:30 pm 3:00pm to 6:30 pm

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UNIT 1:

THE INDIAN CONTRACT ACT, 1872

1. Nature and Kinds of Contracts

Introduction:

- The law of contract in India is contained in the Indian Contract Act, I872.
- **It extends to the whole of India except the State of Jammu and Kashmir and came into force on the first day of September 1872.**
- The Act is **not exhaustive**. It does not deal with all the branches of the law of contract. There are separate Acts which deal with contracts relating to negotiable instruments, transfer of property, sale of goods, partnership, insurance, etc..

Scheme of the Act:

The scheme of the Act may be divided into two main groups:

1. General principles of the law of contract (Secs. 1-75).
2. Specific kinds of contracts, viz:

(a) Contracts of Indemnity and Guarantee (Secs. 124-147).
(b) Contracts of Bailment and Pledge (Secs. 148-181).
(c) Contracts of Agency (Secs. 182-238).

Before 1930 the Act also contained provisions relating to contracts of sale of goods and partnership. Sections 76- 1 23(Chapter VII) relating to sale of goods were repealed in 1930 and a separate Act called the Sale of Goods Act was enacted. Similarly, Sections 239-266(Chapter XI) relating to partnership were repealed in 1932 when the Indian Partnership Act was passed.

Definition of Contract

- According to Section 2(h) of the Indian Contract Act: **"An agreement enforceable by law is a contract**."
- A contract, therefore, is an agreement the object of which is to create a legal obligation i.e. a duty enforceable by law.
- From the above definition, we find that a contract essentially consists of two elements:
  (1) An agreement, and
  (2) Legal obligation i.e. a duty enforceable by law.
  We shall now examine these elements in detail.

1. **Agreement.** As per **Section 2(e):** "**Every promise and every set of promises, forming the consideration for each other, is an agreement."** Thus it is clear from this definition that a '**promise' is an agreement**.
   What is a 'promise'? The answer to this question is contained in **Section 2(b)** which defines the term:
   "**When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise."**
   An agreement, therefore, comes into existence only when one party makes a proposal or offer to the other party and that other party signifies his assent (i.e., gives his acceptance) thereto. In short. an agreement is the sum total of 'offer' and 'acceptance.

On analysing the above definition the following characteristics of an agreement become evident:

(1) Plurality of persons. There must be **two or more persons** to make an agreement because one person cannot enter into an agreement with himself.

(2) Consensus-ad-idem. Both the parties to an agreement must agree about the subject-matter of the agreement in the same sense and at the same time.

2. **Legal obligation**. As stated above, an agreement to become a contract must give rise to a legal obligation i.e., a duty enforceable by law. If an agreement is incapable of creating a duty enforceable by law,it is not a contract. Thus an agreement is a wider term than a contract.
   "**All contracts are agreements but all agreements are not contracts."** Agreements of moral, religious or social nature e.g. a promise to lunch together at a friend's house or to take a walk together are not contracts because they are not likely to create a duty enforceable by law for the simple reason that the parties never intended that they should be attended by legal consequences.

In business agreements the presumption is usually that the parties intend to create legal relations. Thus an agreement to buy certain specific goods at an agreed price e.g. 100 bags of wheat at Rs.430 per bag is a contract because it gives rise to a duty enforceable by law and in case of default on the part of either party an action for breach of contract could be enforced through a court provided other essential elements of a valid contract as laid down in Section 10 are present, namely, if the contract was made by free consent of the parties competent to contract, for lawful consideration and with a lawful object.

Thus it may be concluded that the Act restricts the use of the word 'contract' to only those agreements which give rise to legal obligations between the parties.

It will be appropriate to point out here that the law of contract deals only with such legal obligations which spring from agreements. Obligations which are not contractual in nature are outside the purview of the law of contract. For example, obligation to maintain wife and children (status obligation), obligation to observe the laws of the land, and obligation to comply with the orders of a court of law do not fall within the scope of the Contract Act.Salmond has rightly observed: "**The law of contracts is not the whole law of agreements, nor is it the whole law of obligations. It is the law of those agreements which create obligations, and those obligations, which have their source in agreements".**

Essential Elements of a Valid Contract

- A contract has been defined in **Section 2(h)** as **"an agreement enforceable by law."**
- To be enforceable by law, an agreement must possess the essential elements of a valid contract as contained in Sections 10, 29 and 56.
- According to **Section 10**,**all agreements are contracts if they are made by the free consent of the parties, competent to contract, for a lawful consideration with a lawful object, are not expressly declared by the Act to be void, and, where necessary, satisfy the requirements of any law as to writing or attestation or registration.**

The essential elements of a valid contract may be summed up as follows:

1. **Offer and acceptance**. There must be a **'lawful offer'** and a **'lawful acceptance'** of the offer, thus resulting in an agreement. The adjective 'lawful' implies that the offer and acceptance must satisfy the requirements of the Contract Act in relation thereto.
2. **Intention to create legal relations**. There must be an intention among the parties that the agreement should be attached by legal consequences and create legal obligations. Agreements of a social or domestic nature do not contemplate legal relations and as such they do not give rise to a contract. An agreement to dine at a friend's house is not an agreement intended to create legal relations and therefore is not a contract. Agreements between husband and wife also lack the intention to create legal relationship and thus do not result in contracts.

   ILLUSTRATIONS

   (a) M promises his wife N to get her a saree if she will sing a song. N sang the song but M did not bring the saree for her. N cannot bring an action in a Court to enforce the agreement as it lacked the intention to create legal relations.

(b) The defendant was a civil servant stationed in Ceylon. He and his wife were enjoying leave in England. When the defendant was due to return to Ceylon, his wife could not accompany him because of her health. The defendantagreed to send her £ 30 a month as maintenance expenses during the time they were thus forced to live apart. She sued for breach of this agreement. Her action was dismissed on the ground that no legal relations had beencontemplated and therefore there was no contract. **(Balfour vs Balfour)**

- In commercial agreements an intention to create legal relations is presumed. Thus, an agreement to buy and sell goods intends to create legal relationship, hence is a contract, provided other requisites of a valid contract are present. But if the parties have expressly declared their resolve that the agreement is not to create legal obligation, even a business agreement does not amount to a contract.

3. **Lawful consideration**: The third essential element of a valid contract is the presence of 'consideration'. Consideration has been defined as the price paid by one party for the promise of the other. An agreement is legally enforceable only when each of the parties to it gives something and gets something. The something given or obtained is the price for the promise and is called 'consideration'. Subject to certain exceptions, gratuitous promises are not enforceable at law.
The 'consideration' may be an act (doing something) or forbearance (not doing something) or a promise to do or not to do something. It may be past, present or future. But only those considerations are valid which are 'lawful'. The consideration is 'lawful', unless—it is forbidden by law; or is of such a nature that, if permitted it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or is immoral; or is opposed to public policy (Sec. 23).

4. **Capacity of parties**: The parties to an agreement must be competent to contract otherwise it cannot be enforced by a court of law. In order to be competent to contract the parties must be of the age of majority and of sound mind and must not be disqualified from contracting by any law to which they are subject (Sec. 11). If any of the parties to the agreement suffers from minority, lunacy, idiocy, drunkenness,etc, the agreement is not enforceable at law, except in some special cases e.g., in the case of necessaries supplied to a minor or lunatic, the supplier of goods is entitled to be reimbursed from their estate (Sec. 68).

5. **Free consent.** Free consent of all the parties to an agreement is another essential element of a valid contract. 'Consent" means that the parties must have agreed upon the same thing in the same sense (Sec. 13). There is absence of 'free consent' if the agreement is induced by (i) coercion, (ii) undue influence, (iii) fraud,(iv) misrepresentation or (v) mistake (Sec. 14).
If the agreement is vitiated by any of the first four factors the contract would be voidable and cannot be enforced by the party guilty of coercion,undue influence etc. The other party (i.e., the aggrieved party) can either reject the contract or accept it, subject to the rules laid down in the Act. If the agreement is induced by mutual mistake which is material to the agreement, it would be void (Sec. 20).

6. **Lawful object**. For the formation of a valid contract it is also necessary that the parties to an agreement must agree for a lawful object. The object for which the agreement has been entered into must not be fraudulent or illegal or immoral or opposed to public policy or must not imply injury to the person or property of another (Sec. 23). If the object is unlawful for one or the other of the reasons mentioned above the agreement is void. Thus, when a landlord knowingly lets a house to a prostitute to carry on prostitution, he cannot recover the rent through a court of law.

7. **Not expressly declared void**. The agreement must not have been expressly declared to be void under the Act. Sections 24-30 specify certain types of agreements which have been expressly declared to be void. For

example, an agreement in restraint of marriage, an agreement in restraint of trade, and an agreement by way of wager have been expressly declared void under Sections 26, 27 and 30 respectively.

8. **Writing and registration.** According to the Indian Contract Act, a contract may be oral or in writing. But in certain special cases it lays down that the agreement, to be valid must be in writing or/and registered. For example, it requires that an agreement to pay a time barred debt must be in writing and an agreement to make a gift for natural love and affection must be in writing and registered (Sec. 25). Similarly, certain other Acts also require writing or/and registration to make the agreement enforceable by law which must be observed. Thus, (i) an arbitration agreement must be in writing as per the Arbitration and Conciliation Act. 1996; (ii) an agreement for a sale of immovable property must be in writing and registered under the Transfer of Property Act. 1882 before they can be legally enforced.

9. **Certainty:** Section 29 of the Contract Act provides that "Agreements, the meaning of which is not certain or capable of being made certain are void." In order to give rise to a valid contract the terms of the agreement must not be vague or uncertain. It must be possible to ascertain the meaning of the agreement, for otherwise, it cannot be enforced.
ILLUSTRATION
A, agrees to sell B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

10. **Possibility of performance**: Yet another essential feature of a valid contract is that it must be capable of performance. Section 56 lays down that "An agreement to do an act impossible in itself is void". If the act is impossible in itself, physically or legally, the agreement cannot be enforced at law.
ILLUSTRATION
A, agrees with B to discover treasure by magic. The agreement is not enforceable.

	As given by Section 10 of Indian Contract Act, 1872		Not given by Section 10 but are also considered essential
1	Agreement	1	Two parties
2	Free consent	2	Intention to create legal relationship
3	Competency of the parties	3	Fulfilment of legal formalities(Writing & registration)
4	Lawfulconsideration	4	Certainty of meaning
5	Legal object	5	Possibility of performance
6	Not expressly declared to be void		

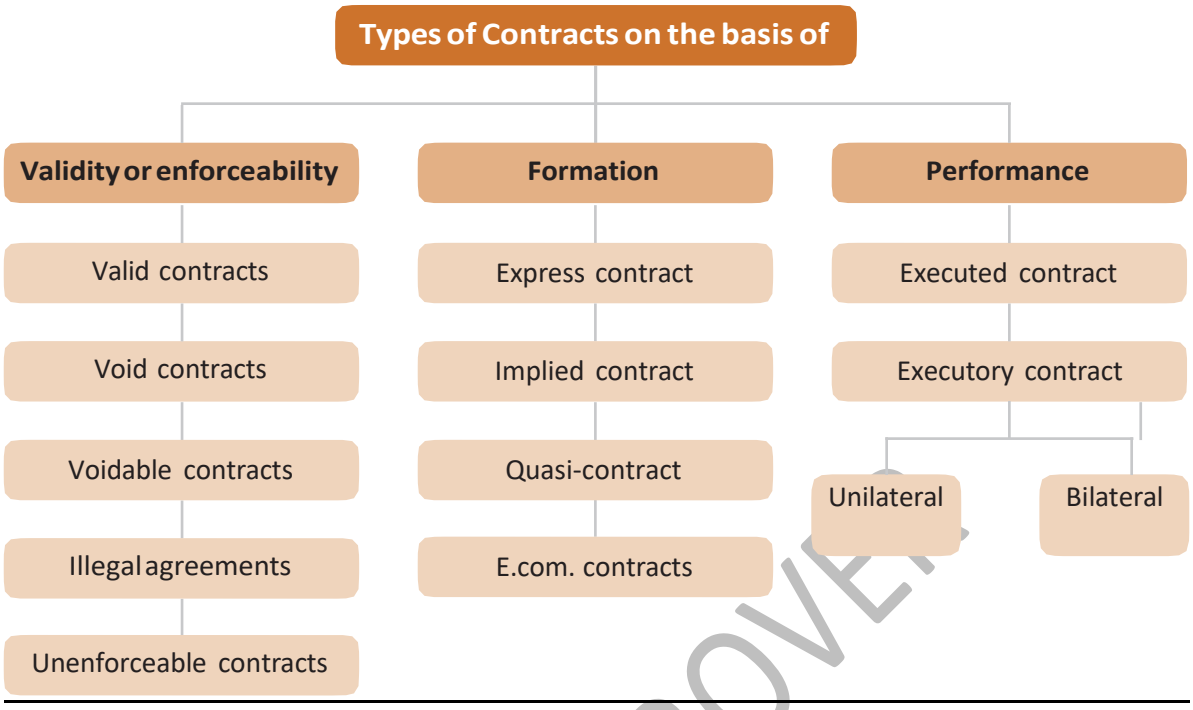
MAY 2005

Father promised to pay his son a sum of Rs one lakh if the son passed C.A. examination in the first attempt. The son passed the examination in the first attempt, but father failed to pay the amount as promised. Son files a suit for recovery of the amount. State along with reasons whether son can recover the amount under the Indian Contract Act, 1872.

Ans.

Problem asked in the question is based on the provisions of the Indian Contract Act, 1872 as contained in section 10. According to the provisions there should be an intention to create legal relationship between the parties. Agreements of a social nature or domestic nature do not contemplate legal relationship and as such are not contracts, which can be enforced. This principle has been laid down in the case of *Balfour vs. Balfour*
Accordingly, applying the above provisions and the case decision, in this case son cannot recover the amount of Rs. 1 lakh from father for the reasons explained above.

KINDS OF CONTRACTS



Kinds of Contracts from the Point of View of Validity

From the point of view of enforceability /validity a contract may be valid or voidable or void or unenforceable or illegal.

1. Valid contract.

A valid contract is an agreement enforceable by law. An agreement becomes enforceable by law when all the essential elements of a valid contract as enumerated above are present.

2. Voidable contract:

According to **Section 2(i), "an agreement which is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others, is a voidable contract."** Thus, a voidable contract is one which is enforceable by law at the option of one of the parties. Until it is avoided or rescinded by the party entitled to do so by exercising his option in that behalf,it is a valid contract.

Usually a contract becomes voidable when the consent of one of the parties to the contract is obtained by coercion, undue influence, misrepresentation or fraud. Such a contract is voidable at the option of the aggrieved party i.e., the party whose consent was so caused (Secs 19 and 19A). But the aggrieved party must exercise his option of rejecting the contract (i) within a reasonable time, and (ii) before the rights of third parties intervene,otherwise the contract cannot be repudiated.

ILLUSTRATIONS

(a) A, threatens to shoot B if he does not sell his new Bajaj bike to A for Rs.2,000. B agrees. The contract has been brought about by coercion and is voidable at the option of B.

(b) A, intending to deceive B, falsely represents that five hundred quintals of indigo are made annually at A's factory and thereby induces B to buy the factory. The contract has been caused by fraud and is voidable at the option of B.

3. Void contract.

Literally the word **'void' means 'not binding in law**". Accordingly the term 'void contract' implies a useless contract which has no legal effect at all. Such a contract is a nullity as for there has been no contract at all. **Section 2(j) defines: "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable."**

It follows from the definition that a void contract is not void from its inception and that it is valid and binding on the parties when originally entered but subsequent to its formation it becomes invalid and destitute of legal effect because of certain reasons. For example, a valid contract is transformed into a void contract in the following situations:

(a) Supervening impossibility (Sec. 56). A contract becomes void by impossibility of performance after the formation of the contract.

For example. A and B contract to marry each other. Before the time fixed for the marriage. A goes mad. The contract to marry becomes void.

(b) Supervening illegality (Sec. 56). A contract also becomes void by subsequent illegality.

For example. A agrees to sell B 100 bags of wheat at Rs 1,650 per bag. Before delivery, the Government bans private trading in wheat. The contract becomes void.

4. Void agreement.

"An agreement not enforceable by law is said to be void" [Sec. 2 (g)]. Thus, a void agreement does not give rise to any legal consequences and is void ab-initio. In the eye of law such an agreement is no agreement at all from its very inception. There is absence of one or more essential elements of a valid contract, except that of 'free consent',in the case of a void agreement. Thus an agreement with a minor is void- ab-initio as against him because a minor lacks the capacity to contract. Similarly, an agreement without consideration is void ab-initio of course with certain exceptions as laid down in Section 25. Certain agreements have been expressly declared void in the Contract Act e.g. agreements which are in restraint of trade or of marriage or of legal proceedings or which are by way of wager.

A 'void agreement'should be distinguished from a 'void contract'. A 'void agreement" never amounts to a contract as it is void ab-initio. A 'void contract' is valid when it is entered into but subsequent to its formation something happens which makes it unenforceable by law.

5. Unenforceable contract:

An unenforceable contract is one which is valid in itself but is not capable of being enforced in a court of law because of some technical defect such as absence of writing, registration requisite stamp, etc or time barred by the law of limitation.

For example, an oral arbitration agreement is unenforceable because the law requires an arbitration agreement to be in writing. Similarly, a bill of exchange or promissory note though valid in itself, becomes unenforceable after three years from the date the bill or note falls due, being time barred under the Limitation Act.

6. Illegal or unlawful contract:

Illegal contract are those that are forbidden by law. All illegal contracts are hence void also. Because of the illegality of their nature they cannot be enforced by any court of law. In fact even associated contracts cannot be enforced. Contracts which are opposed to public policy or immoral are illegal. Similarly contracts to commit crime like supari contracts are illegal contracts.

The above discussion shows that illegal contracts are at par with void contracts. The Act specifies several factors which would render an agreement void. One such factor is unlawful nature of contract or the consideration meant for it. Though illegal agreements and void agreements appear similar they differ in the following manner:

(a) ***Scope:*** All illegal agreements are void. However void agreements might not be illegal at the time of entering but would have become void because of some other factors. For example, where the terms of the agreement are uncertain the agreement would not be illegal but might be treated as void. An illegal contract would encompass a void contract where as a void contract may not include in its scope illegal contracts.

(b) ***Nature and character****:* Illegal agreements are void since the very beginning they are invariably described as void - ab -initio. As already emphasized under the scope, a contract by nature, which is valid, can subsequently change its character and can become void.

(c) ***Effect on collateral transactions****:* In the case of illegal contract, even the collateral transactions namely transactions which are to be complied with before or after or concurrently along with main contract also become not enforceable. In contrast in the case of void contracts the collateral transactions can be enforced despite the fact that the main contract may have become voidable, to the extent the collateral transactions are capable of being performed independently.

(d) ***Penalty or punishment****:* All illegal agreements are punishable under different laws say like Indian Penal Code etc. Whereas parties to void agreements do not face such penalties or punishments.

ILLUSTRATIONS:

(a) A engages B to murder C and borrows Rs.5,000 from D to pay B. B is aware of the purpose of the loan. Here the agreement between A and B is illegal and the agreement between A and D is collateral to an illegal agreement. As such the loan transaction is illegal and void and D cannot recover the money. But the position will change if D is not aware of the purpose of the loan. In that case the loan transaction is not collateral to the illegal agreement and is a valid contract.

(b) In the above case if A borrows from B to pay his wagering debts (a wagering agreement is void under Section 30), the contract between A and B would not have been affected, even though B is aware of the purpose of the loan because an agreement collateral to a void agreement is perfectly valid.

Basis of difference	Void agreement	Illegal agreement
Scope	A void agreement is not necessarily illegal.	An illegal agreement is always void.
Nature	Not forbidden under law.	Are forbidden under law.
Punishment	Parties are not liable for any punishment under the law.	Parties to illegal agreements are liable for punishment.
Collateral Agreement	It's not necessary that agreements collateral to void agreements may also be void. It may be valid also.	Agreements collateral to illegal agreements are always void.

Kinds of Contracts from the Point of View of Mode of Creation/Formation

Express Contracts: A contract would be an express contract if the terms are expressed **by words or in writing.** Section 9 of the Act provides that if a proposal or acceptance of any promise is made in words the promise is said to be express. For example, A tells B on telephone that he offers to sell his car for Rs.80000 and B in reply informs A that he accepts the offer, there is an express contract.

Implied Contracts: Implied contracts in contrast come into existence by implication. Most often the implication is by law and or by action. Section 9 of the Act contemplates such implied contracts when it lays down that in so far as such proposal or acceptance is made **otherwise than in words**, the promise is said to be implied. For *instance* 'A' delivers goods by mistake at the warehouse of 'B' instead of that of 'C'. Here 'B' not being entitled to receive the goods is obliged to return the goods to 'A' although there was no such contract to that effect.

Tacit Contracts: Tacit contracts are those that are inferred **through the conduct of parties**. A classic *example* of tacit contract would be when cash is withdrawn by a customer of a bank from the automatic teller machine [ATM]. Another *example* of of tacit contract is where a contract is assumed to have been entered when a sale is given effect to at the fall of hammer in an auction sale.

E-Contracts: When a contract is entered into by two or more parties using electronics means, such as e-mails is known as e-commerce contracts. In electronic commerce, different parties/persons create networks which are linked to other networks through EDI - Electronic Data Inter change. This helps in doing business transactions using electronic mode. These are known as EDI contracts or Cyber contracts or mouse click contracts.

Kinds of Contracts from the Point of View of performance

Executed Contract: The consideration in a given contract could be an act or forbearance. When the act is done or executed or the forbearance is brought on record, then the contract is an executed contract. A contract is said to be executed when both the parties to a contract have, completely performed their share of obligation and nothing remains to be done by either party under the contract.

For example, when a bookseller sells a book on cash payment it is an executed contract because both the parties have done what they were to do under the contract.

Executory Contract: In an executory contract the consideration is reciprocal promise or obligation. Such consideration is to be performed in future only and therefore these contracts are described as executory contracts.

Unilateral or Bilateral are kinds of Executory Contracts and are not separate kinds.

Unilateral Contract: Unilateral contract is a one sided contract in which only one party has to perform his duty or obligation.

Bilateral Contract: A Bilateral contract is one where the obligation or promise is outstanding on the part of both the parties.

For example, where T agrees to coach R, a pre-medical student, from first day of the next month and R in consideration promises to pay T Rs.1000 per month, the contract is executory because it is yet to be carried out. Similarly, where M promises to sell his car to N for Rs. 1,00,000 cash down but N pays only Rs.10,000 as earnest money and promises to pay the balance on next Sunday. On the other hand,M gives the possession of car to N and promises to execute a sale deed on receipt of the full amount.

Distinction between a void contract and a voidable contract.

The distinctions lie in three aspects namely definition, nature and rights.

These are elaborated hereunder:

(a) Definition: A void contract cannot be enforced at all. A voidable contract is an agreement which is enforceable only at the option of one of the parties but not at the option of the other. Therefore 'enforceability' or otherwise, divides the two types of contracts.

(b) Nature: By nature, a void contract is valid at the time when it is made but becomes unenforceable and thus void on account of subsequent developments or events like supervening impossibility, subsequent illegality etc., Repudiation of a voidable contract also renders the contract void. Similarly a contingent contract might become void when the occurrence of the event on which it is contingent becomes impossible.

On the other hand voidable contract would remain valid until it is rescinded by the person who has the option to treat it as voidable. The right to treat it as voidable does not invalidate the contract until such right is exercised. All

contracts caused by coercion, undue influence, fraud, misrepresentation are voidable. Generally, a contract caused by mistake is void.

(c) Rights: As regards rights of the parties, in the case of a void contract there is no legal remedy for the parties as the contract cannot be performed in any way. In the case of voidable contract the aggrieved party has a right to rescind it within a reasonable time. If it is so rescinded, it becomes void. If it is not rescinded, it is a valid contract.

(d)Reason: A contract becomes void due to change in law or change in circumstances beyond the contemplation of parties. A contract becomes a voidable contract if the consent of a party was not free.

S. N	Basis	Void Contract	Voidable Contract
1	Meaning	A Contract ceases to be enforceable by law becomes void when it ceases to be enforceable.	An agreement which is law at the option of one or more parties thereto, but not at the of the other or others, is a contract.
2	Cause	A contract becomes void due to in law or change in circumstances beyond the contemplation of parties.	A contract becomes a voidable if the consent of a party was not
3	Performanc of contract	A void contract cannot be performed.	If the aggrieved party does not, reasonable time, exercise his avoid the contract, any party can other for claiming the the contract.
4	Rights	A void contract does not grant any right to any party.	The party whose consent was has the right to rescind the

DISTINCTION BETWEEN AN AGREEMENT AND CONTRACT

Basis of differences	Agreement	Contract
Meaning	Every promise and every set of promises, forming the consideration for each other. Offer + Acceptance	Agreement enforceable by law. Agreement + Legal enforceability
Scope	It's a wider term including both legal and social agreement	It is used in a narrow sense with the specification that contract is only legally enforceable agreement.
Legal obligation	It may not create legal obligation. An agreement does not always grant rights to the parties	Necessarily creates a legal obligation. A contract always grants certain rights to every party.
Nature	All agreement are not contracts.	All contracts are agreements

Obligation of person who has received advantage under void agreement or contract that becomes void. (Restitution)

- In this connection Section 65 lays down that when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

- Thus, this Section provides for restitution of the benefit received so that both parties may stand unaffected by the transaction; in the following two cases:

(1) When an agreement is discovered to be void. For example, A pays B Rs.1,000 for B's agreeing to sell his horse to him. It turns out that the horse was dead at the time of the bargain though neither party was aware of the fact. In this case the agreement is discovered to be void and B must repay to A Rs.1,000.
It should,however,be noted that agreements which are known to be void or illegal, when they are entered into, are excluded from the purview of this Section.
Thus, if L pays Rs 10,000 to M to murder Z,the money cannot be recovered.
Similarly nothing can be recovered in case of expressly declared void agreements

(2) When a contract becomes void. For example, A agrees to sell B after one month 10 quintals of wheat at Rs 1,625 per quintal and receives Rs 500 as advance. Soon after the contract, private sales of wheat are prohibited by an Act of the legislature. The contract becomes void but A must return the sum of Rs500 to B. In **Dhuramsey vs. Ahgmedhai** , the plaintiff hired a godown from the defendant for 12 months and paid the advance in full. After about seven months the godown was destroyed by fire, without any fault on the part of plaintiff. When the plaintiff claimed refund of the advance, it was upheld that he was entitled to recover the rent for the unexpired term

2.Offer and Acceptance

While discussing the essential elements of a valid contract in the preceding chapter we observed that as a first step in the making of a contract there must be a 'lawful offer' by one party and a 'lawful acceptance' of the offer by the other party. Thus where A, offers to sell a wrist watch to B for Rs.2,000 and B accepts the offer, a contract comes into being provided other essentials of a valid contract like that of competency of parties to contract,etc are present.

THE PROPOSAL OR OFFER

The words 'proposal' and 'offer' are synonymous and are used interchangeably. **Section 2(a)** of the Indian Contract Act defines a 'proposal' as,

- When one person signifies to another
- his willingness
- to do or to abstain from doing anything,
- with a view to obtaining the assent of that other
- to such act or abstinence
- he is said to make a proposal.

This definition reveals the following three essentials of a 'proposal':

i. It must be an expression of the willingness to do or to abstain from doing something.
ii. The expression of willingness to do or to abstain from doing something must be to another person. There can be no 'proposal' by a person to himself.
iii. The expression of willingness to do or to abstain from doing something must be made with a view to obtaining the assent of the other person to such act or abstinence.

Thus a casual enquiry - "Do you intend to sell your motorcycle?-is not a 'proposal'. Similarly, a mere statement of intention- "I may sell my motorcycle if I can get Rs.14,000 for it" — is not a 'proposal'.
But if M says to N, "Will you buy my motorcycle for Rs .14,000" or "I am willing to sell my motorcycle to you for Rs.14,000." we have a 'proposal' as it has been made with the object of obtaining the assent of N.
The person making the 'proposal' or 'offer' is called the 'promisor' or 'offeror', the person to whom the offer is made is called the 'offeree' and the person accepting the offer is called the 'promisee' or 'acceptor'.
This can be **illustrated** as follows:
(a) Where "A" tells "B" that he desires to marry 'B' by the end of 2006, there is no offer made unless, he also asks "Will you marry me?", conveying his willingness and tries to obtain the assent of 'B' in the same breadth.
(b) Where "A" offers to sell his car to "B" it conveys his willingness to do an act. Through this offer not only willingness is being conveyed but also an intention to obtain the assent can be seen.

Classification of offer

Offer can be classified as general offer, special/specific offer, cross offer, counter offer, standing/open/continuing offer. Now let us examine each one of them.
(a) General offer: It is an offer made to public at large with or without any time limit. In terms of Section 8 of the Act, anyone performing the conditions of the offer can be considered to have accepted the offer ***(Carlill v. Carbolic Smoke Ball).*** Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is a continuing offer.
(b) Special/specific offer*:* Where an offer is made to a particular and specified person, it is a specific offer. Only that person can accept such specific offer, as it is special and exclusive to him. ***[Boulton v. Jones]***

(c) Cross offer: As per section 2(b), when a person to whom proposal (offer) is made signifies his assent, the proposal is said to be accepted. Thus, assent can be only to a 'proposal'. If there was no proposal, question of its acceptance cannot arise. For *example,* if A makes a proposal to B to sell some goods at a specified price and B, without knowing
proposal of A, makes a proposal to purchase the same goods at the price specified in the proposal of A, it is not an acceptance, as B was not aware of proposal made by A. It is only cross proposal (cross offer). And when two persons make offer to each other, it cannot be treated as mutual acceptance. There is no binding contract in such a case.

(d) Counter offer: Upon receipt of an offer from an offeror, if the offeree instead of accepting it straightway, imposes conditions which have the effect of modifying or varying the offer, he is said to have made a counter offer. Counter offers amounts to rejection of original offer.

(e) Standing or continuing or open offer: An offer which is made to public at large and if it is kept open for public acceptance for a certain period of time, it is known as standing or continuing or open offer. Tenders that are invited for supply of materials and goods are classic examples of standing offer.

Legal Rules Regarding a Valid Offer

A valid offer must be in conformity with the following rules:

1. **An offer may be 'express' or 'implied**.
   An offer may be made either by words or by conduct. An offer which is expressed by words,spoken or written, is called an 'express offer' and the one which is inferred from the conduct of a person or the circumstances of the case is called an 'implied offer'.

ILLUSTRATIONS

(a) M says to N that he is willing to sell his motorcycle to him for Rs 20,000. This is an express offer.
(b) X writes to Y that he offers to sell his house to him for Rs.80,000. There is an express offer.
(c) The Delhi Transport Corporation runs omnibuses on different routes to carry passengers at the scheduled fares. This is an implied offer by the D.T.C.
(d) A shoe shiner starts shining some one's shoes, without being asked to do so, in such circumstances that any reasonable man could guess that he expects to be paid for this, he makes an implied offer.

2. **An offer must contemplate to give rise to legal consequences and be capable of creating legal relations**.
   If the offer does not intend to give rise to legal consequences, it is not a valid offer in the eye of law. An offer to a friend to dine at the offeror's place or an offer to one's wife to show her a movie is not a valid offer and as such cannot give rise to a binding agreement even though it is accepted and there is consideration, because in social agreements or domestic arrangements the presumption is that the parties do not intend legal consequences to follow the breach of agreement.
   But in the case of agreements regulating business transactions the presumption is just the other way. In business agreements it is taken for granted that parties intend legal consequences to follow.
3. **The terms of the offer must be certain and not loose or vague**:
   If the terms of the offer are not definite and certain, it does not amount to a lawful offer
   ILLUSTRATIONS:
   (a) X purchased a horse from Y and promised to buy another, if the first one proves lucky. X refused to buy the second horse. Y could not enforce the agreement, it being loose and vague .
   (b) A offers to B lavish entertainment, if B does a particular work for him. A's offer does not amount to lawful offer being vague and uncertain.
   (c) 'A' offers to sell 100 litres of oil, without indicating what kind of oil would be sold, it is a vague offer and hence cannot create any contractual relationship. If however there is a mechanism to end the vagueness, the offer can be treated as valid. For *example*, in the above example if 'A' does not deal in any oil but only

in coconut oil and this is known to everyone, the offer cannot be treated as vague offer. This is for the reason that the trade in which 'A' is, is a clear indicator providing a mechanism to understand the terms of offer.

4. **An invitation to offer is not an offer**.
   - An offer must be distinguished from an 'invitation to receive offer' or as it is sometimes expressed in judicial language an 'invitation to treat.'
   - In the case of an 'invitation to receive offer' the person sending out the invitation does not make an offer but only invites the other party to make an offer.
   - His object is merely to circulate information that he is willing to deal with anybody who ,on such information, is willing to open negotiations with him.
   - Such invitations for offers are therefore not offers in the eye of law and do not become agreements by their acceptance.
   - For example quotations, catalogues of prices or display of goods with prices marked thereon do not constitute an offer. They are instead an invitation for offer and hence if a customer asks for goods or makes an offer, the shopkeeper is free to accept the offer or not.
   - **In Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd.**
     - Goods were displayed in the shop for sale with price tags attached on each article and self-service system was there.
     - One customer selected the goods, but the shop owner refused to sell.
     - It was held that the display of goods was only an invitation to offer.
     - Selection of goods by the customer amounted to an offer.
     - The shop owner had the discretion whether to accept such offer or not, i.e., whether to sell such goods or not.
     - Refusal by shop owner amounted t rejection of the offer, and therefore, and therefore, no contract concluded between the parties.
     - Therefore, the customer had no right to sue the shop-owner.

- In **Harvey vs. Facie** Privy Council clearly explained the distinction between an offer and an invitation to offer.
  - In the given case, the plaintiffs through a telegram asked the defendants two questions namely,
    (i) Will you sell us Bumper Hall Pen? and
    (ii) Telegraph lowest cash price.
  - The defendants replied through telegram that the "lowest price for Bumper Hall Pen is £900".
  - The plaintiffs sent another telegram stating "we agree to buy Bumper Hall Pen at £900…"
  - However the defendants refused to sell the property at the price.
  - The plaintiffs sued the defendants contending that they had made an offer to sell the property at £900 and therefore they are bound by the offer.
  - However the Privy Council did not agree with the plaintiffs on the ground that while plaintiffs had asked two questions, the defendant replied only to the second question by quoting the price but did not answer the first question but reserved their answer with regard to their willingness to sell. Thus they made no offer at all.
  - **Their Lordships held that the mere statement of the lowest price at which the vendor would sell contained no implied contract to sell to the person who had enquired about the price.**

- Following are ***instances*** of invitation to offer to buy or sell:
  - An invitation by a company to the public to subscribe for its shares.
  - Display of goods for sale in shop windows.
  - Advertising auction sales and
  - Quotation of prices sent in reply to a query regarding price.

- Similarly when goods are sold through auction, the auctioneer does not contract with anyone who attends the sale. The auction is only an advertisement to sell but the items are not put for sale though persons who have come to the auction may have the intention to purchase.

5. An offer may be 'specific' or 'general'.

- An offer is said to be 'specific'when it is made to a definite person or persons. Such an offer can be accepted only by the person or persons to whom it is made. Thus where M makes an offer to N to sell his bicycle for Rs 1000, there is a specific offer and N alone can accept it.
- A 'general offer', on the other hand, is one which is made to the world at large or public in general and may be accepted by any person who fulfils the requisite conditions.
- The leading case on the subject of 'general offer' is that of **Carlill vs Carbolic Smoke Ball Co**
  - A pharmaceutical company advertised that it would give 100 Pounds to anyone who contracted influenza after using their smoke balls for a certain period.
  - Mrs. Carlill purchased smoke balls and used them as directed.
  - Shortly afterwards, she contracted influenza. She claimed the 100 Pounds.
  - The Court held that the advertisement issued by the pharmaceutical company was a general offer made to the public at large.
  - Mrs. Carlill, being a member of the public, had received the offer and had acted upon it by using the smoke balls as directed.
  - Therefore, a contract was formed between the pharmaceutical company and Mrs. Carlill, and so Mrs.Carlill could claim 100 Pounds.
- Offers o f reward made by way of advertisement, addressed to the public at large, for the rendering of certain services, or the restoration of lost article are also examples of general offers. **Such offers may be accepted by performance of the conditions by an individual person in order to give rise to a contractual obligation to pay the reward.**

6. An offer must be communicated to the offeree.

- An offer is effective only when it is communicated to the offeree. Until the offer is made known to the offeree, there can be no acceptance and no contract.
- Doing anything in ignorance of the offer can never be treated as its acceptance, for, there was never a consensus of wills.
- This applies to both 'specific' and 'general' offers.

ILLUSTRATIONS

(a) A, without knowing that a reward has been offered for the arrest of a particular criminal, catches the criminal and gives the information to the superintendent of police. A, cannot recover the reward as he cannot be said to have accepted the offer when he was not at all aware of it.

(b) In **Lalman Shukla vs Gauri Datt**,

- G's nephew was missing.
- L, who was munim of G, went in search of missing by.
- Meanwhile G issued handbills offering reward of Rs. 501 to anyone who would trace the boy.
- L found the boy and brought him home.
- Since L had no knowledge of the offer made by G, he could not accept such offer.
- Since there was no acceptance, there could be no contract, and therefore, it was held that L was not eligible to receive the reward.

7. **An offer should not contain a term the non-compliance of which would amount to acceptance.** Thus an offeror cannot say that if acceptance is not communicated up to a certain date, the offer would be presumed to have been accepted. If the offeree does not reply, there is no contract, because no obligation to reply can be imposed on him, on the grounds of justice.

8. **Two identical cross-offers do not make a contract.**
   - When two parties make identical offers to each other, in ignorance of each other's offer, the offers are 'cross-offers'. 'Cross-offers' do not constitute acceptance of one's offer by the other and as such there is no completed agreement.

   ILLUSTRATION

   On 15 October, 2008 A wrote to B offering to sell him 100 tons of iron at Rs 25,000 per ton. On the same day, B wrote to A offering to buy 100 tons of iron at Rs25,000 per ton. The letters crossed in the post. There is no concluded contract between A and B, because the offers were simultaneous, each being made in ignorance of the other, and there is no acceptance of each other's offer.

MAY 2004

Shambhu Dayal started 'self service' system in his shop. Smt. Prakash entered in the shop, took a basket and after taking articles of her choice into the basket reached the cashier for payments. The cashier refuses to accept the price. Can Shambhu Dayal be complied to sell the said articles to Smt. Prakash? Decide.

Ans.

The offer should be distinguished from an invitation to offer. An offer is the final expression of willingness by the offeror to be bound by his offer should the party chooses to accept it. Where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate, he does not make an offer, but invites only the other party to make an offer on those terms. This is the basic distinction between offer and invitation to offer. The display of articles with a price in it in a self-service shop is merely an invitation to offer. It is in no sense an offer for sale, the acceptance of which constitutes a contract. In this case,

Smt. Prakash by selecting some articles and approaching the cashier for payment simply made an offer to buy the articles selected by her. If the cashier does not accept the price, the interested buyer cannot compel him to sell. [*Fisher V. Bell (1961) Q.B. 394 Pharmaceutical society of Great Britain V. Boots Cash Chemists].*

Nov. 2008

"Good Girl' Soap Co. advertised that it would give a reward of Rs. 1,000 who developed skin disease after using 'Good Girl' soap of the company for a certain period according to the printed direction. Miss Rakhi purchased the advertised "Good Girl" and developed skin disease in spite of using this soap according to the printed instructions. She claimed reward of Rs. 1,000. The company refused the reward on the ground that offer was not made to her and that in any case she had not communicated her acceptance of the offer. Decide whether Miss Rakhi can claim the reward or not. Refer the relevant case law, if any,

Ans.

Miss Rakhi can claim the reward	- since there is a contract between Miss Rakhi and Good Girl Soap Co; - since in case of a general offer, the acceptance of offer is not to be given by way of communication of acceptance, but is given by way of performance of the terms and conditions of offer.

DISTINCTION BETWEEN OFFER AND INVITATION TO OFFER

Basis of distinction	Offer	Invitation to offer
1 Meaning	Where a person shows his readiness to enter into a contract, it is called as an offer.	Where a person invites others to make an offer to him, it is called as an invitation to offer.

2	Purpose	An offer is made by a person with the purpose of entering into a contract.	The purpose of making an invitation to offer is to receive the offers or to negotiate the terms on which the pe5rson making the invitation is willing to contract.
3	Legal effect	An offer, if acted upon (i.e., if accepted), results in a contract.	An invitation to offer, if acted upon, only results in making of an offer.

Lapse and Revocation of Offer

An offer lapses and becomes invalid (i.e. comes to an end) in the following circumstances:

1. **An offer lapses after stipulated or reasonable time**.
   - An offer lapses if acceptance is not communicated within the time prescribed in the offer, or if no time is prescribed, within a reasonable time [Sec. 6 (2)].
   - What is a reasonable time is a question of fact depending upon the circumstances of each case. For example, an offer made by telegram suggests that a reply is required urgently and if the offeree delays the communication of his acceptance even by a day or two, the offer will be considered to have lapsed.

   ILLUSTRATION:

   An application for allotment of shares was made on 8 June. The applicant was informed on the 23 November that shares were allotted to him. He refused to accept them. It was held that his offer had lapsed by reason of the delay of the company in notifying their acceptance, and that he was not bound to accept the shares.
2. **An offer lapses by not being accepted in the mode prescribed, or if no mode is prescribed, in some usual and reasonable manner**.
   - But, according to Section 7 ,if the offeree does not accept the offer according to the mode prescribed, the offer does not lapse automatically.
   - It is for the offeror to insist that his proposal shall be accepted only in the prescribed manner and if he fails to do so he is deemed to have accepted the acceptance.
3. **An offer lapses by rejection**.
   - An offer lapses if it has been rejected by the offeree.
   - The rejection may be express i.e.by words spoken or written or implied.
   - Implied rejection is one: (a) where either the offeree makes a counter offer, or (b) where the offeree gives a conditional acceptance.

   ILLUSTRATIONS

   (i) A offered to sell his house to B for Rs.90,000. B offered Rs 80,000 for which price A refused to sell. Subsequently B offered to purchase the house for Rs.90,000. A declined to adhere to his original offer. B filed a suit to obtain specific performance of the alleged contract. Dismissing the suit, the court held that A was justified because no contract had come into existence, as B, by offering Rs 80,000, had rejected the original offer. Subsequent willingness to pay Rs 90,000 could be no acceptance of A's offer as there was no offer to accept. The original offer had already come to an end on account of 'counter offer'.

   (ii) A, offered to sell his motorcar to B for Rs 85,000. B said that he accepted the offer if he was appointed as General Manager of A's factory. B's acceptance is a 'conditional acceptance' which amounts to rejection of A's offer and there is no contract.

- It is worth noting that a rejection is effective only when it comes to the knowledge of the offeror. For example, C makes an offer to D by letter. Immediately on receiving the letter D writes a letter rejecting the

offer. Before the rejection reaches C. D changes his mind. and telephones his acceptance. There would be a contract between C and D and the rejection shall not be effective.

4. **An offer lapses by the death or insanity of the offeror or the offeree before acceptance**.

- If the offeror dies or becomes insane before acceptance, the offer lapses provided that the fact of his death or insanity comes to the knowledge of the acceptor before acceptance [Sec. 6(4)].
- From the language of the Section it may be inferred that an acceptance in ignorance of the death or insanity of the offeror is a valid acceptance, and gives rise to a contract.
- Thus the fact of death or insanity of the offeror would not put an end to the offer until it comes to the notice of the acceptor before acceptance.
- An offeree's death or insanity before accepting the offer puts an end to the offer and his heirs cannot accept for him.

5. **An offer lapses by revocation**.
   - An offer is revoked when it is retracted back by the offeror.
   - An offer may be revoked at any time before acceptance by the communication of notice of revocation by the offeror to the other party [Sec. 6(1)].
   - For example, at an auction sale, A makes the highest bid. But he withdraws the bid before the fall of the hammer. There cannot be a concluded contract because the offer has been revoked before acceptance.
   - A revocation of an offer must be communicated or made known to the offeree otherwise the revocation does not prevent acceptance.
   - Revocation of a 'general offer' must be made through the same channel by which the original offer was made.
   - Again, revocation must always be express and must be communicated by the offeror himself or his duly authorised agent to the other party.
6. **Revocation by non-fulfilment of a condition precedent to acceptance**.
   - An offer stands revoked if the offeree fails to fulfil a condition precedent to acceptance [Sec 6(3)]. Thus, where A, offers to sell his scooter to B, for Rs 4,000, if B joins the Lions Club within a week, the offer stands revoked and cannot be accepted by B, if B fails to join the Lions Club.
7. **An offer lapses by subsequent illegality or destruction of subject matter**.
   - An offer lapses if it becomes illegal after it is made, and before it is accepted.
   - Thus, where an offer is made to sell 10 bags of wheat for Rs.6,500 and before it is accepted, a law prohibiting the sale of wheat by private individuals is enacted, the offer comes to an end.
   - In the same manner, an offer may lapse if the thing, which is the subject matter of the offer, is destroyed or substantially impaired before acceptance.

THE ACCEPTANCE

- Section 2(b) states that **"A proposal when accepted becomes a promise" and defines 'acceptance' as "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted."**

Relationship between offer and acceptance:

According to Sir William Anson"Acceptance is to offer what a lighted match is to a train of gun powder". The effect of this observation is that what acceptance triggers cannot be recalled or undone. But there is a choice to the person who had the train to remove it before the match is applied. It in effect means that the offer can be withdrawn just before it is accepted. Acceptance converts the offer into a promise and then it is too late to

revoke it. This means as soon as the train of gun powder is lighted it would explode. Train of Gun powder [offer] in itself is inert, but it is the lighted match [the acceptance] which causes the gun powder to explode. **The significance of this is an offer in itself cannot create any legal relationship but it is the acceptance by the offeree which creates a legal relationship. Once an offer is accepted it becomes a promise and cannot be withdrawn or revoked. An offer remains an offer so long as it is not accepted but becomes a contract as soon as it is accepted.**

LEGAL RULES REGARDING A VALID ACCEPTANCE

A valid acceptance must be in conformity with the following rules:

1. **Acceptance must be given only by the person to whom the offer is made**.

- An offer can be accepted only by the person or persons to whom it is made and with whom it imports an intention to contract; it cannot be accepted by another person without the consent of the offeror.
- The rule of law is clear that "if you propose to make a contract with A, then B can't substitute himself for A without your consent."
- An offer made to a particular person can be validly accepted by him alone.
- Similarly an offer made to a class of persons (i.e. teachers) can be accepted by any member of that class.
- An offer made to the world at large can be accepted by any person who has knowledge of the existence of the offer.

ILLUSTRATION

A sold his business to his manager B without disclosing the fact to his customers. C, a customer, who had a running account with A, sent an order for the supply of goods to A by name. B received the order and executed the same. C refused to pay the price. It was held that there was no contract between B and C because C never made any offer to B and as such C was not liable to pay the price to B **(Boulton vs Joness).**

2. **Acceptance must be absolute and unqualified**

- In order to be legally effective it must be an absolute and unqualified acceptance of all the terms of the offer.
- Even the slightest deviation from the terms of the offer makes the acceptance invalid.
- In effect a deviated acceptance is regarded as a counter offer in law.

ILLUSTRATION

(a)L offered to M his scooter for Rs 14,000. M accepted the offer and tendered Rs 13,500 cash down, promising to pay the balance of Rs 500 by the evening. There is no contract, as the acceptance was not absolute and unqualified.
(b)'A' enquires from 'B', "Will you purchase my car for Rs 2 lakhs?" If 'B' replies "I shall purchase your car for Rs 2 lakhs, if you buy my motorcycle for Rs 50000/-, here 'B' cannot be considered to have accepted the proposal. If on the other hand 'B' agrees to purchase the car from 'A' as per his proposal subject to availability of valid Registration Certificate / book for the car, then the acceptance is in place though the offer contained no mention of R.C. book. This is because expecting a valid title for the car is not a condition. Therefore the acceptance in this case is unconditional.

3. **Acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted** [Sec. 7(2)].

- If the offeror prescribes no mode of acceptance, the acceptance must be communicated according to some usual and reasonable mode.
- The usual modes of communication are by word of mouth, by post and by conduct.
- When acceptance is given by words spoken or written or by post or telegram it is called an express acceptance.
- When acceptance is given by conduct, it is called an implied or tacit acceptance.

- Implied acceptance may be given either by doing some required act, for example, tracing the lost goods for the announced reward or by accepting some benefit or service for example, stepping in a public bus by a passenger.
- If the offeror prescribes a mode of acceptance, the acceptance given accordingly will no doubt be a valid acceptance, even if the prescribed mode is funny.
- Thus, if an offeror prescribes lighting a match as a mode of acceptance and the offeree accordingly lights the match, the acceptance is effective and complete.
- But what happens if the offeree deviates from the prescribed mode?
- The answer to this query is given in Section 7(2) itself which states that in cases of deviated acceptances **"the proposer may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner and not otherwise; but if he fails to do so, he accepts the (deviated) acceptance**."

ILLUSTRATION

If the offeror prescribes 'acceptance by telegram' and the offeree sends acceptance through a messenger, there is no acceptance of the offer, if the offeror informs the offeree that the acceptance is not according to the mode prescribed. But if the offeror fails to do so, it will be presumed that he has accepted the acceptance and a valid contract will arise.

4. **Mere silence is not acceptance**

- Law does not allow an offeror to prescribe 'silence' as the mode of acceptance.
- Thus, a person cannot say that if within a certain time acceptance is not communicated the offer would be considered as accepted.
- Similarly, a trader who of his own without receiving any order, sends goods to some person with a letter saying "If I do not hear from you by the next Monday, I shall presume that you have bought the goods." cannot impose a contract on the unwilling recipient.
- It is so because in the absence of such a rule the offerees will be at the mercy of offerors, unless they reply all such offers in negative which will certainly be causing a lot of inconvenience and financial burden to them.

5. **Mental acceptance ineffectual. It must be communicated to the offeror :**

- Mental acceptance or quiet assent not evidenced by words or conduct does not amount to a valid acceptance; and this is so even where the offeror has said that such a mode of acceptance will suffice.
- Acceptance must be communicated to the offeror otherwise it has no effect.
- Thus if an oral acceptance is spoken into a telephone after the telephone has gone dead, there is in effect no acceptance.
- Unless the acceptance of the offer comes to the knowledge of the offeror, there is no identity of mind and therefore no contract.

ILLUSTRATIONS

(a) Felthouse offered by letter to buy his nephew's horse for £ 30, 15s, adding,"If I hear no more about him I shall consider the horse mine at £ 30, 15s." The nephew sent no reply to this letter but told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as he intended to reserve it for his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property. The Court held that as there was no communication of acceptance to Felthouse before the auction sale took place, there was no contract and therefore Felthouse had no right to complain of the sale **(Felthouse vs Bindley).**

(b)A person received an offer by letter. In reply he wrote a letter of acceptance, put the letter in his drawer and forgot all about it. Held, this uncommunicated acceptance did not amount to acceptance and so did not complete the contract

6. **Acceptance must be communicated by the acceptor.**
   - For an acceptance to be valid, it must not only be made by the offeree but must also be communicated by or with the authority of the offeree (or acceptor) to the offeror.

   ILLUSTRATION

   In **Powell vs Lee** , P was a candidate for the post of headmaster in a school. The managing committee of the school passed a resolution selecting him for the post. A member of the managing committee, acting in his individual capacity, informed P that he had been selected, but P received no other intimation. Subsequently, the resolution was cancelled, and P was not appointed to the post. P filed a suit against the Committee for breach of contract. The Court held that in the absence of an authorised communication from the Committee there was no binding contract.

7. **Acceptance must be given within a reasonable time and before the offer lapses and/or is revoked.**
   - To be legally effective acceptance must be given within the specified time limit, if any and if no time is stipulated, acceptance must be given within a reasonable time because an offer cannot be kept open indefinitely
   - Where M applied for certain shares in a company in June but the allotment was made in November and he refused to accept the allotted shares, it was held that the offeror M could refuse to take shares as the offer stood withdrawn and could not be accepted because the reasonable period during which the offer could be accepted had elapsed
   - Again, the acceptance must be given before the offer is revoked or lapses by reason of offeree's knowledge of the death or insanity of the offeror.
8. **Rejected offers can be accepted only, if renewed**.

Offer once rejected cannot be accepted again unless a fresh offer is made .

Communication of Offer, Acceptance and Revocation

- When the contracting parties are face to face and negotiate in person, there is instantaneous communication of offer and acceptance and a valid contract comes into existence the moment the offeree gives his absolute and unqualified acceptance to the proposal made by the offeror.
- The question of revocation of either offer or acceptance does not arise, for, in such cases a definite offer is made and accepted instantly at one and the same time.
- But where services of the post office are utilised for communicating among themselves by the contracting parties because they are at a distance from one another, it is not always easy to ascertain the exact time at which an offer or/and an acceptance is made or revoked.

In these cases the following rules, as laid down in Sections 4 and 5, will be applicable:

1. **Communication of an offer**:
   The communication of an offer is complete when it comes to the knowledge of the person to whom it is made i.e., when the letter containing the offer reaches the offeree.
2. **Communication of an acceptance**:
   The communication of an acceptance has two aspects,viz., as against the proposer and as against the acceptor.

The communication of an acceptance is complete

(a) **as against the proposer** when it is put in a course of transmission to him, so as to be out of power of the acceptor. and

(b**) as against the acceptor**; when it comes to the knowledge of the proposer i.e., when the letter of acceptance is received by the proposer.

ILLUSTRATIONS

(i)A proposes, by letter, to sell a house to B for Rs 80,000. The letter is posted, on 6th instant. The letter reaches B on 8th instant. The communication of the offer is complete when B, the offeree, receives the letter, i.e., on 8th.

(ii) B accepts A's proposal, in the above case, by a letter sent by post on 9th instant. The letter reaches A on 11th instant. The communication of the acceptance is complete: as against A, when the letter is posted i.e., on 9th, and as against B, when the letter is received by A, i.e., on 11th.

3. **Communication of a revocation**:

The communication of a revocation is complete:

(a) **as against the person who makes it,** when it is put into a course of transmission to the person to whom it is made so as to be out of the power of the person revoking, i.e., when the letter of revocation is posted. and

(b**) as against the person to whom it is made**, when it comes to his knowledge, i.e., when the letter of revocation is received by him.

ILLUSTRATIONS

(a) In the illustration (i) given above, A revokes his offer by letter on 8th instant. The letter reaches B on 10th instant. The revocation is complete as against A on 8th, when the letter of revocation is posted. It is complete as against B on 10th, when the letter of revocation is received by him.

(b) In the illustration (ii) given above, B revokes his acceptance by letter on 10th instant. The letter reaches A on 12th instant. The revocation is complete as against B on 10th, the date on which the letter of revocation is posted and as against A on 12th, the date on which the letter reaches him.

Time during which an offer or acceptance can be revoked.

In the illustrations (a) and (b) given above, there arises a question: whether the revocation of offer by A is operative or not, or whether the revocation of acceptance by B is operative or not.**For answering this question, it is necessary to know the limit of time within which an offer or acceptance can be revoked.**

Section 5 deals with this question and provides as follows:

"**A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor but not afterwards."**

Applying Section 5 to our illustrations given above: A may revoke his offer at any time before or at the moment when B posts his letter of acceptance i.e., 9th, but not afterwards. B may revoke his acceptance at any time before or at the moment when the letter of acceptance reaches A i.e.11th,but not afterwards.

While discussing the rule regarding 'communication of revocation', we have observed earlier that the revocation of offer is complete as against B (the acceptor) on 10th, when the letter of revocation is received by him. As B posts his letter of acceptance on 9th and the communication of acceptance is complete as against A on the day of posting itself i.e., 9th. A's revocation of his offer, which is complete as against B on 10th, is inoperative. B's acceptance is valid and there shall be a binding contract.

For the sake of practice of the rules regarding communication of offer. acceptance and revocation discussed above, we take another illustration.

ILLUSTRATION

(i) A offers, by letter, to sell his car to B for Rs 75,000 on 1st August. B receives the letter on 3rd August.
(ii) B puts the letter of acceptance in post on 4th August, which reaches A on 6th.
(iii) A writes a letter of revocation of his offer and posts it on 3rd August, which reaches B on 5th August.
Rules applied:
(i) Communication of offer is complete on 3rd August i.e., when it comes to the knowledge of B.
(ii) Communication of acceptance is complete as against the proposer i.e., A, when the letter of acceptance is posted i.e., on 4th, and as against the acceptor i.e., B, when the letter of acceptance reaches the proposer i.e., on 6th August.
(iii) Revocation of offer is complete as against A on 3rd August, when the letter of revocation is posted, and as against B on 5th August, when the letter of revocation is received by him.
(iv) As B has put his acceptance into transmission on 4th August and revocation of offer is communicated to him on 5th August, his acceptance is valid and there shall be a binding contract. **A, cannot revoke his offer after 4th August, when the communication of acceptance is complete as against him.**

- **So to revoke an offer, the letter of revocation of offer must reach the offeree before he posts his acceptance.**
- **To revoke an acceptance, the letter of revocation should reach the offeror before the letter of acceptance reaches him.**

Effect of delay or loss of letter of acceptance in postal transit.

- So far as the offeror is concerned, he is bound by the acceptance the moment the letter of acceptance is posted, although the letter is delayed or wholly lost through an accident of the post and the letter never in fact reaches him.
- But in order to bind the offeror, the letter of acceptance must be correctly addressed, properly stamped and clearly posted.
- So far as the acceptor is concerned, he is not bound by the letter of acceptance till it reaches the offeror.
- Until the letter of acceptance reaches the offeror, the contract remains voidable at the instance of the acceptor. He can compel the offeror to enforce the contract or he may revoke his acceptance by communicating his revocation at any time before the letter reaches the offeror. **Thus the acceptor is at an advantage if the letter is delayed or lost in transit.**

Accidental formation of contract

If the letter of acceptance and the telegram of revocation of acceptance are delivered to the offeror at the same time, in such situation the formation of contract will depend on a matter of chance. If the offeror reads the letter of acceptance first and then the telegram, a binding contract will arise. But if the offeror reads the telegram of revocation of acceptance first ,there will be no binding contract because the communication of revocation comes to the offeror's notice first .It will be seen that the formation of contract in the aforesaid circumstance depends on a matter of chance and therefore such contracts are called 'accidental form of contracts'

Contracts over the Telephone

- In the case of contracts over the telephone, each contracting party is able to hear the voice of the other. There is instantaneous communication of offer and acceptance, rejection and counter offer. And therefore, the rule which applies to contracts negotiated orally by the parties in the physical presence of each other i.e., the contract is complete only when the acceptance is received by the offeror also applies to contracts made over the telephone.

- If the acceptance is not in fact communicated to the offeror because the telephone suddenly goes 'dead', there will be no contract. The offeree, therefore, must make sure that his acceptance is received (heard and understood) by the offeror, otherwise there is no binding contract.

No question of revocation. When the patties negotiate a contract over telephone, no question of revocation can possibly arise, for in such instantaneous communication, a definite offer is made and accepted at one and the same time. An offer when accepted explodes into a contract and cannot be revoked. In the words of Sir Anson: "Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone."

Communication of special conditions: Sometimes there are situations where there are contracts with special conditions. These special conditions are conveyed tacitly and the acceptance of these conditions are also conveyed by the offeree again tacitly or without him even realizing it.

For *instance* where a passenger undertakes a travel, the conditions of travel are printed at the back of the tickets, sometimes these special conditions are brought to the notice of the passenger, sometimes not. In any event, the passenger is treated as having accepted the special condition the moment he bought his ticket.

When someone travels from one place to another by air, it could be seen that special conditions are printed at the back of the air ticket in small letters [in a non computerized train ticket even these are not printed] Sometimes these conditions are found to have been displayed at the notice board of the Air lines office, which passengers may not have cared to read. The question here is whether these conditions can be considered to have been communicated to the passengers of the Airlines and can the passengers be treated as having accepted the conditions. The answer to the question is in the affirmative and was so held in ***Mukul Datta vs. Indian Airlines [1962] AIR cal. 314*** where the plaintiff had travelled from Delhi to Kolkota by air and the ticket bore conditions in fine print.

Yet another *example* is where a launderer gives his customer a receipt for clothes received for washing. The receipt carries special conditions and are to be treated as having been duly communicated to the customer and therein a tacit acceptance of these conditions is implied by the customer's acceptance of the receipt ***[Lily White vs. R. Muthuswami [1966] A. Mad. 13].***

CASE LAW: Lilly White vs. Mannuswamy (1970)

Facts: P delivered some clothes to drycleaner for which she received a laundry receipt containing a condition that in case of loss, customer would be entitled to claim 15% of the market price of value of the article, P lost her new saree. Held, the terms were unreasonable and P was entitled to recover full value of the saree from the drycleaner In the cases referred above, the respective documents have been accepted without a protest and hence amounted to tacit acceptance.

Standard forms of contracts: It is well established that a standard form of contract may be enforced on another who is subjectively unaware of the contents of the document, provided the party wanting to enforce the contract has given notice which, in the circumstances of a case, is sufficiently reasonable. But the acceptor will not incur any contractual obligation, if the document is so printed and delivered to him in such a state that it does not give reasonable notice on its face that it contains certain special conditions. In this connection, let us consider a converse situation. A transport carrier accepted the goods for transport without any conditions. Subsequently, he issued a circular to the owners of goods limiting his liability for the goods. In such a case, since the special conditions were not communicated prior to the date of contract for transport, these were not binding on the owners of goods *[**Raipur transport Co. vs. Ghanshyam** .*

3. Consideration

- Consideration is one of the essential elements of a valid contract (Sec. 10).
- It is an important element, for it imports in a measure the safeguard of deliberation. The fact of its existence serves to distinguish those promises by which the promisor intends to be legally bound from those which are not seriously meant.
- The law supplies no means nor affords any remedy to compel the performance of an agreement made without consideration.
- If I promise a man Rs 100 for nothing, he neither doing nor promising anything in return or to compensate me for my money, my promise has no force in law.
- The breach of a gratuitous promise cannot be redressed by legal remedies. It is only when a promise is made in return of 'something' from the promisee that such promise can be enforced by law against the promisor. This 'something' in return is the consideration for the promise.
- Consideration is the price for which the promise of the other is bought.
- Thus consideration is the very foundation of a contract.
- Subject to certain exceptions, agreements without consideration are void (Sec. 25).

Definition

Section 2(d) of the Indian Contract Act defines consideration as follows:

- When at the desire of the promisor,
- the promisee or any other person
- has done or abstained from doing or
- does or abstains from doing or
- promises to do or to abstain from doing something
- such act or abstinence or promise is called a
- consideration for the promise.

An analysis of the above definition will show that it consists of the following four components:

a) the act or abstinence or promise which forms the consideration for the promise, must be done **at the desire of the promisor**

b) it must be done by the promisee or any other person

c) it may have been already executed or is in the process of being done or may be still executory

d) it must be something to which the law attaches a value.

ILLUSTRATIONS

i. A agrees to sell his house to B for Rs 10,000. Here B's promise to pay the sum of Rs 10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the sum of Rs 10,000.

ii. A promises to maintain B's child and B promises to pay A Rs 1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party.

iii. A promises to pay B Rs 1,000 at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party.

iv. A promises his debtor B not to file a suit against him for one year on B's agreeing to pay him Rs 100 more. The **abstinence of A** is the consideration for B's promise to pay.

v. A promises to type the manuscript of B's book, and in return B promises to teach A's son for a month**. The promise to each party is the consideration for the promise of the other party.**

vi. A person had a daughter to marry and in order to raise funds for her marriage he intended to sell a property. His son promised that if the father would forbear to sell, he would pay the father Rs 50,000. The father accordingly forbore. The **abstinence of the father is the consideration for son's promise to pay**.

Essentials of Valid Consideration { Legal Requirements Regarding Consideration}

1. **Consideration must move at the desire of the promisor**.
   - In order to constitute legal consideration, the act or abstinence forming the consideration for the promise must be done at the desire or request of the promisor.
   - Thus acts done or services rendered voluntarily or at the desire of third party will not amount to valid consideration so as to support a contract.
   - The logic for this may be found in the worry and expense to which every one might be subjected if he were obliged to pay for services which he does not need or require.

   ILLUSTRATIONS

   (a) A sees B's house on fire and helps in extinguishing it. He cannot demand payment for his services because B never asked him to come for help.

   (b) D had built, at his own expense, a market at the request of the Collector of the District. The shopkeepers in the market promised to pay D a commission on the articles sold by them in the market. When D sued the shopkeepers for the commission, it was held that the promise to pay commission did not amount to a contract for want of consideration, because D (the promisee) had constructed the market not at the desire of the shopkeepers (the promisors) but at the desire of the Collector to please him (**Durga Prasad vs Baldeo").**

   - It must be noted that this essential **does not require** that the consideration must confer **'some benefit**" on the promisor.
   - It would be enough if the act or forbearance or promise constituting the consideration was done or given at the promisor's request, the benefit may accrue to a third party.

   ILLUSTRATIONS

   (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment. The contract between A and C is a 'contract of guarantee' and is perfectly valid though the benefit which A confers in retum of C's guarantee is conferred not on C but on B (in the shape of sale of goods on credit). A's promise to deliver the goods is the consideration for C's promise of guarantee.

2. **Consideration may move from the promisee or any other person**.
   - The second essential of valid consideration as contained in the definition of consideration in Section 2(d), is that consideration need not move from the promisee alone but may proceed from a third person.
   - Thus, as long as there is a consideration for a promise, it is immaterial who has furnished it.
   - It may move from the promisee or from any other person.
   - This means that even a stranger to the consideration can sue on a contract provided he is a party to the contract.
   - This is sometimes called as 'Doctrine of Constructive Consideration'.

- The leading case **Chinayya vs Ramayya** provides a good illustration on the point:
  - In the above case A, an old lady, by a deed of gift, made over certain property to her daughter R, with a direction that the daughter should pay an annuity to A's brother C, as has been done by A.
  - Accordingly, on the same day R, the daughter, executed a writing in favour of her maternal uncle C agreeing to pay the annuity.
  - Afterwards she declined to fulfil her promise saying that no consideration had moved from her maternal uncle i.e., the promisee.
  - It was held that the words "the promisee or any other person" in Section 2(d) clearly show that a stranger to consideration may maintain a suit.
  - Hence the maternal uncle, though a stranger to the consideration (as the consideration indirectly moved from his sister) was entitled to maintain the suit.

- **In the above case, it will be observed, that although C, the maternal uncle, was a stranger to the consideration, he was not a stranger to the contract as there was a separate contract between him and R, the daughter. The maternal uncle could not have sued on the basis of 'gift deed' executed by A in favour of R because he was not a party to it**.

3. **Consideration may consist of an act or abstinence**. Consideration may consist of either a positive act or abstinence **i.e. a negative act**. Thus, an agreement between B and A. under which B,on failing to pay the debt amount on the due date to A; promises to raise the rate of interest from 9 per cent to 12 per cent in consideration of A promising not to file a suit against him for another one year, is a valid contract; A's abstinence being the consideration for B is promise.

4. **Consideration may be past, present or future**.

- The words, "has done or abstained from doing; or does or abstains from doing; or promises to do or to abstain from doing," used in the definition of consideration clearly indicate that the consideration may consist of either something done or not done in the past, or done or not done in the present or promised to be done or not done in the future.
- To put it briefly, consideration may consist of a past, present or future act or abstinence.

Past consideration: When something is done or suffered before the date of the agreement, at the desire of the promisor; it is called 'past consideration.' It must be noted that past consideration is good consideration only if it is given by the promisee, 'at the desire of the promisor.'

ILLUSTRATIONS:

(a)A teaches the son of B at B's request in the month of January, and in February B promises to pay A a sum of Rs 200 for his services. The services of A will be past consideration.

(b) A lawyer gave up his practice and served as manager of a landlord at the latter's request in lieu of which the landlord subsequently promised a pension. It was held that there was good past consideration.

Present consideration: Consideration which moves simultaneously with the promise, is called 'present consideration' or 'executed consideration'. For example. A sells and delivers a book to B upon B's promise to pay for it at a future date. The consideration moving from A is present or executed consideration since A has done his act of delivering the book simultaneously with the promise of B. It should, however, be noted that it is said to be "present consideration' when at the time of the agreement it is executed on one side and executory on the other. If both parties have done their part under the contract, e.g., where A sells a book to B and B pays its price immediately, it is a case of executed contract (where nothing remains to be done) and not of executed or present consideration.

Future consideration. When the consideration on both sides is to move at a future date, it is called 'future consideration' or 'executory consideration'. It consists of an exchange of promises and each promise is a consideration for the other. For example,X promises to sell and deliver 10 bags of wheat to Y for Rs 6,500 after a week, upon Y's promise to pay the agreed price at the time of delivery. The promise of X is supported by promise of Y and the consideration is executory on both sides. It is to be observed that in an 'executed consideration', the liability is outstanding against only one side whereas in an 'executory consideration' it is outstanding on both sides

5. **Executed and Executory consideration:** Where consideration consists of performance, it is called "executed" consideration. Where it consists only of a promise, it is executory.
   For *example* where A pays Rs 5000/- to 'B' requesting 'B' to deliver certain quantity of rice, to which B agrees, then here consideration for B is executed by 'A' as he has already paid Rs 5000/- whereas 'B's promise is executory as he is yet to deliver the rice.
   Insurance contracts are of the same type. When A pays a premium of Rs 5000/- seeking insurance cover for the year, from the insurance company which the company promises in the event of fire, the consideration paid by A to the insurance company is executed but the promise of insurance company is executory or yet to be executed.
6. **Consideration must be 'something of value' but need not be 'adequate'**. It must be 'something' to which the law attaches a value. **The consideration need not be adequate** to the promise for the validity of an agreement. The Law only insists on the presence of consideration and not on the adequacy of it. It leaves the people free to make their own bargains.
   Thus, where A agrees to sell his motorcar worth Rs 80.000 for Rs 5000 only and his consent is free, the agreement is a valid contract, notwithstanding the inadequacy of the consideration. However, if the consideration be grossly or shockingly inadequate, and if one of the parties to the contract alleges that his consent was obtained by fraud, coercion or undue influence,the court will treat inadequacy of consideration as an evidence in support of such allegation and will declare the contract void.

   Inadequacy of consideration is no bar to a valid contract unless it is an evidence of unfree consent.

   In **Chijjitumal Vs. Rampal Singh** , the Supreme Court reiterated that consideration need not be material and may be even absent. In the said case, the father had died leaving his house to two sons. They had agreed to partition the house which did not allow the division in exactly equal parts and one of the sons had agreed not to construct a door at a certain place in his portion of the house. In a dispute, the agreement was challenged on the ground that it was without adequate consideration. The Supreme Court came to the conclusion that the motive for the said agreement at the time when it was made, was to avoid any dispute in
   future, and held that it was sufficient consideration.

   "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given." **(Explanation 2 to Section 25).**

7. **Performance of what one is legally bound to perform:** The performance of an act by a person what he is legally bound to perform, the same cannot be consideration for a contract. **Consideration must not be performance of existing duty.** Hence, a promise to pay money to a witness is void, for it is without consideration. Hence such a contract is void for want of consideration
   ILLUSTRATIONS

(a) C (the plaintiff) received a subpoena (a kind of summon) to appear at a trial as a witness on behalf of G (the defendant). G promised him a sum of money for his trouble. On default by G, C filed the suit for the recovery of the promised sum. It was held that C being under a public duty to attend and give evidence, there was no consideration for the promise and hence the promise is unenforceable.
(b) Two of the crew of a ship deserted it half way while the ship was on a voyage from London to the Baltic and back. The captain, being unable to supply their place, promised the rest of the crew that, if they would work the vessel home, the wages of the two deserters should be equally divided amongst them. The agreement was held to be void for want of consideration because it was the contractual duty of the mariners who remained with the ship to exert themselves utmost in any emergency of the voyage to bring the ship in safety to her destined port. The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death.

But where a person promises to do more than he is legally bound to do, such a promise provided it is not opposed to public policy, is a good consideration.

ILLUSTRATION

During a civil strike, a question arose as to how best to protect a coal mine. The police authorities thought that surveillance by a mobile force would be adequate but the colliery manager desired a stationary police guard. Ultimately it was agreed that the police authorities would provide a stationary guard and the manager would pay $2,200 for the service. It was held that the promise to pay the amount **was not without consideration**. The police, no doubt, were bound to afford protection, but they had discretion as to the form it should take. The undertaking to provide more protection than what they deemed to be necessary was a consideration for the promise of reward. **[*Classbrook Brothers vs. Glamorgan Country Council*]**

8. **Consideration must be real and not illusory**. Though consideration need not be adequate, it must be of some value in the eye of law. I.e.it must be real and competent. Where consideration is **physically impossible, illegal, uncertain or illusory, it is not real and therefore shall not be a valid consideration.**

    - **Physically impossible**. A promise to do something which is physically impossible, e.g., to make a dead man alive or to run at a speed of 100 kilometres per hour, does not form valid consideration
    - **Legally impossible**. A promise to do something which is illegal e.g. promise for illegal cohabitation, does not amount to good consideration.
    - **Uncertain consideration**. A promise to do something which is too vague and uncertain. e.g. a promise to pay such remuneration “as shall be deemed right," is no consideration in the eye of law.

9. **Consideration must not be unlawful, immoral, or opposed to public policy.** Only presence of consideration is not sufficient it must be lawful. Anything which is immoral or opposed to public policy also cannot be valued as valid consideration.

Suit by a Third Party to an Agreement

There is a big difference between a third party to consideration and third party to a contract; while the first can sue, the second cannot sue. Thus a stranger / third Party to an Agreement lead to the doctrine of **privity of contract**. The doctrine says that only parties to a contract can enforce the contract. The parties stranger to a contract cannot sue and be sued. *Example,* where A mortgages his property to B in consideration of B’s promise to A to pay A’s debt to C, C cannot file a suit against B to enforce his promise, C being no party to the contract between A and B

Dunlop Pneumatic Tyre Co. v Selfridge and Co.

- D entered into a contract of sale of certain tyres to P.

- The contract provided that P shall not sell the tyres below the list price. Also, the contract provided that P shall, at time of resale, impose a condition on the retailer that sale by retailer shall not be made below the list price.
- P sold certain tyres to S. S resold certain tyres below the list price.
- In a suit instituted by D against S, the Court held that such suit was not maintainable since there was no privity of contract between S and D.

EXCEPTIONS TO RULE OF PRIVITY OF CONTRACT

1. In the case of ***a trust***, the beneficiary can sue enforcing his right though he was not a party to the contract between the trustee and the settler. In *Khawja Mohammed Khan Vs Hussain* where, the father of the bridegroom promised to pay through a contract with the father of the bride, an allowance to the bride, if she married his son, the bride sued her father-in-law after marriage for the allowance which he did not pay per the contract. It was held by the Privy Council that though the bride was not a party to the contract between her father and father in law, she could enforce her claim in equity.
2. In the case **of *family settlement***, if the terms of settlement are reduced in writing, members of the family who were not a party to the settlement can (also) enforce their claim.*(Shuppu Vs Subramanian 33 Mad.238)*
3. In the case of certain ***marriage contracts*** a female member can enforce a provision for marriage expense based on a petition made by the Hindu undivided family *(Sunder Raja Vs Lakshmi 38. Mad 788).*
4. Where there is an ***assignment of a contract,*** the assignee can enforce the contract for various benefits that would accrue to him on account of the assignment.[*Krishanlal Sadhu Vs Primila Bala Dasi (1928) Cal.1315]*
5. In case of ***part performance of a contractual obligations*** or where there is ***acknowledgment of liability*** on **account of estoppel**, a third party can sue for benefits. Where for *example* 'A' gives Rs 25000/- to 'B' to be given to 'C' and 'B' informs 'C' that B is holding it on behalf of C, but subsequently refuses to pay 'C' then 'C' can sue and enforce his claim.
6. Where a piece of land which is sold to buyer with **certain *covenants relating to land*** and the buyer is kept on notice of the covenants with certain duties, there the successors to the seller can enforce these covenant.
7. **Contracts entered into through an agent:** The principal can enforce the contracts entered by his agent where the agent has acted within the scope of his authority and in the name of the principal.

Exceptions to the Rule, "No Consideration, No Contract"

Consideration being one of the essential elements of a valid contract, the general rule is that "an agreement made without consideration is void." But there are a few exceptions to the rule where an agreement without consideration will be perfectly valid and binding. These exceptions are as follows:

1. **Agreement made on account of natural love and affection [Sec. 25(1)].** An agreement made without consideration is enforceable if it is
   (i) expressed in writing, and
   (ii) registered under the law for the time being in force for the registration of documents, and
   (iii)is made on account of natural love and affection,
   (iv) between parties standing in a near relation to each other.
   Thus there are four essential requirements which must be complied with to enforce an agreement made without consideration, as per Section 25(1).

ILLUSTRATIONS

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

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

(c) A registered agreement, whereby an elder brother, on account of natural love and affection, promised to pay the debts of his younger brother, was held to be valid and binding and the younger brother could sue the elder brother in the event of his not carrying out the agreement.

It should, however, be noted that mere existence of a near relation (blood relations or relation through marriage) between the parties does not necessarily import natural love and affection.

ILLUSTRATION

Where a Hindu husband, after referring to quarrels and disagreement between him and his wife executed a registered document in favour of his wife, agreeing to pay for separate residence and maintenance,it was held that the agreement was void for want of consideration because it was not made out of natural love and affection. (**Rajlakhi Devi vs Bhootnaath**)

2. **Agreement to compensate for past voluntary service [Sec.25(2)].** A promise made without consideration is also valid, if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or done something which the promisor was legally compellable to do.

   ILLUSTRATIONS

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

   (b) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.(Note that B was legally bound to support his infant son.)

   (c) A rescued B from drowning in the river, and B, appreciating the service that has been rendered, promises to pay Rs 1,000 to A. There is a contract between A and B.

In order to attract this exception, it should be noted that the promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor.

Thus, where B treated A during his illness but refused to accept payment from A; they being friends; and A in gratitude promises to pay Rs1000 to B's son D, the agreement between A and D is void for want of consideration as it is not covered under the exception.

3. **Agreement to pay a time-barred debt [Sec. 25(3)].** Where there is an agreement, made in writing and signed by the debtor or by his authorised agent to pay wholly or in part a debt barred by the law of limitation, the agreement is valid even though it is not supported by any consideration. A time barred debt cannot be recovered and therefore a promise to repay such a debt is without consideration, hence the importance of the present exception.

   But before the exception can apply, it is necessary that:

   i. the debt must be such of which the creditor might have enforced payment but for the law for the limitation of suits
   ii. the promisor himself must be liable for the debt. So a promissory note ted by a widow in her personal capacity in payment of time barred debt of her husband cannot be brought within the exception
   iii. there must be an 'express promise to pay' a time barred debt as distinguished from a mere 'acknowledgment of a liability' in respect of a debt. Thus a debtor's letter to his creditor, "I owe you Rs 1000 on account of my time- barred promissory note" is not a contract. There must be a distinct promise to pay; and
   iv. the promise must be in writing and signed by the debtor or his agent. An oral promise to pay a time-barred debt is unenforceable.

   The logic behind this exception is that by lapse of time the debt is not destroyed but only the remedy is lost. The remedy is revived by a new promise under the exception.

   ILLUSTRATION

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

4. **Completed gift**. A gift (which is not an agreement) does not require consideration in order to be valid. "As between the donor and the donee, any gift actually made will be valid and binding even though without consideration"
5. **Contract of agency**. Section 185 of the Contract Act lays down that no consideration is necessary to create an agency.
6. **Remission by the promisee, of performance of the promise (Sec. 63).**
   For compromising a due debt, i.e. agreeing to accept less than what is due, no consideration is necessary. In other words, a creditor can agree to give up a part of his claim and there need be no consideration for such an agreement. Similarly, an agreement to extend time for performance of a contract need not be supported by consideration (Sec. 63).
7. **Contribution to charity**. A promise to contribute to charity, though gratuitous, would be enforceable, if on the faith of promised subscription, the promisee takes definite steps in furtherance of the object and undertakes a liability, to the extent of liability incurred, not exceeding the promised amount of subscription. Where the defendant had agreed to subscribe Rs 1000 towards the construction of a Town Hall at Howarh. The plaintiff (secretary of the Town Hall) on the faith of the promise entrusted the work to a contractor and undertook liability to pay him. The defendant was held liable.
   But where the promisee had done nothing on the faith of the promise, a promised subscription is not legally recoverable. Accordingly, where the defendant promised to subscribe Rs 500 to a fund started for rebuilding a mosque but no steps had been taken to carry out the repairs. The defendant was held not liable and the suit was dismissed.

Nov. 2009

Mr. Singh, an old man, by a registered deed of gift, granted certain landed property to A, his daughter. By the terms of the deed, it was stipulated that an annuity of Rs. 2,000 should be paid every year to B, who was the brother of Mr. Singh. On the same day, A made a promise with B and executed in his favour an agreement to give effect to stipulation. A failed to pay the stipulated sum. In an action against her by B, she contended that since B had not furnished any consideration, he has no rights of action.

Examining the provisions of Indian Contract Act, 1872, decide whether the contention of A is valid?

Answer

Problem as asked in the question is based on the provisions of the Indian Contract Act, 1872 as contained in section 2(d) and on the principle 'privity of consideration'.

Consideration is one of the essential elements to make a contract valid and it can flow from the promisee or any other person. In view of the clear language used in definition of 'consideration' in Section 2(d) "…. **the promisee or any other person…..**" it is not necessary that consideration should be furnished by the promisee only. A promise is enforceable if there is some consideration for it and it is quite immaterial whether it moves from the promisee or any other person.

The leading authority in the decision of the ***Chinnaya Vs. Ramayya*** , held that the consideration can legitimately move from a third party and it is an accepted principle of law in India.

In the given problem, Mr. Singh has entered into a contract with A, but Mr. B has not given any consideration to A but the consideration did flow from Mr. Singh to A and such consideration from third party is sufficient to the enforce the promise of A, the daughter, to pay an annuity to B. Further the deed of gift and the promise made by A to B to pay the annuity were executed simultaneously and therefore they should be regarded as one transaction and there was sufficient consideration for it.

Thus, a stranger to the contract cannot enforce the contract but a stranger to the consideration may enforce it.

4.Capacity of Parties

An essential ingredient of a valid contract is that the contracting parties must be 'competent to contract' (**Sec. 10**). **Section 11** lays down that "**Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject."**

Thus the Section declares that a person is incompetent to contract under the following circumstances:

i. if he is a minor, according to the law to which he is subject,
ii. if he is of unsound mind, and
iii. if he is disqualified from contracting by any law to which he is subject.

We shall now discuss them one by one in detail.

1. Minor

According to Section 3 of the Majority Act, 1875, amended by the Majority (Amendment) Act. 1999, a person, domiciled in India, who is **under 18 years of age is a minor**. Accordingly every person who has completed the age of 18 years becomes a major.

Minor's Agreements

The law regarding minor's agreements may be summed up as under:

1) **An agreement by a minor is absolutely void and inoperative as against him.**
   - Law acts as the guardian of minors and protects their rights, because their mental faculties are not mature-they don't possess the capacity to judge what is good and what is bad for them.
   - Accordingly, where a minor is charged with obligations and the other contracting party seeks to enforce those obligations against minor, the agreement is deemed as void -ab-initio.
   - In the leading case **of Mohori Bibi vs Dharmodos Ghosh**,' a minor executed a mortgage for Rs 20,000 and received Rs 8,000 from the mortgagee. The mortgagee filed a suit for the recovery of his mortgage money and for sale of the property in case of default. The Privy Council held that an agreement by a minor was absolutely void as against him and therefore the mortgagee could not recover the mortgage money nor could he have the minor's property sold under his mortgage.

2) **Beneficial agreements are valid contracts.**
   - As observed earlier, the court protects the rights of minors.
   - Accordingly, any agreement which is of some benefit to the minor and under which he is required to bear no obligation, is valid.
   - In other words, a minor can he a beneficiary e.g., a payee, an endorsee or a promisee under a contract.
   - Thus money advanced by a minor can be recovered by him by a suit because he can take benefit under a contract.

   ILLUSTRATIONS

   (a)A promissory note executed in favour of a minor is valid and can be enforced in a court.
   (b) Where a minor had performed his part of the agreement and delivered the goods, he was held entitled to maintain a suit for the recovery of their price.

   (c) A minor cannot become partner in a partnership firm. However, he may with the consent of all the partners, be admitted to the benefits of partnership (Section 30 of the Indian Partnership Act,1932).

3) **No ratification on attaining the age of majority**

- Ratification means the subsequent adoption and acceptance of an act or agreement.
- A minor's agreement being a nullity and void- ab-initio has no existence in the eye of law.
- It cannot be ratified by the minor on attaining the age of majority, for, an agreement void -ab-initio cannot be made valid by subsequent ratification.
- **Thus, if an advance is made to a minor during his minority, a promise to pay for such amount after he attains majority would not be enforceable**. **A minor cannot sign fresh promissory notes on his attaining majority in lieu of promissory notes executed for a loan transaction when he was minor.**
- **Since ratification relates back to the date when the contract was originally made,it is necessary for a valid ratification that the person who purports to ratify must be competent to contract at the time of the contract**.

4) **The rule of estoppel does not apply to a minor**.

- "Estoppel arises when you are precluded from denying the truth of anything, which you have represented as a fact, although it is not a fact."
- The rule **of estoppel does not apply to a minor**, i.e., a minor is not estopped from pleading his infancy in order to avoid a contract, even if he has entered into an agreement by falsely representing that he was of full age
- **In other words, where an infant represents fraudulently or otherwise that he is of full age and thereby induces another to enter into a contract with him, then in an action founded on the contract, the infant is not estopped from setting up infancy.**
- *[But if anything is traceable in the hands of minor, out of the proceeds of the contract made by fraudulently representing that he was of full age, the court may direct the minor to restore that thing to the other party on equitable considerations, for 'minors can have no privilege to cheat man'*
- *Thus, if a minor obtains a loan by fraudulent representation and purchases a motorcar out of that, although the loan transaction is invalid, the court may direct the minor to restore the motorcar to the lender. But once the identity of the property or money has been lost because it has been spent wastefully, it is no longer possible to invoke the aid of the 'equitable doctrine of restitution'.*
- *Again, it may be noted that restoration is allowed only when a minor commits fraud by misrepresenting his age because Section 65 expressly prohibits restoration in cases which are known to be void.*
- *This position was upheld by Privy Council in Mohiri Bibee's case where money was lent to a minor with **full knowledge** of the borrower's infancy and even request for payment of compensation was refused.*]

5) **Minor's liability for necessaries**.

- The case of necessaries supplied to a minor is governed by Section 68 of the Contract Act which provides that "if a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

ILLUSTRATIONS:

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

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

- Thus, Section 68 confers a quasi-contractual right on the supplier of "necessaries" to a person incapable of entering into a contract, or to any one whom he is legally bound to support.
- **But a minor is not personally liable; it is his property only which is liable**.
- Therefore if a minor owns no property, the supplier will lose the price of necessaries.
- Even where a minor owns property, the supplier will get a reasonable price and not the price agreed to by the minor.(as minor can't agree to anything!)
- "What is a necessary article," is to be determined with reference to the status and circumstances of the particular minor. Objects of mere luxury are not necessaries nor are objects, which though of real use, are excessively costly. Food and clothing may be taken as simple examples of necessaries. The necessaries would also include the infant's lodging expense, medical attendance, and cost of defending a minor in civil and criminal proceedings. Loans taken by a minor to obtain necessaries also bind him.

6) **Contract by guardian are valid:**
   - Though an agreement with minor is void, valid contract can be entered into with the guardian on behalf of the minor.
   - The guardian must be competent to make the contract and the contract should be for the benefit of the minor.
   - For *instance* a guardian can make an enforceable marriage contract on behalf of the minor.
   - Similarly father of bride can enter the contract with the father of bridegroom for payment of certain allowance to the bride.
   - But not all contracts by guardian are valid. A guardian cannot bind a minor in a contract to purchase immovable properties *[Mir Sarwarjan vs. Fakharuddan (1912) 39. Cal. 232].*
   - However, a court appointed guardian can bind a minor is respect of certain sale of property ordered by the court.

7. **No specific performance:**
   A minor's agreement being absolutely void, there can be no question of the specific performance of such an agreement.
8. **No insolvency:**
   A minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of minor and he is not personally liable.
9. **Partnership:**
   A minor being incompetent to contract **cannot be a partner in a partnership firm,** but under **Section 30 of the Indian Partnership Act,** he can be **admitted to the benefits of partnership with the consent of all the partners** by an agreement executed through his lawful guardian with the other partners. Such a minor will have a **right to such share of the property or profits of the firm** as may be agreed upon and he would have **access to and inspect and copy any of the accounts of the firm**. The minor **cannot participate in the management of the business** and shall **not share losses** except when liability to third parties has arisen but then too upto his share in the partnership assets. He **cannot be made personally liable** for any obligations of the firm, although he may after attaining majority accept those obligations if he thinks fit to do so.
10. **Minor can be an agent:** A minor can act as an agent. But he will not be liable to his principal for his acts. A minor can draw, deliver and endorse negotiable instruments without himself being liable.
11. **Minor cannot bind parent or guardian:** In the absence of authority, express or implied, an infant is not capable of binding his parent or guardian, even for necessaries. The parents will be held liable only when the child is acting as an agent for parents.

12. **Joint contract by minor and adult:** In such a case, the adult will be liable on the contract and not the minor. ***In Sain Das vs. Ram Chand***, where there was a joint purchase by two purchaser, one of them was a minor, it was held that the vendor could enforce the contract against the major purchaser and not the minor.
13. **Surety for a minor:** In a contract of guarantee when an adult stands surety for a minor then he (adult) is liable to third party as there is direct contract between the surety and the third party.
14. **Minor as Shareholder:** A minor, being incompetent to contract cannot be a shareholder of the company. If by mistake he becomes a member, the company can rescind the transaction and remove his name from register. But, a minor may, acting though his lawful guardian become a shareholder by transfer or transmission of fully paid shares to him.
15. **Liability for torts:** A tort is a civil wrong. A minor is liable in tort unless the tort in reality is a breach of contract. Thus, where a minor hired a horse for riding and injured it by over-riding, he was not held liable *(Jennings* vs *Rundall22)* . The court observed in that case, "if an infant in the course of doing what he is entitled to do under the contract is guilty of negligence, he cannot be made liable in tort if he is not liable on the contract."
    But if the wrongful action is of a kind not contemplated by the contract, the minor may be held liable for tort. Thus, where a minor hired a horse for riding under express instructions not to jump, he was held liable when he lent the horse to one of his friends who jumped it, whereby it was injured and ultimately died. The court observed," ... it was a bare trespass, not within the object and purpose of the hiring, for which the minor was liable"*(Burnard* vs *Haggis).*

2. Persons of Unsound Mind

- As stated earlier, as per Section 11 of the Contract Act for a valid contract, it is necessary that each party to it must have a 'sound mind'.
- What is a 'sound mind'? **Section 12** of the Contract Act defines the term 'sound mind' as follows**: "A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effects upon his interests."**
- According to this Section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgment as to whether what he is about to do is to his interest or not.
- The Section further states that:
    i. **"A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind."** Thus a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
    ii. **"A person who is usually of sound mind but occasionally of unsound mind, may not make a contract when he is of unsound mind."** Thus, a sane man who is delirious from fever or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.
- The burden of proof of 'unsound mind' is on the person who challenges the validity of the contract.
- A lunatic whose estate is managed by a committee or manager is not capable of entering into a contract even during the periods of lucidity in view of special provisions of Lunacy Act.
- The basic test for lunacy or lucidity is to see whether the person is able to understand the implications of a contract which he enters into on his interest.
- Idiots, lunatics and drunken persons are examples of persons of unsound mind.

Effects of agreements made by persons of unsound mind. An agreement entered into by a person of unsound mind is treated on the same footing as that of minor's, and therefore an **agreement by a person of unsound mind** is absolutely void and inoperative as against him but he can derive benefit under it**. The property of a person of**

unsound mind is, however, always liable for necessaries supplied to him or to any one whom he is legally bound to support, under Section 68 of the Act."

3. Disqualified Persons

The third type of incompetent persons, as per Section 11, are those who are "disqualified from contracting by any law to which they are subject."

(a) Alien enemies.

An alien (citizen of a foreign country) living in India can enter into contracts with citizens of India during peace time only and that too subject to any restrictions imposed by the Government in that respect. On the declaration of a war between his country and India, he becomes an alien enemy and cannot enter into contracts. "Alien friend can contract but an alien enemy can't contract." Contracts entered into before the declaration of the war stand suspended and cannot be performed during the course of war. Of course, they can be revived after the war is over provided they have not already become time-barred.

(b) Foreign sovereigns and ambassadors.

One has to be cautious while entering into contracts with foreign sovereigns and ambassadors because whereas they can sue others to enforce the contracts entered upon with them, they cannot be sued without obtaining the prior sanction of the Central Government. Thus they are in a privileged position and are ordinarily considered incompetent to contract.

(c) Convict.

A convict is one who is found guilty and is imprisoned. During the period of imprisonment, a convict is incompetent to enter into contracts, and to sue on contracts made before conviction. On the expiry of the sentence, he is at liberty to institute a suit and the Law of Limitation is held in abeyanee during the period of his sentence.

(d) Insolvent.

An adjudged insolvent (before an 'order of discharge') is competent to enter into certain types of contracts i.e. he can incur debts, purchase property or be an employee but he cannot sell his property which vests in the Official Receiver. Before 'discharge he also suffers from certain disqualifications e.g. can't be a magistrate or a director of a company or a member of local body but he has the contractual capacity except with respect to his property. After the 'order of discharge,' he is just like an ordinary citizen.

(e) Joint-stock company and corporation incorporated under a special Act (like L.I.C., U.T.I.).

A company/corporation is an artificial person created by law. lt cannot enter into contracts outside the powers conferred upon it by its Memorandum of Association or by the provisions of its special Act, as the case may be. Again, being an artificial person (and not a natural person) it cannot enter into contracts of a strictly personal nature e.g., marriage.

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X, a minor was studying in M.Com in a college. On 1st July, 2005 he took a loan of Rs. 10,000 from B for payment of his college fees and to purchase books and agreed to repay by31st December, 2005. X possesses assets worth Rs. 2 lakhs. On due date X fails to pay back the loan to B. B now wants to recover the loan from X out of his (X's) assets. Referring to the provisions of the Indian Contract Act 1872 decide whether B would succeed.

Hint:

Loan of Rs. 10,000 is an account of necessities	- since 'necessities' means necessities of life as per the social status and conditions of life of the minor. - since food, clothing, housing, medical treatment and education have been held to be the 'necessities'.
X's property is liable to B for Rs. 10,000	- since the person who supplies necessities to the incompetent person is entitled to be reimbursed from the property of such incompetent person (Sec. 68);

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W is the wife of H, who is lunatic, purchases a diamond set of Rs. 10 lacs from Beauty Jeweller on credit. Referring to the provisions of Indian Contract Act, 1872, decide whether the Beauty Jeweller is entitled to claim the above amount from the property of H.

Hint:

Jeweller is not entitled to recover the amount of diamond set from H	- since H is not competent to contract; - since H is not liable u/s 68, as the diamond set Rs. 10 lacs sold to his wife is not 'necessities'.

5. Free Consent

It has already been pointed out in Chapter 1 that, according to Section 10, 'free consent' of all the parties to an agreement is one of the essential elements of a valid contract.

'Consent' defined:

- **Section 13** of the Contract Act defines the term 'consent' and lays down that "**Two or more persons are said to consent when they agree upon the same thing in the same sense."**
- Thus, consent involves identity of minds or **consensus-ad-idem i.e., agreeing upon the same thing in the same sense.**
- If, for whatever reason, there is no consensus-ad-idem among the contracting parties, there is no real consent and hence no valid contract.
- That there is no contract in the absence of consent was considered in the case of ***Cundy Vs Lindsay***.
  - In this case one Blenkarn in placing order for goods with Cundy closely imitated the address and signature of another well-known firm known as Blenkiron & Co.
  - Cundy sent the goods to Blenkarn but thinking that the order was from Blenkiron & Co. Blenkarn in turn sold the goods to Lindsay.
  - Cundy discovered his mistake, brought a suit against Lindsay for recovery of goods.
  - It was held by the House of Lords that Cundy was under mistake as he thought he was dealing with Blenkiron & Co, while he was in fact dealing with Blenkarn. Hence there was no contract at all.
  - The agreement was declared as void in the absence of identity of minds or proper consent.
  - The suit was decreed against Lindsay.

'Free Consent' defined: Section 14 lays down that "Consent is said to be 'free' when it is not caused by:

1. Coercion, as defined in Section 15, or
2. Undue influence, as defined in Section 16, or
3. Misrepresentation as defined in Section I8; or
4. fraud, as defined in Section 17. Or
5. mistake, subject to the provisions of Sections, 20, 21 and 22."

- "Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, misrepresentation, fraud or mistake" (Sec. 14).
- This means that in order to bring a case within this Section, the party, who alleges that his consent has been caused by any of the above elements which vitiate consent, must show that, but for the vitiating circumstance the agreement would not have been entered into.
- To put it differently, in order to prove that his consent is 'not free' ,the complainant must prove that if he had known the truth, or had not been forced to agree, he would not have entered into the contract.
- In the absence of 'free consent", the contract may turn out to be either voidable or void depending upon the nature of the flaw in consent.
- When consent to an agreement is caused by coercion,undue influence, misrepresentation or fraud, there is 'no free consent' and the contract is voidable at the option of the party whose consent was so caused (Secs. 19 and 19A).
- But when consent is caused by 'bilateral mistake." as to a matter of fact essential to the agreement, the agreement is void (Sec. 20). In such a case there is 'no consent' at all.

The various causes leading to 'flaw in consent' will now be discussed one by one in detail.

COERCION

Definition

- **Section 15** of the Contract Act defines 'Coercion' as follows:
  - Coercion is the committing or threatening to commit,
  - any act
  - forbidden by the Indian Penal Code or
  - the unlawful detaining or threatening to detain
  - any property, to the prejudice of any person whatever,
  - with the intention of
  - causing any person to enter into an agreement.

The Explanation to the Section further adds that "it is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed."

The above definition can be analysed as follows:

1. Coercion implies (a) committing or threatening to commit any act forbidden by the Indian Penal Code; or (b) unlawful detaining or threatening to detain any property,with the intention of causing any personto enter into an agreement.

ILLUSTRATIONS

(i) A Madrasi gentleman died leaving a young widow. The relatives of the deceased threatened the widow to adopt a boy otherwise they would not allow her to remove the dead body of her husband for cremation. The widow adopted the boy and subsequently applied for cancellation of the adoption. It was held that her consent was not free but induced by coercion, as any person who obstructed a dead body from being removed for cremation, would be guilty of an offence under Section 297 of the I.P.C. The adoption was set aside

(ii) L, threatens to shoot M, if he does not let out his house to him. M agrees to let out his house to L. The consent of M has been induced by coercion.

(iii) An agent refused to hand over the account books of the business to the new agent sent in his place, unless the Principal released him from all liabilities. The Principal had to give a release deed as demanded. Held, which the release deed was voidable at the instance of the Principal who was made to execute the release deed under coercion.

(iv) X says to Y 'I shall not return the documents of title relating to your wife's property, unless you agree to sell your house to me for Rs 5000'. 'Y' says, "All right, I shall sell my house to you for Rs 5000; do not detain my wife's documents of title". X has employed coercion; he cannot therefore enforce the contract. But Y can enforce the contract if he finds the contract to his benefit. An agreement induced by coercion is voidable and not void

- Threat to shoot, murder, intimidation, threat to cause hurt, rape, defamation, giving wrong evidence, instigating to commit crime, theft, attempt to commit suicide are a few examples of acts forbidden by Indian Penal Code.

2. The act constituting coercion may be directed at any person, and not necessarily at the other party to the agreement. Likewise it may proceed even from a stranger to the contract.

ILLUSTRATIONS

(a) A, threatens to shoot B, a friend of C if C does not let out his house to him.C agrees to do so. The agreement has been brought about by coercion.

(b) A, threatens to shoot B if he does not let out his house to C. B agrees to let out his house to C. B's consent has been caused by coercion.

3. It does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed. If the suit is filed in India. The above provision (i.e., Sec. 15) will apply.

ILLUSTRATION

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code(Sec 506 of IPC). A, afterwards sues B for breach of contract at Calcutta. A, has employed coercion, although his act is not an offence by the law of England and although Section 506 of the Indian Penal Code was not in force, at the time when, or place where, the act was done.

Threat to Commit suicide.

- Neither 'suicide' nor 'threat to commit suicide ' is punishable under the Indian Penal Code; only 'an attempt to commit suicide" is punishable under it.
- In **Amiraju Vs. Seshamma** there arose a question as to whether 'a threat to commit suicide' amounts to coercion, and the Court answered the question in the affirmative holding that this amounts to coercion.
- In this case a person, by a threat to commit suicide, induced his wife and son to execute a deed in favour of his brother in respect of certain properties which they claimed as their own. The transaction was set aside on the grounds of coercion. It was stated by the majority of judges that though 'a threat to commit suicide' was not punishable under the Indian Penal Code, it must be deemed to be forbidden by that Code, as 'an attempt to commit suicide' was punishable under Section 309 of that Code. Their Court observed: "The term '**any act *forbidden* by the Indian Penal Code**" is **wider** than the term '***punishable* by the Indian Penal Code.**' Simply because a man escapes punishment, it does not follow that the act is not forbidden by the Penal code. For example, a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Penal Code."

Effect of Coercion

- A contract brought about by coercion is voidable at the option of the party whose consent was so caused (Sec. 19).
- This means that the aggrieved party may either exercise the option to affirm the transaction and hold the other party bound by it or repudiate the transaction by exercising a right of recission.
- As per Section 64, if the aggrieved party opts to rescind a voidable contract, he must restore any benefit received by him under the contract to the other party from whom received.
- A person to whom money has been paid or anything delivered under coercion must repay or return it. (Section 71)
- The burden of proof that coercion was used lies on the party who wants to set aside the contract on the plea of coercion.

Duress: The term 'duress' is used in English Law to denote illegal imprisonment *or* either actual or threatened violence over the person (body) of another party or his wife or children with a view to obtain the consent of that party to the agreement. In short, for ' duress' the act or threat must be aimed at the life or liberty of the other party to the contract or the members of his family. A threat to destroy or detain property will not amount to ' duress. ' Thus the scope of the term 'coercion,' as defined in Section 15, is wider, because it includes threats over property also.

UNDUE INFLUENCE

Definition

- **Section 16(1**) defines the term 'Undue influence' as follows:
  - "A contract is said to be induced by undue influence where,
    (i) the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and
    (ii) he uses the position to obtain an unfair advantage over the other."
  - The phrase "**in a position to dominate the will of the other**" is clarified by the same Section under sub-section (2), as follows
    - A person is deemed to be in a position to dominate the will of another:
      a) where he holds a **real or apparent authority** over the other, e.g., the relationship between master and the servant, police officer and the accused; or
      b) where he stands in a **fiduciary relation** to the other. Fiduciary relation means a relation of mutual trust and confidence. Such a relationship is supposed to exist in the following cases: father and son, guardian and ward, solicitor and client, doctor and patient. Guru (spiritual adviser) and disciple, trustee and beneficiary, etc; or
      c) where he makes a contract with a person whose **mental capacity is temporarily or permanently affected** by reason of age, illness, or mental or bodily distress. e.g.. old illiterate persons.
  - It is to be observed that for proving the use of undue influence **both the elements mentioned above, namely, (1) the other party was in a position to dominate his will, and (ii) the transaction was an unfair one(unconscionable), must be established.**

Presumption of Undue Influence

- Undue influence is presumed to exist under the circumstances mentioned above in sub-clauses (a), (b) and (c).
- In other words, for example, where the relationship between the contracting parties is that of **master and servant, father and son, doctor and patient,solicitor and client, eta. or where one of the parties to the contract is an old illiterate person,there is no need ofproving the use of undue influence by the party whose consent was so caused.**
- Merely status of parties is enough to prove the existence of undue influence in these cases.

There is, however, no presumption of undue influence in the following cases:

(1) Husband and wife
(2) Landlord and tenant.
(3) Creditor and debtor.

In these cases, undue influence shall have to be proved by the party alleging that undue influence existed.

Burden of proof and rebutting the presumption.

- In cases where there is a presumption of undue influence the burden of proving that the person who was in a position to dominate the will of another did not use his position to obtain an unfair advantage, will lie upon the person who was in a position to dominate the will of the other [Sec. 16(3)].
- He can rebut or oppose the presumption by arguing (i) that full disclosure of facts was made. (ii) that the price was adequate, (iii) that the other party was in receipt of competent independent advice and his consent was free.

ILLUSTRATIONS

(a) A, having advanced money to his son B, obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence. As undue influence is presumed to exist if the relationship between contracting parties is that of father and son, the burden of proof lies on A, the father. It will be for A to prove that he did not employ undue influence, on a suit by B alleging undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence. On a petition by A alleging undue influence, it lies on B, the doctor, to prove that the contract was not induced by undue influence.

(c) An old illiterate woman made a gift of almost the whole of her property to her nephew, who was managing her estate. On a petition by the old lady for setting aside the gift deed on the ground of undue influence, the onus lies on the nephew to prove that the transaction is bona fide, well understood and free from undue influence, because undue influence is presumed in such a case.

Effect of Undue Influence

- When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.
- Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as the court may seem just.**(Sec. 19-A)**

ILLUSTRATIONS:

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

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

SECTION 19 vs. SECTION 19A

- Thus, it will be noticed that Section 19-A also declares a contract brought about by undue influence voidable at the option of the aggrieved party, just as Section 19 so declares in case of a contract brought about by coercion, misrepresentation or fraud.
- The special feature of Section 19-A is that while in the case of rescission of a contract procured by coercion, misrepresentation or fraud, any benefit received by the aggrieved party has to be restored under Section 64 of the Contract Act; under Section 19-A, if a contract procured by undue influence is set aside, the Court has discretion to direct the aggrieved party for refunding the benefit whether in whole or in part or set aside the contract without any direction for refund .

NO UNDUE INFLUENCE

Every transaction where the terms are disadvantageous to one party is not necessarily influenced by undue influence. Thus the mere fact the transaction is a hard bargain for one party doesn't always indicate undue influence, if the parties to such transaction were on equal footing and the transaction between them was a normal commercial transaction done in normal course of business.

NOV 2002

'A' applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. Whether the contract induced by undue influence? Decide.

Answer

The Banker has not obtained any unfair advantage	- since there is stringency in the money market, thereby resulting in increase in interest rates - since the loan is made by the banker in the ordinary course of business.
There is no undue influence	- since, as between the parties on equal footing, the Court does not hold a transaction to be unconscionable merely on the ground of high rate of interest.

Distinction between Coercion and Undue Influence

Basis of difference	Coercion	Undue Influence
Nature of action	It involves the physical force or threat. The aggrieved party is compelled to make the contract	It involves moral or mental pressure.
Involvement of criminal action	It involves committing or threatening to commit and act forbidden by Indian Penal Code or detaining or threatening to detain property unlawfully.	No such illegal act is committed or a threat is given.
Relationship between parties	It is not necessary that there must be some sort of relationship between the parties.	Some sort of relationship between the parties is absolutely necessary.
Exercised by whom	Coercion need not proceed from the promisor nor need it be the directed against the promisor. It can be used even by a stranger to the contract.	Undue influence is always exercised between parties to the contract.
Enforceability	The contract is voidable at the option of the party whose consent has been obtained by the coercion.	Where the consent is induced by undue influence, the contract is either voidable or the court may set it aside or enforce it in a modified form.
Position of benefits received	In case of coercion where the contract is rescinded by the aggrieved party, as per Section 64, any benefit received has to be restored back to the other party.	The court has the discretion to direct the aggrieved party to return the benefit in whole or in part or not to give any such directions.

MISREPRESENTATION

- A representation means a statement of fact made by one party to the other, either before or at the time of contract relating to some matter essential to the formation of the contract with an intention to induce the other patty to enter into the contract.
- It may be expressed by words spoken or written or implied from the acts or conducts of the parties (e.g., by any half statement of truth).
- A representation when wrongly made, either innocently or intentionally is termed as a misrepresentation.
- To put in differently misrepresentation may be either innocent or intentional or deliberate with an intent to deceive the other party.
- **In law, for the former kind the term 'Misrepresentation' and for the latter the term 'Fraud' is used**.

Definition

According to **Section 18 '**Misrepresentation' includes following cases:

(i) Positive assertion of unwarranted statements of material facts believing them to be true. If a person makes an explicit statement of fact not warranted by his information (i.e. without any reasonable ground) under an honest belief as to its truth though it is not true, there is misrepresentation.

ILLUSTRATION

- A says to B who intends to purchase his land, "My land produces 10 quintals of wheat per acre." A, believes the statement to be true, although he did not have sufficient grounds for the belief. Later on, it transpires that the land produces only 7 quintals of wheat per acre. This is a misrepresentation.
- A makes a positive statement to B that C will be made the director of a company. A makes the statement on information derived, not directly from C but from M. B applies for shares on the faith of the statement which turns out to be false. The statement amounts to misrepresentation, because the information received second-hand did not warrant A to make the positive statement to B.
- 'A' believed the engine of his motor cycle to be in an excellent condition. 'A' without getting it checked in a workshop, told to 'B' that the motor cycle was in excellent condition. On this statement, 'B' bought the motor cycle, whose engine proved to be defective. Here, 'A's statement is misrepresentation as the statement turns out to be false.

(ii) Breach of duty which brings an advantage to the person committing it by misleading the other to his prejudice. This clause covers those cases where a statement when made was true but subsequently before it was acted upon; it became false to the knowledge of the person making it. In such a case, the person making the statement comes under an obligation to disclose the change in circumstances to the other party, otherwise he will be guilty of misrepresentation.

ILLUSTRATION

A, before signing a contract with B for the sale of business, correctly states that the monthly sales are Rs 50,000. Negotiations lasted for five months, when the contract of sale was signed. During this period the sales dwindled to Rs 5,000 a month. A, unintentionally keeps quiet. It was held that there was misrepresentation and B was entitled to rescind the contract.

Note, that a partial non-disclosure may also constitute a misrepresentation, for instance, where a vendor of land told a purchaser that all the farms on the land were fully let, but inadvertently omitted to inform him that the tenants had given notice to quit, he was held guilty of misrepresentation

(iii) Causing mistake about subject matter innocently :If one of the parties induces the other, though innocently, to commit a mistake as to the quality or nature of the thing bargained, there is misrepresentation.

ILLUSTRATION

In a contract of sale of 500 bags of wheat, the seller made a representation that no sulphur has been used in the cultivation of wheat. Sulphur, however, had been used in 5 out of 200 acres of land. The buyer would not have purchased the wheat but for the representation. There is a misrepresentation.

Essentials of misrepresentation.

From the foregoing discussion, it follows that for alleging misrepresentation the following four things are necessary:

i. There should be a representation, made innocently with an honest belief as to its truth and without any desire to deceive the other party, either expressly or impliedly.
ii. The representation must relate to facts material to the contract and not to mere opinion or hearsay.
iii. The representation must be, or must have become untrue.
iv. The representation must have been instrumental in inducing the other party to enter into a contract.

Effects of Misrepresentation

In case of misrepresentation, the aggrieved party has two alternative courses open to him —

1. he can rescind the contract, treating the contract as voidable

Or

2. he may affirm the contract and insist that he shall be put in the position in which he would have been if the representation made had been true (Sec. 19).

Misrepresentation does not entitle the aggrieved party to claim damages by way of interest or otherwise for expenses incurred.

ILLUSTRATION

A, innocently in good faith tells B that his TV set is made in Japan. B, thereupon buys the TV set. However, it comes out to be an Indian make. A, is guilty of misrepresentation. B, may either avoid the contract or may insist on its being carried out. In the latter case, B may either ask for replacing the set by a Japanese make set or may keep the Indian make set and claim the difference in price between that set and a Japanese make set.

FRAUD

The term 'fraud' includes all acts committed by a person with an intention to deceive another person.

Definition

According to Section 17, 'fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent with intent to deceive or to induce another party thereto or his agent, to entering to the contract:

1. **The representation that a fact is true when it is not true by one who does not believe it to be true**.
   - Thus a false statement intentionally made is fraud.
   - An absence of honest belief in the truth of the statement made is essential to constitute fraud.
   - If a representor honestly believes his statement to be true, he cannot be liable in deceit no matter how ill-advised, stupid, or even negligent he may have been.
   - In order to be called fraudulent representation the false statement must be made intentionally

2. **The active concealment of a fact by a person who has knowledge or belief of the fact**.
   - Active concealment of a material fact is taken as much a fraud as if the existence of such fact was expressly denied or the reverse of it expressly stated.
   - Mere non-disclosure is not fraud where there is no duty to disclose.
   - Caveat Emptor or 'Buyer Beware' is the principle in all contracts of sale of goods.
   - As a rule the seller is **not bound** to disclose to the buyer the faults in the goods he is selling.The buyer must make all enquiries before he buys a good to ensure that the good suits his needs ,
   - In the **absence of any enquiry from the buyer, the seller is not bound to disclose every defect in goods of which he may be aware**

     ILLUSTRATIONS

     (a)A, a horse dealer, sells a mare to B. A knows that the mare has a cracked hoof which he fills up in such a way as to defy detection or on enquiry from B, A affirms that the mare is sound. The defect is subsequently discovered by B. There is 'fraud' on the part of A and the agreement can be avoided by B as his consent has been obtained by fraud.

     (b) A, sells by auction, to B a horse, which he knows to be unsound. A says nothing to B about the horse's unsoundness. This is not 'fraud' because A is under no duty to disclose the fact to B, the general rule of law being 'let the buyer beware'

(c)A director of a company issues prospectus containing misstatement knowing fully well about such misstatement. It was held any person who had purchased shares on the faith of such misstatement can repudiate the contract on the ground of fraud.

(d)B discovered an ore mine in the Estate of 'A' He conceals the mine and the information about the mine. 'A' in ignorance agrees to sell the estate to 'B' at a price that is grossly undervalued. The contract would be voidable of the option of 'A' on the ground of fraud.

3. **A promise made without any intention of performing it**.
   If a man while entering into a contract has no intention to perform his promise, there is fraud on his part.
   ILLUSTRATIONS
   (a) X purchases certain goods from Y on credit without any intention of paying for them as he was in insolvent circumstances. It is a clear case of fraud from X's side. Note that mere failure to pay, where there was no original dishonest intention, is not fraud.
   (b) Where a man and a woman went through a ceremony of marriage without any intention on the part of the husband to regard it as a real marriage, it was held that the consent of the wife was obtained by fraud and that the marriage was mere pretence .
4. **Any other act fitted to deceive:**
   "The fertility of man "s invention in devising new schemes of fraud is so great that it would be difficult, if not impossible, to confine fraud within the limits of any exhaustive definition. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered fraud and sub-section (4) is obviously intended to cover all those cases of fraud which cannot appropriately be covered by the other sub-sections.
5. **Any such act or omission as the law specially declares to be fraudulent:**
   This sub-section refers to the provisions in certain Acts which make it obligatory to disclose relevant facts. Thus, for instance, under Section 55 of the Transfer of Property Act, the seller of immovable property is bound to disclose to the buyer all material defects in the property (e.g., the roof has a crack) or in the seller's title (e.g., the property is mortgaged). An omission to make such a disclosure amounts to fraud.

Thus, in order to allege fraud, the act complained of must be brought within the scope of the acts enumerated above. A mere expression of opinion or commendatory expression is not fraud. "The land is very fertile" is simply a statement of opinion or "our products are the best in the market" is merely a commendatory expression. Such statements do not ordinarily amount to fraud.

Can Silence be Fraudulent?

- The **Explanation to Section 17** deals with cases as to when 'silence is fraudulent' or what is sometimes called 'constructive fraud.'
- The explanation declares that "mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless:
  i. The circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak or
  ii. Silence is, in itself, equivalent to speech

It therefore follows that:

(1) **As a rule mere silence is not fraud** because there is no duty cast by law on a party to a contract to make a disclosure to the other party, of material facts within his knowledge.

ILLUSTRATION

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

(2) Silence is fraudulent **if circumstances of the case are such that it is the duty of the person keeping silence to speak'.**

- In other words, silence is fraudulent in contracts of 'utmost good faith' i.e. contracts 'uberrimae fidei'.
- These are contracts in which the law imposes a duty of abundant disclosure on one of the parties thereto, due to peculiar relationship of the parties or due to the fact that one of the parties has peculiar means of knowledge which are not accessible to the other.
- For example in contracts of marine, fire and life insurance, the insurer contracts on the basis that all material facts have been communicated to him; and it is an implied condition of the contract that full disclosure shall be made, and that if there has been non-disclosure he shall be entitled to avoid the contract. The assured, therefore must disclose to the insurer all material facts concerning the risk to be undertaken e.g., disease eta, in case of life insurance. A concealment or misstatement of a material fact will render the contract void

  Following contracts come within this category:

  (a) Fiduciary Relationship: Here, the person in whom confidence is reposed is under a duty to act with utmost good faith and make full disclosure of all material facts concerning the agreement, known to him. **Example:** A broker was asked to buy shares for client. He sold his own shares without disclosing this fact. The client was entitled to avoid the contract or affirm it with a right to claim secret profit made by broker on the transaction since the relationship between the broker and the client was relationship of utmost good faith. ***(Regier V. Campbell Staurt)***

  (b) Contracts of Insurance: In contracts of marine, fire and life insurance, there is an implied condition that full disclosure of material facts shall be made, otherwise the insurer is entitled to avoid the contract.

  (c) Contracts of marriage: Every material fact must be disclosed by the parties to a contract of marriage ***(Hazi Ahmed v. Abdul Gassi).***

  (d) Contracts of family settlement: These contracts also require full disclosure of material facts within the knowledge of the parties.

(3) **Silence is fraudulent where the circumstances are such that "silence is, in itself equivalent to speech."** Where, for example, B says to A "If you do not deny it. I shall assume that the horse is sound." A says nothing. Hence A's silence is equivalent to speech. If the horse is unsound A's silence is fraudulent

Analysis of Section 17: The following are the essential elements of the fraud:

(1) There must be a representation or assertion and it must be false. However, silence may amount to fraud or an active concealment may amount to fraud.

(2) The representation must be related to a fact.

(3) The representation should be made before the conclusion of the contract with the intention to induce the other party to act upon it.

(4) The representation or statement should be made with a knowledge of its falsity or without belief in its truth or recklessly not caring whether it is true or false.

(5) The other party must have been induced to act upon the representation or assertion.

(6) The other party must have relied upon the representation and must have been deceived.

(7) The other party acting on the representation must have consequently suffered a loss.

Effect of Fraud upon validity of Contract

A party who has been induced to enter into a contract by fraud has the following remedies open to him:

(1) He can **rescind the contract**, i.e., he can avoid the performance of the contract; contract being voidable at his option (Sec. 19); or
(2) He can **ask for restitution** and insist that the contract shall be performed, and that he shall be **put in the position in which he would have been, if the representation made had been true** (See. 19).

ILLUSTRATION

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

(3) The aggrieved party **can also sue for damages**, if any. Fraud is a 'civil wrong' hence compensation is payable. For instance, if the party suffers injury because ofunsound horse, which was not disclosed despite enquiry, compensation can be demanded. Similarly, where a man was fraudulently induced to buy a house, he was allowed to recover the expense involved in moving into the house as damages (in addition to rescission of the contract)

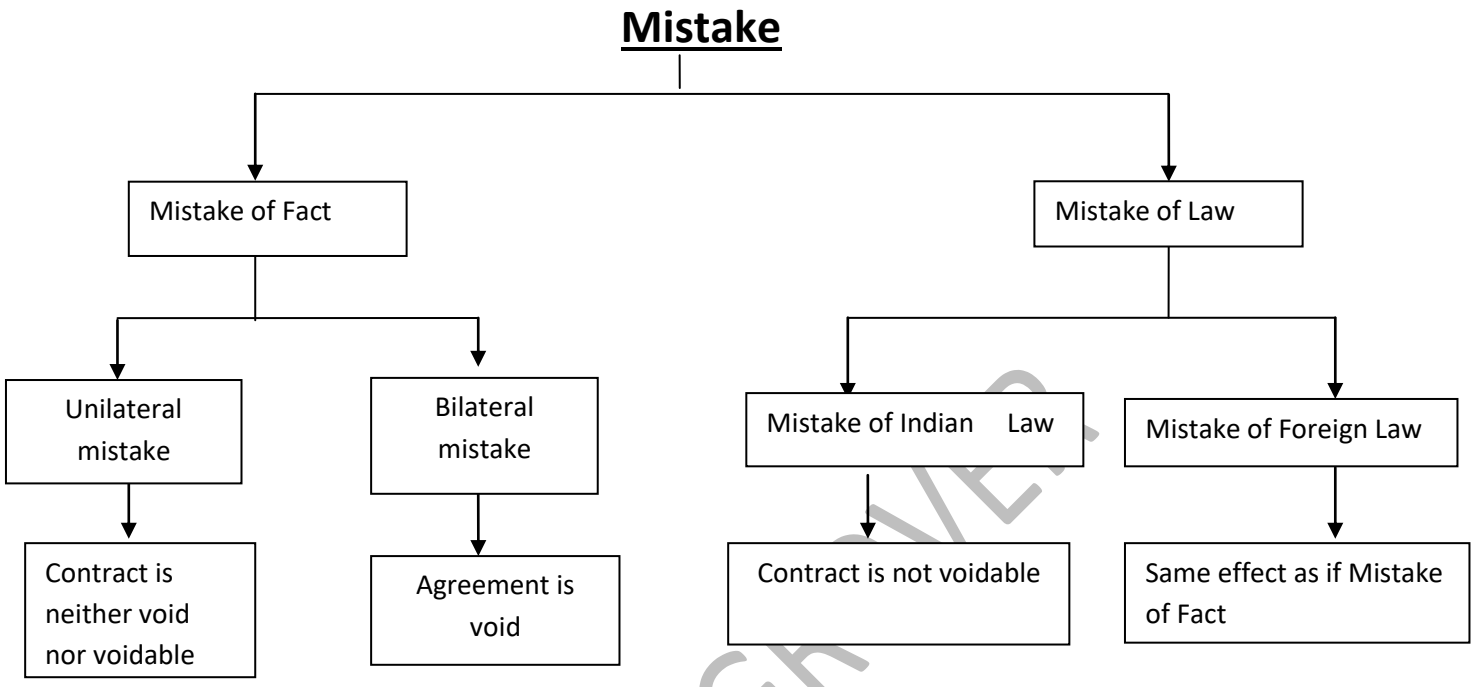
Special points. For giving rise to an action for deceit, the following points deserve special attention:

i. Fraud by a stranger to the contract does not affect contract. It may be recalled that 'coercion' by a stranger to a contract affects the contract.
ii. Fraudulent representation must have been instrumental in inducing the other party to enter into the contract. i.e., but for this, the aggrieved party would not have entered into the contract.
iii. **The plaintiff must have been actually deceived by fraudulent statement. A deceit which does not deceive gives no ground for action.**
Explanation to Section 19 – "A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable."
Thus where a party to a contract commits fraud or misrepresentation, but the other party is not, in fact, misled by such fraud or misrepresentation, the contract cannot be avoided by the later. **(Explanation to Section 19).** Thus, when a seller of specific goods deliberately conceals a fault in order that the buyer may not discover it even if he inspects the goods but the buyer does not in fact, make any inspection, the buyer cannot avoid the contract, as he is not in fact deceived by the conduct of the seller.
iv. **In cases of fraudulent silence, the contract is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence (Exception to Sec. 19 given in the Act). Note that in other cases of fraud, this is no defence i.e., the contract is voidable even if the fraud could be discovered with ordinary diligence**.

Difference between Fraud and Misrepresentation.

Basis of difference	Fraud	Misrepresentation
Intention	To deceive the other party by hiding the truth.	There is no such intention to deceive the other party.
Knowledge of truth	The person making the suggestion believesthatthe	The person making the statement believes it to be true, although it is not
Recission of the contract and claim for damages	The injured party can repudiate the contract and claim damages.	The injured party is entitled to repudiate the contract or sue for restitution but cannot claim the damages.

Means to discover the truth	The party using the fraudulent act cannot secure or protect himself by saying that the injured party had means to discover the truth.(except in case of fraudulent	Party can always plead that the injured party had the means to discover the truth.



The fifth significant element that vitiates consent is 'Mistake'. **Where parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, then the agreement is void. As we all know a void agreement cannot be enforced at all.**

Example: **'**A' agrees to sell certain cargo which is supposed to be on its way in a ship from London to Bombay. But in fact, just before the bargain was struck, the ship carrying the cargo was cast away because of storm and rain and the goods were lost. Neither of the parties was aware of it. The agreement is void. *[Couturier vs Hasite]*

Its effect can be broadly studied as under:

(i) **Mistake of Law:** A mistake of law does not render a contract void as one cannot take excuse of ignorance of the law of his own country. But if the mistake of law is caused through the inducement of another, the contract may be avoided. Mistake of foreign law is excusable and is treated like a mistake of fact. Contract may be avoided on such mistake.

(ii) **Mistake of fact:** Where the contracting parties misunderstood each other and are at cross purposes, there is a bilateral or mutual mistake. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Example: A offers to sell his Ambassador Car to B, who believes that A has only Fiat Car, agrees to buy the car. Here, the two parties are thinking about different subject matter so that there is no real consent and the agreement is void.

Analysis:

Mistake must be a matter of fact and not of law. Where 'A' and 'B' enter into contract believing wrongly that a particular debt is not barred by law of limitation, then the contract is valid because there is no mistake of fact but of law only. However a **question on foreign law would become a matter of question of fact**

Yet another issue to remember in mistake is that it **must be of an essential fact**. Whether the fact is essential or not would again depend on how a reasonable man would regard it under given circumstances. **A mere wrong opinion as to the value is not an essential fact.**

While deciding whether a contract is hit by mistake or not it must be remembered that **'Mistake' is not unilateral**. Both the parties should be under mistake. A **unilateral mistake would not render the contract invalid. For *example*** where 'A' agrees to purchase from 'B' 18 carat gold thinking it to be pure gold but 'B' was not instrumental for creating such an impression then contract between 'A' and 'B' should be treated as valid.

From the foregoing it is clear that:-

a. Mistake should be a matter of fact
b. Mistake should not be a matter of law
c. Mistake should be a matter of essential fact
d. Mistake should not be unilateral but of both the parties, and
e. Mistake renders agreement void and neither party can enforce the contract against each other

Loss of Right of Rescission

We have observed earlier that a contract brought about by coercion, undue influence,misrepresentation or fraud is voidable at the option of the party whose consent was so caused. He has the option either to rescind the contract or to affirm it. But his right of rescission is lost in the following cases:

1. **Affirmation.** If after becoming aware of his right to rescind, the aggrieved party affirms the transaction either by express words or by an act which shows an intention to affirm it, the right of rescission is lost. So, for example, if a person, who has purchased shares on the faith of a misleading prospectus, subsequently becomes aware of its falsity, but accepts dividends paid to him, he will not be permitted to avoid the contract. Paying for the goods purchased (if not paid so far), attempting to sell the goods are some other examples of implied affirmation.
2. **Restitution not possible**. If the patty seeking rescission is not in a position to restore the benefits he may have obtained under the contract, e.g., where the subject-matter of the contract has been consumed or destroyed, the right to rescind the contract cannot be exercised.
3. **Lapse of time**. It may be treated as evidence of affirmation where the party misled fails to exercise his right promptly on discovering the representation to be untrue or on becoming aware of the fraud or coercion. As such the right of rescission may also be lost by too long-a-delay.
4. **Rights of third parties**. Since the contract is valid until rescinded, being a voidable contract, if before the contract is rescinded third parties, bonafide for value, acquire rights in the subject matter of the contract, those rights are valid against the party misled, and the right to rescind will no longer be available.

Thus where a person obtains goods by fraud and, before the seller rescinds the contract, disposes them off to a bonafide party, the seller cannot then rescind.

6. Legality of Object and Consideration

- The object or consideration of an agreement must be lawful, in order to make the agreement a valid contract.
- Section 10 lays down that all agreements are contracts if made for lawful consideration and with a lawful object.
- Section 23 declares what kinds of considerations and objects are not lawful. If the object or consideration is unlawful for one or the other of the reasons mentioned in Section 23,the agreement is 'illegal' and therefore void (Sec. 23).
- The words 'object' and consideration" used in Section 23 are not synonymous. **The word 'object' here means 'purpose or design'.** Thus, where a person, while in insolvent circumstances, transferred his property to one of his creditors with the object of defrauding his other creditors, it was held that the agreement was void and the transfer was inoperative. The court observed that although the consideration of the contract was lawful but the object was unlawful because the purpose of the parties was to defeat the provisions of the Insolvency Law.

What Considerations and Objects are Unlawful?

According to **Section 23,** every agreement of which the object or consideration is unlawful is void and the consideration or the object of an agreement is unlawful in the following cases:

1. **If it is forbidden by law.** This clause refers to agreements which are declared illegal by law. If the consideration or object for a promise is such as is forbidden by law, the agreement is void. An act or an undertaking is forbidden by law
   (a) When it is punishable by the criminal law of the country
   Or
   (b) When it is prohibited by special legislation or regulations made by a competent authority under powers derived from the legislature.

ILLUSTRATIONS

a) Agreements for sale or purchase above the standard price fixed by the relevant law (e.g., Essential Commodities Act, 1955) with regard to a controlled article are illegal and hence void.

b) An agreement to pay consideration to a tenant to induce him to vacate premises governed by the Rent Restriction Act is illegal and cannot be enforced because such an act is forbidden by the said Act.

c) A plantation company that is commenced, for growing, felling and selling timber cannot enter into any agreement to grow and fell sandalwood trees as felling of sandalwood is prohibited by law viz.The Forest Act.

d) A license to cut grass is given to 'X' by Forest Department under the Forest Act. The license provides for imposition of penalty in the events of 'X' choosing to assign his right. However, if 'X' assigns his right, the agreement would still be valid since there is no prohibition for such assignment as the consideration stipulating penalty is only to regulate the matter as a matter of administrative measure.

e) Where a debtor agrees not to plead limitation vis-à-vis his creditor, it is an agreement to defeat the Limitation Act.

f) An agreement between owner of land who has to pay land revenue in arrears and a stranger that the stranger would purchase his estate for revenue's sake and reconveys it to the former on receipt of purchase money is void, as it would defeat the law relating to revenue, which apparently prohibits defaulting owners from purchasing back the same estate already sold due to his default.

g) An agreement by a Hindu to give his son in adoption in consideration of annual allowance to natural parents would be in violation of Hindu Law and hence is unlawful.

h) Any agreement by a Muslim with the wife before their marriage that the wife shall be at liberty to live with her parents after marriage is void as it would defeat the provisions of Muslim Law.

2. **If it is of such a nature that, if permitted, it would defeat the provisions of any law.**
This clause refers to cases where the object or consideration of an agreement is of such a nature that though not directly forbidden by law, it would indirectly lend to a violation of law whether enacted or otherwise (e.g.. Hindu and Mohammedan Laws). Such an agreement is also void.

ILLUSTRATIONS

a) A loan granted under a promissory note to the guardian of a minor to enable him to celebrate the minor's marriage in contravention of the Child Marriage Restraint Act was held illegal and could not be recovered back. It will be seen that the purpose of borrowing in this case is of such a nature that if permitted it would defeat the provisions of Child Marriage Restraint Act of 19297, for the money was lent to enable the guardian to celebrate the marriage contrary to the provisions of the said Act.

b) An agreement by the debtor not to rise the plea of limitation should a suit have to be filed, is void as tending to limit the provisions of the Limitation Act.

c) An agreement between husband and wife to live separately is invalid as being opposed to Hindu Law.

d) A 'will' must be proved in order to be probated by a court. A mere consent of parties by way of agreement to except this requirement of proof of genuineness or proper execution of will is not lawful and therefore cannot be enforced under C.P.C.

e) A receiver is a court officer. Therefore his remuneration has to be fixed by the court. Parties to certain litigations cannot add or deviate of the power of the receiver. Similarly they cannot fix salary of a receiver without the leave of the court however unconditional it may be. Such an act would be in contravention of law.

3. **If it is fraudulent:** An agreement whose object or consideration is to defraud others is unlawful and hence void.

ILLUSTRATIONS

a) A, promises to pay Rs.200 to B, if B would commit fraud on C. B agrees. B's agreeing to defraud is unlawful consideration for A's promise to pay. Hence the agreement is illegal and void.

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

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

d) 'A' & 'B' are partners in a firm. They agree to defraud a Government department by submitting a tender in the individual name and not in the firm name. This agreement is void as it is a fraud on the Government department.

4. **If it involves or implies injury to the person or property of another:**
If the object or consideration of an agreement is injury to the person or property of another, it is void, being an unlawful agreement.

ILLUSTRATIONS

a) An agreement to commit an assault or to beat a man has been held unlawful and void.

b) An agreement to put certain property to fire is unlawful and void under this clause.

c) An agreement involving the publication of a libel (defamatory article against someone) has been held unlawful and void.

d) An agreement by which a debtor, who borrowed Rs.100, promised to do manual labour without pay for the creditor, so long as the debt was not repaid in full has been held to be void, as it involved injury to the person of the debtor.

e) 'A' agrees to print a book of 'B' which has clearly been published by "W" This agreement is void as it is not only in violation of Copyright Act but also with the intent to cause injury to the property of another.

f) 'A' borrowed money from 'B'. He is unable to pay either the principal or interest. Therefore he agrees to render manual labour for certain period failing which he agrees to pay exorbitant interest. This agreement is void as rendering labour as consideration amounts to agreeing to be a slave. Slavery is opposed to public policy as well. In other words consideration involves 'injury' to 'A'. Hence the agreement is void.

5. If the court regards it as immoral:

An agreement whose object or consideration is immoral is illegal and therefore void. The scope of the word 'immoral' here extends to the following:

i. **Sexual immorality** e.g. illicit cohabitation or concubinage or prostitution.

ILLUSTRATIONS

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

b) A gift deed executed in consideration of illicit intercourse has been held void as its object was immoral.

ii. **Furtherance of sexual immorality.**

ILLUSTRATIONS

a) A prostitute was sued for the hire money of a carriage in which she used to go every evening in order to make a display of her beauty and thus to attract customers. The suit was dismissed on the ground that the plaintiff contributed towards the performance of an immoral and illegal act and hence he was liable to suffer.

b) A man who knowingly lets out his house for prostitution cannot recover the rent, it being an act for furtherance of sexual immorality . The landlord may, however, recover if he did not know the purpose.

iii. **Interference with marital relations.**

ILLUSTRATIONS

a) Money advanced to a married woman to enable her to procure a divorce and to marry the plaintiff could not be recovered back as the object of the agreement was held immoral .

b) An agreement for future separation between a husband and wife is void -ab- inltio it being immoral in the eye of law.

iv. **Such acts which are against good public morals.**

ILLUSTRATION

An agreement for future marriage, after the death of first wife is against good morals and hence would be void .

6. If the court regards it as 'opposed to public policy':

- An agreement is unlawful if the court regards it as 'opposed to public policy'.
- It is not possible to give a precise or exact definition of the term 'public policy'.

- It is rather an elastic term and its connotation may vary with the social structure of a State. Public policy is that principle of law which holds that no person can lawfully do that which is injurious to the public or is against the interests of the society or the State.
- Broadly speaking, an agreement which tends to promote corruption or injustice or immorality is said to be opposed to public policy.
- It is interesting to note that 'opposed to public policy' and 'immoral'. both are very much similar in nature because what is 'immoral' must be 'opposed to public policy' and reverse is also true in most cases.
- 'Public policy' as a concept is evolved basically to develop an orderly society and for good of the community.
- But framing public policy itself is a difficult exercise since a too restrictive approach would stifle the rights of people and a too liberal approach would open the gate for many illegal transactions. Therefore policy on 'public policy' has to be developed with great caution.
- Public policy has been described as ***"an unruly horse, which if not properly bridled, may carry its rider he knows not where".***

On the basis of decided cases on the subject the following agreements have been held by courts to be against public policy:

i. **Trading with an alien enemy:** It is now fully established that trading with an alien enemy (i.e. a citizen of the other country at war with the State is against public policy in so far as it tends to aid the economy of the enemy country. Such agreements are therefore illegal unless made with the special permission of Government. Any agreement made during peace time would be suspended automatically and cannot be carried on further until hostilities (war) come to an end.

ii. **Agreements interfering with the course of justice:** An agreement the object of which is to interfere with the course of justice.e.g. an agreement not to disclose misconduct to the other interested party or an agreement to influence a judge to induce him to decide the ease in a party's favour, is obviously opposed to public policy and is void. But an agreement to refer present or future disputes to arbitration is a valid agreement.

ILLUSTRATION

- 'A' agrees to reward 'B' if he abstains from being a witness in a suit against 'A' is void.
- But an agreement to pay for to a holy man for prayers for success of a suit **is valid.**

iii. **Agreements for stifling criminal prosecution**:

It is well settled law that if a person has committed a crime, he must be punished. **Hence any agreement which seeks to prevent the prosecution of a guilty party is opposed to public policy and is void as "no one can be allowed to make a trade of a felony"**

ILLUSTRATION

- A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the thing taken, the agreement is void as its object is unlawful.
- Similarly, the compromise of a public offence is illegal. It is obvious that if such a course is allowed to be adopted and agreements made between the parties based solely on the consideration of stifling criminal prosecutions are sustained,the basic purpose of Criminal Law would be defeated.

However, under the Indian Criminal Procedure Code there are certain compoundable offences (e.g. assault) which can be compromised and agreements for the compromise of such offences are valid.

ILLUSTRATION

a) 'A' agrees to sell certain land to 'B' in consideration of 'B' abstaining from taking any criminal proceeding against 'A' with respect to an offence which is compoundable, the agreement **is not opposed to public policy and a valid agreement.**

b) 'A' agrees to sell certain land to 'B' in consideration of 'B' abstaining from taking any criminal proceeding against 'A' with respect to an offence which is compoundable, the agreement is not opposed to public policy.

iv. Maintenance and Champerty.

- 'Maintenance may be defined as an agreement whereby a stranger promises to help another person by money or otherwise in litigation in which that third person has himself no legal interest.
- 'Champerty' is an agreement whereby a person agrees to assist another in litigation in exchange of a promise to hand over a portion of the proceeds of the action.
- **Thus. in both cases financial or professional assistance is provided with a view to assisting another person in litigation but in case of champerty the party helping in litigation also shares in the gains of the litigation in addition to interest on money advanced or fees for professional services.**
- Under the English Law both 'Maintenance' and 'Champerty' are absolutely void. The Indian Law, however, does not make them absolutely void because of the peculiar position of Indian litigants many of whom are too poor to afford expensive litigation.
- The rules applied in India are as follows:
  - An agreement for supplying funds by way of 'maintenance' or 'champerty' is valid **unless:**
    (a) it is **unreasonable so as to be unjust to the other party**, or
    (b) it is made by a malicious motive like that of gambling in litigation and not with the bonaflde object of assisting a claim believed to be just

    ILLUSTRATIONS:

    a) Where 75 paise in a rupee was agreed as the share of the financier, out of the property recovered, it was held that the agreement was unreasonable and hence void. However, the plaintiff (financier) was awarded the expenses legitimately incurred by him with interest.

    b) An agreement by a client to pay his lawyer according to the result of the case was held opposed to public policy and void, it being against the professional code of conduct.

v. **Traffic in public offices.** Agreements for sale or transfer of public offices or for appointments to public offices in consideration of money are illegal, being opposed to public policy. Such agreements, if enforced, would lead to inefficiency and corruption in public life.

ILLUSTRATIONS

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

(b) A promise to pay money to a public servant to induce him to retire and make way for the appointment of the promisor is void.

vi. **Agreements creating an interest opposed to duty.** An agreement which tends to create a conflict between interest and duty is illegal and void on the ground that it is opposed to public policy.

ILLUSTRATIONS

(a) A, agrees to pay B, the lieutenant colonel in the army, Rs.50,000 if he will assist her brother to desert the army. The object of the agreement is opposed to public policy and hence the agreement is void and illegal.

(b)An agreement by an agent to receive without his principal's consent compensation from another for the performance of his agency is invalid.

(c)A promise by a trustee to do something in violation of his duty is unlawful.

(d) A, who is the manager of a firm, agrees to pass a contract to X if X pay to A Rs.2000 privately; the agreement is void.

vii. **Marriage brokerage agreements.** These are agreements for the payment of money in consideration of procuring for another in marriage a husband or a wife. Such agreements are illegal and void as being contrary to public policy. Thus, when a 'Prohit' was promised Rs 200 in consideration of procuring a wife for the defendant, the agreement was held invalid and the money could not be recovered . Further an agreement of dowry i.e. to give money or property to the parents of the bride or the bridegroom in connection of their agreeing to the contract of marriage is also illegal and cannot be enforced. But such an agreement is illegal in respect of payment only, the validity of marriage is not affected.

viii. **Sale of public offices:** While appointing a person to certain important and high public office, merit alone should be the criteria. Any attempt to influence or any agreement to influence anyone in this regard should be seen as an act 'opposed to public policy'. 'Public policy' also demands that there should be no money consideration and if it is there, it could be opposed to public policy. This is for the reason presence of money consideration would convert the situation as sale of public office.

ILLUSTRATIONS:

(1) An agreement to pay money to public servant in order to induce him to retire from his office so that another person may secure the appointment is void.

(2) An agreement to procure a public recognition like Padma Vibhushan for reward is void.

(3) The sale of the office of a mutawali of wakf is opposed to public policy, because the office of mutawali is connected with matters of public interest.

ix. **Agreement for the creation of monopolies:** Agreements having for their object the establishment of monopolies are opposed to public policy and therefore void.

Object or Consideration Unlawful in Part

Section 23 (already discussed) deals with cases in which object or/and consideration is wholly illegal. But what is the position if the same agreement contains both legal and illegal terms. i.e. it is partly legal and partly illegal.

Sections 24. 57 and 58 of the Contract Act provide for such cases. Accordingly, if the object or consideration is partially unlawful, the following rules will apply:

1) When an agreement contains several distinct promises to do things legal and also other things illegal and the legal part **cannot be separated from the illegal part** (i.e. the consideration for different promises is a single sum of money), **the whole agreement is illegal and void (Sec. 24).**

ILLUSTRATIONS:

(a) A, promises to superintend, on behalf of B,a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A, a salary of Rs.10,000 a year. The agreement is void and unlawful. Here a part of the object is legal and a part is illegal which are not severable because the consideration for both promises is a single sum of money (Illustration to Sec. 24).

(b) A, agrees to serve B as his housekeeper and also to live in adultery with him at a fixed salary. The whole agreement is unlawful and void. A cannot sue even for service rendered as housekeeper because it cannot be ascertained as to what was due on account of adulterous intercourse and what was due for housekeeping.

2) Where there is **reciprocal promise to do things legal and also other things illegal** and the legal part can be **separated** from the illegal part (i.e. there is a separate consideration for different promises),the **legal part is a contract and the illegal part is a void agreement (Sec. 57).**

ILLUSTRATIONS:

A and B agree that A shall sell B a house for Rs.10,000, but that, if B uses it is as a gambling house, he shall pay A Rs.50,000 for it. The first set of reciprocal promises, namely, to sell the house and to pay RS.10,000 for it, is a contract. The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void and illegal agreement. Here it is to be noted that the two promises are distinct and severable with a separate consideration for each such promise. The promises are thus independent of each other except that they form part of the same contract.

3) In the case of an **alternative promise,** one branch of which is legal and the other illegal, **the legal branch alone can be enforced (Sec. 58).**

ILLUSTRATIONS:

A and B agree that A shall pay B Rs 1,000 for which B shall afterwards deliver to A either rice or smuggled opium. This is a valid contract to deliver rice and a void and unlawful agreement as to opium .

Effect of Illegal Agreements on Collateral Transactions

Both **'illegal agreements'** and **'void agreements'** are unenforceable as between the immediate parties. **But an 'illegal agreement' has this further effect that other transactions which are incidental or collateral to it are also tainted with illegality and therefore are not enforceable, provided the parties to the collateral transaction had the knowledge of the illegal or immoral design of the main or primary agreement (a void agreement does not invalidate collateral transactions).**

ILLUSTRATIONS:

(a) A, enters into a smuggling of goods agreement with B and borrows Rs.11,000 from C for giving an advance to B. C cannot recover the money lent if he knew the illegal purpose, because his loan agreement was a collateral transaction to an illegal agreement. Of course if C did not know the purpose of the loan, he can recover even though A had used the money for an illegal object.

(b) A bets on a horse race with B and borrows 2500 from C for this purpose. C can always recover the money lent, whether he knew the purpose of loan or not because his loan agreement was collateral to a void (wagering) agreement only.

No restitution is allowed.

Parties to an illegal agreement cannot get any help from a court of law as "no polluted hand shall touch the pure fountain of justice."

So nothing can he recovered under an illegal agreement and if something has been paid it cannot he recovered back whether the illegal object has been carried out or has not been carried out is immaterial. The rule of law is that "no action is allowed on an 'illegal agreement'.

ILLUSTRATION

X promises Y to pay Rs.10,000 if he murders Z. If Y commits the murder, he cannot recover the amount from X. If X has already paid the amount and Y fails in murdering Z, X cannot recover the amount back.

7.VOID AGREEMENTS

- "An agreement not enforceable by law is said to be void" [Sec. 2(g)].
- Thus a void agreement does not give rise to any legal consequences and is void -ab-initio. In the eye of law such an agreement is no agreement at all from its very inception(beginning).

We have already dealt with the following types of void agreements in the preceding chapters, and will not therefore discuss them here again:

1. Agreements by a minor or a person of unsound mind (Sec.11)
2. Agreements made under a bilateral mistake of fact material to the agreement (Sec. 20).
3. Agreements of which the consideration or object is unlawful (Sec. 23).
4. Agreements of which the consideration or object is unlawful in part and the illegal part cannot be separated from the legal part (Sec. 24)
5. Agreements made without consideration (Sec. 25).

EXPRESSLY DECLARED VOID AGREEMENTS

The last essential of a valid contract as declared by **Section 10 is that it must not be one which is 'expressly declared' to be void by the Act.** Thus, there arises a question, as to what are 'expressly declared' void agreements?

The following agreements have been 'expressly declared', to be void by the Indian Contract Act:

1. Agreements in restraint of marriage (Sec. 26).
2. Agreements in restraint of trade (Sec. 27).
3. Agreements in restraint of legal proceedings (Sec. 28).
4. Agreements the meaning of which is uncertain (Sec. 29).
5. Agreements by way of wager (Sec. 30).
6. Agreements contingent on impossible events (Sec. 36).
7. Agreements to do impossible acts (Sec. 56).

- At the very outset, it may be borne in mind that the law declares these **agreements void -ab-initio and not illegal, and therefore transactions collateral to such agreements are not made void.**
- In fact it is for this reason that these agreements have not been discussed in the preceding chapter dealing with "unlawful or illegal agreements," because otherwise, in effect, these agreements are also 'unlawful agreements' as they are expressly declared void by the Contract Act.
- **It may be recalled that in the case of illegal agreements, transactions collateral to them are also tainted with illegality and hence void.**

1. Agreements in Restraint of Marriage:

- Every individual enjoys the freedom to marry and so according to **Section 26 of the Contract Act "every agreement in restraint of the marriage of any person, other than a minor, is void."**
- The restraint may be general or partial but the agreement is void, and therefore, **an agreement agreeing not to marry at all, or a certain person, or a class of persons, or for a fixed period, is void**.
- However, an **agreement restraining the marriage of a minor is valid** under the Section.
- So if a person, being a major, agrees for good consideration not to marry, the promise is not binding.
- It is interesting to note that **a promise to marry a particular person does not imply any restraint of marriage,** and is, therefore, a valid contract.

ILLUSTRATIONS:

(a) A agrees with B for good consideration that she will not marry C. It is a void agreement.

(b) A agrees with B that she will marry him only. It is a valid contract of marriage.

2. Agreements in Restraint of Trade:

- The Constitution of India guarantees the freedom of trade and commerce to every citizen and therefore **Section 27** declares **"every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."**
- Thus no person is at liberty to deprive himself of the fruit of his labour, skill or talent, by any contracts that he enters into.
- The object of this law is to protect trade.
- **An agreement whereby one of the parties agrees to close his business in consideration of the promise by the other party to pay a certain sum of money, is void, being an agreement is restraint of trade, and the amount is not recoverable, if the other party fails to pay the promised sum of money.**

Exceptions: An agreement in restraint of trade is valid in the following cases:

i. Sale of goodwill.

- The seller of the 'goodwill' of a business
- can be restrained from carrying on a similar business, within specified local limits,
- so long as the buyer, or any person deriving title to the goodwill from him,
- carries on a like business therein, **provided the restraint is reasonable in point of time and space** (Exception to Sec. 27).

ILLUSTRATIONS:

(a) A, after selling the goodwill of his business to B promises not to carry on similar business **"anywhere in the world." As the restraint is unreasonable the agreement is void.**

(b) C, a seller of imitation jewellery in London sells his business to D and promises that for a period of two years he would not deal: (a) in imitation jewellery in England, (b) in real jewellery in England, and (c) in real or imitation jewellery in certain foreign countries. The first promise alone was held lawful. The other two promises, namely (b) and (c), were held void as the restraint was unreasonable in point of space and the nature of business.

ii. Partners' agreements.

An agreement in restraint of trade among the partners or between any partner and the buyer of firm's goodwill is valid if the restraint comes within any of the following cases:

a) **Restriction on existing partner:** An agreement among the partners that a partner shall not carry on any business other than that of the firm while he is a partner.
b) **Restriction on outgoing partner**: An agreement by a partner with his other partners that on retiring from the partnership he will not carry on any business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable.
c) **Restrictions on partners upon or in anticipation of dissolution of firm:** An agreement among the partners, upon or in anticipation of the dissolution of the firm, that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable
d) **Restrictions in case of sale of goodwill of the firm**: An agreement between any partner and the buyer of the firm's goodwill that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits, provided the restrictions imposed are reasonable .

iii. Negative stipulations in service agreements.

- An agreement of service by which a person binds himself during the term of the agreement, not to take service with anyone else, is not in restraint of lawful profession and is valid. Thus a chartered accountant employed in a company may be debarred from private practice or from serving elsewhere during the continuance of service.
- An agreement of service through which an employee commits not to compete with his employer is not in restraint of trade. *Example:* 'B' is a Doctor and he employs 'A' a junior Doctor as his assistant. 'A' agrees not to practice as Doctor during the period of his employment with 'B' as a Doctor independently. Such an agreement will be valid.

iv. Trade combinations.

- As pointed out earlier, an agreement, the primary object of which is to regulate business and not to restrain it is valid.
- Thus, an agreement in the nature of a business combination between traders or manufacturers e. g., not to sell their goods below a certain price, to pool profits or output and to divide the same in an agreed proportion, does not amount to a restraint of trade and is perfectly valid .
- Similarly, an agreement among sellers not to sell a particular product below a particular price is not an agreement in restraint of trade.
- But if an agreement attempts to create a monopoly, it would be void . Agreements tending to create monopolies are now also governed by the provisions of the Competition Act, 2002, which forbids certain types of trade agreements.

v. An agreement between manufacturer and a wholesale merchant that the entire production during a period will be sold by the manufacturer to the wholesale merchant is not in restraint of trade.

ILLUSTRATION

An agreement to sell all produce to a certain party, with a stipulation that the purchaser was bound to accept the whole quantity, was held valid because it aimed to promote business and did not restrain it . But where in a similar agreement the purchaser was free to reject the goods (i.e., was not bound to accept the whole quantity tendered) it was held that the agreement was void as being in restraint of trade .

MAY 2016,Nov 2007,Nov 2016

'X' agreed to become an assistant for 2 years to 'Y' who was practicing chartered accountant at Jodhpur. It was also agreed that during the term of agreement 'X' will not practice as a chartered accountant on his own account within 20 kms. of the office of 'Y' at Jodhpur. At the end of one year, 'X' left the assistantship of 'Y' and started practice on his own account within the said area of 20 kms. Referring to the provisions of the Indian Contract Act, 1872, decide whether 'X' could be restrained from doing so? **(4 Marks)**

Answer

Section 27 of the Indian Contract Act, 1872 deals with agreements in restraint of trade. According to the said section, every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

However, in the case of the service agreements restraint of trade is valid. In an agreement of service by which a person binds himself during the term of agreement not to take service with anyone else directly or indirectly to promote any business in direct competition with that of his employer is not in restraint of trade, so it is a valid contract.

In the instant case, agreement entered by X with Y is reasonable, and do not amount to restraint of trade and hence enforceable.

Therefore, X can be restrained by an injunction from practicing on his own account in Jodhpur.

NOV 2004, NOV 2016

Mr. Seth an industrialist has been fighting a long drawn litigation with Mr. Raman another industrialist. To support his legal campaign Mr. Seth enlists the services of Mr. X a legal expert stating that on amount of Rs. 5 lakhs would be paid, if Mr. X does not take up the brief of Mr. Raman. Mr. X agrees, but at the end of the litigation, Mr. Seth refuses to pay. Decide whether Mr. X can recover the amount promised by Mr. Seth under the provisions of the Indian Contract Act, 1872.

Hint:

Mr. X cannot recover Rs. 5 lakhs Mr. Seth	since the given agreement restrains Mr. X from exercising a lawful profession, and so this agreement is in restraint of trade (Sec. 27).

Nov. 2005

Miss X, a film actress agreed to work exclusively for a period of two years, for a film production company. However, during the said period she enters into a contract to work for another film producer. Discuss the rights of the aggrieved film production company under the Indian Contract Act, 1872.

Answer

Restraint on Miss X is valid	- since an agreement of service under which on employee agrees to serve a certain employer for a certain duration, and that he will not serve anybody else during such period is a valid agreement.
Miss X cannot be compelled to work with the film production company	- since specific performance is generally not allowed where personal performance is required
Miss X may be restrained from working for another producer	- since, in case of a negative term of a contract, the defaulting party is generally restrained from doing what the promised not to do(Suit for injunction).

3. Agreements in Restraint of Legal Proceedings

- Section 28, as amended by the Indian Contract Act, declares the following kinds of agreements void:
  (a) An agreement by which a party is restricted **absolutely** from taking usual legal proceedings, in respect of any rights arising from a contract.
  (b) An agreement which **limits the time** within which one may enforce his contract rights, **without regard to the time allowed by the Limitation Act.**

Restriction on legal proceedings. As stated above, Section 28 renders every agreement in restraint of legal proceedings void. This is in furtherance of what we studied under the definition of a 'contract', namely, agreement plus enforceability at law is a contract. Thus if an agreement inter-alia provides that no party shall go to a court of law, in case of breach, there is no contract and the agreement is void ab-initio. In this connection the following points must also be borne in mind:

(a) **This Section does not affect the law relating to arbitration e.g., if the parties agree to refer to arbitration any dispute which may arise between them under the contract, such a contract is valid .**

(b) **The Section does not affect an agreement whereby parties agree "not to file an appeal" in a higher court.** Thus where it was agreed that neither patty shall appeal against the trial court's decision, the agreement was held valid, for, Section 28 applies only to absolute restriction on taking the legal proceedings, whereas here the restriction is

only partial as the parties can go to a court of law alright and the only restriction is that the losing party cannot file an appeal.

(c) Lastly, this Section **does not prevent the parties to a contract from selecting one of the two courts which are equally competent to try the suit**. Thus where an agreement provides—"Any litigation arising out of this agreement shall be settled in the High Court of Judicature at Calcutta, and in no other court whatsoever." and defendants filed a suit in Agra whereas the plaintiff brought a suit in Calcutta. It was held that the agreement was binding between the parties and it was not open to the defendants to proceed with their suit in Agra.

Curtailing the period of limitation.

- Any agreement **curtailing the period of limitation** prescribed by the Limitation Act is also void under Section 28.
- Thus, if a clause in an agreement between A and B provides that either patty can sue for breach within a year of breach only, the clause is void and despite the clause the parties have a right to sue in case of breach by either party within the time allowed by the Limitation Act i.e., within three years from the date of breach.
- It is relevant to state that agreements **extending the period of limitation prescribed by the Limitation Act are also void, not under this Section but under Section 23, as the object will be to defeat the provisions of the law.**

4. Uncertain Agreements

- "Agreements, the meaning of which is not certain, or capable of being made certain, are void" (Sec. 29).
- Through Section 29 the law aims to ensure that the parties to a contract should be aware of the precise nature and scope of their mutual rights and obligations under the contract.
- Thus, if the words used by the parties are vague or indefinite, the law cannot enforce the agreement.

ILLUSTRATIONS:

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

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

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

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

- Further, an agreement "to enter into an agreement in future" is void for uncertainty unless all the terms of the proposed agreement are agreed expressly or implicitly. Thus, an agreement to engage a servant some time next year, at a salary to be mutually agreed upon is a void agreement.

5. Wagering Agreements

- Literally the word **'wager' means 'a bet'**: something stated to be lost or won on the result of a doubtful issue, and, therefore, **wagering agreements are nothing but ordinary betting agreements.**
- Thus where A and B mutually agree that if it rains today A will pay B Rs 100 and if it does not rain B will pay A Rs 100 or where C and D enter into an agreement that on tossing up a coin, if it falls head upwards C will pay D Rs 50 and if it falls tail upwards D will pay C Rs.50, there is a wagering agreement.

- **"The essence of wagering is that one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose; but if it turns out the other way he will win."**
- **Wager is a game of chance in which the contingency of either gain or loss is wholly dependent on an 'uncertain event'.**
- **An event may be uncertain, not only because it is a future event, but because it is not yet known to the parties. Thus a wager may be made upon the result of the cricket match which is to take place next month in Kolkata, or upon the result of an election which is over, if the parties do not know the result.**
- **The parties to a wager must have no interest in the event's happening or non-happening except the winning or losing of the bet laid between them. It is here that wagering agreements differ from insurance contracts which are valid because parties have an interest to protect the life or property, and have, for that very reason, entered into the contract of insurance.**

Essential features of a wager:

The essentials of a wagering agreement may thus be summarised as follows:
(a) There must be a promise to pay money or money's worth.
(b) The promise must be conditional on an event happening or not happening.
(c) The event must be an uncertain one. If one of the parties has the event in his own hands, the transaction is not a wager.
(d) Each party must stand to win or lose under the terms of agreement. An agreement is not a wager if one party may only win and cannot lose, or if he may lose but cannot win, or if he can neither win nor lose.
(e) **No patty should have a proprietary interest in the event. The stake must be the only interest which the parties have in the agreement.(No interest except winning the bet).**

Agreements by way of wager are void:

Section 30 lays down that

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

ILLUSTRATION:

- Where A and B enter into an agreement which provides that if England's cricket team wins the test match, A will pay B Rs.100, and if it loses B will pay Rs100 to A, nothing can be recovered by the winning party under the agreement, it being a wager.
- **Similarly, where C and D enter into a wagering agreement and each deposits Rs 100 with Z instructing him to pay or give the total sum to the winner, no suit can be brought by the winner for recovering the bet amount from Z, the stake-holder. Further, if Z had paid the sum to the winner, the loser cannot bring a suit, for recovering his Rs 100, either against the winner or against Z, the stake-holder, even if Z had paid after the loser's definite instructions not to pay. Of course the loser can recover back his deposit if he makes the demand before the stake-holder had paid it over to the winner. But even such a deposit cannot be recovered by a loser in the States of Maharashtra and Gujarat where such an agreement is void and illegal.**

Exception:

- **HORSE RACES :**
  - The Section makes an exception in favour of certain prizes for horse racing.
  - A bet on a **horse race carrying a prize of Rs.500 or more** to the winners has been made **valid** under the exception.

- But with a view to protecting the poor persons from gambling, a bet on **a horse race carrying a prize of less than Rs 500 remains a wager.**

Another important point:

- It is important to note that in the States of **Maharashtra and Gujarat** wagering agreements are, by a local statute, **not only void but also illegal**. **As a result in these states the collateral transactions to wagering agreements become tainted with illegality and hence are void.**

Special cases:

Commercial transactions/Speculative transactions:

- Agreements for sale and purchase of any commodity or share market transactions, **in which there is a genuine intention to do legitimate business i.e., to give and take delivery of goods or shares, are not wagering agreements.**
- If there is **no such genuine intention and parties only want to gamble on the rise or fall of the market by paying or receiving the differences in prices only, the transaction would be a wagering agreement and therefore void.**
- "In order to constitute a wagering contract, neither party should intend to perform the contract itself, but only to pay the differences.

  ILLUSTRATION:

  'A' enters into a agreement with 'B' to buy 100 bales of jute at Rs.150/- per bale for forward delivery after six months. This is a proposed transaction of purchase @ Rs.150/- per bale. What if the price at the time of delivery goes up to ` 200/- 'A' has the following two options:

  i. to take delivery of 100 bales at the contracted rate of Rs 150/- and sell it to some other buyer and make a profit of Rs 50/-per bale or
  ii. to simply collect the difference of Rs 50/- per bale from 'B'

  Similarly what if the price at the time of delivery goes down to Rs.125/- per bale. 'A' has the following two options:

  i. to take delivery of 100 bales at the contracted rate of Rs.150/- [and perhaps sell it to some buyer and incur a loss of Rs25 per bale] or
  ii. to pay the difference of Rs.25/- per bale to 'B' & close the contract.

In the above *example* if the original intention of the parties was only to settle the difference in price, than it would be a wagering contract which would be void.

While gambling and wagering are prohibited by law, speculation is not.

Lotteries: A lottery is a game of chance. Hence the lottery business is a wagering transaction. Such a transaction is not only void but also illegal because Section 294-A of the Indian Penal Code declares 'conducting of lottery' a punishable offence. If a lottery is authorised by the Government, the only effect of such permission is that the persons conducting the lottery (i.e., the persons running the lottery and the buyer of lottery ticket) will not be guilty of a criminal offence, but the lottery remains a wager.

Crossword Puzzles and Competitions: Crossword puzzles in which prizes depend upon the correspondence of the competitor's solution with a previously prepared solution kept with the editor of a newspaper is a lottery and therefore, a wagering transaction.

Case Law: ***State of Bombay vs. R.M.D. Chamarbangwala AIR (1957)*** **Facts:** A crossword puzzle was given in magazine. Abovementioned clause was stated in the magazine. A solved his crossword puzzle and his solution corresponded with previously prepared solution kept with the editor. Held, this was a game of chance and therefore a lottery (wagering transaction). Crossword puzzles, picture competitions and athletic competitions where prizes are

awarded on the basis of skill and intelligence are the games of skill and hence such competitions are valid. According to the Prize Competition Act, 1955 prize competitions in games of skill are not wagers provided the prize money does not exceed Rs.1,000.

Transactions resembling with wagering transaction but are not void

(i) Chit fund: Chit fund does not come within the scope of wager (Section 30). In case of a chit fund, a certain number of persons decide to contribute a fixed sum for a specified period and at the end of a month, the amount so contributed is paid to the lucky winner of the lucky draw.

(ii) Commercial transactions or share market transactions: In these transactions in which delivery of goods or shares is intended to be given or taken, do not amount to wagers.

(iii) Games of skill and Athletic Competition: Crossword puzzles, picture competitions and athletic competitions where prizes are awarded on the basis of skill and intelligence are the games of skill and hence such competition are valid. According to the Prize Competition Act, 1955 prize competition in games of skill are not wagers provided the prize money does not exceed ` 1,000.

(iv) Insurance contracts. Insurance contracts **are valid contracts** even though they provide for payment of money by the insurer on the happening of a future uncertain event. Such contracts differ from wagering agreements mainly in three respects:

(a) The **holder of an insurance policy must have an 'insurable interest' in the event** upon which the insurance money becomes payable. Thus contracts of insurance are entered into to protect an interest. In a wagering agreement there is no interest to protect and the parties bet exclusively because they can thereby make some easy money.
(b) Contracts of insurance are based on scientific and actuarial calculation of risks, whereas wagering agreements are a gamble without any scientific calculation of risks.
(c) Contracts of insurance are regarded as beneficial to the public, whereas wagering agreements do not serve any useful purpose.

Distinction between Contract of Insurance and Wagering Agreement

	Basis	Contracts of Insurance	Wagering Agreement
1.	Meaning	It is a contract to indemnify the loss.	It is a promise to pay money or money's worth on the happening or non happening of an uncertain event.
2.	Consideration	The crux of insurance contract is the mutual consideration (premium and compensation amount).	There is no consideration between the two parties. There is just gambling for money.
3.	Insurable Interest	Insured party has insurable interest in the life or property sought to be insured.	There is no property in case of wagering agreement. There is betting on other's life and properties.
4.	Contract	Except life insurance, the contract of insurance indemnifies the insured person against loss.	Loser has to pay the fixed amount on the happening of uncertain event.
5.	Enforceability	It is valid and enforceable	It is void and unenforceable agreement.
6.	Premium	Calculation of premium is based on scientific and actuarial calculation of risks.	No such logical calculations are required in case of wagering agreement.

7.	Public Welfare	They are beneficial to the society.	They have been regarded as against the public welfare.

Wager and collateral transactions:

- The validity of a collateral transaction cannot be challenged because the main contract is a wager and void.
- **Collateral transactions to void agreements are not void. Collateral transactions to illegal agreements are illegal and thus void.**
- For *instance* in a wagering contract, the broker is entitled to collect his brokerage.
- Similarly the principal can recover the prize money from his agent received by him on account of a wagering transactions.

- **The acid test of validly of a collateral transaction is whether the main transaction is illegal or legal but void. If the main transaction is illegal, the collateral transaction cannot be valid.** For *example* security given for regular payment of the rent of a house let out for the purpose of gambling cannot be recovered; the recovery of security being tainted with the illegality of original transaction cannot be enforced.

- **A promise made by the loser of a wager to pay the amount lost in consideration of the winners forbearance to sue him as defaulter can be enforced as a fresh contract, separate and distinct from original wagering contract though collateral to it.**

No Restitution. The term 'restitution' means 'return' or 'restoration' of the benefit received from the plaintiff under the agreement. As per Section 65 no restitution of the benefit received is allowed in the case of expressly declared void agreements.

DISTINCTION BETWEEN VOID AGREEMENT AND ILLEGAL AGREEMENT

Basis of distinction	Void agreement	Illegal agreement
1. Meaning	An agreement not enforceable by law is said to be a void agreement	An agreement which is forbidden (i.e., prohibited) by any law for the time being in force, is an illegal agreement.
2. One in another	All void agreements are not illegal.	An illegal agreement is always void.
3. Reason	If an agreement does not satisfy one or more requirements of Sec. 10, 29 and 56, it is void.	An agreement becomes an illegal agreement only if it is made against the provisions of any law for the time being in force.
4. Punishment	The parties are not liable to be punished.	In case o fan illegal agreement, the parties are criminally liable.
5. Void-ab-initio	A valid contract may subsequently become void.	An illegal agreement is void from the very beginning.
6. Effect on collateral transactions	A transaction which is collateral to a void agreement, is not void.	A transaction which is collateral to an illegal agreement, is also illegal.

DISTINCTION BETWEEN VOID AGREEMENT AND VOID CONTRACT

Basis of distinction	Void agreement	Void Contract
1. Meaning	An agreement not enforceable by law is said to be a void i.e void agreement	A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable .

2. Status at the time of formation	All the essentials of the contract are not satisfied at the time of formation of agreement .Thus it is a nullity since very beginning	All the essentials of the contract are satisfied at the time of formation of a contract ,which subsequently becomes void .Thus at the time of formation ,it is a valid contract
3. Restitution	No restitution is allowed in case of a expressly declared void agreements .or if the object or consideration of an agreement is unlawful .	Restitution is allowed in case of a void contract .In others words ,any party who has obtained any benefit under a void contract ,must restore it back to the other party .
4. Legal obligation	A void agreement does not create any legal obligations between the parties from the very beginning .	When legal obligations created under a contract come to an end subsequent to formation of the contract ,the contract becomes void

8.CONTINGENT CONTRACTS

Definition:

Section 31 of the Contract Act defines a contingent contract as follows:

- A contingent contract is a contract to do or not to do something
- if some event
- **collateral to such contract**
- does or does not happen.

Thus it is a contract, the performance of which is dependent upon the happening or non- happening of an uncertain event, collateral to such contract.

ILLUSTRATION

A contracts to indemnify B upto Rs 20,000 ,in consideration of B paying Rs 1,000 annual premium if B's factory is burnt. This is a contingent contract.

Any ordinary contract can be changed into a contingent contract, if its performance is made dependent upon the happening or non-happening of an uncertain event, **collateral to such contract. For example, the following are contingent contracts:**

(a)A contracts to sell B 10 bales of cotton for Rs 20,000,if the ship by which they are coming returns safely.

(b)A promises to give a loan of Rs.1,000 to B,if he is elected the president of a particular association.

(c) A promises to pay Rs 50,000 to B if a certain ship does not return, of course after charging usual premium. (It is a contract of insurance.)

(d) C advances a loan of Rs 10,000 to D and M promises to that if D does not repay the loan,M will do so. (It is a contract of guarantee.)

Contracts of insurance and contracts of indemnity and guarantee are popular instances of contingent contracts.

- In certain cases a **contract may look like a 'contingent contract'** whereas **in fact it may be simply an ordinary absolute contract** where the promisor undertakes to perform the contract in all events.
- **For example:** Where A promises to pay Rs 500 to B, a property broker, if B manages to get a two rooms accommodation for him at a rental of Rs 2.500 per month, it is not a contingent contract, though on the face of it, it appears like a conditional contract. It is an ordinary absolute contract because the uncertain event (namely managing to get an accommodation) itself forms the consideration of the contract and is not a collateral event.)
- **Hence it must be clearly understood that in the ease of contingent contracts the uncertain event must be collateral to such contracts.**

What is a Collateral event:

A 'collateral event 'means **an event which is "neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise."**

- Thus where C contracts to pay Rs 100 to D for white-washing his house on the terms that no payment shall be made till the completion of the work, it is not a contingent contract because the event (D's completing the work) is not collateral to the contract, but is itself a reciprocal promise or is the very thing contracted for and is thus an integral part of the contract.
- Similarly, a contract for the sale of goods wherein the seller agrees to give delivery of goods after a week provided the purchaser makes the payment within two days is an absolute contract and not a contingent

contract because the event (making payment by the buyer) is an integral part of the contract (a condition precedent) and not collateral to the contract.

In simple words, the collateral event is one which does not form part of consideration of the contract, and is independent of it.

- For example, A contracts to pay Rs 50,000 to B, a contractor, for constructing a building, provided the construction is approved by an architect. It is a contingent contract because the consideration of the promise to pay Rs 50, 000, is the construction of the building, and the event, namely, approval by an architect, is a collateral event, which is independent of the consideration and it is on the happening of this collateral event that the contract shall be enforced.
- A contracts to pay B Rs. 100,000 if B's house is burnt. This is a contingent contract. Here the burning of the B's house is neither a performance promised as part of the contract nor it is the consideration obtained from B. The liability of A arises only on the happening of the collateral event.

Essentials of Contingent Contract

From the forgoing discussion the following essentials of a contingent contract become evident:

1. The performance of such a contract depends upon the **happening or non-happening of some future uncertain event.**
2. The **future uncertain event is collateral** i.e. incidental to the contract. The event is not part of the contract. The event should be neither performance promised nor a consideration for a promise.
   Where 'A' agrees to deliver 100 bags of wheat and 'B' agrees to pay after delivery, this is a conditional contract and not a contingent contract. Similarly where 'A' promises to pay 'B' Rs 10000/- if he marries 'C' is not a contingent contract but a conditional contract.
3. **The contingent event should not be a mere 'will' of the promisor.** The event should be contingent in addition to being the will of the promisor.
   For example if 'A' promises to pay 'B' ` 10000/- if 'A' left for Delhi from Mumbai on a particular day, it is a contingent contract because though 'A's leaving for Delhi is his own will, it cannot happen only at his will.
4. **The event must be uncertain.** Where the event is certain or bound to happen, the contract is due to be performed, then it is a not contingent contract.
   Example: 'A' agreed to sell his agricultural land to 'B' after obtaining the necessary permission from the collector. As a matter of course, the permission was generally granted on the fulfilment of certain formalities. It was held that the contract was not a contingent contract as the grant of permission by the collector was almost a certainty.

Rules Regarding the Performance of Contingent Contracts

The rules regarding the performance of contingent contracts as contained in **Sections 32 to 36** of the Contract Act are given below:

(1) Contingency is the "happening of an event": Where a contingent contract is made contingent on happening of a future contingent event, the contract cannot be enforced until and unless the event 'happens'. If the happening of the event becomes impossible, then the contingent contract is void.

ILLUSTRATION:

(a)'X' enters into a contract to buy 'Y's car provided 'Y' survives 'A'. Here 'Y' surviving 'A' or 'A' dying before 'Y' is the event on which the contract is contingent and it cannot be enforced until 'A' dies.

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

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

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

(2) Contingency is the non-happening of an event: Where a contingent contract is made contingent on a non happening of an event, it can be enforced only when the happening of the event becomes impossible and not before.

ILLUSTRATION:

A agrees to pay B a sum of money (as insurance claim) if a certain ship does not return (of course after charging premium). The ship is sunk. The contract can be enforced when the ship sinks.

(3) Contingent on the future conduct of a living person: A contract would cease to be enforceable if it is contingent upon the conduct of a living person when that living person does something to make the 'event' or 'conduct' as impossible of happening within any definite time, or otherwise then under further contingencies.

ILLUSTRATION:

A agrees to pay B a sum of money (as loan) if B marries C.C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B. [If later B actually marries C (the D's widow),it will not revive the old obligation of A to pay the sum, because that came to an end when C married D].

(4) Contingent contracts to do or not to do anything, if a **specified uncertain event happens within a fixed time**, becomes void, if, at the expiration of the time fixed, such event has not happened or if before the time fixed, such event becomes impossible .

ILLUSTRATION

A promises to pay B a sum of money (as loan) if a certain ship returns within a year. The contract may be enforced if the ship returns within the year and becomes void if the ship is burnt within the year or if the ship does not return within the year.

(5) Contingent contracts to do or not to do anything, if **a specified uncertain event does not happen within a fixed time** , may be enforced by law when the time fixed has expired and such event has not happened, or if , before the time fixed has expired, if it becomes certain that such event will not happen.

ILLUSTRATION

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

(6) Contingent on an impossible event: A contingent agreement to do a thing or not to do a thing if an impossible event happens is void and hence is not obviously enforceable. The situation would not change even if the parties to the agreement are not aware of such impossibility.

ILLUSTRATION:

(a) 'A' agrees to pay 'B' Rs 1 lakh if sun rises in the west next morning. This is an impossible event and hence void.

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

Difference between a Contingent Contract and a Wagering Agreement

Basis of difference	Contingent contract	Wagering Agreement
Meaning	A contingent contract is a contract to do or not to do something with reference to a collateral event happening or not happening.	A wagering agreement is a promise to give money or money's worth with reference to an uncertain event happening or not happening.
Reciprocal promises	Contingent contract may not contain reciprocal promises.	A wagering agreement consists of reciprocal promises.
Uncertain event	In a contingent contract, the event is collateral.	In a wagering contract, the uncertain event is the core factor.

Nature of contract	Contingent contract may not be wagering in nature.	A wagering agreement is essentially contingent in nature.
Interest of contracting parties	Contracting parties have interest in the subject matter in contingent	The contracting parties have no interest in the subject matter.
Doctrine of mutuality of lose and gain	Contingent contract is not based on doctrine of mutuality of lose and gain.	A wagering contract is a game, losing and gaining alone matters.
Effect of contract	Contingent contract is valid.	A wagering agreement is void.

Similarity: Performance of agreement depends on happening or not happening of a future uncertain event.

SUMMARY OF RULES REGARDING CONTINGENT CONTRACTS

Contract contingent upon	**When can it be enforced?**	**When does it become void?**
- happening of an event	When such event has happened.	When the happening of such event becomes impossible.
- non-happening of a future event	When the happening of such event becomes impossible.	When such event has happened.
- happening of an event within a specified time	When such event has happened within the specified time.	♦ When the happening of such event becomes impossible before the expiry of specified time. ♦ When such event has not happened within the specified time.
- non-happening of an event within a fixed time	▪ When the happening of such event becomes impossible before the expiry of specified time. ▪ When such event has not happened within the specified time.	When such event has happened within the specified time.
-future conduct of a living person	When such person acts in the manner as desired in the contract	When such person does anything which makes the desired future conduct of such person – (a) impossible; or (b) dependent upon certain contingency.
- impossible events	Such an agreement cannot be enforced since it is void. Whether the impossibility of the event was known to the parties or not is immaterial	

9. PERFORMANCE OF CONTRACTS

- "Performance of Contract" means fulfilling of their respective legal obligations created under the contract by both the promisor and the promisee.
- When a contract is duly performed by both the parties, the contract comes to a happy ending and nothing more remains.
- Performance by all the parties of the respective obligations is the normal and natural mode of discharging or terminating a contract.

We shall here discuss "various rules" as to the performance of contracts.

Who can Demand Performance?

- It is only the promisee (or his duly authorised agent) who can demand performance of the promise under a contract, for, the general rule is that “a person cannot acquire rights under a contract to which he is not a party".
- A third party cannot demand performance of the contract even if it was made for his benefit.
- In case of the death of the promisee, his legal representatives are entitled to enforce the performance of the contract against the promisor.

ILLUSTRATIONS:

a) A promises B to pay C a sum of Rs. 1000. The person who can demand performance is B and not C. Lf A does not pay the amount to C, C cannot take any action against A. It is only B who can take action against A. On the death of B,B's legal representatives are entitled to enforce the promise against A.

b) A mortgaged his land to B, part of the consideration for the same being B's promise to discharge a debt of A to C. B did not pay to C. It was held that C was a stranger to the contract and could not sue B for the payment of the debt

By whom Contracts must be Performed?

1. **By the promisor himself:**
   - In the case of a contract involving personal skill, taste or credit. e. g. a contract to paint a picture, a contract of agency or service, the promisor must himself perform the contract.
   - Section 40 states “if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor”

     ILLUSTRATION:

     A promises to paint a picture for B. A must perform this promise personally

2. **By the promisor or his agent:**
   - In the case of a contract of impersonal nature; e.g., a contract of sale of goods or a contract to lend a sum of money, the promisor himself or his agent may perform the contract [Section 40 Clause (2)].

     ILLUSTRATION:

     a) A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another.
3. **By the legal representatives:**
   - In case of the death of the promisor before performance, the liability of performance falls on his legal representatives, unless a contrary intention appears from the contract [Section 37 Clause (2)].

- Thus, in the case of **contracts involving personal skill, the heirs or legal representatives of a deceased promisor are not bound to perform the contract.** Such contracts come to an end on the death of the promisor.
- In the case of **contracts not involving personal considerations, the legal representatives are bound to perform the contract.** But their liability is limited to the estate of the deceased which has come to their hands. They are not personally liable.

ILLUSTRATIONS:

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

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

4. **Performance by a third person.**
   - **Section 41** lays down that if a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.
   - Thus, where a promisee accepted lesser amount from a third party in full satisfaction of his claim, it was held that he cannot enforce the promise against the promisor.
   - Notice that under this Section performance of the promise by a stranger, once accepted by the promisee, discharges the promisor, although the latter has neither authorised nor ratified the act of the third party.
5. **Joint promisors.(Section 42)**
   - Where two or more persons jointly promise, the promise must be performed jointly unless a contrary intention appears from the contract.
   - Where one of the joint promisors dies, the legal representative of the deceased along with the other joint promisor(s) is bound to perform the contract.
   - Where all the joint promisors die, the legal representatives of all of them are bound to perform the promise.

ILLUSTRATION:

A delivered certain goods to B who promise to pay Rs.5000. Later on B expresses his inability to clear the dues. C, who is known to B, pays Rs2000/-to A on behalf of B. Before making this payment C did tell B nothing about it. Now A can sue B only for the balance and not for the whole amount.

Performance of Joint Promises

Joint promises may take any of the following shapes:

i. where several joint promisors make a promise with a single promisee. e. g. A, B and C jointly promise to pay Rs.13.000 to D, or

ii. where a single promisor makes a promise with several joint promisees. e.g., P promises to pay Rs3,000 to Q and R jointly. Or

iii. where several joint promisors make a promise with several joint promisees. e.g. A, B and C jointly promise to pay Rs.3, 000 to P, Q and R jointly.

We have earlier seen as to "who can demand performance," and "by whom contracts must be performed" when there is an agreement between a single promisor and a single promisee. We now attempt to answer the aforesaid questions in the ease of joint promises.

Who can demand performance of joint promises?

- The answer to this question is found in **Section 45** which provides that when a promise is made to several persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests with all **the promisees jointly and a single promisee cannot demand performance**.
- When any one of the promisees dies, the right to claim performance rests with the legal representatives of such deceased person jointly with the surviving promisees.
- When all the promisees are dead, the right to claim perfomance rests with the legal representatives of all jointly.
- **In brief, so long as all the joint promisees are alive, the right to claim performance rests with all of them jointly and on the death of any promisee his legal representatives step into his shoes**.

  ILLUSTRATION

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

By whom joint promises must be performed? [Liability of Joint Promisor & Promisee]

The rules on the subject as contained in **Sections 42 to 44** of the Contract Act, are as follows:

1. **All promisors must jointly fulfil the promise**:
   - When two or more persons have made a joint promise (e.g. signed a promissory note jointly), then, unless a contrary intention appears by the contract, all such persons must jointly fulfil the promise.
   - When any one of the joint promisors dies, his legal representatives must jointly with the surviving promisors, fulfil the promise.
   - On the death of all the original promisors, the legal representatives of all of them jointly must fulfil the promise (See. 42).

The above rule is of course subject to the following usual conditions:

- Contracts involving personal skill e. g. to paint a picture come to an end on the death **of any of the joint promisors and the liability of performance does not fall on the legal representatives.**
- Wherever the legal representatives are made liable to perform the promise, they are not personally liable. Their liability is limited to the assets inherited by them.

2. **Any one or more of joint promisors may be compelled to perform**:
   - When two or more persons make a joint promise, the promisee is entitled, in the absence of express agreement to the contrary, to compel any one or more of such joint promisors to perform the whole of the promise **(Sec. 43, Para I).**
   - In other words, according to the Section the liability of joint promisors is "joint and several" as against the promisee, unless there is a contract to the contrary.
   - For example, A, B and C jointly promise to pay D Rs 3,000. D may compel either A or B or C or all or any two of them to pay him Rs 3,000.

3. **Right of contribution inter-se between joint promisors**:
   - If one of several joint promisors is made to perform the whole contract, he may require equal contribution from the other joint promisors, unless a contrary intention appears from the contract **(See. 43, Para 2).**
   - Thus, in our example, if A is compelled to pay the entire amount of Rs3,000, he can realise from B and C Rs.1,000 each.

4. **Sharing of loss by default in contribution:**
   - If any one of the joint promisors makes a default in making contribution, if any, the remaining joint promisors must bear the loss arising from such default in equal shares **(Sec.43, Para 3).**
   - Thus, in our example, if A is compelled to pay the whole and C is unable to pay anything, A is entitled to receive Rs 1,500 from B. If C's estate is able to pay one-half of his share, A is entitled to receive Rs 500 from C's estate and Rs 1,250 from B [Illustrations (b) and (c) to Section 43].

5. **Effect of release of one joint promisor: (Section 44)**
   - **In case of joint promise, if one of the joint promisors is released from his liability by the promisee, his liability to the promisee ceases but this does not discharge the other joint promisors from their liability; neither does it free the joint promisor so released from his liability to contribute to the other joint promisors (Sec. 44).**

Nov. 2007

X, Y and Z jointly borrowed Rs. 50,000 from A. The whole amount was paid to A by Y. Decide in the light of the Indian Contract Act, 1872 whether:

(a) Y can recover the contribution from X and Z.
(b) Legal representatives of X are liable in case of death of X,
(c) Y can recover the contribution from the assets, in case Z becomes insolvent.

Hint:

(i) Y can recover the contribution equally from X and Z	- since in case of a joint promise, the liability of the joint promisors is joint and several; - since a joint promisor is entitled to recover from the other joint promisors equal contribution in case he makes the entire payment.
(ii) Legal representatives of X are liable in case of death of X	- since in case of death of a joint promisor, his legal representative is liable for the performance of the promise; - but the liability of the legal representative shall be limited to the value of the estate inherited by him. He shall not be personally liable
(iii) Y can recover the contribution from Z's estate	- since in case of insolvency of a joint promisor, his official assignee / official receiver is liable to pay the contribution.

Nov. 2007, May 2014

A, B and C are partners in a firm. They jointly promise to pay Rs. 1,50,000 to P.C become insolvent and his private assets are sufficient to pay only 1/5 of his share of debts. A is compelled to pay the whole amount to P. Examining the provisions of the Indian Contract Act, 1872, decide the extent to which A can recover the amount from B**.**

Hint:

Liability of A, B and C	- is Rs. 50,000 each since joint promisors are jointly liable to fulfil the promise.
Payment made by C	- is Rs. 10,000 only.
Deficiency of C to be shared by A and B	- is Rs. 20,000 only.
Amount recoverable from B by A	- is Rs. 70,000 only.

DISTINCTION BETWEEN SUCCESSION AND ASSIGNMENT

This discussion arises in the context of the observation that the obligations of a promisor would bind the legal representative also, only to the extent of value of property inherited by them. This became the law that legal representatives are successors.

Succession: When the benefits of a contract are succeeded by a process of law, both the burden and the benefit would sometimes devolve on the legal heir. For *example* 'B' is the son of 'A'. Upon A's death 'B' will inherit all the assets and liabilities of 'A' [These assets and liabilities are also referred to as debts and estates]
Thus 'B' will be liable to all the debts of 'A', but if the liabilities inherited are more than the value of the estate [assets] inherited it will be possible to pay only to the extent of assets inherited.

Assignment: Unlike succession, the assignor can assign only the assets to the assignee and not the liabilities. Because when a liability is assigned, a third party gets involved in it. The debtor cannot through assignment relieve himself of his liability to creditor. The obligations (i.e. the liabilities) under a contract cannot be assigned except with the consent of the promisee and when such consent is given, it is really a "novation"resulting in a substitution of liabilities.

For instance, if X owes Y Rs 200, he cannot transfer the liability to Z and force Y to collect his money from Z. But if Y agrees to accept Z as his debtor in place of X , there is "novation" (i.e., the old contract is substituted by new contract) and the liability to pay the debt stands transferred from X to Z.

Basis of distinction	Succession	Assignment
1. Meaning	The transfer of rights and liabilities of a deceased person to his legal representative is called as succession.	The transfer of rights by a person to another person is called as assignment.
2. Time	Succession takes place on the death of a person.	Assignment takes place during the lifetime of a person.
3. Voluntary act	Succession is not a voluntary act .	Assignment is a voluntary act of the parties.
4. Written document	Succession may take place even without any written document.	Assignment requires execution of an assignment deed.
5. Scope	All the rights and liabilities of a person are transferred.	Only rights can be assigned.
6. Notice	No notice of succession is required to be given to any person.	Notice of assignment must be given to the creditor.
7. Consideration	No consideration is necessary for succession.	Consideration is a must for assignment.

Time and Place for Performance

Sections 46 to 50 and 55 of the Contract Act lay down the rules regarding the time and place for performance of a contract, which are summarised below:

The law on the subject is contained in Sections 46 to 50 explained below:

(i) **Time for performance of promise, where no application is to be made and no time is specified – (Section 46):**
Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement **must be performed within a reasonable time**.
Explanation to Section 46 - The expression reasonable time is to be interpreted having regard to the facts and circumstances of a particular case.

(ii) **Time and place for performance of promise, where time is specified and no application to be made (Section 47):**
When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business, on such day and the place at which the promise ought to be performed.
Example: If the delivery of goods is offered say after sunset, the promisee may refuse to accept delivery, for the usual business hours are over. Moreover, the delivery must be made at the usual place of business.

(iii) **Application for performance on certain day to be at proper time and place (Section 48)**

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

Explanation to Section 48 states that the question "what is a proper time and place" is, in each particular case, a question of fact.

(iv) Place for the performance of promise, where no application to be made and no place fixed for performance – (Section 49)

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

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

(v) Performance in manner or at time prescribed or sanctioned by promisee (Section 50):

The performance of any promise may be made in any such manner, or at any time which the promisee prescribes or sanctions.

SUMMARY:

Where prescribed by the promisee*. Where the time and place are prescribed by the promisee, the performance of the contract must be at the specified time and place.*

Where not prescribed by the promisee. *If no time and place are prescribed by the promisee, then the contract must be performed:*

(a) Within a reasonable time, on a working day and within the usual hours of business*. The question, "what is a reasonable time" is in each particular case, a question of fact. It depends either on special circumstances of each particular case or the usage of trade or the intention of parties at the time of entering into contract.*

ILLUSTRATION

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

(b) At proper place *e. g. at godown or shop and not at a public meeting or a fair. "What is a proper place" is in each particular case, a question of fact. Generally speaking the promisor must ask the promisee where he would like the contract to be performed, and to perform it at such place (Sec. 49).*

ILLUSTRATION

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

EFFECTS OF FAILURE TO PERFORM A CONTRACT WITHIN THE STIPULATED TIME:

Section 55 deals with the subject and lays down the following rules:

1. Where **"time is of the essence of the contract"** and there is failure to perform within the fixed time, the contract (or so much of it as remains unperformed) **becomes voidable at the option of the promisee**. He may rescind the contract and sue for the breach.
2. Where **"time is not of the essence of the contract**" failure to perform within the specified time **does not make the contract voidable.** It means that in such a case the promisee **cannot rescind** the contract and he will have to accept the delayed performance. But **he would be entitled to claim compensation** from the promisor for any loss caused to him by the delay. This rule is, however, subject to the condition that the **promisor should not delay the performance beyond a reasonable time, otherwise the contract will become voidable at the option of the promisee.**
3. **In case of a contract voidable on account of the promisor's failure to perform his promise within the agreed time or within a reasonable time, as the case may be, if the promisee, instead of rescinding the**

contract, accepts the delayed performance, he cannot afterwards claim compensation for any loss caused by the delay, unless, at the time of accepting the delayed performance, he gives notice to the promisor of his intention to do so.

When is the time the essence of the contract? "Time is of the essence of the contract,

i. if the parties to the contract have expressly agreed to treat it as such, or
ii. if the nature of transaction and the intention of parties were such that the performance within a limited time was necessary.

- Even where a time is specified for the performance of a certain promise, 'time may not be of the essence of the contract' and one has to look at the nature and construction of the contract and the intention of the parties in order to ascertain whether "time is of the essence of the contract" or not.
- It is well settled that unless a different intention appears from the terms of the contract, ordinarily in commercial contracts the time of delivery of goods is of the essence of the contract but not the time of payment of the price.
- This is so because there are great chances of rapid market fluctuations and also because after entering into a contract the businessman, on that basis, may enter into other contracts with other persons which cannot be fulfilled unless he receives the delivery of goods under the contract.
- In contracts for the purchase of land, usually time is not of the essence of the contract because land values do not frequently fluctuate

The general principles that are followed can be enunciated as under:

i. In transaction of sale of gold, silver, blue chip shares, time of delivery is of essence. Here time will be treated as essence of contract.
ii. In transaction involving sale of land, redemption of mortgages, though certain time frame is fixed, any delay is not valued seriously provided justice can be done to parties. Of course even in sale of land, time can be made as on essence of contract by express words.

MODE OR MANNER OF PERFORMANCE.

- "The performance of any promise may be made in any manner,..which the promisee prescribes or sanctions" (Sec. 50).
- The promisor must perform the promise in strict accordance with the terms of the contract or instructions from the promisee.
- He has no right to substitute, for what he has been directed, something else, even if the substitute may be more beneficial to the promisee.

ILLUSTRATIONS

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

Order of Performance of Reciprocal Promises

The law relating to reciprocal promise as set out in **Sections 51 to 54** of the Indian Contract Act,1872.

General observation:

- A contract may consist of (i) an act and a promise or (ii) two promises one being the consideration for the other.
- The second type of contract which involves two promises, one promise from each to the other party is known as "Reciprocal promise".
- This can be **illustrated** with the following:
  When 'A' sells 500 quintals of rice to 'B' and 'B' promises to pay the price on delivery, the contract would consist of two promises one by 'A' to 'B' and another by 'B' to 'A'. These promises are reciprocal promises. Here the promise of 'A' is the consideration for the promise of 'B' and vice versa.

- The above is in contrast to another situation. In the above *example* if 'B' promises to pay the price after a month, the contract would have two parts one is the act of 'A' and the second is promise of 'B'. This is not a reciprocal promise.

The performance of reciprocal promise can take in different forms-

(i) Simultaneously performance of reciprocal promise [Section 51]: In this case, promises have to be performed simultaneously. **The conditions and performances are concurrent.** If one of the parties does not perform his promise, the other also need not perform his promise. For *example* where 'A' promises to deliver rice and 'B' promises to pay the price on delivery, both have to be performed simultaneously. Here both 'A' and 'B' must be willing and ready to perform their accepted part.

(ii) Performance of reciprocal promise where the order is expressly fixed(Section 52): Where the order of performance is expressly fixed, the promise must be performed in that order only. Where 'A' promises to build a house for 'B' and 'B' promises to pay after construction, here 'A' must perform his promise before he can call upon 'B' to fulfill his promise of payment of money. A's performance of the promise is a condition precedent to 'B' performing his part of the promise. Any breach of promise by 'A' would enable 'B' to avoid the contract.

(iii) Performance of reciprocal promise by implication: Where the performance of reciprocal promise is not fixed expressly, sometimes the order is understood by implication. For *example* where 'A' agrees to make over certain stock in trade to 'B' and 'B' agrees to provide certain security for the value of stock in trade, then 'A' need not make over the stock until 'B' provides the security as by implications 'B' is required to perform his part first; otherwise 'A' in the absence of any security will not make over the stock to 'B'.

(iv) Effect of one party preventing another from performing promise [Section 53]: When in a contract consisting of reciprocal promises one party prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented. The person so prevented is entitled to get compensation for any loss he may have sustained for the non-performance.

The above can be illustrated with the following *illustrations* by way of two case laws.

(a) Where there is a contract for sale of standing timber and as per the terms seller is expected to cut and cord the standing timber before the buyer takes delivery but seller cords only a part of it, but neglects to cord the rest of it, then the buyer has a right to avoid the contract and claim compensation for any loss sustained.

(b) A and B contract that B shall execute certain work for A for Rs.1,000. B is ready and willing to do the work accordingly but A prevents him from doing so. The contract becomes voidable at the option of B and if he elects to rescind it he is entitled to recover from A compensation for any loss which he has incurred by its non-performance

Sometimes the parties would be prevented from discharging a part of the contract but not the entire contract. In such a case, the party so prevented need not avoid the full contract but perform the rest of it.

(v) Effects of default as to promise to be performed first: Section 54 of the Act provides that promises may be such that:

(i) one of them cannot be performed or

(ii) its performance cannot be demanded till the other has been performed.

Example:

(a)Where 'B' a ship owner agrees to convey A's cargo from Calcutta to Mauritius for a freight. Here the beginning part of the transaction is on 'A' as he has to provide the cargo to 'B' to enable 'B' to perform his promise. Thus until cargo is handed over by 'A',A cannot expect 'B' to perform his promise nor would 'B' be in a position to perform his

promise. This peculiar position arises because of default on the part of one of the parties. Here 'B' is entitled to put an end to the contract and claim compensation for any loss he may have suffered.

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

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

(vi) Position of legal and illegal parts of Reciprocal promises: Reciprocal promise to do certain things that are legal and certain others that are not legal –

Section 57 of the Act provides that if reciprocal promises have two parts, the first part being legal and the second part being illegal, the legal part is a valid contract and the illegal part is void.

Example: Where 'A' agrees to sell his house to 'B' for Rs.50000/- and further 'A' insists and it is agreed that if the house is used as a gambling house, then 'B' would pay another Rs.75000/-. In this case the first part is valid as it is legal, the second part is void as it is illegal.

(vii) Alternative promise one branch being illegal: "In the case of the alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced".(Discussed in chapter on legality of object)

ILLUSTRATIONS:

A and B agree that A shall pay B Rs 1,000 for which B shall afterwards deliver to A either rice or smuggled opium. This is a valid contract to deliver rice and a void and unlawful agreement as to opium

Appropriation of Payments

When a debtor who owes several debts to the same creditor, makes a payment which is insufficient to satisfy the whole indebtedness, the question arises. "as to which of the debts the payment is to be applied"?

Sections 59 to 61 of the Contract Act answer this question and lay down the following rules:

1. Application of payment where debt to be discharged is indicated:

1. **Debtor's express instructions must be followed.** Appropriation is a right given to the debtor for his benefit. Thus if the debtor expressly states that the payment made by him is to be applied to the discharge of some particular debt, the creditor must act accordingly otherwise he should not accept the payment.
2. **Debtor's implied intention must be followed.** If there are no express instructions, then debtor's implied intention should be gathered from the circumstances attending the payment and appropriation must be done accordingly.

ILLUSTRATIONS

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

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

2. Application of payment where debt to be discharged is not indicated:

If there is no express or implied direction by the debtor regarding appropriation, then the creditor has got the option to apply the payment to any debt lawfully due from the debtor, including a debt which is barred by the Limitation Act.

3. Application of payment when neither party appropriates: In terms of section 61 of the Act, where neither party appropriates-

(a) the payment shall be applied in discharge of debts in order of time, and

(b) if the debts are of equal standing the payment shall be applied in discharge of each proportionately.

The above appropriation takes place whether or not the debt is barred by limitation.

For *example* where there are two debts one Rs 500/- and another Rs 700/- falling due on the same day, and if the debtor pays Rs 600/- the appropriation shall be pro rata of Rs 250/- and Rs 350/- for the two debts.

4. When principal and interest both due. If a payment has been made without expressly stating whether it is towards interest or principal, payment is to be applied towards interest first and then the balance to principal.

10.QUASI CONTRACTS

INTRODUCTION:

- We have seen that a contract is the result of an agreement enforceable by law.
- But in some cases there is no offer, no acceptance, no consensus ad-idem and in fact no intention on the part of parties to enter into a contract and still the law from the conduct and relationship of the parties, implies a promise imposing obligation on the one party and conferring a right in favour of the other.
- In other words under **certain special circumstances obligations resembling those created by a contract are imposed by law although the parties have never entered into a contract.**
- Such obligations imposed by law are referred to as **'Quasi-Contracts' or 'Constructive Contracts' under the English law, and "certain relations resembling those created by contracts" under the Indian law.**
- The term 'quasi-contract' has been used because such a contract resembles with a contract so far as result or effect is concerned but it has little or no affinity with a contract in respect of mode of creation.
- **A quasi-contract rests upon the equitable "doctrine of unjust enrichment" which declares that a person shall not be allowed to enrich himself unjustly at the expense of another.**
- **Quasi contracts are based on principles of equity, justice and good conscience.**
- **Duty and not a promise or agreement is the basis of such contracts.**
- **It may be noted that a suit for damages for the breach of the contract can be filed in the case of a quasi-contract in the same way as in the case of a completed contract (Sec. 73).**

The salient features of quasi-contracts are:

Firstly, such a right is always a right to money and generally, though not always, to a liquidated sum of money;
Secondly, it does not arise from any agreement between the parties concerned but the obligation is imposed by law and;
Thirdly, the rights available are not against all the world but against a particular person or persons only, so in this respect it resembles to a contractual right.

Types of Quasi Contracts

The Contract Act deals with 'quasi-contractual obligations' under **Sections 68 to 72,** which are discussed below:

1. Claim for necessaries supplied to a person incapable of contracting or on his account (Sec. 68):

Section 68 provides

- If a person, incapable of entering into a contract,
- or any one whom he is legally bound to support
- is supplied by another person
- with necessaries suited to his condition in life,
- the person who has furnished such supplies
- is entitled to be reimbursed **from the property** of such incapable person.

➢ Although agreements by minors, idiots, lunatics, etc are void ab-initio, but Section 68 makes an exception to this rule by providing that their estates are liable to reimburse the supplier who supplies them or to someone whom they are legally bound to support with "necessaries" of life.
The following points need to be emphasised:

(i) The Section **does not create any personal liability but only the estates are liable.**

(ii) The things supplied must come within the category of **'necessaries'. The word 'necessaries' here covers not only bare necessities of existence. e.g. food and clothes, but all things which are reasonably necessary to the incompetent person, having regard to his status in society. e.g. watch, a radio, a bicycle may be included therein.**

(iii) Necessaries should be supplied only to such incompetent person or to someone whom the incompetent person is legally bound to support, such as his wife and children.

(iv) Incompetent person's property is liable to **pay only a reasonable price for the goods or services supplied and not the price which the incompetent person might have 'agreed to' (legally speaking an incompetent person cannot agree to anything).**

ILLUSTRATIONS:

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. No claim for supplies of luxury articles can be made. If 'B' has no property 'A' obviously cannot make his claim.

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

2. Reimbursement of person paying money due by another, in payment of which he is interested:

Section 69 provides "A person who is interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other."

Conditions of Section 69:

(a) One person is legally bound to make a payment.
(b) Some other person makes such payment.
(c) The person making such payment is not legally bound to make such payment.
(d) The person making such payment is interested in paying such amount.

If all the conditions of Sec. 69 are satisfied, the person who is interested in paying such amount shall be entitled to recover the payment made by him.

ILLUSTRATION

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

May 2007

Y holds agricultural land in Gujarat on a lease granted by X, the owner. The land revenue payable by X to the Government ,being in arrear, his land is advertised for sale by the Government. Under the Revenue law, the consequence of such sale will be termination of Y's lease. Y, in order to prevent the sale and the consequent termination of his own lease, pays the Government, the sum due from X. Referring to the provisions of the Indian Contract Act, 1872 decide whether X is liable to make good to Y, the amount so paid?

Hint:

X is liable to pay to Y the amount paid by Y to the Government	- since there is a contract between X and Y, viz. quasi contract; - since X is bound to make the payment of land revenue to the Government; - Since Y is interested in such payment; - since Y is not himself liable for such payment.

May 2010

Z rents out his house situated at Mumbai to W for a rent of Rs. 10,000 per month. A sum of Rs. 5 lacs, the house tax payable by Z to the Municipal Corporation being in arrears, his house is advertised for sale by the corporation. W pays the Corporation, the sum due from Z to avoid legal consequences. Referring to the provisions of the Indian Contract Act, 1872 decide whether W is entitled to get the reimbursement of the said amount from Z.

3. Obligation of person enjoying benefit of non-gratuitous act (Sec.70):

This is the third type of quasi-contract provided in the Contract Act. Section 70 lays down:

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

For giving rise to a right of action under this Section. the following three conditions must be fulfilled:

(a) A person has lawfully –
  (i) done something for another person; or
  (ii) delivered something to another person.
(b) Such person must have acted –
  (i) voluntarily; and
  (ii) Non-gratuitously i.e. it must have been done with the intention of being paid for.
(c) The other person has enjoyed the benefit of –
  (i) the act done for him; or
  (ii) the thing delivered to him.

If the conditions of Sec. 70 are satisfied, there will be a quasi contract between the parties. Consequently, the party who has done something or delivered a thing shall be entitled to recover its value from the person who obtained the benefit of the same.

ILLUSTRATIONS:

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
(b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.
(c) Where a coolie takes the luggage at the railway station without being asked by the passenger or a shoe-shiner starts shining shoes of the passenger without being asked to do so and if the passenger does not object to that, then he is bound to pay reasonably for the same as the work was not intended to be gratuitous.

4. Responsibility of finder of goods (Sec. 71):

Section 71 lays down another circumstance in which also a quasi-contractual obligation is to be presumed. It says "**A person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee."**

Thus an agreement is also implied by law between the owner and finder of the goods and the latter is deemed to be a bailee.

Duties of finder of goods:

1. He must try to find out the real owner of the goods and must not appropriate the property to his own use. If the real owner is traced, he must restore the goods to him on demand. If he does not take these measures, he will be guilty of criminal misappropriation of the property under Section 403 of Indian Penal Code.
2. Further, till the goods are in possession of the finder, he must take as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value.

   ILLUSTRATION:

   Where 'P' a customer in 'D's shop puts down a brooch worn on her coat and forgets to pick it up and one of 'D's assistants finds it and puts it in a drawer over the week end. On Monday, it was discovered

to be missing. 'D' was held to be liable in the absence of ordinary care which a prudent man would have taken.

Rights of finder of goods:

The rights of a finder of goods have been discussed in **Sections 168-169** which provide as follows:

- Till the true owner is found out, he can retain possession of the goods against everybody in the world.
- He is entitled to receive from the true owner, all expenses incurred by him for preserving the goods or finding the true owner.
- He has a lien on the goods for the money so spent i.e. he can refuse to return the goods to the true owner until these moneys are paid. He is not entitled to file a suit for the recovery of such sums.
- But he can file a suit against the owner to recover any reward which was offered by the owner for the return of the goods provided he came to know of the offer of reward before actually finding out the goods.
- The finder of goods is entitled to sell the goods if the owner cannot be found out or if he refuses to pay the lawful charges of the finder in the following two situations only:
  (a) when the thing is in danger of perishing or of losing the greater part of its value. or
  (b) when the lawful charges of the finder amount to at least two-thirds of the value of goods found.

  The true owner is entitled to get the balance of sale proceeds, if there is surplus after meeting the lawful charges.
- It is to be noted that no one except the real owner can claim possession of goods from the finder. If anybody deprives him of the possession of the goods, he can file a suit for damages for trespass.

ILLUSTRATION

H picked up a diamond on the floor of F's shop and handed it over to F to keep it till the owner appeared. In spite of best efforts the true owner could not be searched. After the lapse of some weeks, H tendered to F the lawful expenses incurred by him for finding the true owner and an indemnity bond and requested him to return the diamond to him (i.e. H). F refused to do so. Held F must return the diamond to H as he was entitled to retain the goods as against everybody except the true owner .

5. Liability of person to whom money is paid or thing delivered by mistake or under coercion [Sec.72].

This is the fifth and the last kind of 'quasi-contract 'mentioned in the Act. Section 72 declares thus:

"A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it". Accordingly, if one party under a mistake pays to another party money which is not due by contract or otherwise, that money must be repaid.

ILLUSTRATIONS

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

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

(c) A fruit parcel is delivered under a mistake to R who consumes the fruits thinking them as birthday present. R must return the parcel or pay for the fruits. Although there is no agreement between R and the true owner, yet he is bound to pay as the law regards it a quasi-contract.

Difference between quasi contracts and contracts

Basis of distinction	Quasi- Contract	Contract
Essential for the valid contract	The essentials for the formation of a valid contract are absent	Present
Obligation	Imposed by law	Created by the consent of the parties

11. DISCHARGE OF A CONTRACT

Meaning of discharge of a contract:

- Discharge of a contract means termination of contractual relations between the parties to a contract.
- Where the rights and obligations arising out at a contract are extinguished the contract is said to be discharged or terminated.

Modes of Discharge of a Contract

A contract may be discharged in any of the following ways:

1. By performance -actual or attempted.
2. By mutual consent or agreement
3. By lapse of time.
4. By operation of law.
5. By subsequent or supervening impossibility or illegality
6. By breach of contract

1. Discharge by Performance

Performance of contract is the principal and most usual mode of discharge of a contract. Performance may be: (1) Actual Performance or (2) Attempted performance or Tender.

1. **Actual performance**:
   - When each party to a contract fulfils his obligation arising under the contract within the time and in the manner prescribed it amounts to actual performance of the contract and the contract comes to an end or stands discharged.
   - But if one party only performs his promise, he alone is discharged. Such a party gets a right of action against the other party who is guilty of breach.
2. **Attempted performance or tender**:
   - When the **promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called "attempted performance" or "tender."**
   - Thus "tender" is **not actual performance but is only an 'offer to perform'** the obligation under the contract.
   - **A valid tender of performance is equivalent to performance and the contract comes to an end**.

Essentials of a valid tender: A valid tender or offer of performance must fulfil the following conditions:

- It must be **unconditional.** A conditional tender is no tender. For example, A, who is a debtor of company B, offers to pay if shares are allotted to him at par. It is no tender.
- It must he made **at proper time and place**. A tender before or after the due date or at a place other than agreed upon is not a valid tender. For example, A is a tenant of B. He offers him rent at a marriage party. B is not bound to accept as the tender is not made at a proper place.
- It must be of the **whole obligation contracted for and not only of the part**. Thus deciding of his own to pay in instalments and offering the first instalment was held an invalid tender as it was not of the whole amount due
- If the tender relates to delivery of goods, it must give a **reasonable opportunity to the promisee for inspection of goods** so that he may be sure that the goods tendered are of contract description.

- It must be **made by person who is in position and is willing to perform the promise**. A tender by a minor or idiot is not a valid tender
- It must be **made to the proper person i.e. the promisee or his duly authorised agent**. Tender made to a stranger is invalid.
- If there **are several joint promisees, an offer to any one of them is a valid tender.** (But the actual payment must be made to all joint promisees and not to any one of them, for a valid discharge of the contract, as, Section 45 provides that when a promise is made to two or more persons jointly, the right to claim performance rests with all of them jointly.)
- In case of tender of money, **exact amount should be tendered in the legal tender money**. Tendering a smaller or larger amount is an invalid tender e.g. tendering Rs 2000 currency note to a conductor of a bus for a ten rupees ticket is not a valid tender. Similarly, a tender by a cheque is invalid as it is not legal tender but if the creditor accepts the cheque, he cannot afterwards raise an objection.

Effect of refusal to accept a valid tender (Sec. 38).

- The effect of refusal to accept a properly made "offer of performance" is that the contract is deemed to have been performed by the promisor, i.e., tenderer and the promisee can be sued for breach of contract.
- A valid tender, thus, discharges the contract.

Exception.

- Tender of money, however, does not discharge the contract.
- The money will have to be paid even after the refusal of tender, of course without interest from the date of refusal.
- In case of a suit, cost of defence can also be recovered from the plaintiff, if tender of money is proved.

2. DISCHARGE BY MUTUAL AGREEMENT

Question: What are the circumstances under which a contract would not require performance?

Novation (Sec. 62)	➢ Novation means substitution of a new contract in place of the original contract. ➢ The new contract may be (a) between the same parties; or (b) between different parties. ➢ **If parties are not changed then the nature of the obligation (i.e. material terms of the contract) must be altered substantially in the new substituted contract, for, a mere variation of some of the terms of a contract, while the parties remain the same is not "novation" but "alteration."** ➢ A new contract is entered into in consideration of discharge of the old contract. In other words, the consideration for the new contract is the discharge of the original contract. **ILLUSTRATIONS:** (a) A is indebted to B and B to C. By mutual agreement B's debt to C and B's loan to A are cancelled and C accepts A as his debtor. There is novation involving change of parties. (b) A owes B Rs.10, 000. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for Rs.5, 000 in place of the debt of Rs.10, 000. This is a new contract and extinguishes the old. **The following points are also worth noting in connection with novation:** ➢ Novation **can't be compulsory**. It can only be with the mutual consent of all the parties. **ILLUSTRATION** (a) A owes B Rs.1, 000 under a contract. B owes C Rs.1,000. B orders A to credit C with Rs.1,000 in his books, but C does not assent to the agreement. B still owes C Rs 1,000 and no new

	contract has been entered into. ➢ **The new contract must be valid and enforceable**. If it suffers from any legal flaw,e.g..want of proper stamp or registration etc, on account of which it becomes unenforceable, then the **original contract revives**.
Alteration (Sec. 62)	➢ Alteration means a change in one or more of the **material terms of a contract with mutual consent of parties.** ➢ A material alteration is one which alters the legal effect of the contract. e.g. a change in the amount of money to be paid or a change in the rate of interest. ➢ Immaterial alteration, e.g., correcting a clerical error in figures or the spelling of a name has no effect on the validity of the contract and does not amount to alteration in the technical sense. ➢ An alteration discharges the original contract and creates a new contract between the parties. ➢ However, the parties to the new contract remain the same. ➢ **A material alteration made in a written contract by one party without the consent of the other will make the whole contract void and no person can maintain an action upon it, it comes under "discharge of a contract by operation of law" which will be discussed later**.
Remission (Sec. 63)	➢ Remission means waiver. ➢ Section 63 of the Act deals with remission. It provides that "**every promisee may dispense with or remit wholly or in part, the performance of the promise made to him or may extend the time for such performance or may accept instead of it any satisfaction which it thinks fit".** ➢ Thus the promisee can waive either in full or in part the obligation of the promisor or extend the time for performance ➢ A contract is discharged by remission, i.e., where a promisee agrees to – (a) dispense with (wholly or in part) the performance of a promise made to him; or (b) extend the time for performance due by the promisor; or (c) accept a lesser sum instead of the sum due under the contract; or (d) accept any other consideration than agreed to in the contract. ➢ **No consideration is necessary for remission**. **ILLUSTRATIONS:** (a) If the promisee agrees to accept Rs.2,000 in full satisfaction of a claim of Rs.5,000,the promise is enforceable and the promisee cannot in future bring a suit for the recovery of Rs.5.000. (b) A owes B Rs.5, 000. A pays to B and B accepts, in satisfaction of the whole debt,Rs.2,000 paid at the time and place at which the Rs.5.000 were payable. The whole debt is discharged. (c) A owes B Rs.2,000 and is also indebted to other creditors. A makes an agreement with his creditors, including B,to pay them a composition of eight annas (fifty paise) in the rupee upon their respective demands. Payment to B of Rs.1,000 is a discharge of B's demand . (d) A owes B Rs.5,000 payable on 1st June. A is not in a position to meet his liability on the due date and as such makes a request to B to extend the time for payment by three months. B accedes to A's request. The promise is binding and no suit can be instituted before the expiry of the extended period of credit although the promise is not supported by any consideration. (e) A promises to sell his horse for a consideration of Rs.5000/- to 'B', 'A' may instead of cash consideration of Rs. 5000/-may accept jewellery worth Rs 5,000/-in full satisfaction of the consideration.

Rescission (Sec. 62)	➢ It means cancellation of a contract by one or all the parties to the contract. a. A party whose consent was not free may avoid the contract. b. A party to the contract has the right to rescind a contract if the other party fails to perform his part of obligation. c. **All the parties may mutually agree to bring the contract to an end. This is called as discharge of contract by rescission by mutual consent.** ➢ An agreement of rescission releases the parties from their obligations arising out of the contract. **ILLUSTRATION** A promises to deliver certain goods to B on a certain date. Before the date of performance, A and B mutually agree that the contract will not be performed. The contract stands discharged by rescission. ➢ There may also be an implied rescission of a contract,e.g.,where there is non-performance of a contract by both the parties for a long period, without complaint, it amounts to an implied rescission. In the case of rescission, the existing contract is cancelled by mutual consent without substituting a new contract in its place.

DISTINCTION BETWEEN NOVATION AND ALTERATION

Basis of distinction	Novation	Alteration
1. Meaning	Novation means substitution of a new contract in place of the original contract.	Alteration means a change in one or more of the terms of a contract with mutual consent of parties.
2. New contract	Novation requires entering into a new contract.	Alteration does not require entering into a new contract.
3. Different parties	Novation may involve different parties, i.e., the parties in the altered contract cannot be different from the parties in the original contract.	Alteration does not involve different parties, i.e., the parties in the altered contract cannot be different from the parties in the original contract.
4. Variation in terms and conditions	Novation may or may not involve a variation in terms and conditions of the original contract (i.e., where the only change in original contract is made by way of changing the parties).	Alteration always requires variation in terms and conditions of the original contract.

DISTICTION BETWEEN RECISSION AND ALTERATION

Basis of distinction	Rescission	Alteration
1. Meaning	Rescission means cancellation of a contract.	Alteration means a change in one or more of the terms of a contract with mutual consent of parties.
2. Whether mutual consent is essential	Rescission may be made without mutual consent.	Alteration of a contract cannot take place without mutual consent.
3. Whether it can be implied?	Non-performance of a contract by both the parties for a long period, without any complaint, amounts to implied rescission.	Alteration of terms cannot be implied. Thus, the alteration of a contract cannot be implied.
4. Effect	When rescission is made, the contractual relationship between the parties comes to an end.	When a contract is altered, the contractual relationship between the parties continues, i.e., the parties are legally bound to each other under the altered contract.

3. DISCHARGE BY LAPSE OF TIME

- The Limitation Act lays down that in case of breach of a contract legal action should be taken within at specified period, called the period of limitation, otherwise the promisee is debarred from instituting a suit in at court of law and the contract stands discharged.
- Thus in certain circumstances lapse of time may also discharge a contract.
- For example, the period of limitation for simple contracts is three years under the Limitation Act and therefore on default by debtor if the creditor does not file a suit of recovery against him within three years of default, the debt becomes time-barred on the expiry of three years and the creditor will be deprived of his remedy at law. This in effect implies discharge of contract.
- Also, where "time is of essence in a contract", if the contract is not performed at the fixed time, the contract comes to an end, and the party not at fault need not perform his obligation and may sue the other party for damages.

4. DISCHARGE BY OPERATION OF LAW

Death	➢ Contracts involving personal skill, knowledge or ability of the deceased party are discharged automatically on the death of the promisor. ➢ In other contracts the rights and liabilities of the deceased person pass on to the legal representatives of the dead man
Insolvency	The insolvent is discharged from liability on all contracts entered into upto the date of insolvency.
Unauthorised material alteration	➢ An alteration which changes the substance (i.e., legal effect or basic character) of a contract is called as material alteration. ➢ A material alteration made in a written document or contract by one party without the consent of the other will make the whole contract void. Thus where the amount of money to he received is altered or an additional signature is forged on a promissory note by a creditor, he cannot bring a suit on it and the pro-note cannot by enforced against the debtor even in its original shape. ➢ The effect of making such an alteration is exactly the same as that of cancelling the contract
Merger of rights	➢ Where an inferior right contract merges into a superior right contract, the former stands discharged automatically. **ILLUSTRATIONS:** **(a)** Where a man holding property under a contract of tenancy buys the property, his rights as a tenant are merged into the rights of ownership and the contract of tenancy stands discharged by operation of law. **(b)** Where a part-time lecturer is made full time lecturer, the contract of part-time lectureship is discharged by merger. **(c)** A bill of exchange is discharged if the acceptor becomes the holder of it at or after its maturity in his own right.

5.DISCHARGE BY BREACH OF CONTRACT

- Breach of contract by a party thereto is also at method of discharge of a contract because "breach" also brings to an end the obligations created by a contract on the part of each of the parties.
- Of course the aggrieved party, i.e., the party not at fault can sue for damages for breach of contract as per law; but the contract as such stands terminated.
- **Breach of contract may be of two kinds:**

1. Anticipatory breach; and
2. Actual breach.

1. Anticipatory breach:

- An anticipatory breach of contract is a breach of contract occurring before the time fixed for performance has arrived. It may take place in two ways:

a. **Expressly by words spoken or written**.

- Here a party to the contract communicates to the other party, before the due date of performance, his intention not to perform it.
- **For example**: A contracts with B to supply 100 bags of wheat for Rs.60,000 on 1st March. On 15th February A informs B that he will not be able to supply the wheat. There is express rejection of the contract.

b. **Impliedly by the conduct of one of the parties**:

- Here a party by his own voluntary act disables himself from performing the contract. **For example**: (i) a person contracts to sell a particular horse to another on 1st of June and before that date he sells the horse to somebody else; (ii) A agrees to marry B but before the agreed date of marriage she marries C.
- In both the above cases there occurs an anticipatory breach of contract brought about by the conduct of one of the parties.

Effect of an anticipatory breach.

- When there is an anticipatory breach of contract, the promisee is excused from performance or from further performance.
- Further, it gives an option to the promisee (the aggrieved party) whereby:

1. He may either treat the contract as rescinded and sue the other party tor damages for breach of contract immediately without waiting until the due date of performance

OR

2. He may elect not to rescind but to treat the contract as still operative, and wait for the time of performance and then hold the other party responsible for the consequences of non-performance. But in that case, he will keep the contract alive for the benefit of the other party as well as his own ,and the guilty party, if he so decides on reconsideration, may still perform his part of the contract and can also take advantage of any supervening impossibility which may have the effect of discharging the contract.

ILLUSTRATIONS:

(a) A, agrees to employ B as a clerk, the service to commence from 1st June. On the 20th of May he informs B that his services will not be required. B is exonerated from his obligation under the contract and may at once sue A for damages for breach of contract without waiting until the time fixed for performance.

(b) A, agrees to sell his house to B for Rs 8,50,000 on 1st of March. But on 10th February he changes his mind and writes to B that he will not be able to sell his house. There is an anticipatory breach of contract Two courses are open to B: (1) he may treat the contract as rescinded and at once sue A for damages, or (2) he may wait till 1st of March. B adopts the second course. On 28th February the house is destroyed by fire. The contract stands discharged by supervening impossibility. A is entitled to take advantage of this supervening impossibility and B cannot recover any damages from him. If the house did not catch fire, A could have taken back his letter of repudiation and asked B to take possession of the house on payment as per agreement.

The principle of anticipatory breach was well summed up in **Frost vs. Knight .**

- In this case it was held that promisee could wait till the due date of performance also before he puts an end to the contract. In such a case the amount of damages will vary depending on the circumstances.
- This can be explained with the following ***illustration*:**
- 'X' agrees to sell 'Y' certain quantity of wheat at a certain price. viz @ Rs.100/- per quintal by 3rd March. However on 2nd February X gives notice of his unwillingness to sell the given goods. Price of wheat on that date is Rs. 110/- per quintal. 'Y' has a right to repudiate the contract on the same day instead of waiting for the date of performance. On that day 2nd February, he is entitled to recover damages of Rs.10/- per quintal this being the difference between market price and contracted price. If on the other hand, he chooses to wait till 3rd March and the price on that date is Rs.125/-, he can recover damages @ Rs. 25/- per quintal. The third possibility is that if between 2nd February and 3rd March, Government prohibits sale of wheat, then the contract becomes void and Y will not be able to recover any damage whatsoever. **Hence from this illustration it would be clear that when the promisee postpones his right to repudiate the promise, it would operate to the advantage of the promisor also depending on circumstances**

- **The doctrine of anticipatory breach does not apply to contracts for the payment of a debt. Thus, if A borrows Rs.5,000 from B and signs a Promissory Note as evidence of the debt, same to be paid six months from date and if A notifies B two months before the due date that he will not pay the Note,A's renunciation will not entitle B to sue immediately. B must wait until the Note is due and if A then refuses to pay, B may file suit.**

2. Actual breach:

- Actual breach may also discharge a contract. **It occurs when a party fails to perform his obligation upon the date fixed for performance by the contract.**
- For example, where on the appointed day the seller does not deliver the goods or the buyer refuses to accept the delivery.
- It is important to note that **there can be no actual breach of contract by reason of non-performance so long as the time for performance has not yet arrived.**
- Actual breach entitles the party not in default to elect to treat the contract as discharged and to sue the party at fault for damages for breach of contract.
- **During the performance of the contract:** Actual breach of contract also occurs when during the performance of the contract, one party fails or refuses to perform his obligation under it by express or implied act.

6.Discharge by subsequent or supervening Impossibility or Illegality

- Agreements become void when it becomes impossible to perform them due to a variety of reasons. This is known as "impossibility of performance" and dealt with by **section 56** of the Act.
- In terms of **Section 56 of the Act** "An agreement to do an act **impossible in itself is void**.
  A contract to do an act which, after the contract is made, becomes impossible, or, (by reason of some event which the promisor could not prevent,) unlawful, becomes void when the act becomes impossible or unlawful.
  Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor, must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

(1) Impossibility existing at the time of contract: Even at the time of entering into the agreement, it may be impossible to perform certain contracts at the beginning or inception itself. **The impossibility of performance may be known or may not be known to the parties. Section 56,Para l,provides: "an agreement to do an act impossible in itself is void." .Notice that this paragraph of the Section speaks of something which is impossible inherently or by its very nature and which may or may not be known to both the parties at the time when the contract is made. For example, an agreement to discover treasure by magic is void-ab -initio.**

(i) *If the impossibility is known to the parties* : Where 'A' agrees to pay 'B' `RS 5000/- to 'B' if he would swim from Bombay in Indian ocean to 'Aden' in 7 days time, this is an agreement where both the parties know that it is impossible to swim the distance between 'Bombay' to 'Aden' in 7 days time and hence is void.

(ii) *If unknown to the parties*: Even where both the promisor and the promisee are ignorant of the impossibility the contract then too is void.

(iii) *If known only to the promisor*: If the impossibility is **not obvious** and the **promisor alone knows** it is impossible to perform or even if he does not know but **he should have known about the impossibility with reasonable diligence,** the **promisee is entitled to claim compensation** for the loss suffered because of failure of the promisor to perform.

ILLUSTRATION:

A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B tor the loss caused to her by the now performance of his promise [Illustration (c) to Section 56].

(2) Supervening impossibility:

- **In this case, the impossibility supervenes after the contract has been made, which is material to our study of discharge of contracts**.
- In this connection, Section 56,Para 2, declares: "A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful"
- Thus, under Section 56 (Para 2), where an event which could not reasonably have been in the contemplation of the parties when the contract was made, renders performance impossible or unlawful, the contract becomes void and stands discharged. This is known **as frustration of the contract** brought about by supervening impossibility. It is also known as the ***doctrine of supervening impossibility.***
- The rationale behind the doctrine is that if the performance of a contract becomes impossible by reason of supervening impossibility or illegality of the act agreed to be done, it is logical to absolve the parties from further performance of it as they never did promise to perform an impossibility. Thus to summarise:
- **If** - no impossibility existed at the time of formation of the contract; but
  - the impossibility arises subsequent to the formation of the contract; and
  - the impossibility is of such a nature that it makes the performance of the contract impossible or illegal;

  Then - it is called as supervening impossibility

Effects of supervening impossibility	**Contract becomes void**	▪ The contract is discharged, i.e., the contract becomes void. ▪ All the parties are discharged from their respective obligations;
	Restitution	Restitution is allowed. In terms of section 65 of the Act, where (a) an agreement is discovered to be void or (b) a contract becomes void

			any person who received an advantage must (a) restore it or (b) pay compensation for damages in order to put the position prior to contract. In ***Dhuramsey vs. Ahgmedhai*** **,** the plaintiff hired a godown from the defendant for 12 months and paid the advance in full. After about seven months the godown was destroyed by fire, without any fault on the part of plaintiff. When the plaintiff claimed refund of the advance, it was upheld that he was entitled to recover the rent for the unexpired term.
Examples of supervening impossibility/ Circumstances or Cases where doctrine of supervening impossibility applies	**Accidental destruction of subject matter**		If the subject matter of the contract is **accidentally** destroyed, **without any fault of any party,** it amounts to supervising impossibility. Therefore, **both the parties are excused from performance of the contract.** **ILLUSTRATONS:** (a)A music hall was agreed to be let out for a series of concerts on certain days. The hall was destroyed by fire before the date of the first concert. The plaintiff sued the defendant for damages for the breach of contract. It was held that the contract has become void and the defendant was not liable**.(TAYLOR VS.CALDWELL)** (b) Similarly, if a factory premises on which a machinery is to be installed are destroyed by fire, or a ship under a charter party is seized by a foreign government, the contract is discharged.
	Incapacity To perform a contract of personal service		Where a contract has to be personally performed by a party, **disability or incapacity to perform caused due to circumstances be beyond the control of such party (e.g., illness or death**) amounts to supervening impossibility. **ILLUSTRATIONS:** (a) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void [Illustration (b) to Section 56]. (b) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void [Illustration (e) to Section 56]. (c) An artist undertook to paint a picture for a certain price, but before he could do so, he met with an accident and lost his right arm. Held, the artist was discharged due to disablement.
	Change of law		• Performance of a contract may also become impossible due to change in law subsequently. • The law passed subsequently may prohibit the act which may form part as basis of contract. Here the parties are discharged from their obligations. **ILLUSTRATIONS:** • 'A' and 'B' may agree to start a business for sale of lottery and contribute capital for the business. If the business of sale of lottery ticket is banned by a subsequent law, parties need not keep up their legal obligations. • A sold to B 100 bags of wheat at Rs.1,700 per bag. But before delivery the Government rendered the sale and

		purchase of wheat by private traders illegal under the Defence of India Rules. The contract was discharged by impossibility created by subsequent change in law. • There was a contract for the sale of the trees of a forest. Subsequently by an Act of Legislature, the forest was acquired by the State Government. The contract was discharged because it had become impossible of performance.
	Outbreak of war	If one of the parties becomes an alien enemy due to outbreak of war, it amounts to supervening impossibility. Outbreak of war may affect the enforceability of contracts in many ways like: (a) emergency legislations controlling prices (b) relaxation of trade restrictions and (c) Prohibiting or restraining transaction with alien enemy. • All contracts entered into with an alien enemy **during war** are illegal and void-ab-initio. • Contracts entered into **before the outbreak** of war are **suspended** during the war and may **be revived** after the war is over **provided they have not already become time-barred.** • It may be noted that if a war is declared **between the countries of the contracting parties** then only the contract is suspended during war. • If war is declared between the **country of one of the parties to the contract and a third country**, the contract remains binding and if the party of the country now at war could not perform the contract because of dislocation of transport etc it will be treated as "difficulty in performance" only and does not discharge the contract.
	Non-existence or non-occurrence of things forming the basis of a contract	If particular state of things, which forms the basis of a contract, ceases to exist or occur, the contract is discharged by supervening impossibility. **Krell v Henry** ♦ X hired a room from Y for viewing the coronation process of king Edward. ♦ The procession was cancelled because of King's illness. ♦ Since the ultimate and only purpose of the contract was defeated, the contract was discharged.
What is not supervening impossibility? / Cases not covered by supervening impossibility	**Commercial impossibility/ Difficulty in performance**	Where performance **becomes difficult or burdensome**, e.g., rise or fall in prices, depreciation or appreciation of currency, obstacles to the execution of the contract, execution of contract becoming more expensive or less profitable, availability of transport at exorbitant rates, etc., it does not amount to supervening impossibility and thus doesn't excuse performance. **ILLUSTRATIONS:** (a)A sold to B a certain quantity of Finnish birch timber. A found it impossible to fulfil this contract because the outbreak of war disorganised the transport and A could not get any supply of

		timber from Finland. Held, B was not concerned with the way in which A was going to get timber and therefore there was no frustration. (b) X contracted with Y to send certain goods from Bombay to Delhi in September.In August transport companies went on strike and transport was available at very high rates. Held, the increase in freight rates did not excuse performance. (c) A contracts with B to supply B 1,000 tons of raw silk by a fixed day for a specified price. A fails to perform his contract with B since he could not procure the required quantity from the market. Held, mere non-availability of goods agreed to be sold did not excuse performance. (d)In **Satyabrat Ghosh vs Mugneeram Bangur**,Calcutta High court held in a context of impossibility of performance that "having regard to the actual existence of war condition, the extent of the work involved and total absence of any definite period of time agreed to the parties, the contract could not be treated as falling under impossibility of performance. In the given case the plaintiff had agreed to purchase immediately after outbreak of war a plot of land. This plot of land was part of a scheme undertaken by the defendant who had agreed to sell after completing construction of drains, roads etc. However the said plot of land was requisitioned for war purpose. The defendant thereupon wrote to plaintiff asking him to take back the earnest money deposit, thinking that the contract cannot be performed as it has become impossible of being performed. The plaintiff brought a suit against the defendant that he was entitled for conveyance of the plot of land under condition specified in the contract. It was held that the requisition order did not make the performance impossible.
	Default by third party	Default by a third party on whose work or conduct the promisor relied does not amount to supervening impossibility. **ILLUSTRATION:** (a)A,a wholesaler, enters into a contract with B for the sale of certain goods 'to be produced by Z',manufacturer of those goods. Z does not manufacture those goods. A is liable to B for damages. The words 'to be produced by Z' simply indicate quality of goods here. (b) 'A' promised to 'B' that he would arrange for B's marriage with his daughter. 'A' could not persuade his daughter to marry 'B'. 'B' sued 'A' who pleaded on the ground of impossibility that he is not liable for any damages. But it was held that there was no ground of impossibility. It was held that 'A' should not have promised what he could not have accomplished. Further 'A' had

		chosen to answer for voluntary act of his daughter and hence he was liable. (c) The defendant agreed to supply specified quantity of 'cotton' manufactured by a mill within a specified time to plaintiff. The defendant could not supply the material as the mill failed to make any production at that time. The defendant pleaded on the ground of impossibility which was not approved by the Privy Council and held that contract was not performed by the defendant and he was responsible for the failure. (d) The defendant agreed to procure cotton goods manufactured by Victoria Mills to plaintiff as soon as they were supplied to him by the mills. It was held by Supreme Court that the contract between defendant and plaintiff was not frustrated because of failure on the part of Victoria Mills to supply goods ***[Ganga Saran vs Finn Rama Charan, A.I.R 1952 S.C.9]***
	Strikes, riots or civil disturbances	Strike by the workers, or outbreak of riots or some civil disturbances interrupting the performance of promise do not amount to supervening impossibility. **ILLUSTRATION:** (a)A dock strike would not necessarily relieve a labourer from his obligation of unloading the ship within specified time. (b)The lessor of certain salt pans, failed to repair them according to the terms of the contract on the ground of a strike of the workmen. Held, a strike by the workmen was not sufficient reason to excuse performance of the contract
	Self induced impossibility	Impossibility arising due to a party's own conduct or act (i.e. a deliberate or a negligent act), is not supervening impossibility,eg,lockout.
	Partial failure of objects or partial impossibility	If a contract is made for fulfilment of several objects, the failure of one or more of them does not amount to supervening possibility. **H.B.Steamboat Co. v Hulton** ▪ X agreed to hire a boat from Y for the purpose of viewing the naval review on the eve of coronation of king and for sailing around the fleet. ▪ Due to king's illness, the naval review was cancelled, but the fleet was assembled. ▪ X used the boat for sailing around the fleet. ▪ Although the primary purpose of the contract was defeated, the secondary purpose was fulfilled and therefore, the contract was not discharged by supervening impossibility.

MAY 2004

Akhilesh entered into an agreement with Shekhar to deliver him (Shekhar) 5,000 bags to be manufactured in his factory. The bags could not be manufactured bacause of strike by the workers and Akhilesh failed to supply the said bags to Shekhar. Deciede whether Akhilesh can be exempted from liability under the provisions of the Indian Contract Act, 1872.

Hint:

Labour strike	- does not amount to supervening empossibility (Sec. 56)
Non – delivery of bags by Akhilesh to Shekhar	- results in a breach of contract by Akhilesh.
Akhilesh is liable	- to compensate the loss incurred by Shekhar, i.e., to pay ordinary damages (Sec.73)

MAY 2005

M Ltd. Contracts with Shanti Traders to make and deliver machinery to them by 30.6.2004 for Rs. 11.50 lakhs. Due to labour strike, M Ltd. could not manufacturer and deliver the machinery to Shanti Traders. Later, Shanti Traders procured the machinery from another manufacturer for Rs. 12.75 lakhs. Shanti Traders was also prevented from performing a contract which it had made with Zenith Traders at the time of their contract with M Ltd. and were compelled to pay compensation for breach of contract. Advise Shanti Traders the amount of compensation which it can claim form M Ltd, referring to the legal provisions of the Indian Contract Act.

Ans.

Labour strike	- does not amount to supervening impossibility (Sec.56)
Non – delivery of machinary by M Ltd.	- results in a breach of contract by M Ltd.
M Ltd. is liable	- to compensate the loss incurred by Shanti Traders, to pay ordinary damages of Rs. 1.25 lakhs (i.e., the difference between Rs. 12.75 lakhs and Rs. 11.50 lakhs) (Sec. 73)
M Ltd. is not liable	- to pay any compensation for loss caused to Shanti Traders due to non-performance of contract entered into with Zenith Traders - since special circumstances, viz, contract between Shati Traders and Zenith traders were not brought to the knowledge of M. Ltd.

MAY 2007

Mr. Ramaswamy of Chennai placed an order with Mr. Shah of Ahmedabad for supply of Urid Dhall on 10.11.2006 at a contracted price of Rs. 40 per kg. The order was the supply of 10 tonnes within a month's time viz. before 09.12.2006. On 04.12.2006 Mr. Shah wrote a letter to Mr. Ramaswamy stating that the price of Urid Dhall was sky rocketing to Rs. 50 Per. Kg. and he would not be able to supply as per original contract. The price of Urid Dhall rose to Rs. 53 on 09.12.06 Advise Mr. Ramaswamy citing the legal position.

Ans.

Increase in price of urad dhall	- does not amount to supervening impossibility (Sec. 56)
Non – delivery of urad dhall by Mr. Shah	- results in a breach of contract by Mr. Shah.
If Ramaswamy waits till 09.12.2006	Mr. Shah shall be liable to pay damages to Mr. Ramaswamy. The amount of damages shall be 10 tons @ Rs. 13 per kg (i.e., difference between the contract price and price as on 09.12.2006), i.e., Rs. 1,30,000. - However, if some supervening impossibility arises before 09.12.2006 (e.g., imposition of ban on trading in urid dhall by the Government), the contract shall become void, and consequently, Mr. Shah shall not be liable to pay any damages.
If Ramaswamy repudiates the contract on 04.12.2006	- Mr. Shah shall be liable to pay damages to Mr. Ramaswamy. The amount of damages shall be 10 tons @ Rs. 10 per kg (i.e., difference between the contract price and price as on 04.12.2006), i.e., Rs. 1,00,000.

Question: What are the various modes of discharge of a contract?

Answer:

A contract may be discharged in eight ways as discuss hereunder:

(a) Discharge by performance: Discharge by performance will take place when there is (i)Actual performance or (ii) Attempted performance

Actual performance / discharge takes place when parties to the contract fulfill their obligations within time and in the manner prescribed. Here each party has done what he has to do under the contract. In attempted performance the promisor offers to perform his part but the promisee refuses to accept his part. This is also known as tender.

(b) Discharge by mutual agreement: Discharge also takes place where there is substitution [novation] rescission, alteration and remission. In all these cases old contract need not be performed.

(c) Discharge by impossibility of performance: A situation of impossibility may have existed at the time of entering into the contract or it may have transpired subsequently (also known as supervening impossibility)

Impossibility can arise when

(i) there is an unforeseen change in law.

(ii) destruction of subject matter.

(iii) non-existence or non occurrence of a state of thing to facilitate happening of the agreement.

(iv) personal incapacity of the promisor.

(v) declaration of war.

(d) Discharge by lapse of time: Performance of contract has to be done within certain prescribed time. In other words it should be performed before it is barred by law of limitation. In such a case there was no remedy for the promisee. For *example,* where then the debt is barred by law of limitation.

(e) Discharge by operation of law: Where the promisor dies or goes insolvent there is a discharge by operation of law.

(f) Discharge by breach of contract: Where there is a default by one party from performing his part of contract on due date then there is breach of contract. Breach of contract can be actual breach or anticipatory breach. Where a person repudiates a contract before the stipulated due date, it is anticipatory breach. In both the events, the party who has suffered injury is entitled for damages. Further he is discharged from performing his part of the contract.

(g) A promisee may remit the performance of the promise by the promisor. Here there is a discharge. Similarly the promisee may accept some other satisfaction. Then again there is a discharge on the ground of accord and satisfaction

(h) When a promisee neglects or refuses to afford the promisor reasonable facilities or opportunities for performance, promisor is excused by such neglect or refusal.

(i) Merger of rights: Sometimes, the inferior rights and the superior rights coincide and meet in one and the same person. In such cases, the inferior rights merge into the superior rights. On merger, the inferior rights vanish and are not required to be enforced.

Example: A took a land on lease from B. Subsequently, A purchases that very land. Now, A becomes the owner of the land and the ownership rights being superior to rights of a lessee, the earlier contract of lease stands terminated.

12. REMEDIES FOR BREACH OF CONTRACT

Whenever there is breach of a contract, the injured party becomes entitled to any one or more of the following remedies against the guilty party:

1. Rescission of the contract.
2. Suit for damages.
3. Suit upon quantum merit.
4. Suit for specific performance of the contract.
5. Suit for an injunction.

As regards the last two remedies stated above, the law is regulated by the Specific Relief Act, I963.

1. Rescission of the contract

- Rescission means a right available to an aggrieved party to terminate a contact.
- When there is a breach of contract by one party, the other party may rescind the contract and **need not perform his part of obligations** under the contract and may sit quietly at home if he decides not to take any legal action against the guilty party.
- But in case the aggrieved party intends to sue the guilty party for damages for breach of contract he has to file a suit for rescission of the contract.
- When the court grants rescission, **the aggrieved party is freed from all his obligations under the contract and becomes entitled to compensation for any damage which he has sustained through the non fulfilment of the contract (Sec. 75),**

  ILLUSTRATION

  A contracts to supply 100 kg of tea leaves for Rs. 20,000 to B on 15 April. If A does not supply the tea leaves on the appointed day, B need not pay the price. B may treat the contract as rescinded and may sit quietly at home. B may also file a 'suit for rescission' and claim damages.

- Thus, applying to the court for 'rescission of the contract' is necessary for claiming damages for breach or for availing any other remedy. In practice a 'suit for rescission' is accompanied by a 'suit for damages' etc; in the same plaint.

2. Suit for damages

May 2011

What is the law relating to determination of compensation, on breach of contract, contained in Section 73 of the Indian Contract Act, 1872?

- **Damages are a monetary compensation allowed to the injured party for the loss or injury suffered by him as a result of the breach of contract**.
- The **fundamental principle underlying damages is *not punishment but compensation*.** By awarding damages the court aims to ***put the injured party into the position in which he would have been, had there been performance and not breach and not to punish the defaulter party***.
- As a general rule "compensation must be commensurate with the injury or loss sustained, arising naturally from the breach. If actual loss is not proved, no damages will be awarded."

Assessment of damages/Measurement of damages: We will now consider the extent to which a plaintiff is entitled to demand damages for breach of contract. The rules in this regard have been laid down by Section 73. Accordingly, an injured party is entitled to receive front the defaulter party:

- Such damages which naturally arose in the usual course of things from such breach. No compensation is to be given generally for any remote or indirect loss sustained by reason of the breach **(Ordinary Damages).**
- Such damages which the parties knew when they entered into the contract as likely to result from the breach **(Special Damages).**
- In estimating the loss or damage caused to a party by breach, the means which existed of remedying the inconvenience caused by the breach must also be taken into account (Explanation to Sec. 73). **(Duty to mitigate damage suffered)**

Different kinds of damages.

Damages may be of following kinds:

1. Ordinary or General or Compensatory damages (i.e. damages arising naturally from the breach).
2. Special damages (i.e. damages in contemplation of the parties at the time of contract).
3. Exemplary, Punitive or Vindictive damages.
4. Nominal damages.
5. Damages for deterioration caused by delay.
6. Pre fixed damages

1. Ordinary Damages

- When a contract has been broken, the injured party can, as a rule, always recover from the guilty party ordinary or general damages.
- These are such damages as may fairly and reasonably be considered as arising naturally and directly in the usual course of things from the breach of contract itself.
- In other words, ordinary damages are restricted to the "**direct or proximate consequences**" of the breach of contract and **remote or indirect losses**, **which are not the natural and probable consequence of the breach of contract are generally not regarded.**

ILLUSTRATIONS:

(a) The leading case of **Hadley vs. Baxendale**, which is said to be the foundation of modern law of damages in England and India (as Sec. 73 is almost based on the rules laid down in this case); is an authority on the point. In that case:

H's mill was stopped by a breakage of the crankshaft. H delivered the shaft to B, a common carrier, to take it to the manufacturers at Greenwich as a pattern for a new one. The only information given to B was that the article to be carried was the broken shaft of the mill. **It was not made known to B that delay would result in loss of profits.** By some neglect on the part of B the delivery of the shaft was delayed beyond a reasonable time. In consequence the mill remained idle for a longer period than should have been necessary. H brought an action against B claiming damages for loss of profits which would have been made during the period of delay. Held that B was not liable for loss of profits caused by the delay because it was a remote consequence, and only nominal damages were awarded. **The Court pointed out that B, the defendant, was never told that the delay in the delivery of the shaft would entail loss of profits of the mill; the plaintiffs might have had another shaft or there might have been some other defect in the machinery to cause the stoppage, or for any other reason there might have been loss actually. Accordingly it was not a direct consequence of the breach and hence not recoverable.**

(b)Madras High Court in **Madras Railway Company vs. Govind Ram** upheld the same principle as above.

In that case a tailor had given his sewing machine to railways to be delivered at a station as a consignment. **He did not mention that any delay in delivering the sewing machine would result in damages for the business of the tailor as he had planned to do good business at the place proposed where a festival was to be held.** The sewing machine was delivered after the festival was over**. Held Railways were not responsible for the damages as the Railway authorities were not informed of the specific purpose of delivery of the sewing machine namely business during a festival**.

(c)A contracts to pay a sum of money to B on a specified day. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest upto the date of payment [Illustration (n) to Section 73]. (If a suit has been filed then A will have also to pay 'cost of the suit' to B.)

2. Special Damages

- Special damages are those which arise on account of the **special or unusual circumstances** affecting the plaintiff.
- In other words, they are **such remote losses which are not the natural and probable consequence** of the breach of contract.
- Unlike ordinary damages, special damages cannot be claimed as a matter of right. These can be claimed only if the special circumstances which would result in a special loss in case of breach of contract are **brought to the notice of the other party. In our given *example* above if the tailor had informed about the special circumstances, special damages would have become payable**.
- It is important that such damages **must be in contemplation of the parties at the time when the contract is entered into. Subsequent knowledge of the special circumstances will not create any special liability on the guilty party.**

ILLUSTRATIONS:

(a)A, having contracted with B to supply B 1,000 tons of iron at Rs.100 a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at Rs 80 a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, and A could not procure other iron, and B, in consequence rescinds the contract. C must pay to A Rs 20,000 being the profit which A would have made by the performance of his contract with B. (If C was not told of B's contract then only the difference in contract price and market price, if any, could be claimed.)

(b) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down, and has to be rebuilt by B, who, in consequence loses the rent which he was to have received from C, and is obliged to make compensation for breach of that contract. A must pay to B, by way of compensation, (i) for the cost of rebuilding the house, (ii) for the rent lost, and (iii) for the compensation made to C.

3. Exemplary or Vindictive Damages

- These are such damages which are awarded with a view to punishing the guilty party for the breach and not by way of compensation for the loss suffered by the aggrieved party.
- As observed earlier, the cardinal principle of the law of damages for a breach of contract is to compensate the injured party for the loss suffered and not to punish the guilty party. Hence, obviously exemplary damages have no place in the law of contract and are not recoverable for a breach of contract. There are, however ,two exceptions to this rule:

(a) **Breach of a contract to marry**: In this case the amount of the damages will depend upon the extent of injury to the party's feelings. One may be ruined, other may not mind so much.

(b) **Dishonour of a cheque by a banker when there are sufficient fund to the credit of the customer**: In case of wrongful dishonour of cheques the damages would depend upon the loss of credit and reputation suffered by the customer. The damages could be very heavy if loss had been suffered by a businessman, when compared to a non-businessman customer.
For example Mrs. G, a non-trader paid a cheque for £90 and 16 shillings drawn on Westminster Bank to her landlord for rent. The cheque was dishonoured by the bank. But she was awarded damages of only 40 shilling as nominal damages.
Similarly where the **value of cheque is small the damages could be very heavy in comparison to a situation where the value of cheque is heavy**. This is on the theory that dishonour of a small value of cheque would cause more damages to the honour of the customer.

4. Nominal Damages

- Nominal damages are those which are awarded only for the name sake.
- These are neither awarded by way of compensation to the aggrieved party nor by way of punishment to the guilty party.
- These are awarded to establish the right to decree for breach of contract when the injured party has not actually suffered any real damage and consist of a very small sum of money,say,a rupee or two.
- For example, where in a contract of sale of goods, if the contract price and the market price is almost the same at the date of breach of the contract, then the aggrieved party is entitled only to nominal damages.

5. Damages for deterioration caused by delay:

- Compensation can be recovered even without notice for damages or 'deterioration' caused to goods on account of delay by carriers amounting to breach of contract.
- Here the word "deterioration" means not only physical damages but also loss of opportunity.
- In **Wilson vs. Lancashire and Yorkshire Railway Company**, the plaintiff bought velvet with a view to making it into caps for sale during spring. But due to delay in transit, he was unable to use the velvet for making caps for sale during season. It was held that the fall in value of sale of cloth in consequence of the same having arrived after the season amounted to deterioration. It was here held that the plaintiff is entitled for compensation without notice.

6. **Pre-fixed damages:** Sometimes, parties to a contract stipulate at the time of its formation that on a breach of contract by any of them, a certain amount will be payable as damage. **It may amount to either liquidated damages (i.e., a reasonable estimate of the likely loss in case of breach) or a penalty (i.e., an amount arbitrarily fixed as the damages payable).**
Section 74 provides that if a sum is named in a contract as the amount to be paid in case of a breach, the aggrieved party is entitled to receive from the party at fault a reasonable compensation not exceeding the amount so named (Section 74).
Example: If the penalty provided by the contract is ` 1,00,000 and the actual loss because of breach is ` 70,000, only ` 70,000 shall be available as damages, i.e., the amount of actual loss and not the amount stipulated. But if the loss is, say, ` 1,50,000, then only, ` 1,00,000 shall be recoverable.

Liquidated Damages and Penalty

- 'Liquidated damages'means a sum fixed up in advance, which is **a fair and genuine pre-estimate** of the probable loss that is likely to result from the breach.
- 'Penalty' means a sum fixed up in advance, which is **extravagant and unconscionable** in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. It

is imposed by way of punishment to prevent parties from committing the breach.

- Sometimes the parties fix up at the time of the contract the sum payable as damages in case of breach.
- In such a case. a distinction is made in English Law as to whether the provision amounts to 'liquidated damages' or a 'penalty'. Courts in England usually allow 'liquidated damages'as stipulated in the contract without any regard to the actual loss sustained. 'Penalty' clauses, however, are treated as invalid and the courts in that case calculate damages according to the ordinary principles and allow only reasonable compensation.
- **Under the Indian Law, Section 74 does away with the distinction between 'liquidated damages 'and 'penalty'. This Section lays down that the courts are not bound to treat the sum mentioned in the contract either by way of liquidated damages or penalty as the sum payable as damages for breach. Instead the courts are required to allow reasonable compensation so as to cover the actual loss sustained, not exceeding the amount so named in the contract.**
- **Thus, according to the Section, the named sum, regardless whether it is a penalty or not, determines only the maximum limit of liability in case of the breach of contract.**
- **In terms of Section 74, courts are empowered to reduce the sum payable on breach whether it is 'penalty' or "liquidated damages" provided the sum appears to be unreasonably high.**
- The Section does not confer a special benefit upon any party: it merely declares the law that notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated.
- Supreme Court in **Sri Chunni Lal vs. Mehta & Sons Ltd**. laid down the ratio that the aggrieved party should not be allowed to claim a sum greater than what is specific in the written agreement. But even there the court has powers to reduce the amount if it considers it reasonable to reduce.
- Any stipulation for payment of increased interest is a stipulation for payment of penalty which has to be paid. It may disallowed if the rate is exorbitant.

ILLUSTRATIONS

(a) A contracts with B to pay Rs.1,000 if he fails to pay B Rs.500 on a given day. A fails to pay B Rs 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs.1,000 as the court considers reasonable. [Illustration (a) to Section74]

(b) A agreed to build a house for B by 31st March, 2008. A further agreed to pay Rs.5,000 per month as damages in case of delay beyond the agreed date. A was late by two months. B sued A for Rs.23,500, the actual loss caused to him as a result of escalation in prices of building material during the period of delay. A is liable to pay Rs.10,000 only because when a sum is named in the contract as the amount to be paid in case of breach, the court will allow only reasonable compensation so as to cover the actual loss sustained within the limits stated in the contract.

(c)A gives B a bond for repayment of Rs.1000 with interest at 12 per cent per annum at the end of six months, with a stipulation that in case of default interest shall be payable at the rate of 75 percent p.a. from the date of default. This is stipulation by way of penalty and B is only entitled to recover from A such compensation as court considers reasonable.

Exception: Where any person gives any bond to the Central or State government for the performance of any public duty or act in which the public are interested, on breach of the condition of any such instrument, he shall be liable to pay the whole sum mentioned therein.

DISTINCTION BETWEEN LIQUIDATED DAMAGES AND PENALTY

Basis of distinction	Liquidated Damages	Penalty
1.Meaning	If the sum payable by the defaulting party in case of breach of a contract (as specified in the contract) represents a fair and genuine pre-estimate of the damages likely to result due to breach, such specified sum is called as liquidated damages. Thus, liquidated damages are based on probable loss.	If the sum payable by the defaulting party in case of breach of a contract (as specified in the contract) is not based on probable loss, and is disproportionate to the damages which are likely to result as a result of breach, such specified sum is called as penalty.
2.Purpose	Liquidated damages are imposed by way of compensation to the aggrieved party.	Penalty is imposed by way of punishment, so as to prevent a party from committing a breach.
3.Validity in England	In England, liquidated damages are awarded in full (disregarding the actual damages suffered by the aggrieved party).	In England, no amount is awarded to any party, where a contract requires payment of penalty.
4. Validity in India	In India, the Courts do not differentiate between liquidated damages and penalty. Indian Courts restrict the damages to reasonable compensation so as to cover the actual loss suffered by aggrieved party(i.e. it is immaterial as to whether the specified sum is in the nature of liquidated damages or penalty).	

DISTINCTION BETWEEN ORDINARY DAMAGES AND LIQUIDATED DAMAGES

Basis of distinction	Ordinary Damages	Liquidated Damages
1.Meaning	Ordinary damages are determined by the Court. Ordinary damages are not specified by the parties in the contract. Ordinary damages means such damages as may fairly and reasonably be considered as arising naturally from the breach of contract.	If the sum payable by the defaulting party in case of breach of a contract (as specified in the contract) represents a fair and genuine pre-estimate of the damages likely to result due to breach, such specified sum is called as liquidated damages. Thus, liquidated damages are based on probable loss.
2.Purpose	The purpose of awarding damages it to compensate the loss caused to the aggrieved party.	The purpose of specifying the liquidated damages is to avoid uncertainty and expenses of proving damages in the Court.
3.Effect	The actual loss suffered by the aggrieved party due to breach of contract is allowed in the form of compensation, i.e., ordinary damages are allowed.	The liquidated damages act as a ceiling, i.e., the aggrieved party shall be allowed actual loss suffered by him or liquidated damages, whichever is less.

How to Calculate the Damage

- In case of a contract for sale of good,

  i) where the buyer breaks the contract, the damages would be the difference between contract price and market price as **on the date of breach,**

  (ii) where the seller breaks the contract, the buyer can recover the difference between market price and contract price **as on date of breach.**

  Any subsequent increase or decrease in the market price would not be taken note of.

  ILLUSTRATION

  A agrees to sell to B 5 bags of rice at Rs 1,500 per bag delivery to be given after two months. On the date of delivery the price of rice goes up and the rate is Rs 1,750 per bag. A refuses to deliver the bags to B. B can claim from A Rs 1,250, as ordinary damages arising directly from the breach, being the difference between

the contract price (i.e., Rs 1,500 per bag) and the market price (i.e., Rs 1,750 per bag) on the date of delivery of 5 bags. Notice that if Rs 1,250 are paid to B by way of damages, then he will be in the same position as if the contract has been performed.

- Where if the seller retains the goods after the contract has been broken by the buyer- there the seller cannot recover from the buyer any further loss even if the market falls. Again he is not liable to have the damages reduced if the market rises.
- In Jamal vs. Mulla Dawood , the defendant agreed to purchase from the plaintiff, certain shares on December 30, but wrongfully rejected them when tendered on date. The difference between the contract price and market price amounted to Rs 1,09,218; the plaintiff recovered a part of the loss by selling those shares in a rising market and the actual loss amounted to Rs 79,882. The plaintiff, however, sued the defendant claiming Rs 1,09,218 as damages and the Privy Council allowed the claim in full.

Nov. 2004

Dubious Textile enters into a contract with retail garment Show Room for supply of 1000 pieces of Cotton Shirts at Rs. 300 per Shirt to be supply on or before 31st December,2004. However on 1st November, 2004 Dubious Textiles informs the Retail Garments Show Room that he is not willing to supply the goods as the price of cotton Shirts in the meantime has gone upto Rs. 350 per shirt. Examine the rights of the retail Garments show Room in this regard.

Ans.

If Retail Garments Show Room waits till 31st December	-Dubious Textile shall be liable to pay damages (equal to difference between the contract price and price as on 31st December, 2004 if it fails to supply the cotton shirt upto 31st December 2004
If Retail Garments Show Room does not wait till 31st December, 2004	-Dubious Textile shall be liable to pay damages (equal to difference between the contract price and price as on 31st December, 2004.)

MAY 2007

A contracted with B to supply him B 500 tons of iron-steel @ Rs. 5,000 per ton, to be delivered at a specified time Thereafter, A contract with C for the purchase of 500 tons of iron- steel @Rs.4,800 per ton and at the same time told 'C' that he did so for the purpose of performing his contract into with B.C failed to perform his contract in due course. Consequently, A could not procure any iron- steel and B rescinded the contract. What would be the amount of damages which A could claim from C in the circumstances?

Ans.

A can recover Rs. 1 Lakh as special damages from C	-Since it was within C's knowledge that breach of contract by him (C) wouid result in non-performance of contract between A and B resulting in loss of Rs. 1 lakh (i.e., the difference between Rs. 5.000 per ton and Rs. 4,800 per ton for 500 tons) A (Sec. 73)

MAY 2015

X' entered into a contract with 'Y' to supply him 1,000 water bottles @ Rs.5 per water bottle, to be delivered at a specified time. Thereafter, 'X' contracts with 'Z' for the purchase of 1,000 water bottles @ Rs.4.50 per water bottle, and at the same time told 'Z' that he did so for the purpose of performing his contract entered into with 'Y'. 'Z' failed to perform his contract in due course and market price of each water bottle on that day was Rs.5.25 per water bottle. Consequently, 'X' could not procure any water bottle and 'Y' rescinded the contract. What would be the amount of damages which 'X' could claim from 'Z' in the circumstances? What would be your answer if 'Z' had not informed about the Y's contract? Explain with reference to the provisions of the Indian Contract Act, 1872.

Answer:

Section 73 of the Indian Contract Act, 1872 lays down that when a contract has been broken the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it.

The leading case on this point is "Hadley v. Baxendale" in which it was decided by the Court that the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both the parties to the contract, the damages resulting from the breach of such contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated.

The problem asked in this question is based on the provisions of Section 73 of the Indian Contract Act, 1872. In the instant case 'X' had intimated to 'Z' that he was purchasing water bottles from him for the purpose of performing his contract with 'Y'. Thus, 'Z' had the knowledge of the special circumstances. Therefore, 'X' is entitled to claim from 'Z' Rs. 500/- at the rate of 0.50 paise i.e. 1000 water bottles x 0.50 paise (difference between the procuring price of water bottles and contracted selling price to 'Y') being the amount of profit 'X' would have made by the performance of his contract with 'Y'.
If 'X' had not informed 'Z' of 'Y's contract then the amount of damages would have been the difference between the contract price and the market price on the day of default. In other words, the amount of damages would be Rs. 750/- (i.e. 1000 water bottles x 0.75 paise).

Duty to Mitigate Damage Suffered

- It is the duty of the injured party to mitigate damage suffered as a result of the breach of contract by the other party. He must use all reasonable means of mitigating the damage, just as a prudent man would under similar circumstances in his own case.
- He cannot recover any part of the damage traceable to his own neglect to mitigate.

ILLUSTRATION

(a) Where a servant is dismissed, even though wrongfully, it is his duty to mitigate the damages by seeking other employment. He can recover only nominal damages if he refuses a reasonable offer of fresh employment. But if it cannot be proved that he has failed in his duty of mitigation, he will be entitled to the full salary for the whole of the unexpired period of service, if the contract of employment was for a fixed period. If the contract of employment was not for a fixed term, then the principle of awarding damages for a reasonable period of notice comes into play.

(b) A took a shop on rent from B and paid one month's rent in advance. B could not give possession of the shop to A. A chose to do no business for 8 months though there were other shops available in the vicinity. A sued B for breach of contract and claimed damages for the loss suffered. Held, he was entitled only to a refund of his advance, and nothing more as he had failed in his duty to minimise the loss by not taking another shop in the neighbourhood.

Cost of Suit

The aggrieved party is entitled in addition to the damages to get the costs of getting the decree for damages from the defaulter party. The cost of suit for damages is in the discretion of the court.

Summary of the Rules Regarding the Measure of Damages

The principles governing the measure of damages discussed above may be summarised as under:

1. The damages are awarded by way of compensation for the loss suffered by the aggrieved party and not for the purpose of punishing the guilty party for the breach.
2. The injured party is to be placed in the same position so far as money can do as if the contract had been performed.
3. The aggrieved party can recover by way of compensation only the actual loss suffered by him arising naturally in the usual course of things from the breach itself.

4. Special or remote damages i.e. damages which are not the natural and probable consequence of the breach are usually not allowed until they are in the knowledge of both the parties at the time of entering into the contract.
5. When no real loss arises from the breach of contract, only nominal damages are awarded.
6. If the parties fix up in advance the sum payable as damages in case of breach of contract, the court will allow only reasonable compensation so as to cover the actual loss sustained not exceeding the amount so named in the contract.
7. Exemplary damages cannot be awarded for breach of contract except in case of breach of contract of marriage or wrongful refusal by the bank to honour the customer's cheque.
8. It is the duty of the injured party to minimise the damage suffered.
9. The injured party is entitled to get the costs of getting the decree for damages from the defaulter party.

Suit for Specific Performance

- Specific performance means the actual carrying out of the contract as agreed.
- Under certain circumstances an aggrieved party may file a suit for specific performance i.e. for a decree by the court directing the defendant to actually perform the promise that he has made.
- Such a suit may be filed either instead of or in addition to a suit for damages.
- A decree for specific performance is not granted for contracts of every description. It is only where it is just and equitable so to do. i.e. where the legal remedy is inadequate or defective that the courts issue a decree for specific performance.
- It is usually granted in contracts connected with land, buildings, rare articles and unique goods having some special value to the party suing because of family association.
- Specific performance is not granted, as a rule, in the following cases:
    - Where monetary compensation is an adequate relief. Thus the courts refuse specific performance of a contract to lend or to borrow money or where the contract is for the sale of goods easily procurable elsewhere.
    - Where the contract is for personal services e.g a contract to marry or to paint a picture. In such contracts 'injunction' (i.e.an order which forbids the defendant to perform a like personal service for other persons) is granted in place of specific performance.

Suit for an Injunction

- 'Injunction" is an order of a court restraining a person from doing a particular act.
- It is a mode of securing the specific performance of the negative terms of the contract.
- To put it differently, where a party is in breach of negative term of the contract (i.e. where he is doing something which he promised not to do) the court may by issuing an injunction restraint him from doing what he promised not to do.
- Thus 'injunction' is a preventive relief.

ILLUSTRATIONS:

(a)A, agreed to sing at B's theatre for three months from 1stApril and to sing for no one else during that period. Subsequently she contracted to sing at C's theatre and refused to sing at B's theatre. On a suit by B, the court refused to order specific performance of her positive engagement to sing at the plaintiffs theatre, but granted an injunction restraining A from singing elsewhere and awarded damages to B to compensate him for the loss caused by A's refusal.

(b) G agreed to take the whole of his supply of electricity from a certain company. The agreement was held to import a negative promise that he would take none from elsewhere. He was, therefore, restrained by an injunction from buying electricity from any other company.

Suit upon quantum meruit:

- **Quantum Meruit:** Where one person has rendered service to another in circumstances which indicate an understanding between them that it is to be paid for although no particular remuneration has been fixed, the law will infer a promise to pay.
- ***Quantum Meruit* i.e. as much as the party doing the service has deserved.**
- It covers a case where the party injured by the breach had at time of breach done part but not all of the work which he is bound to do under the contract and seeks to be compensated for the value of the work done.
- For the application of this doctrine, two conditions must be fulfilled:
  (1) It is only available if the original contract has been discharged.
  (2) The claim must be brought by a party not in default.
- The object of allowing a claim on quantum meruit is to recompensate the party or person for value of work which he has done. Damages are compensatory in nature while quantum merit is restitutory. It is but reasonable compensation awarded on implication of a contract to remunerate. Where a person orders from a wine merchant 12 bottles of a whiskey and 2 of brandy, and the purchaser accepts them, the purchaser must pay a reasonable price for the brandy.

The claim for quantum meruit arises in the following cases:

(a) When an agreement is discovered to be void or when a contract becomes void.
(b) When something is done without any intention to do so gratuitously.
(c) Where there is an express or implied contract to render services but there is no agreement as to remuneration.
(d) When one party abandons or refuses to perform the contract.
(e) Where a contract is divisible and the party not in default has enjoyed the benefit of part performance.
(f) When an indivisible contract for a lump sum is completely performed but badly the person who has performed the contract can claim the lump sum, but the other party can make a deductionfor bad work.

ILLUSTRATIONS

i. X wrongfully revoked Y's (his agent) authority before Y could complete his duties. Held, Y could recover, as a quantum meruit, for the work he had done and the expenses he had incurred in the course of his duties as an agent.
ii. A agrees to deliver 100 bales of cottons to B at a price of `1000 per bale. The cotton bales were to be delivered in two installments of 50 each. A delivered the _rst installment but failed to supply the second. B must pay for 50 bags.
iii. C was appointed as managing director of a company by the Board of Directors under a written contract which provided for his remuneration. The contract was found void because the directors who constituted the 'Board' were not qualified to make the appointment. C, nevertheless, purporting to act under the agreement, rendered services to the company and sued for the sums specified in the agreement, or, alternatively, for a reasonable remuneration on a quantum meruit. Held, C could recover on a quantum meruit.
iv. A contracts with B to repair his house at a piece rate. After a part of the repairs were carried out, the house is destroyed by lightning. Although the contract becomes void and stands discharged because of destruction of the house, A can claim payment for the work done on 'quantum meruit'. Note that if under the contract a lump sum is to be paid for the repair job as a whole, then A cannot claim quantum meruit because no money is due till the whole job is done.
v. A, a trader, leaves certain goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

vi. Where A ploughed the field of B with a tractor to the satisfaction of B in B's presence, it was held that A was entitled to payment as the work was not intended to be gratuitous and the other party has enjoyed the benefit of the same.

vii. P agreed to write a volume on ancient armour to be published in a magazine owned by C. For this he was to receive $ 100 on completion. When he had completed part, but not the whole, of his volume, C abandoned the magazine. P was held entitled to get damages for breach of contract and payment quantum meruit for the part already completed .

viii. A. engages B. a contractor, to build a three storied house. After a part is constructed A prevents B from working any more. B, the contractor, is entitled to get reasonable compensation for work done under the doctrine of quantum meruit in addition to the damages for breach of contract.

ix. Where a common carrier fails to take a complete consignment to the agreed destination, he may recover pro-rata freight, (He will, of course, be liable for breach of the contract.)

x. S had agreed to erect upon H's land two houses and stables for $ 565. S did part of the work and then abandoned the contract. H himself completed the buildings using some materials left on his land by S. In an action by S for the value of work done and of the materials used by H, it was held that S could recover the value of the materials (for H had the option to accept or to reject these) but he could not recover the value of the work done (for H had no option with regard to the partly erected building, but to accept that).

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