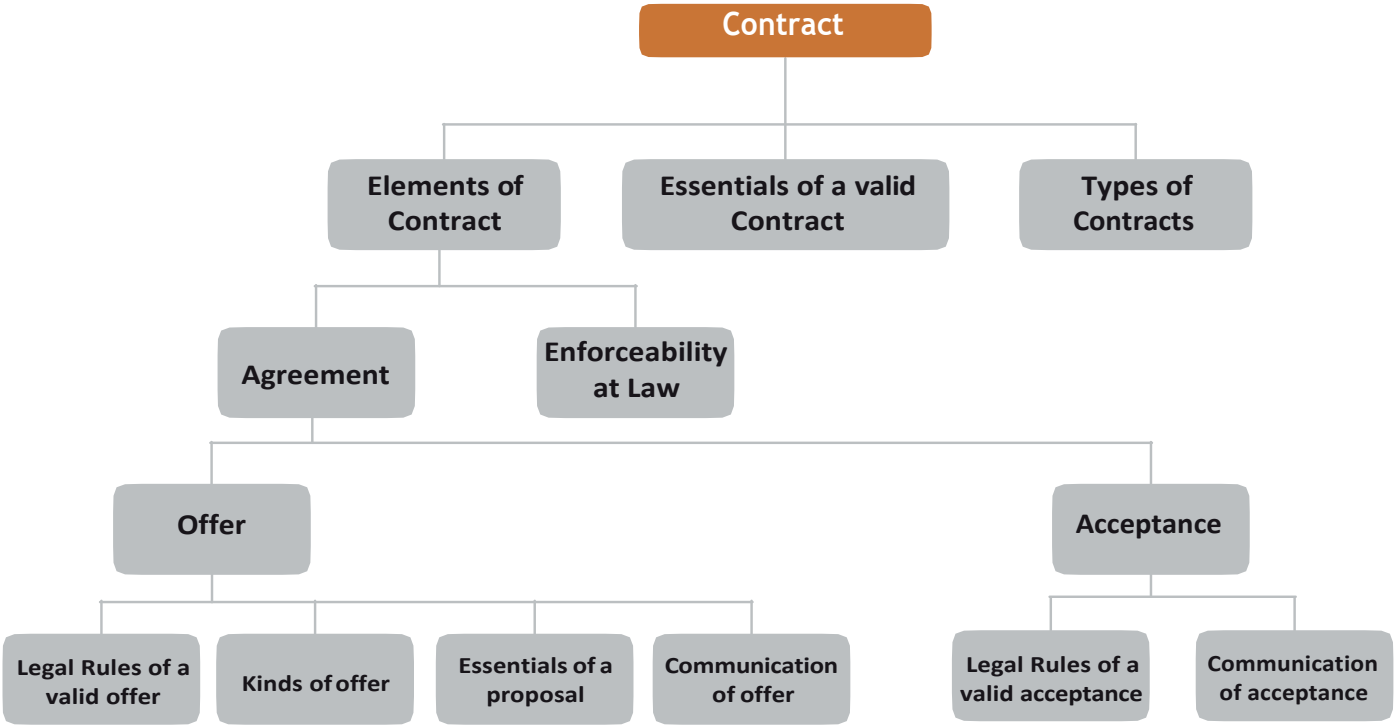
Chapter - 1

THE INDIAN CONTRACT ACT,1872

UNIT I : NATURE OF CONTRACT



The Law of contract: Introduction

- As a result of increasing complexities of business environment, innumerable contracts are entered into by the parties in the usual course of carrying on their business. 'Contract' is the most usual method of defining the rights and duties in a business transaction.
- This branch of law is different from other branches of law in a very important respect. It does not prescribe so many rights and duties, which the law will protect or enforce; it contains a number of limiting principles subject to which the parties may create rights and duties for themselves.
- The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts'. The Act basically identifies the ingredients of
- A legally enforceable valid contract in addition to dealing with certain special type of contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc.
- All agreements are not studied under the Indian Contract Act, 1872, as some of those are not contracts. Only those agreements, which are enforceable by law, are contracts.
- This unit refers to the essentials of a legally enforceable agreement or contract. It sets out rules for the offer and acceptance and revocation thereof.
- It states the circumstances when an agreement is voidable or enforceable by one party only, and when the agreements are void, i.e. not enforceable at all.

1.1 WHAT IS A CONTRACT?

- The term contract is defined under section 2(h) of the Indian Contract Act, 1872 as- "an agreement enforceable by law".

The contract consists of two essential elements:

I. an agreement, and

II. its enforceability by law.

I. Agreement -

- The term 'agreement' given in Section 2(e) of the Act is defined as- "every promise and every set of promises, forming the consideration for each other".

  To have an insight into the definition of agreement, we need to understand promise.

Section 2 (b) defines promise as-

- "when the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. Proposal when accepted, becomes a promise".

  The following points emerge from the above definition :

1. when the person to whom the proposal is made
2. signifies his assent on that proposal which is made to him
3. the proposal becomes accepted
4. accepted proposal becomes promise

- Thus we say that an agreement is the result of the proposal made by one party to the other party and that other party gives his acceptance thereto of course for mutual consideration.

  Agreement = offer/Proposal + Acceptance

II. Enforceability by law

- An agreement to become a contract must give rise to a legal obligation which means a duly enforceable by law.
- Thus from above definitions it can be concluded that –

  Contract = Accepted proposal/Agreement + Enforceability by law

- On elaborating the above two concepts, it is obvious that contract comprises of an agreement which is a promise or a set of reciprocal promises, that a promise is the acceptance of a proposal giving rise to a binding contract. Further, section 2(h) requires an agreement to be worthy of being enforceable by law before it is called'contract'. Where parties have made a binding contract, they created rights and obligations between themselves.

Example:

A agrees with B to sell car for `2 lacs to B. Here A is under an obligation to give car to B and B has the right to receive the car on payment of `2 lacs and also B is under an obligation to pay `2 lacs to A and A has a right to receive `2 lacs.

- So Law of Contract deals with only such legal obligations which has resulted from agreements. Such obligation must be contractual in nature. However some obligations are outside the purview of the law of contract.

Example:

An obligation to maintain wife and children, an order of the court of law etc. These are status obligations and so out of the scope of the Contract Act.

Difference between 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.

1.2 ESSENTIALS OF A VALID CONTRACT

I. Essentials of a valid contract

	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	Fulfillment of legal formalities
4	Lawful consideration	4	Certainty of meaning
5	Legal object	5	Possibility of performance
6	Not expressly declared to be void	6	-

- In terms of Section 10 of the Act, "all agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void".

- Since section 10 is not complete and exhaustive, so there are certain others sections which also contain requirements for an agreement to be enforceable. Thus, in order to create a valid contract, the following elements should be present:

1. Two Parties:

- One cannot contract with himself. A contract involves at least two parties- one party making the offer and the other party accepting it. A contract may be made by natural persons and by other persons having legal existence e.g. companies, universities etc. It is necessary to remember that identity of the parties be ascertainable.

Example:

To constitute a contract of sale, there must be two parties- seller and buyer. The seller and buyer must be two diuerent persons, because a person cannot buy his own goods. In State of Gujarat vs. Ramanlal S & Co. when on dissolution of a partnership, the assets of the firm were divided among the partners, the sales tax oflcer wanted to tax this transaction. It was held that it was not a sale. The partners being joint owner of those assets cannot be both buyer and seller.

2. Parties must intend to create legal obligations:

- There must be an intention on the part of the parties to create legal relationship between them. Social or domestic type of agreements are not enforceable in court of law and hence they do not result into contracts.

Example:

A husband agreed to pay to his wife certain amount as maintenance every month while he was abroad. Husband failed to pay the promised amount. Wife sued him for the recovery of the amount. Here in this case wife could not recover as it was a social agreement and the parties did not intend to create any legal relations. (Balfour v. Balfour)

3. Other Formalities to be complied with in certain cases:

- In case of certain contracts, the contracts must be in writing, e.g. Contract of Insurance is not valid except as a written contract. Further, in case of certain contracts, registration of contract under the laws which is in force at the time, is essential for it to be valid, e.g. in the case of immovable property.

4. Certainty of meaning: The agreement must be certain and not vague or indefinite.

Example:

A agrees to sell to B a hundred tons of oil. There is nothing certain in order to show what kind of oil was intended for.

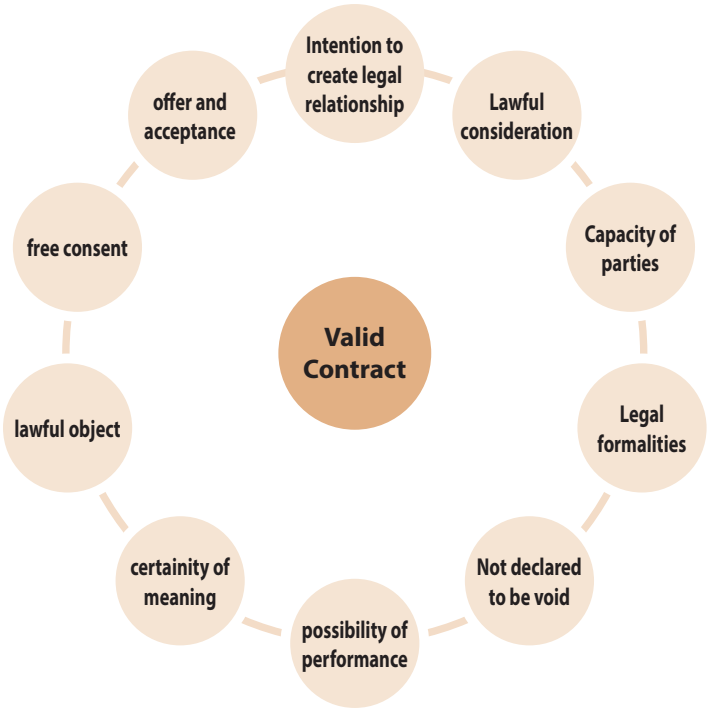
5. Possibility of performance of an agreement:

- The terms of agreement should be capable of performance. An agreement to do an act impossible in itself cannot be enforced.

Example:

A agrees with B to discover treasure by magic. The agreement cannot be enforced as it is not possible to be performed.

Essential elements of a valid contract



According to Section 10 of the Indian Contract Act, 1872, the following are the essential elements of a Valid Contract:

I. Offer and Acceptance or an agreement:

- An agreement is the first essential element of a valid contract. According to Section 2(e) of the Indian Contract Act, 1872, "Every promise and every set of promises, forming consideration for each other, is an agreement" and according to Section 2(b)"A proposal when accepted, becomes a promise". An agreement is an outcome of offer and acceptance.

II. Free Consent:

- Two or more persons are said to consent when they agree upon the same thing in the same sense. This can also be understood as identity of minds in understanding the terms viz consensus ad idem.
- Further such a consent must be free. Consent would be considered as free consent if it is not caused by coercion, undue influence, fraud or, misrepresentation or mistake.
- When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

When consent is vitiated by mistake, the contract becomes void.

Example:

A threatened to shoot B if he (B) does not lend him `2000 and B agreed to it. Here the agreement is entered into under coercion and hence voidable at the option of B.

III. Capacity of the parties: Capacity to contract means the legal ability of a person to enter into a valid contract. Section 11 of the Indian Contract Act specifies that every person is competent to contract who

(a) is of the age of majority according to the law to which he is subject and

(b) is of sound mind and

(c) is not otherwise disqualified from contracting by any law to which he is subject. A person competent to contract must fulfil all the above three qualifications.

- Qualification (a) refers to the age of the contracting person i.e. the person entering into contract must be of 18 years of age. Persons below 18 years of age are considered minor, therefore, incompetent to contract.
- Qualification (b) requires a person to be of sound mind i.e. he should be in his senses so that he understands the implications of the contract at the time of entering into a contract. A lunatic, an idiot, a drunken person or under the influence of some intoxicant is not supposed to be a person of sound mind.
- Qualification (c) requires that a person entering into a contract should not be disqualified by his status, in entering into such contracts. Such persons are: an alien enemy, foreign sovereigns, convicts etc. They are disqualified unless they fulfil certain formalities required by law.
- Contracts entered by persons not competent to contract are not valid.

IV. Consideration:

- It is referred to as 'quid pro quo' i.e. 'something in return'. A valuable consideration in the sense of law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, surrendered or undertaken by the other.

Example:-

A agrees to sell his books to B for ₹100, B's promise to pay ₹100 is the consideration for A's promise to sell his books and A's promise to sell the books is the consideration for B's promise to pay ₹100.

V. Lawful Consideration and Object:

- The consideration and object of the agreement must be lawful.
- Section 23 states that consideration or object is not lawful if it is prohibited by law, or it is such as would defeat the provisions of law, if it is fraudulent or involves injury to the person or property of another or court regards it as immoral or opposed to public policy.

Example :

'A' promises to drop prosecution instituted against 'B' for robbery and 'B' promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

VI. Not expressly declared to be void:

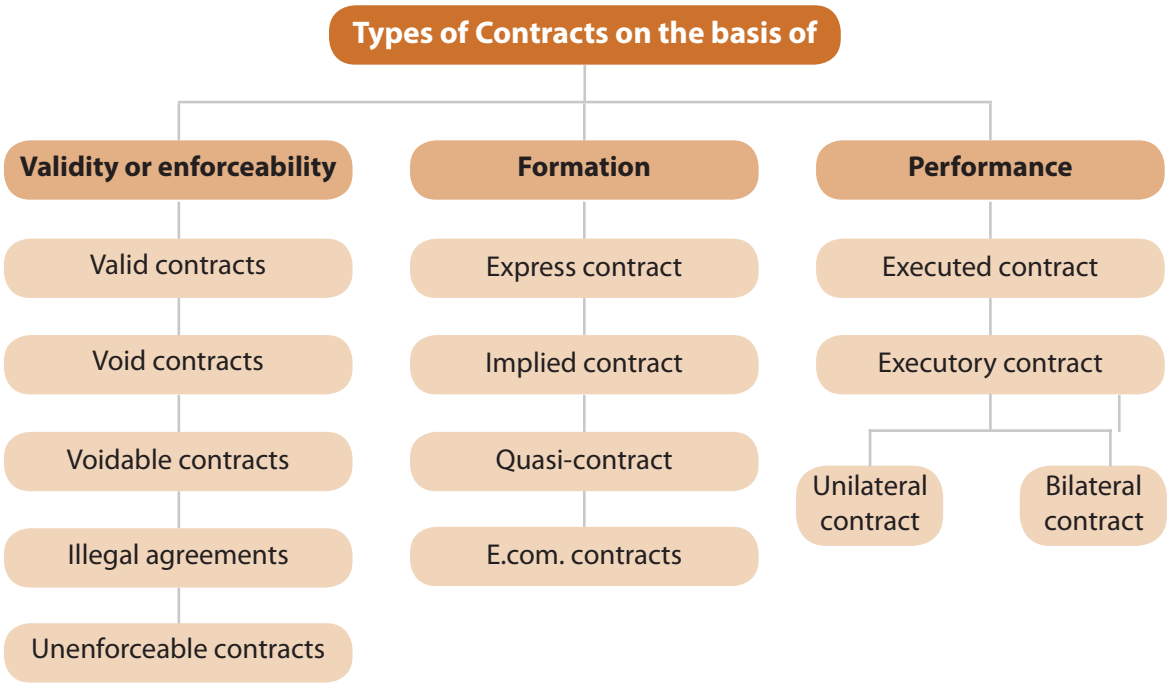
- The agreement entered into must not be which the law declares to be either illegal or void. An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects.

Example:

Threat to commit murder or making/publishing defamatory statements or entering into agreements which are opposed to public policy are illegal in nature. Similarly any agreement in restraint of trade, marriage, legal proceedings, etc. are classic examples of void agreements.

1.3 TYPES OF CONTRACT

Now let us discuss various types of contracts.



I. On the basis of the validity

1. Valid Contract:

- An agreement which is binding and enforceable is a valid contract. It contains all the essential elements of a valid contract.

2. Void Contract:

- Section 2 (j) states as follows: "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". Thus a void contract is one which cannot be enforced by a court of law.

Example:

Mr. X agrees to write a book with a publisher. After few days, X dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract.

Example:

A contracts with B (owner of the factory) for the supply of 10 tons of sugar, but before the supply is euected, the fire caught in the factory and everything was destroyed. Here the contract becomes void.

- It may be added by way of clarification here that when a contract is void, it is not a contract at all but for the purpose of identifying it, it has to be called a [void] contract.

3. Voidable Contract:

- Section 2(i) defines that "an agreement which is enforceable by law at the option of one or more parties thereto, but not at the option of the other or others is a voidable contract".

- This in fact means where one of the parties to the agreement is in a position or is legally entitled or authorized to avoid performing his part, then the agreement is treated and becomes voidable.
- Such a right might arise from the fact that the contract may have been brought about by one of the parties by coercion, undue influence, fraud or misrepresentation and hence the other party has a right to treat it as a voidable contract.

Difference can be summarized as under:

S. No.	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 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.
2	Cause	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.
3	Performance of contract	A void contract cannot be performed.	If the aggrieved party does not, within reasonable time, exercise his right to avoid the contract, any party can sue the other for claiming the performance of the contract.
4	Rights	A void contract does not grant any right to any party.	The party whose consent was not free has the right to rescind the contract.

4. Illegal Contract :

- It is a contract which the law forbids to be made. The court will not enforce such a contract but also the connected contracts. All illegal agreements are void but all void agreements are not necessarily illegal.

Example:

Contract that is immoral or opposed to public policy are illegal in nature. Similarly, if R agrees with S, to purchase brown sugar, it is an illegal agreement.

- According to Section 2(g) of the Indian Contract Act, "an agreement not enforceable by law is void". The Act has specified various factors due to which an agreement may be considered as void agreement. One of these factors is unlawfulness of object and consideration of the contract i.e. illegality of the contract which makes it void

Difference can be summarized as:

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.

5. Unenforceable Contract:

- Where a contract is good in substance but because of some technical defect i.e. absence in writing, barred by limitation etc. one or both the parties cannot sue upon it, it is described as an unenforceable contract

II. On the basis of the formation of contract

1. 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.

Example:

A tells B on telephone that he offers to sell his house for ` 2 lacs and B in reply informs A that he accepts the offers, this is an express contract.

2. 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.

Example:

Where a coolie in uniform picks up the luggage of A to be carried out of the railway station without being asked by A and A allows him to do so, it is an implied contract and A must pay for the services of the coolie detailed by him.

3. Tacit Contracts:

- The word Tacit means silent. Tacit contracts are those that are inferred through the conduct of parties without any words spoken or written.
- 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 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. It is not a separate form of contract but falls within the scope of implied contracts.

4. Quasi-Contract:

- A quasi-contract is not an actual contract but it resembles a contract. It is created by law under certain circumstances. The law creates and enforces legal rights and obligations when no real contract exists. Such obligations are known as quasi-contracts.
- In other words, it is a contract in which there is no intention on part of either party to make a contract but law imposes a contract upon the parties.

Example:

Obligation of finder of lost goods to return them to the true owner or liability of person to whom money is paid under mistake to repay it back cannot be said to arise out of a contract even in its remotest sense, as there is neither offer and acceptance nor consent. These are said to be quasi-contracts.

5. 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 ED1 - 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.

III. On the basis of the performance of the contract

1. 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.

Example:

When a grocer sells a sugar on cash payment it is an executed contract because both the parties have done what they were to do under the contract.

2. 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.

Example:

Where G agrees to take the tuition of H, a pre-engineering student, from the next month and H in consideration promises to pay G ₹ 1,000 per month, the contract is executory because it is yet to be carried out.

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

(a) Unilateral Contract: Unilateral contract is a one sided contract in which one party has performed his duty or obligation and the other party's obligation is outstanding.

Example:

M advertises payment of are ward of ₹ 5000 to any one who finds his missing boy and brings him. As soon as B traces the boy, there comes into existence an executed contract because

- B has performed his share of obligation and it remains for M to pay the amount of reward to B. This type of Executory contract is also called unilateral contract.

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

Example:

A promises to sell his plot to B for `1 lacs cash down, but B pays only `25,000 as earnest money and promises to pay the balance on next Sunday. On the other hand A gives the possession of plot to B and promises to execute a sale deed on the receipt of the whole amount. The contract between the A and B is executory because there remains something to be done on both sides. Executory contracts are also known as Bilateral contracts.

1.4 PROPOSAL/OFFER [SECTION2 (a) OF THE INDIAN CONTRACT ACT, 1872]

I. Definition of Offer/Proposal:

- According to Section 2(a) of the Indian Contract Act, 1872, "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".

Analysis of the above definition Essentials of a proposal/offer are-

1. 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'.
2. For a valid offer, the party making it must express his willingness'to do' or'not to do' something:

   Mere expression of willingness does not constitute an offer.

Example:

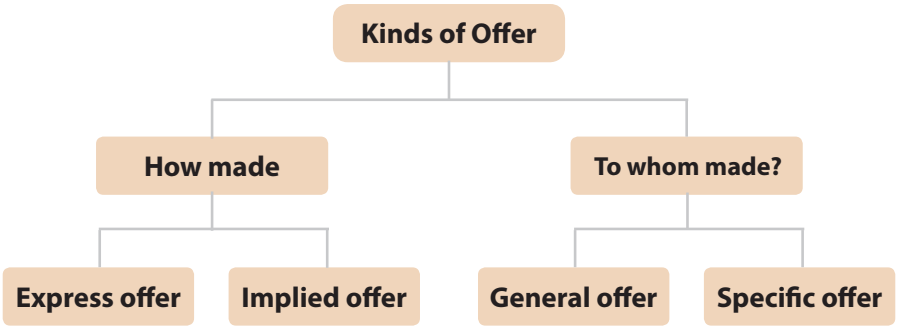
Where 'A' tells 'B' that he desires to marry by the end of 2017, it does not constitute an offer of marriage by 'A' to 'B'. Therefore, to constitute a valid offer expression of willingness must be made to obtain the assent (acceptance) of the other. Thus, if in the above example, 'A' further adds, 'Will you marry me', it will constitute an offer.

3. An offer can be positive as well as negative: Thus "doing" is a positive act and "not doing", or "abstinence" is a negative act; nonetheless both these acts have the same euect in the eyes of law.

Example:

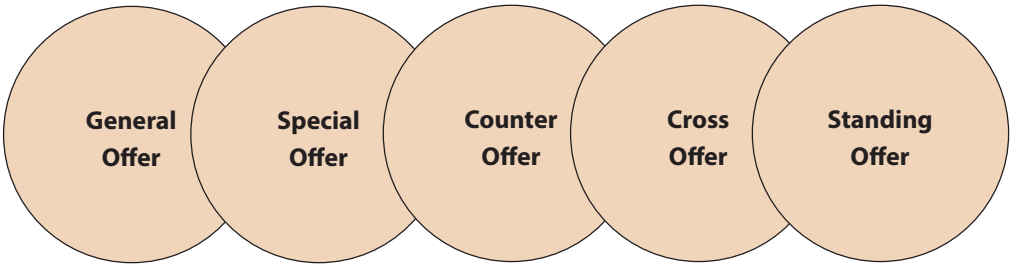
A offers to sell his car to B for ₹3 lacs is an act of doing. So in this case, A is making an offer to B. On the other hand, when A ask B after his car meets with an accident with B's scooter not to go to Court and he will pay the repair charges to B for the damage to B's scooter; it is an act of not doing or abstinence.

4. The willingness must be expressed with a view to obtain the assent of the other party to whom the offer is made.



I. Classification of offer

- An 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 and hence anyone can accept and do the desired act (Carlill v. Carbolic Smoke Ball Co.). In terms of Section 8 of the Act, anyone performing the conditions of the offer can be considered to have accepted the offer. Until the general offer is retracted or with-drawn, it can be accepted by anyone at any time as it is a continuing offer.

Case Law: Carlill Vs. Carbolic Smoke Ball Co. (1893)

Facts:

In this famous case Carbolic smoke Ball Co. advertised in several newspapers that a reward of £100 would be given to any person who contracted influenza after using the smoke balls produced by the Carbolic Smoke Company according to printed directions. One lady, Mrs. Carlill, used the smoke balls as per the directions of company and even then suuered from influenza. Held, she could recover the amount as by using the smoke balls she had accepted the offer.

(b) Special/specific offer:

- When the offer is made to a specific or an ascertained person, it is known as a specific offer. Specific offer can be accepted only by that specified person to whom the offer has been made. [Boulton v. Jones]

Example:

'A' offers to sell his car to'B' at a certain cost. This is a specific offer.

(c) Cross offer:

- When two parties exchange identical offers in ignorance at the time of each other's offer, the offers are called cross offers. There is no binding contract in such a case because offer made by a person cannot be construed as acceptance of the another's offer.

Example:

If A makes a proposal to B to sell his car for ₹ 2 lacs and B, without knowing the proposal of A, makes an offer to purchase the same car at ₹ 2 lacs from 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 can not be treated as mutual acceptance. There is no binding contract in such a case.

(d) Counter offer: When the offeree offers to qualified acceptance of the offer subject to modifications and variations in the terms of original offer, he is said to have made a counter offer. Counter-offer amounts to rejection of the original offer. It is also called as Conditional Acceptance.

Example:

'A' offers to sell his plot to 'B' for ₹10 lakhs. 'B' agrees to buy it for ₹ 8 lakhs. It amounts to counter offer. It may result in the termination of the offer of 'A'. Any if later on 'B' agrees to buy the plot for ₹ 10 lakhs, 'A' may refuse.

(e) Standing or continuing or open offer:

- An offer which is allowed to remain open for acceptance over a period of time is known as standing or continuing or open offer. Tenders that are invited for supply of goods is a kind of standing offer.

III. Essential of a valid offer

1. It must be capable of creating legal relations:

- Offer must be such as in law is capable of being accepted and giving rise to legal relationship. If the offer does not intend to give rise to legal consequences and creating legal relations, it is not considered as a valid offer in the eye of law. A social invitation, even if it is accepted, does not create legal relations because it is not so intended.

2. It must be certain, definite and not vague:

- If the terms of an offer are vague or indefinite, its acceptance cannot create any contractual relationship. Thus, where A offers to sell B 100 quintals of oil, there is nothing whatever to show what kind of oil was intended. The offer is not capable of being accepted for want of certainty.

3. It must be communicated to the offeree:

- An offer, to be complete, must be communicated to the person to whom it is made, otherwise there can be no acceptance of it. Unless an offer is communicated, there can be no acceptance by it. An acceptance of an offer, in ignorance of the offer, is not acceptance and does not confer any right on the acceptor.

This can be illustrated by the landmark case of Lalman Shukla v. GauriDutt

Facts:

- G (Gauridutt) sent his servant L (Lalman) to trace his missing nephew. He then announced that anybody who traced his nephew would be entitled to a certain reward. L traced the boy in ignorance of this announcement. Subsequently when he came to know of the reward, he claimed it. Held, he was not entitled to the reward, as he did not know the offer.

4. It must be made with a view to obtaining the assent of the other party:

- Offer must be made with a view to obtaining the assent of the other party addressed and not merely with a view to disclosing the intention of making an offer.

5. It may be conditional:

- An offer can be made subject to any terms and conditions by the offeror.

Example:

Offer or may ask for payment by RTGS, NEFT etc. The offeree will have to accept all the terms of the offer otherwise the contract will be treated as invalid.

6. Offer should not contain a term the non compliance of which would amount to acceptance:

- Thus, one cannot say that if acceptance is not communicated by a certain time the offer would be considered as accepted.

Example:

- A proposes B to purchase his android mobile for `5000 and if no reply by him in a week, it would be assumed that B had accepted the proposal. This would not result into contract.

7. The offer may be either specific or general:

- Any offer can be made to either public at large or to the any specific person. (Already explained in the heading types of the offer)

8. Offer is Different from a mere statement of intention, an invitation to offer, a mere communication of information, Casual Equity, A prospectus and Advertisement.

(i) An invitation to make an offer or do business. In case of "an invitation to make an offer", the person making the invitation does not make an offer rather invites the other party to make an offer. His objective is to send out the invitation that he is willing to deal with any person who, on the basis of such invitation, is ready to enter into contract with him subject to final terms and conditions.

Example:

An advertisement for sale of goods by auction is an invitation to the offer. It merely invites offers/ bids made at the auction. Similarly, Red Herring Prospectus issued by a company, is only an invitation to the public to make an offer to subscribe to the securities of the company.

(ii) A statement of intention and announcement.

(iii) Offer must be distinguished from an answer to a question.

Case Law: Harvey vs. Facie [1893] AC 552

- In this case, Privy Council succinctly explained the distinction between an offer and an invitation to offer. In the given case, the plaintiff 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 plaintiff 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 plaintiff 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 plaintiff on the ground that while plaintiff 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.

- The above decision was followed in Mac Pherson vs Appanna [1951] A.S.C. 184 where the owner of the property had said that he would not accept less than £ 6000/- for it. This statement did not indicate any offer but indicated only an invitation to offer.

- Similarly when goods are sold through auction, the auctioneer does not contract with any one 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. Similar decision was given in the case of Harris vs. Nickerson (1873).

9. The offer may be express or implied:

- An offer may be made either by words or by conduct.

Example:

A boy starts cleaning the car as it stops on the traflc signal without being asked to do so, in such circumstances any reasonable man could guess that he expects to be paid for this, here boy makes an implied offer.

10. A statement of price is not an offer

a. What is invitation to offer?

- An offer should be distinguished from an invitation to offer. An offer is definite and capable of converting an intention into a contract. Whereas an invitation to an offer is only a circulation of an offer, it is an attempt to induce offers and precedes a definite offer.
- An invitation to offer is an act precedent to making an offer. Acceptance of an invitation to an offer does not result in the contract and only an offer emerges in the process of negotiation.
- When a person advertises that he has stock of books to sell or houses to let, there is no offer to be bound by any contract. Such advertisements are offers to negotiate-offers to receive offers.
- In order to ascertain whether a particular statement amounts to an 'offer' or an 'invitation to offer', the test would be intention with which such statement is made. Does the person who made the statement intend to be bound by it as soon as it is accepted by the other or he intends to do some further act, before he becomes bound by it. In the former case, it amounts to an offer and in the latter case, it is an invitation to offer.

Example:

The price list of goods does not constitute an offer for sale of certain goods on the listed prices. It is an invitation to offer.

b. Difference between offer and invitation to make an offer:

- In terms of Section 2(a) of the Act, an offer is the final expression of willingness by the offeror to be bound by the offer should the other party chooses to accept it. On the other hand, offers made with the intention to negotiate or offers to receive offers are known as invitation to offer.
- Thus 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 only invites the other party to make an offer on those terms. Hence the only thing that is required is the willingness of the offeree to abide by the terms of offer.
- In order to ascertain whether a particular statement amounts to an offer or an invitation to offer, the test would be intention with which such statement is made.
- The mere statement of the lowest price which the vendor would sell contains no implied contract to sell at that price to the person making the inquiry.
- If a person who makes the statement has the intention to be bound by it as soon as the other accepts, he is making an offer. Thus the intention to be bound is important factor to be considered in

deciding whether a statement is an 'offer' or 'invitation to offer.'

Following are instances of invitation to offer to buy or sell:

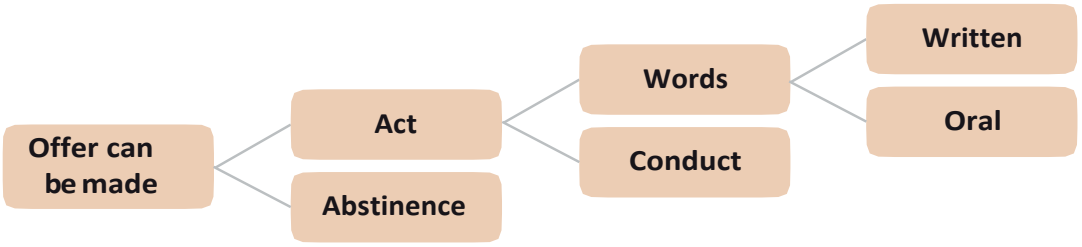
(i) An invitation by a company to the public to subscribe for its shares.

(ii) Display of goods for sale in shop windows.

(iii) Advertising auction sales and

(iv) Quotation of prices sent in reply to a query regarding price

How to make an offer?



1.5 ACCEPTANCE

1.5.1 Definition of Acceptance:

- In terms of Section 2(b) of the Act, 'the term acceptance' is defined as follows:
- "When the person to whom the proposal is made signifies his assent thereto, proposal is said to be accepted. The proposal, when accepted, becomes a promise".

Analysis of the above definition

1. When the person to whom proposal is made - for example if A offers to sell his car to B for ₹ 200000. Here, proposal is made to B.
2. The person to whom proposal is made i.e. B in the above example and if B signifies his assent on that proposal. In other words if B grants his consent on A's proposal, then we can say that B has signified his consent on the proposal made by A.
3. When B has signified his consent on that proposal, we can say that the proposal has been accepted.
4. Accepted proposal becomes promise.

1.5.2 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 effet 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

(1) Acceptance can be given only by the person to whom offer is made: In case of a specific offer, it can be accepted only by the person to whom it is made. [Boulton vs. Jones (1857)]

Case Law: Boulton vs. Jones (1857)

Facts:

- Boulton bought a business from Brocklehurst. Jones, who was Broklehurst's creditor, placed an order with Brocklehurst for the supply of certain goods.
- Boulton supplied the goods even though the order was not in his name. Jones refused to pay Boultan for the goods because by entering into the contract with Blocklehurst, he intended to set ou his debt against Brocklehurst. Held, as the offer was not made to Boulton, therefore, there was no contract between Boulton and Jones.
- In case of a general offer, it can be accepted by any person who has the knowledge of the offer. [Carlill vs. Carbolic Smoke Ball Co. (1893)]

(2) Acceptance must be absolute and unqualified:

- As per section 7 of the Act, acceptance is valid only when it is absolute and unqualified and is also expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it must be accepted. If the proposal prescribes the manner in which it must be accepted, then it must be accepted accordingly.

Example:

'A' enquires from'B', "Will you purchase my car for ₹2 lakhs?" If 'B' replies"I shall purchase your car for ₹2 lakhs, if you buy my motorcycle for ₹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) The acceptance must be communicated:

- To conclude a contract between the parties, the acceptance must be communicated in some perceptible form. Any conditional acceptance or acceptance with varying or too deviant conditions is no acceptance. Such conditional acceptance is a counter proposal and has to be accepted by the proposer, if the original proposal has to materialize into a contract.
- Further when a proposal is accepted, the offeree` must have the knowledge of the offer made to him. If he does not have the knowledge, there can be no acceptance. The acceptance must relate specifically to the offer made. Then only it can materialize into a contract. The above points will be clearer from the following examples,

(a) Brogden vs. Metropolitan Railway Co. (1877)

Facts:

- B a supplier, sent a draft agreement relating to the supply of coal to the manager of railway Co. viz, Metropolitian railway for his acceptance. The manager wrote the word "Approved" on the same and put the draft agreement in the drawer of the table intending to send it to the company's solicitors for a formal contract to be drawn up. By an over sight the draft agreement remained in drawer. Held, that there was no contract as the manager had not communicated his acceptance to the supplier, B.

(b) M offered to sell his land to N for £280. N replied purporting to accept the offer but enclosed a cheque for £ 80 only. He promised to pay the balance of £ 200 by monthly installments of £ 50 each. It was held that N could not enforce his acceptance because it was not an unqualified one. [Neale

vs. Merret [1930] W. N. 189].

(c) A offers to sell his house to B for ` 1,00,000/-. B replied that, "I can pay ₹ 80,000 for it. The offer of 'A' is rejected by'B' as the acceptance is not unqualified. B however changes his mind and is prepared to pay ` 1,00,000/-. This is also treated as counter offer and it is upto A whether to accept it or not. [Union of India v. Bahulal AIR 1968 Bombay 294].

(d) Where an offer made by the intended offeree without the knowledge that an offer has been made to him cannot be deemed as an acceptance thereto. (Bhagwandas v. Girdharilal)

(e) A mere variation in the language not involving any diuerence in substance would not make the acceptance ineuective. [Heyworth vs. Knight [1864] 144 ER 120].

(4) Acceptance must be in the prescribed mode: Where the mode of acceptance is prescribed in the proposal, it must be accepted in that manner. But if the proposer does not insist on the proposal being accepted in the manner prescribed after it has been accepted otherwise, i.e., not in the prescribed manner, the proposer is presumed to have consented to the acceptance.

Example:

If the offer or prescribes acceptance through messenger and offeree sends acceptance by email, 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.

(5) Time:

- Acceptance must be given within the specified time limit, if any, and if no time is stipulated, acceptance must be given within the reasonable time and before the offer lapses. What is reasonable time is nowhere defined in the law and thus would depend on facts and circumstances of the particular case.

(6) Mere silence is not acceptance:

- The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has in any previous conduct indicated that his silence is the evidence of acceptance.

Case Law: Felthouse vs. Bindley (1862)

Facts:

- F (Uncle) offered to buy his nephew's horse for £30 saying "If I hear no more about it I shall consider the horse mine at £30." The nephew did not reply to F at all. He told his auctioneer, B to keep the particular horse out of sale of his farm stock as he intended to reserve it for his uncle. By mistake the auctioneer sold the horse. F sued him for conversion of his property. Held, F could not succeed as his nephew had not communicated the acceptance to him.

Example:

- 'A' subscribed for the weekly magazine for one year. Even after expiry of his subscription, the magazine company continued to send him magazine for five years. And also 'A' continued to use the magazine but denied to pay the bills sent to him. 'A' would be liable to pay as his continued use of the magazine was his acceptance of the offer.

(7) Acceptance by conduct/Implied Acceptance:

- Section 8 of the Act lays down that "the performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, constitutes an acceptance of the proposal.

- This section provides the acceptance of the proposal by conduct as against other modes of acceptance i.e. verbal or written communication.
- Therefore, when a person performs the act intended by the proposer as the consideration for the promise offered by him, the performance of the act constitutes acceptance.

Example,

when a tradesman receives an order from a customer and executes the order by sending the goods, the customer's order for goods constitutes the offer, which has been accepted by the trades man subsequently by sending the goods. It is a case of acceptance by conduct.

1.6 COMMUNICATION OF OFFER AND ACCEPTANCE

- The importance of 'offer' and 'acceptance' in giving effect to a valid contract was explained in the previous paragraphs. One important common requirement for both 'offer' and 'acceptance' is their effective communication. Effective and proper communication prevents avoidable revocation and misunderstanding between parties.
- When the contracting parties are face-to-face, there is no problem of communication because there is instantaneous communication of offer and acceptance. In such a case the question of revocation does not arise since the offer and its acceptance are made instantly.
- The difficulty arises when the contracting parties are at a distance from one another and they utilise the services of the post office or telephone or email (internet). In such cases, it is very much relevant for us to know the exact time when the offer or acceptance is made or complete.
- The Indian Contract Act,1872 gives a lot of importance to "time" element in deciding when the offer and acceptance is complete.

I. Communication of offer:

- In terms of Section 4 of the Act, "the communication of offer is complete when it comes to the knowledge of the person to whom it is made". This can be explained by an example.
- Where 'A' makes a proposal to 'B' by post to sell his house for ₹5 lakhs and if the letter containing the offer is posted on 10th March and if that letter reaches 'B' on 12th March the offer is said to have been communicated on 12th March when B received the letter.
- Thus it can be summed up that when a proposal is made by post, its communication will be complete when the letter containing the proposal reaches the person to whom it is made.
- Mere receiving of the letter is not sufficient, he must receive or read the message contained in the letter.
- He receives the letter on 12th March, but he reads it on 15th of March. In this case offer is communicated on 15th of March, and not 12th of March.

II. Communication of acceptance:

- There are two issues for discussion and understanding. They are: The modes of acceptance and when is acceptance complete?
- Let us, first consider the modes of acceptance. Section 3 of the Act prescribes in general terms two modes of communication namely, (a) by any act and (b) by omission, intending thereby, to communicate to the other or which has the euect of communicating it to the other.
- Communication by act would include any expression of words whether written or oral. Written words will include letters, telegrams, faxes, emails and even advertisements. Oral words will include telephone messages.

- Again communication would include any conduct intended to communicate like positive acts or signs so that the other person understands what the person 'acting' or 'making signs' means to say or convey.
- Communication of acceptance by 'omission' to do something. Such omission is conveyed by a conduct or by forbearance on the part of one person to convey his willingness or assent. However silence would not be treated as communication by 'omission'.
- Communication of acceptance by conduct. For instance, delivery of goods at a price by a seller to a willing buyer will be understood as a communication by conduct to convey acceptance. Similarly one need not explain why one boards a public bus or drop a coin in a weighing machine.
- The first act is a conduct of acceptance and its communication to the offer by the public transport authority to carry any passenger. The second act is again a conduct conveying acceptance to use the weighing machine kept by the vending company as an offer to render that service for a consideration.
- The other issue in communication of acceptance is about the effect of act or omission or conduct. These indirect efforts must result in effectively communicating its acceptance or non acceptance.
- If it has no such effect, there is no communication regardless of which the acceptor thinks about the offer within himself. Thus a mere mental unilateral assent in one's own mind would not amount to communication.

Where a resolution passed by a bank to sell land to 'A' remained uncommunicated to' A', it was held that there was no communication and hence no contract. [Central Bank Yeotmal vs Vyankatesh (1949) A. Nag. 286].

- Let us now come to the issue of when communication of acceptance is complete. In terms of Section 4 of the Act, it is complete,

(i) As against the proposer, when it is put in the course of transmission to him so as to be out of the power of the acceptor to withdraw the same;

(ii) As against the acceptor, when it comes to the knowledge of the proposer.

- Where a proposal is accepted by a letter sent by the post, the communication of acceptance will be complete as against the proposer when the letter of acceptance is posted and as against the acceptor when the letter reaches the proposer.
- For instance in the above example, if 'B' accepts, A's proposal and sends his acceptance by post on 14th, the communication of acceptance as against 'A' is complete on 14th, when the letter is posted. As against 'B' acceptance will be complete, when the letter reaches' A'. Here 'A' the proposer will be bound by B'sacceptance, even if the letter of acceptance is delayed in post or lost in transit. The golden rule is proposer becomes bound by the contract, the moment acceptor has posted the letter of acceptance. But it is necessary that the letter is correctly addressed, adequately stamped and duly posted. In such an event the loss of letter in transit, wrong delivery, non delivery etc., will not effect the validity of the contract. However, from the view point of acceptor, he will be bound by his acceptance only when the letter of acceptance has reached the proposer. So it is crucial in this case that the letter reaches the proposer. If there is no delivery of the letter, the acceptance could be treated as having been completed from the viewpoint of proposer but not from the viewpoint of acceptor. Of course this will give rise to an awkward situation of only one party to the contract, being treated as bound by the contract though no one would be sure as to where the letter of acceptance had gone.

III Acceptance over telephone or telex or fax:

- When an offer is made of instantaneous communication like telex, telephone, fax or through e-mail, the contract is only complete when the acceptance is received by the offeree, and the contract is made at the place where the acceptance is received (Entores Ltd. v. Miles Far East Corporation). How-

ever, in case of a call drops and disturbances in the line, there may not be a valid contract.

IV. 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 oflce, 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 Kolkata 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. Mannuswamy [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.

1.7 COMMUNICATION OF PERFORMANCE

- We have already discussed that in terms of Section 4 of the Act, communication of a proposal is complete when it comes to the knowledge of the person to whom it is meant. As regards acceptance of the proposal, the same would be viewed from two angles. These are:

(i) from the viewpoint of proposer and

(ii) the other from the viewpoint of acceptor himself:

- From the viewpoint of proposer, when the acceptance is put in to a course of transmission, when it would be out of the power of acceptor. From the viewpoint of acceptor, it would be complete when it comes to the knowledge of the proposer.
- At times the offeree may be required to communicate the performance (or act) by way of acceptance. In this case it is not enough if the offeree merely performs the act but he should also communicate his performance unless the offer includes a term that a mere performance will constitute

acceptance. The position was clearly explained in the famous case of

Carlill Vs Carbolic &Smokeball Co. In this case the defendant a sole proprietary concern manufacturing a medicine which was a carbolic ball whose smoke could be inhaled through the nose to cure influenza, cold and other connected ailments issued an advertisement for sale of this medicine. The advertisement also included a reward of $100 to any person who contracted influenza, after using the medicine (which was described as'carbolic smoke ball'). Mrs. Carlill bought these smoke balls and used them as directed but contracted influenza. It was held that Mrs. Carlill was entitled to a reward of $100 as she had performed the condition for acceptance. Further as the advertisement did not require any communication of compliance of the condition, it was not necessary to communicate the same.

The court thus in the process laid down the following three important principles:

(i) an offer, to be capable of acceptance, must contain a definite promise by the offeror that he would be bound provided the terms specified by him are accepted;

(ii) an offer may be made either to a particular person or to the public at large, and

(iii) if an offer is made in the form of a promise in return for an act, the performance of that act, even without any communication thereof, is to be treated as an acceptance of the offer

1.8 REVOCATION OF OFFER AND ACCEPTANCE

- If there are specific requirements governing the making of an offer and the acceptance of that offer, we also have specific law governing their revocation.
- In term of Section 4, communication of revocation (of the proposal or its acceptance) is complete.

(i) 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 who makes it, and

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

I. The above law can be illustrated as follows:

- If you revoke your proposal made to me by a telegram, the revocation will be complete, as far as you are concerned when you have dispatched the telegram. But as far as I am concerned, it will be complete only when I receive the telegram.
- As regards revocation of acceptance, if you go by the above example, I can revoke my acceptance (of your offer) by a telegram. This revocation of acceptance by me will be complete when I dispatch the telegram and against you, it will be complete when it reaches you.
- But the important question for consideration is when a proposal can be revoked? And when can an acceptance be revoked? These questions are more important than the question when the revocation (of proposal and acceptance) is complete.
- Ordinarily, the offeror can revoke his offer before it is accepted. If he does so, the offeree cannot create a contract by accepting the revoked offer.

Example

the bidder at an auction sale may withdraw (revoke) his bid (offer) before it is accepted by the auctioneer by fall of hammer.

- An offer may be revoked by the offeror before its acceptance, even though he had originally agreed to hold it open for a definite period of time. So long as it is a mere offer, it can be withdrawn whenever the offeror desires.

Example:

- X offered to sell 50 bales of cotton at a certain price and promised to keep it open for acceptance by Y till 6 pm of that day. Before that time X sold them to Z. Y accepted before 6 p.m., but after the revocation by X. In this case it was held that the offer was already revoked.

- In terms of Section 5 of the Act a proposal can be revoked at any time before the communication of its acceptance is complete as against the proposer. An acceptance may be revoked at any time before the communication of acceptance is complete as against the acceptor.

Example:

A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post. A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards. Whereas B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

- An acceptance to an offer must be made before that offer lapses or is revoked.
- The law relating to the revocation of offer is the same in India as in England, but the law relating to the revocation of acceptance is different.
- In English law, the moment a person expresses his acceptance of an offer, that moment the contract is concluded, and such an acceptance becomes irrevocable, whether it is made orally or through the post. In Indian law, the position is different as regards contract through post.

II. Contract through post-

- As acceptance, in English law, cannot be revoked, so that once the letter of acceptance is properly posted the contract is concluded. In Indian law, the acceptor or can revoke his acceptance any time before the letter of acceptance reaches the offeror, if the revocation telegram arrives before or at the same time with the letter of acceptance, the revocation is absolute.

III. Contract over Telephone-

- A contract can be made over telephone. The rules regarding offer and acceptance as well as their communication by telephone or telex are the same as for the contract made by the mutual meeting of the parties.
- The contract is formed as soon as the offer is accepted but the offeree must make it sure that his acceptance is received by the offeror, otherwise there will be no contract, as communication of acceptance is not complete. If telephone unexpectedly goes dead during conversation, the acceptor must confirm again that the words of acceptance were duly heard by the offeror.

Revocation of proposal otherwise than by communication:

- When a proposal is made, the proposer may not wait indefinitely for its acceptance. The offer can be revoked otherwise than by communication or sometimes by lapse.

IV. Modes of revocation of offer

(i) By notice of revocation

(ii) By lapse of time: The time for acceptance can lapse if the acceptance is not given within the specified time and where no time is specified, then within a reasonable time. This is for the reason that proposer should not be made to wait indefinitely. It was held in Ramsgate Victoria Hotel Co. Vs Montefiore (1866 L.R.Z. Ex 109), that a person who applied for shares in June was not bound by an allotment made in November. This decision was also followed in India Cooperative Navigation and

Trading Co. Ltd. Vs Padamsey PremJi. However these decisions now will have no relevance in the context of allotment of shares since the Companies Act, 2013 has several provisions specifically covering these issues.

(iii) By non fulfillment of condition precedent: Where the acceptor fails to fulfill a condition precedent to acceptance the proposal gets revoked. This principle is laid down in Section 6 of the Act. The offeror for instance may impose certain conditions such as executing a certain document or depositing certain amount as earnest money. Failure to satisfy any condition will result in lapse of the proposal. As stated earlier 'condition precedent' to acceptance prevents an obligation from coming into existence until the condition is satisfied. Suppose where 'A' proposes to sell his house to be 'B' for ₹ 5 lakhs provided 'B' leases his land to 'A'. If 'B' refuses to lease the land, the offer of 'A' is revoked automatically.

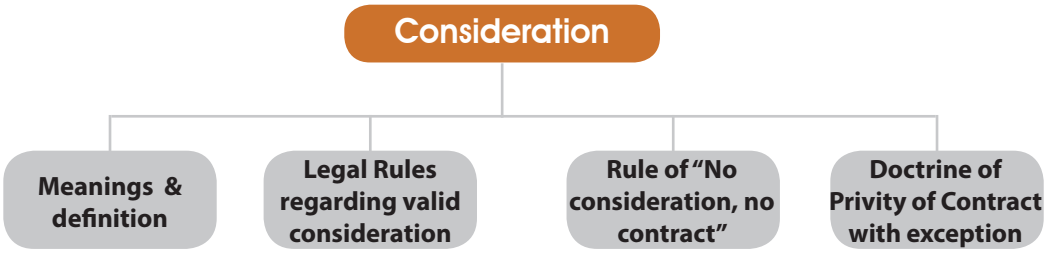
(iv) By death or insanity: Death or insanity of the proposer would result in automatic revocation of the proposal but only if the fact of death or insanity comes to the knowledge of the acceptor.

(v) By counter offer

(vi) By the non acceptance of the offer according to the prescribed or usual mode

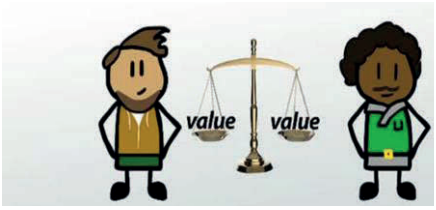
(vii) By subsequent illegality

UNIT II : CONSIDERATION



- Consideration is an essential element of a valid contract without which no single promise will be enforceable. It is a term used in the sense of quid pro quo, i.e., 'something in return'.
- Having a double aspect of a benefit to the promisor and a detriment to the promisee, it has to be really understood in the sense of some detriment as envisaged by English Law. In this Unit, we shall try to understand the concept of consideration and also the legal requirements regarding consideration.

2.1 WHAT IS CONSIDERATION?



- Consideration is the price agreed to be paid by the promisee for the obligation of the promisor. The word consideration was described in a very popular English case of Misa v. Currie as:
- "A valuable consideration in the sense of law may consist either in some right, interest, profit or benefit accruing to one party (i.e. promisor) or forbearance, detriment, loss or responsibility given, suuered or undertaken by the other (i.e., the promisee)."

I. Section 2(d) 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 abstain from doing something, such an act or abstinence or promise is called consideration for the promise".

II. Analysis of Definition of Consideration

(1) Consideration is an act- doing something.

Example-

Ajay promises Bhuvan to guarantee payment of price of the goods which Bhuvan wanted to sell on one month credit to Chaitanya. Here selling of goods on credit by Bhuvan to Chaitanya is consideration for A's promise.

(2) Consideration is abstinence- abstain from doing something.

Example-

Abhishek promises Bharti not to file a suit against him if he (Bharti) would pay him (Abhishek) Rs. 1,00,000. Here abstinence on the part of Abhishek would constitute consideration against Bharti's payment of Rs. 1,00,000 in favor of Abhishek.

(3) Consideration must be at the desire of the promisor.

(4) Consideration may move from promisee or any other person.

(5) Consideration may be past, present or future.

Thus from above it can be concluded that:

Consideration = Promise / Performance that parties exchange with each other.

Form of consideration = Some benefit, right or profit to one party / some detriment, loss, or forbearance to the other.

2.2 LEGAL RULES REGARDING CONSIDERATION

(i) Consideration must move at the desire of the promisor:

- Consideration must be offered by the promisee or the third party at the desire or request of the promisor. This implies "return" element of consideration. Contract of marriage in consideration of promise of settlement is enforceable.

An act done at the desire of a third party is not a consideration.

In Durga Prasad v. Baldeo, D (defendant) promised to pay to P (plaintiu) a certain commission on articles which would be sold through their agency in a market. Market was constructed by P at the desire of the C (Collector), and not at the desire of the D. D was not bound to pay as it was without consideration and hence void.

Example:

R saves S's goods from fire without being asked to do so. R cannot demand any reward for his services, as the act being done voluntary.

(ii) Consideration may move from promisee or any other person:

- In India, consideration may proceed from the promisee or any other person who is not a party to the contract. The definition of consideration as given in Section 2(d) makes that proposition clear.
- According to the definition, when at the desire of the promisor, the promisee or any other person does something such an act is consideration. In other words, there can be a stranger to a consideration but not stranger to a contract.

Example:

An old lady made a gift of her property to her daughter with a direction to pay a certain sum of money to the maternal uncle by way of annuity. On the same day, the daughter executed a writing in favour of the brother agreeing to pay annuity. The daughter did not, however, pay the annuity and the uncle sued to recover it. It was held that there was suflcient consideration for the uncle to recover the money from the daughter. [Chinnayya vs. Ramayya (1882)]

(iii) Executed and executory consideration:

- A consideration which consists in the performance of an act is said to be executed. When it consists in a promise, it is said to be executory.
- The promise by one party may be the consideration for an act by some other party, and vice versa.

Example:

A pays ₹ 5,000 to B and B promises to deliver to him a certain quantity of wheat within a month. In this case A pays the amount, whereas B merely makes a promise. Therefore, the consideration paid by A is executed, whereas the consideration promised by B is executory.

(iv) Consideration may be past, present or future:

- The words "has done or abstained from doing" [as contained in Section 2(d)] are a recognition of the doctrine of past consideration. In order to support a promise, a past consideration must move

by a previous request. It is a general principle that consideration is given and accepted in exchange for the promise. The consideration, if past, may be the motive but cannot be the real consideration of a subsequent promise. But in the event of the services being rendered in the past at the request or the desire of the promisor, the subsequent promise is regarded as an admission that the past consideration was not gratuitous.

Example:

- 'A' performed some services to'B' at his desire. After a week,'B' promises to compensate'A' for the work done by him. It is said to be present consideration and A can sue B for recovering the promised money.

(v) Consideration need not be adequate:

- Consideration need not to be of any particular value. It need not be approximately of equal value with the promise for which it is exchanged but it must be something which the law would regard as having some value. Something in return need not be equal to something given. It can be considered a bad bargain of the party.
- It may be noted in this context that Explanation 2 to Section 25 states that an agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate.
- But as an exception if it is shockingly less and the other party alleges that his consent was not free than this inadequate consideration can be taken as an evidence in support of this allegation.

Example:

X promises to sell a house worth ₹6 lacs for ₹1 lacs only, the adequacy of the price in itself shall not render the transaction void, unless the party pleads that transaction takes place under coercion, undue influence or fraud.

(vi) Performance of what one is legally bound to perform:

- (consideration must not be performance of existing duty) The performance of an act by a person who is legally bound to perform the same cannot be consideration for a contract. 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. Similarly, an agreement by a client to pay to his counsel after the latter has been engaged, a certain sum over and above the fee, in the event of success of the case would be void, since it is without consideration. It should not be vague or uncertain.

(vii) Consideration must be real and not illusory:

- Consideration must be real and must not be illusory. It must be something to which the law attaches some value. If it is legally or physically impossible it is not considered valid consideration.

Examples:

A man promises to discover treasure by magic. This transaction can be said to be void as it is illusory.

(viii) 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.

Example:

A agrees with B to sell car for ₹2 lacs to B. Here A is under an obligation to give car to B and B has the right to receive the car on payment of ₹2 lacs and also B is under an obligation to pay ₹2 lacs to A and A has a right to receive ₹2 lacs.

2.3 SUIT BY A THIRD PARTY TO A CONTRACT

- Though under the Indian Contract Act, 1872, the consideration for an agreement may proceed from a third party, the third party cannot sue on contract. Only a person who is party to a contract can sue on it.
- Thus, the concept of stranger to consideration is a valid and is different from stranger to a contract.

Example:

P who is indebted to Q, sells his property to R and R promises to pay out the debt amount to Q. If R fails to pay, then in such situation Q has no right to sue, as R is a stranger to contract.

- The aforesaid rule, that stranger to a contract cannot sue is known as a "doctrine of privity of contract", is however, subject to certain exceptions. In other words, even a stranger to a contract may enforce a claim in the following cases:

(1) In the case of trust, a beneficiary can enforce his right under the trust, though he was not a party to the contract between the settler and the trustee.

(2) In the case of a family settlement, if the terms of the settlement are reduced into writing, the members of family who originally had not been parties to the settlement may enforce the agreement.

(3) In the case of certain marriage contracts, a female member can enforce a provision for marriage expenses made on the partition of the Hindu Undivided Family.

(4) In the case of assignment of a contract / arrangements, a provision may be made for the benefit of a person. He may file the suit though he is not a party to the agreement.

(5) Acknowledgement or estoppel – where the promisor by his conduct acknowledges himself as an agent of the third party, it would result into a binding obligation towards third party.

For example,

if L gives to M `20,000 to be given to N, and M informs N that he is holding the money for him, but afterwards M refuses to pay the money. N will be entitled to recover the same from the former i.e. M.

(6) In the case of covenant running with the land, the person who purchases land with notice that the owner of land is bound by certain duties affecting land, the covenant affecting the land may be enforced by the successor of the seller.

(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.

2.4 VALIDITY OF AN AGREEMENT WITHOUT CONSIDERATION

- The general rule is that an agreement made without consideration is void (Section 25). In every valid contract, consideration is very important. A contract may only be enforceable when consideration is there. However, the Indian Contract Act contains certain exceptions to this rule.
- In the following cases, the agreement though made without consideration, will be valid and enforceable.

1. Natural Love and Affection: Conditions to be fulfilled under section 25(1)

(i) It must be made out of natural love and affection between the parties.

(ii) Parties must stand in near relationship to each other.

(iii) It must be in writing.

(iv) It must also be registered under the law.

- A written and registered agreement based on natural love and affection between the parties standing in near relation (e.g., husband and wife) to each other is enforceable even without consideration.

Example:

A husband, by a registered agreement promised to pay his earnings to his wife. Held the agreement though without consideration, was valid.

2. Compensation for past voluntary services: A

- promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, is enforceable under Section 25(2). In order that a promise to pay for the past voluntary services be binding, the following essential factors must exist:

(i) The services should have been rendered voluntarily.

(ii) The services must have been rendered for the promisor.

(iii) The promisor must be in existence at the time when services were rendered.

(iv) The promisor must have intended to compensate the promisee.

Example:

- P finds R's purse and gives it to him. R promises to give P `10,000. This is a valid contract.

3. Promise to pay time barred debt:

- Where a promise in writing signed by the person making it or by his authorised agent, is made to pay a debt barred by limitation it is valid without consideration [Section 25(3)].

Example:

- A is indebted to C for ₹60,000 but the debt is barred by the Limitation Act. A signs a written promise now to pay ₹50,000 in final settlement of the debt. This is a contract without consideration, but enforceable.

4. Agency:

- According to Section 185 of the Indian Contract Act, 1872, no consideration is necessary to create an agency.

5. Completed gift:

- In case of completed gifts, the rule no consideration no contract does not apply.
- Explanation (1) to Section 25 states "nothing in this section shall affect the validity as between the donor and donee, of any gift actually made."Thus, gifts do not require any consideration.

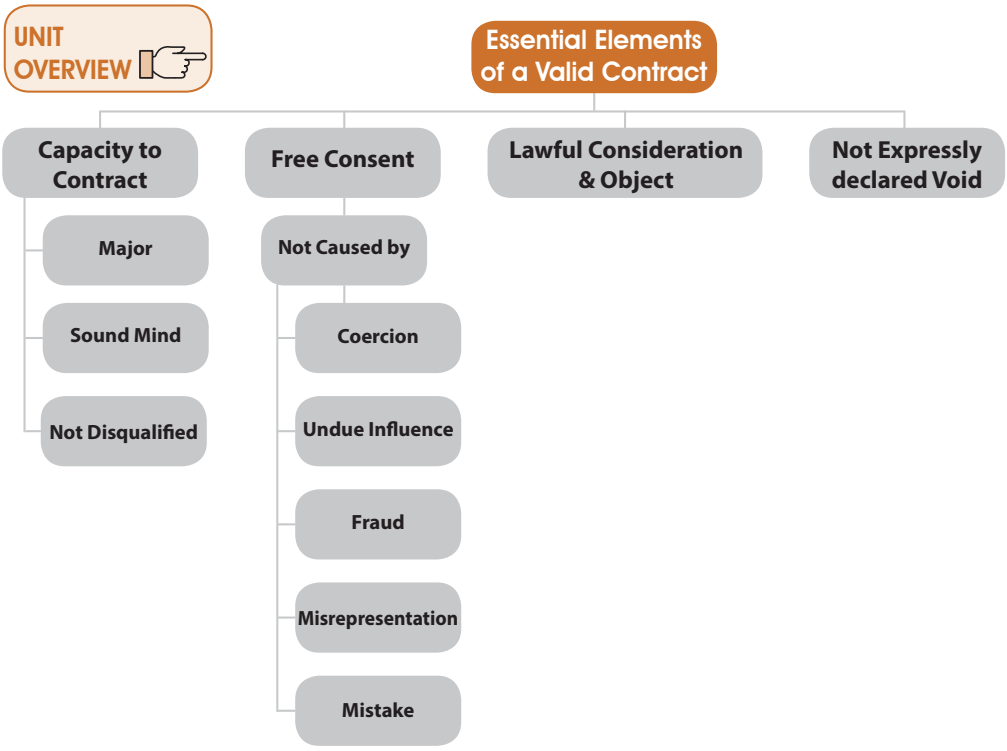
6. Bailment:

- No consideration is required to effect the contract of bailment (Section 148).

7. Charity:

- If a promisee undertakes the liability on the promise of the person to contribute to charity, there the contract shall be valid. (Kadarnath v. Gorie Mohammad)

UNIT III
OTHER ESSENTIAL ELEMENTS OF A CONTRACT



- Section 10 of the Indian Contract Act, 1872 provides that an agreement in order to be a contract, must satisfy the following conditions:

(1) the parties must be competent to contract;

(2) it must be made by the free consent of the parties;

(3) it must be made for a lawful consideration and with a lawful object;

(4) it should not have been expressly declared as void by law.

3.1 CAPACITY TO CONTRACT

- Meaning: Capacity refers to the competence of the parties to make a contract. It is one of the essential element to form a valid contract.

I. Who is competent to contract (Section 11)

- "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".

II. Analysis of Section 11

- This section deals with personal capacity of three types of individuals only. Every person is competent to contract who-

(A) has attained the age of majority,

(B) is of sound mind and

(C) is not disqualified from contracting by any law to which he is subject.

(A) Age of Majority:

- In India, the age of majority is regulated by the Indian Majority Act, 1875.
- Every person domiciled in India shall attain the age of majority on the completion of 18 years of age and not before. The age of majority being 18 years, a person less than that age even by a day would be minor for the purpose of contracting.

1. Law relating to Minor's agreement/Position of Minor

1. A contract made with or by a minor is void ab-initio:

- A minor is not competent to contract and any agreement with or by a minor is void from the very beginning.

  In the leading case of Mohori Bibi vs. Dharmo Das Ghose (1903),

  "A, a minor borrowed ` 20,000 from B and as a security for the same executed a mortgage in his favour. He became a major a few months later and filed a suit for the declaration that the mortgage executed by him during his minority was void and should be cancelled. It was held that a mortgage by a minor was void and B was not entitled to repayment of money.

- It is especially provided in Section 10 that a person who is incompetent to contract cannot make a contract within the meaning of the Act.

2. No ratification after attaining majority:

- A minor cannot ratify the agreement on attaining majority as the original agreement is void ab initio and a void agreement can never be ratified.

Example:

X, a minor makes a promissory note in the name of Y. On attaining majority, he cannot ratify it and if he makes a new promissory note in place of old one, here the new promissory note which he executed after attaining majority is also void being without consideration.

3. Minor can be a beneficiary or can take benefit out of a contract:

- Though a minor is not competent to contract, nothing in the Contract Act prevents him from making the other party bound to the minor. Thus, a promissory note duly executed in favour of a minor is not void and can be sued upon by him, because he though incompetent to contract, may yet accept a benefit.
- 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).

Example:

A mortgage was executed in favour of a minor. Held, he can get a decree for the enforcement of the mortgage.

4. A minor can always plead minority:

- A minor can always plead minority and is not stopped to do so even where he has taken any loan or entered into any contract by falsely representing that he was major. Rule of estoppel cannot be applied against a minor. It means he can be allowed to plea his minority in defence.

5. Liability for necessaries:

- The case of necessaries supplied to a minor or to any other person whom such minor is legally bound to support is governed by section 68 of the Indian Contract Act. A claim for necessaries sup-

plied to a minor is enforceable by law. But a minor is not liable for any price that he may promise and never for more than the value of the necessaries. There is no personal liability of the minor, but only his property is liable.

To render minor's estate liable for necessaries two conditions must be satisfied.

(i) The contract must be for the goods reasonably necessary for his support in the station in life.

(ii) The minor must not have already a sufficient supply of these necessaries.

Necessaries mean those things that are essentially needed by a minor.

- They cannot include luxuries or costly or unnecessary articles. Necessaries extend to all such things as reasonable persons would supply to an infant in that class of society to which the infant belongs. Expenses on minor's education, on funeral ceremonies come within the scope of the word 'necessaries'.
- The whole question turns upon the minor's status in life. Utility rather than ornament is the criterion.

6. Contract by guardian - how far enforceable:

- Though a minor's agreement is void, his guardian can, under certain circumstances enter into a valid contract on minor's behalf. Where the guardian makes a contract for the minor, which is within his competence and which is for the benefit of the minor, there will be valid contract which the minor can enforce.
- But all contracts made by guardian on behalf of a minor are not valid. For instance, the guardian of a minor has no power to bind the minor by a contact for the purchase of immovable Property.
- But a contract entered into by a certified guardian (appointed by the Court) of a minor, with the sanction of the court for the sale of the minor's property, may be enforced by either party to the contract.

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.

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 borrowed a horse for riding only he was held liable when he lent the horse to one of his friends who jumped and killed the horse. Similarly, a minor was held liable for his failure to return certain instruments which he had hired and then passed on to a friend.

(B) Person of sound mind:

- According to section 12 of Indian Contract Act, "a person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it is capable of understanding it and of forming a rational judgment as to its effect upon his interests."
- A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.
- A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Example 1:

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

Example 2:

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 interests, cannot contract whilst such delirium or drunkenness lasts.

- Position of unsound mind person making a contract: A contract by a person who is not of sound mind is void.

(C) Contract by disqualified persons:

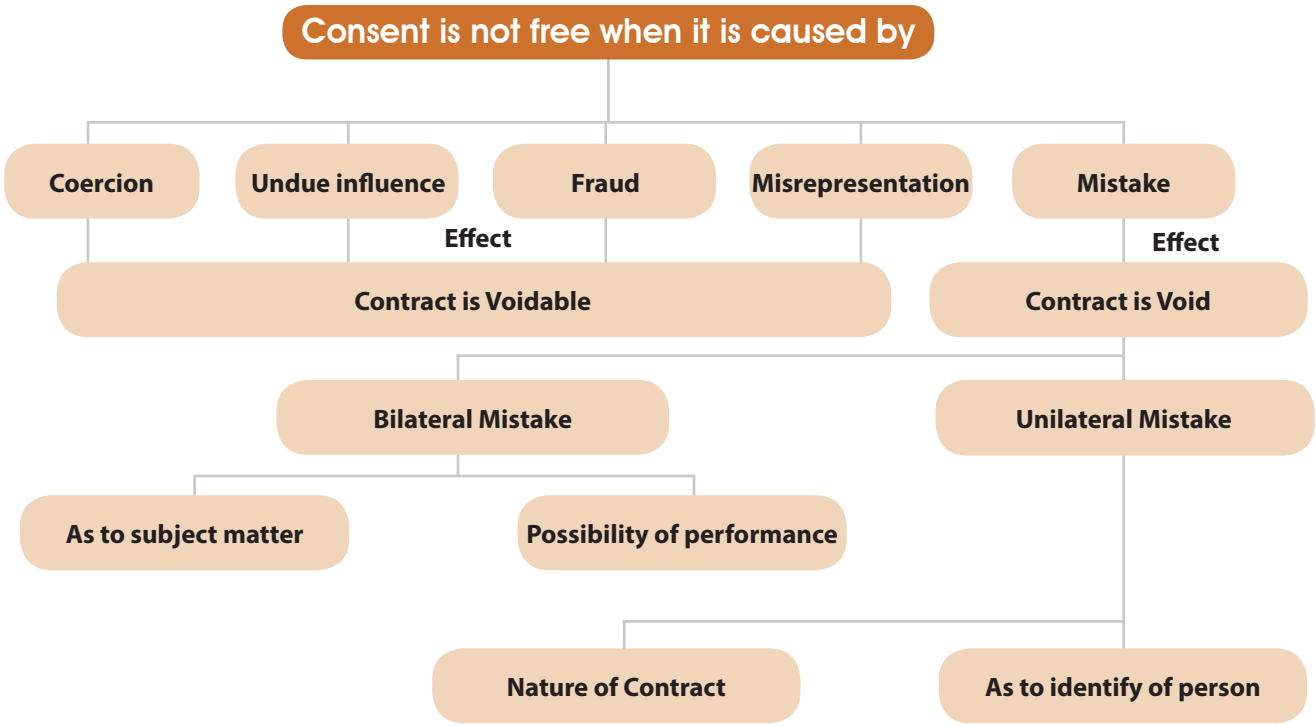
- Besides minors and persons of unsound mind, there are also other persons who are disqualified from contracting, partially or wholly, so that the contracts by such person are void. Incompetency to contract may arise from political status, corporate status, legal status, etc. The following persons fall in this category: Foreign Soverigns and Ambassadors, Alien enemy, Corporations, Convicts, Insolvent etc.

3.2 FREE CONSENT

I. Definition of Consent according to Section 13:

- "two or more persons are said to consent when they agree upon the same thing in the same sense."

- Parties are said to have consented when they not only agreed upon the same thing but also agreed upon that thing in the same sense. 'Same thing' must be understood as the whole content of the agreement.
- Consequently, when parties to a contract make some fundamental error as to the nature of the transaction, or as to the person dealt with or as to the subject-matter of the agreement, it cannot be said that they have agreed upon the same thing in the same sense. And if they do not agree in the same sense, there cannot be consent. A contract cannot arise in the absence of consent.
- If two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by similarity of name, had a different person or ship in his mind, no contract would exist between them as they were not ad idem, i.e., of the same mind.
- Again, ambiguity in the terms of an agreement, or an error as to the nature of any transaction or as to the subject-matter of any agreement may prevent the formation of any contract on the ground of absence of consent. In the case of fundamental error, there is really no consent whereas, in the case of mistake, there is no real consent.
- As has been said already, one of the essential elements of a contract is consent and there cannot be a contract without consent. Consent may be free or not free. Only free consent is necessary for the validity of a contract.



Definition of 'Free Consent' (Section 14)

Consent is said to be free when it is not caused by:

1. Coercion, as defined in Section 15; or
2. Undue Influence, as defined in Section 16; or
3. Fraud, as defined in Section 17; or
4. Misrepresentation, as defined in Section 18 or
5. Mistake, subject to the provisions of Sections 20, 21, and 22.

- When consent to an agreement is caused by coercion, fraud, misrepresentation, or undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. When the consent is vitiated by mistake, the contract becomes void.

3.3 ELEMENTS VITIATING FREE CONSENT

I. Coercion (Section 15)

- "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."

Analysis of Section 15

- The section does not require that coercion must proceed from a party to the contract; nor is it necessary that subject of the coercion must be the other contracting party, it may be directed against any third person whatever. Following are the essential ingredients of coercion:

(i) Committing or threatening to commit any act forbidden by the India Penal Code; or

(ii) the unlawful detaining or threatening to detain any property to the prejudice of any person whatever,

(iii) With the intention of causing any person to enter into an agreement.

(iv) It is to be noted that is immaterial whether the India Penal Code is or is not in force at the place where the coercion is employed.

Effects of coercion under section 19 of Indian Contract Act, 1872

(i) Contract induced by coercion is voidable at the option of the party whose consent was so obtained.

(ii) As to the consequences of the rescission of voidable contract, the party rescinding a void contract should, if he has received any benefit, thereunder from the other party to the contract, restore such benefit so far as may be applicable, to the person from whom it was received.

(iii) A person to whom money has been paid or anything delivered under coercion must repay or return it. (Section 71)

Example:

Where husband obtained a release deed from his wife and son under a threat of committing suicide, the transaction was set aside on the ground of coercion, suicide being forbidden by the Indian Penal Code. The threat of suicide amounts to coercion within Section 15.

II Undue influence (Section 16)

- According to section 16 of the Indian Contract Act, 1872, "A contract is said to be induced by 'undue influence' where 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 he uses that position to obtain an unfair advantage over the other".

A person is deemed to be in position to dominate the will of another:

(a) Where he holds a real or apparent authority over the other; or

(b) Where he stands in a fiduciary relationship to the other; 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 for example, an old illiterate person.

Example 1:

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

Example 2:

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

Example 3:

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

Example 4:

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

Analysis of Section 16

The essential ingredients under this provision are:

(1) Relation between the parties:

- A person can be influenced by the other when a near relation between the two exists.

(2) Position to dominate the will:

- Relation between the parties exist in such a manner that one of them is in a position to dominate the will of the other. A person is deemed to be in such position in the following circumstances:

(a) Real and apparent authority:

- Where a person holds a real authority over the other as in the case of master and servant, doctor and patient and etc.

Example:

A father, by reason of his authority over the son can dominate the will of the son.

(b) Fiduciary relationship:

- Where relation of trust and confidence exists between the parties to a contract. Such type of relationship exists between father and son, solicitor and client, husband and wife, creditor and debtor, etc.

Example:

By reason of fiduciary relationship, a solicitor can dominate the will of his client and a trustee can dominate the will of the beneficiary.

(c) Mental distress:

- An undue influence can be used against a person to get his consent on a contract where the mental capacity of the person is temporaily or permanently affected by the reason of mental or bodily distress, illness or of old age.

Example:

A doctor is deemed to be in a position to dominate the will of his patient enfeebled by protracted illness.

(d) Unconscionable bargains:

- Where one of the parties to a contract is in a position to dominate the will of the other and the contract is apparently unconscionable i.e., unfair, it is presumed by law that consent must have been obtained by undue influence. Unconscionable bargains are witnessed mostly in money-lending transactions and in gifts.

Example:

A youth of 18 years of age, spend thrift and a drunkard, borrowed `90,000 on a bond bearing compound interest at 2% per mensem (p.m.). It was held by the court that the transaction is unconscionable, the rate of interest charged being so exorbitant [Kirpa Ram vs. Sami-Ud-din Ad. Khan (1903)]

(3) The object must be to take undue advantage:

- Where the person is in a position to influence the will of the other in getting consent, must have the object to take advantage of the other.

(4) Burden of proof:

- The burden of proving the absence of the use of the dominant position to obtain the unfair advantage will lie on the party who is in a position to dominate the will of the other.

Power to set aside contract induced by undue influence- (Section 19A)

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

Example 1:

A, a money lender advances ₹ 1,00,000 to B, an agriculturist, and by undue influence induces B to execute a bond for ₹ 2,00,000 with interest at 6 percent per month. The court may set aside the bond, ordering B to repay ₹1,00,000 with such interest as may seem just.

Case study:

A student was induced by his teacher to sell his brand new car to the latter at less than the purchase price to secure more marks in the examination. Accordingly the car was sold. However, the father of the student persuaded him to sue his teacher. State on what ground the student can sue the teacher?

Yes, the student can sue his teacher on the ground of undue influence under the provisions of Indian Contract Act, 1872. A contract brought as a result of coercion, undue influence, fraud or misrepresentation would be voidable at the option of the person whose consent was caused.

(III) Fraud (Section 17)

- Definition of Fraud under 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 an intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

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

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

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

(4) any other act fitted to deceive;

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

Explanation to Section 17

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

Example 1:

A sells, by auction, to B, a horse which A knows to be unsound, A says nothing to B about the unsoundness of the horse. This is not fraud by A.

Example 2:

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

Example 3:

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

Example 4:

- A and B being traders, enter into 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.

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 a contract:

- When the consent to an agreement in caused by the fraud, the contract is voidable at option of the party defrauded and he has the following remedies:

(1) He can rescind the contract within a reasonable time.

(2) He can sue for damages.

(3) He can insist on the performance of the contract on the condition that he shall be put in the position in which he would have been had the representation made been true.

Mere silence is not fraud

- A party to the contract is under no obligation to disclose the whole truth to the other party. 'Caveat Emptor' i.e. let the purchaser beware is the rule applicable to contracts. There is no duty to speak in

such cases and silence does not amount to fraud. Similarly there is no duty to disclose facts which are within the knowledge of both the parties.

Example:

H sold to W some pigs which were to his knowledge suffering from fever. The pigs were sold 'with all faults' and H did not disclose the fact of fever to W. Held there was no fraud. [Word vs. Hobbs. (1878)].

Silence is fraud:

1. Duty of person to speak:

- Where the circumstances of the case are such that it is the duty of the person observing silence to speak. For example, in contracts of uberrimae fidei (contracts of utmost good faith).

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.

(e) Share Allotment contracts:

- Persons issuing 'Prospectus' at the time of public issue of shares/ debentures by a joint stock company have to disclose all material facts within their knowledge.

2. Where the silence itself is equivalent to speech:

- For example, A says to B"If you do not deny it, I shall assume that the horse is sound."A says nothing. His silence amounts to speech.
- In case of fraudulent silence, contracts is not voidable if the party whose consent was so obtained had the means of discovering the truth with ordinary diligence (Exception to section 19)

(IV) Misrepresentation (Section 18) Misrepresentation means and includes -

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him; by misleading another to his prejudice or to the prejudice of any one claiming under him;

(3) causing, however, innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Analysis of Section 18

According to Section 18, there is misrepresentation:

(1) statement of fact, which of false, would constitute misrepresentation if the maker believes it to be true but which is not justified by the information he possesses;

(2) When there is a breach of duty by a person without any intention to deceive which brings an advantage to him;

(3) When a party causes, even though done innocently, the other party to the agreement to make a mistake as to the subject matter.

Example 1:

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.

Example 2:

'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.

Difference 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 against its will.	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.**

Distinction 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 **believes that the statement as untrue.**	The person making the statement **believes it to be true, although it is not true.**
Rescission 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.**	Party can always **plead that the injured party had the means to discover the truth.**

Legal effects of agreements without free consent - (Section 19)

- When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
- A party to contract, whose consent was so caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

Exception -

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

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.

Example:

A, intending to deceive B, falsely represents that 500 pounds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B. This is because when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Analysis of Section 19

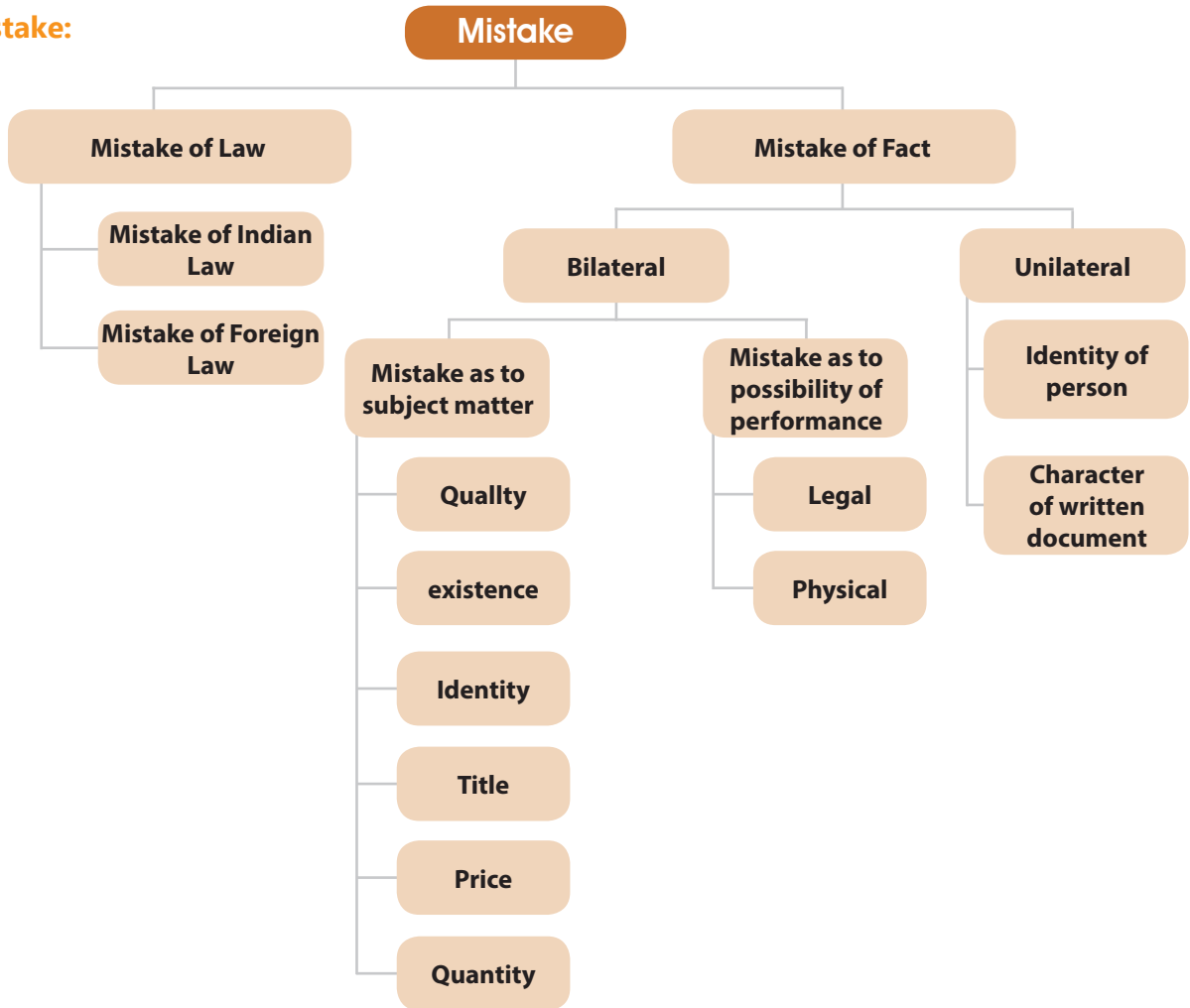
- It has already been considered that when consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, though the agreement amounts to a contract, such a contract is voidable at the option of the party those consent was so obtained.
- The party, however, may insist that the contract should be performed and that he should be put in the same position in which he would have been, if the representation made had been true.
- But a person who had the means of discovering the truth with ordinary diligence cannot avoid a contract on the ground that his consent was caused by misrepresentation or silence amounting to fraud.

Example:

A by a misrepresentation leads B to believe erroneously that 750 tons of sugar is produced per annum at the factory of A. B examines the accounts of the factory, which should have disclosed, if ordinary diligence had been exercised by B, that only 500 tons had been produced. Thereafter B purchases the factory. In the circumstance, B cannot repudiate the contract on the ground of A's misrepresentation.

- 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.

V. Mistake:



- Mistake may be defined as innocent or erroneous belief which leads the party to misunderstand the others. Mistake may be either Bilateral or Unilateral.
- Bilateral mistake is when both the parties to a contract are under a mistake. Unilateral mistake is when only one party to the contract is under a mistake. Euect of mistake on validity of a contract:
- Mistake is some unintentional act, omission or error, arising from unconsciousness, ignorance or forgetfulness, imposition or misplaced confidence. It may be of two kinds-

- It is essential for the creation of a contract that both the parties should agree to the same thing in the same sense. Thus, if two persons enter into a contract, each of them thinking about a different subject matter,no contract will arise. As a result, a mistake may lead a contract towards voidness. Its euect 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 ouers 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 diuerent subject matter so that there is no real consent and the agreement is void.

3.4 LEGALITY OF OBJECT AND CONSIDERATION

I. Which considerations and objects are lawful, and those which are not (Section 23):

The consideration or object of an agreement is lawful, unless-

1. It is forbidden by law; or
2. Is of such a nature that, if permitted, it would defeat the provisions of any law; or
3. Is fraudulent; or
4. Involves injury to the person or property of another; or
5. The court regards it as immoral; or
6. Opposed to public policy.

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

In the following examples, the agreement is void because the object is unlawful:

(1) A, B and C enter into an agreement for the division among them of gains acquired, or to be ac-

quired, by them by fraud. The agreement is void, as its object, viz., acquisition of gains by fraud is unlawful.

(2) A promises to B to abandon a prosecution which he had instituted against B for robbery and B promises in lieu thereof to restore the value of the property robbed. The agreement is void as its object, namely, the stifling of prosecution, is unlawful.

- Section 10 of the Indian Contract Act provides for the legality of consideration and objects thereto. Section 23 of the Act also states that every agreement of which the object or consideration is unlawful is void.
- The following is an example of the agreement which is void because of unlawful consideration.

  A promises to obtain for B an employment in the public service and B promises, in return, to pay ₹1,00,000 to A. The agreement is void, as the consideration thereof is unlawful. Here A's promise to procure for B an employment in the public services is the consideration for B's promise to pay ₹1,00,000. The consideration, being opposed to public policy, is unlawful.
- Under Section 23 of the Indian Contract Act, in each of the following cases the consideration or object of an agreement is said to be unlawful:

(i) When consideration or object is forbidden by law:

- Acts forbidden by law are those which are punishable under any statute as well as those prohibited by regulations or orders made in exercise of the authority conferred by the legislature.

Example:

A licence to cut grass is given to X by the Forest Department under the Forest Act. One of the terms of licence is that the licencee should not assign his interest under the licence without the permission of the Forest Oflcer, and a fine is prescribed for a breach of this condition. But the observance of the conditions of the licence is not obligatory under the Forest Act. If A in breach of the condition, agrees to assign his interest under the licence to B, that agreement will be valid. Here, the assignment is not prohibited by law, the condition against assignment has been imposed only for administrative purpose or solely for the protection of revenue.

(ii) When consideration or object defeats the provision of law:

The words 'defeat the provisions of any law' must be taken as limited to defeating the intention which the law has expressed. The court looks at the real intention of the parties to an agreement. If the intention of the parties is to defeat the provisions of law, the court will not enforce it.

- Legislative enactment would be defeated by an agreement by a debtor not to plead limitation, as the object is to defeat the provisions of the Limitation Act. The Hindu Law is defeated by an agreement to give son in adoption in consideration of annual allowance to the natural parents.

(iii) When it is fraudulent:

- Agreements which are entered into to promote fraud are void. For example, an agreement for the sale of goods for the purpose of smuggling them out of the country is void and the price of the goods so sold, cannot be recovered.

(iv) When consideration involves injury to the person or property of another:

- The general term"injury" means criminal or wrongful harm. In the following examples, the object or consideration is unlawful as it involves injury to the person or property of another.

(1) An agreement to print a book in violation of another's copyright is void, as the object is to cause injury to the property of another. It is also void as the object of the agreement is forbidden by the law relating to copyright.

(2) A promises to repay his debt by doing manual labour daily for a special period and agrees to pay interest at an exorbitant rate in case of default. Here A's promise to repay by manual labour is the consideration for the loan, and this consideration is illegal as it imposes what, in substance, amounts to slavery on the part of A. In other words, as the consideration involves injury to the person of A, the consideration is illegal. Here, the object too is illegal, as it seeks to impose slavery which is opposed to public policy. Hence, the agreement is void.

(v) When consideration is immoral:

- The following are the examples of agreements where the object or consideration is unlawful, being immoral.

(1) A landlord cannot recover the rent of a house knowingly let to prostitute who carries on her vocation there. Here, the object being immoral, the agreement to pay rent is void.

(2) Where P had advanced money to D, a married woman to enable her to obtain a divorce from her husband and D had agreed to marry him as soon as she could obtain the divorce, it was held that P was not entitled to recover the amount, since the agreement had for its object the divorce of D from her husband and the promise of marriage given under these circumstances was against good morals.

(vi) When consideration is opposed to public policy:

- The expression 'public policy' can be interpreted either in a wide or in a narrow sense. The freedom to contract may become illusory, unless the scope of 'public policy' is restricted. In the name of public policy, freedom of contract is restricted by law only for the good for the community. In law, public policy covers certain specified topics, e.g., trading with an enemy, stifling of prosecutions, champerty, maintenance, interference with the course of justice, marriage brokerage, sales of public oflces, etc.
- Agreements tending to create interest against duty, agreements tending to create monopolies and agreements not to bid at an auction are also opposed to public policy.
- An attempt to enlarge the scope of the doctrine is bound to result in the curtailment of individual freedom of contract.

Agreements opposed to public policy

Some of the agreements which are held to be opposed to public policy are-

(1) Trading with enemy:

- Any trade with person owing allegiance to a Government at war with India without the licence of the Government of India is void, as the object is opposed to public policy. Here, the agreement to trade ouends against the public policy by tending to prejudice the interest of the State in times of war.

(2) Stifling Prosecution:

- An agreement to stifle prosecution i.e. "an agreement to present proceedings already instituted from running their normal course using force" tends to be a perversion or an abuse of justice; therefore, such an agreement is void. The principle is that one should not make a trade of felony.
- The compromise of any public ouence is generally illegal. Under the Indian Criminal Procedure Code, there is, however, a statutory list of compoundable ouences and an agreement to drop proceeding relating to such ouences with or without the permission of the Court, as the case may be, in consideration the accused promising to do something for the complainant, is not opposed to public policy.

- Thus, where A agrees to sell certain land to B in consideration of B abstaining from taking criminal proceeding against A with respect to an ouence which is compoundable, the agreement is not opposed to public policy. But, it is otherwise, if the ouence is uncompoundable.

(3) Maintenance and Champerty:

- Maintenance is an agreement in which a person promises to maintain suit in which he has no interest.
- Champerty is an agreement in which a person agrees to assist another in litigation in-exchange of a promise to hand over a portion of the proceeds of the action.

The agreement for supplying funds by way of Maintenance or Champerty is valid unless

(a) It is unreasonable so as to be unjust to other party or

(b) It is made by a malicious motive like that of gambling in litigation or oppressing other party by encouraging unrighteous suits and not with the bonafide object of assisting a claim believed to be just.

(4) Traffic relating to Public Offences:

- An agreement to traflc in public oflce is opposed to public policy, as it interferes with the appointment of a person best qualified for the service of the public. Public policy requires that there should be no money consideration for the appointment to an oflce in which the public is interested.
- The following are the examples of agreements that are void; since they are tantamount to sale of public oflces.

(1) An agreement to pay money to a public servant in order to induce him to retire from his oflce 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.

(5) Agreements tending to create monopolies:

- Agreements having for their object the establishment of monopolies are opposed to public policy and therefore void.

(6) Marriage brokerage agreements:

- An agreement to negotiate marriage for reward, which is known as a marriage brokerage contract, is void, as it is opposed to public policy. For instance, an agreement to pay money to a person hired to procure a wife is opposed to public policy and therefore void.

  Note: Marriage bureau only provides information and doesn't negotiate marriage for reward, therefore, it is not covered under this point.

(7) Interference with the course of justice:

- An agreement whose object is to induce any judicial oflcer of the State to act partially or corruptly is void, as it is opposed to public policy; so also is an agreement by A to reward B, who is an intended witness in a suit against A in consideration of B's absenting himself from the trial. For the same reasons, an agreement which contemplates the use of under-hand means to influence legislation is void. Similarly, as agreement to induce any executive oflcer of the State to act partially or corruptly is void.

(8) Interest against obligation:

- The following are examples of agreement that are void as they tend to create an interest against obligation. The object of such agreements is opposed to public policy.

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

(2) A, who is the manager of a firm, agrees to pass a contract to X if X pays to A `200,000 privately; the agreement is void.

Consideration Unlawful in Part:

- By virtue of Section 24, if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void."
- This section is an obvious consequence of the general principle of Section 23. There is no promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. The general rule is that where the legal part of a contract can be severed from the illegal part, the bad part may be rejected and the good one can be retained. But where the illegal part cannot be severed, the contract is altogether void.

Example:

A promises to superintend, on behalf of B, a legal manufacturer of indigo and an illegal traflc in other articles. B promises to pay A salary of `20,000 per month. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

3.5 VOID AGREEMENTS

Expressly declared Void Agreements

1.	Made by incompetent parties (Section 11)	6.	Agreement in restraint of marriage (Section 26)
2.	Agreements made under Bilateral mistake of fact (Section 20)	7.	Agreements in restraint of trade (Section 27)
3.	Agreements the consideration or object of which is unlawful (Section 23)	8.	Agreement in restraint of legal proceedings (Section 28)
4.	Agreement the consideration or object of which is unlawful in parts (Section 24)	9.	Agreement the meaning of which is uncertain (Section 29)
5.	Agreements made without consideration (Section 25)	10.	Wagering Agreement (Section 30)
	[Refer Unit 2]	11.	Agreements to do impossible Acts (Section 56)

(1) Agreement in restraint of marriage (Section 26):

- Every agreement in restraint of marriage of any person other than a minor, is void. So if a person, being a major, agrees for good consideration not to marry, the promise is not binding and considered as void agreement.

(2) Agreement in restraint of trade (Section 27):

- An agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void. But this rule is subject to the following exceptions, namely, where a person sells the goodwill of a business and agrees with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or his successor in interest carries on a like business therein, such an agreement is valid (goodwill is the advantage enjoyed by a business on account of public patronage and encouragement from habitual customers). The local limits within which the seller of the goodwill agrees not to carry on similar business must be reasonable.

- Under Section 36 of the Indian Partnership Act, 1932 if an outgoing partner makes an agreement with the continuing partners that he will not carry on any business similar to that of the firm within a specified period or within specified local limits, such an agreement, thought in restraint of trade, will be valid, if the restrictions imposed are reasonable. Similarly, under Section 11 of that Act an agreement between partners not to carry on competing business during the continuance of partnership is valid.
- But an agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer is not in restraint of trade.

Example 1:

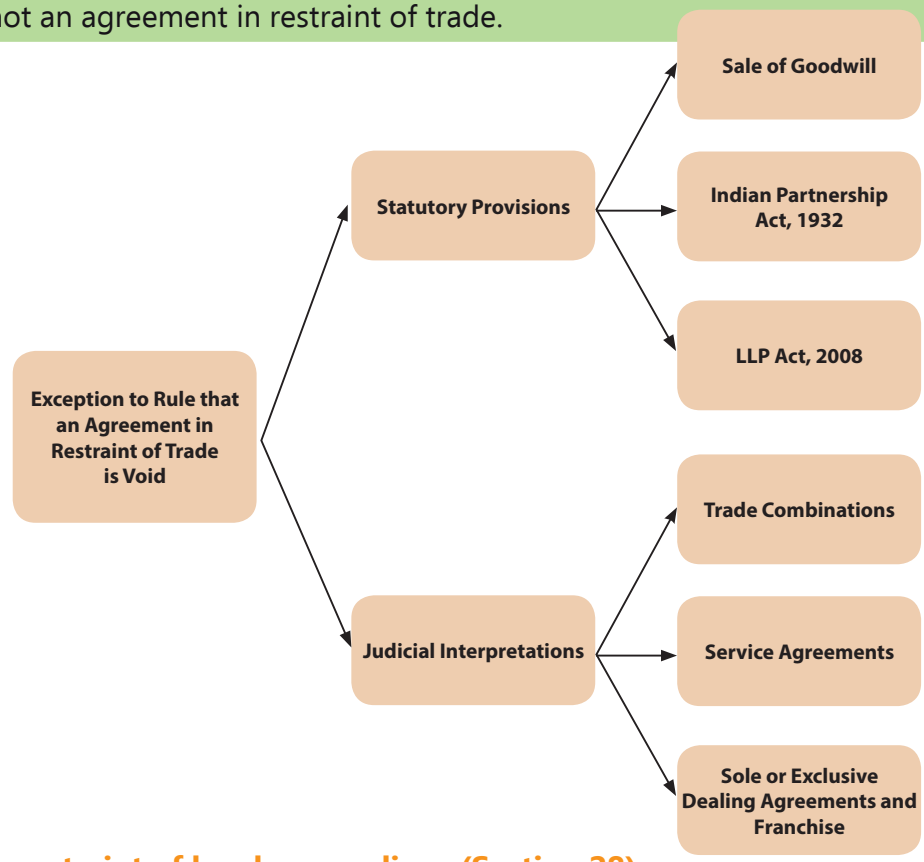
B, a physician and surgeon, employs A as an assistant for a term of three years and A agrees not to practice as a surgeon and physician during these three years. The agreement is valid and A can be restrained by an injunction if he starts independent practice during this period.

Example 2:

An agreement by a manufacturer to sell during a certain period his entire production to a wholesale merchant is not in restraint of trade.

Example 3:

Agreement among the sellers of a particular commodity not to sell the commodity for less than a fixed price is not an agreement in restraint of trade.



(3) Agreement in restraint of legal proceedings (Section 28):

- An agreement in restraint of legal proceeding is the one by which any party thereto is restricted absolutely from enforcing his rights under a contract through a Court or which abridges the usual period for starting legal proceedings. A contract of this nature is void.

However, there are certain exceptions to the above rule:

(i) A contract by which the parties agree that any dispute between them in respect of any subject shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable

is a valid contract.

(ii) Similarly, a contract by which the parties agree to refer to arbitration any question between them which has already arisen or which may arise in future, is valid; but such a contract must be in writing.

4. Agreement -

- the meaning of which is uncertain (Section 29): An agreement, the meaning of which is not certain, is void, but where the meaning thereof is capable of being made certain, the agreement is valid.

Example:

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. But the agreement would be valid if A was dealer only in coconut oil; because in such a case its meaning would be capable of being made certain.

5. Wagering agreement (Section 30):

- An agreement by way of a wager is void. It is an agreement involving payment of a sum of money upon the determination of an uncertain event. The essence of a wager is that each side should stand to win or lose, depending on the way an uncertain event takes place in reference to which the chance is taken and in the occurrence of which neither of the parties has legitimate interest.

Example:

A agrees to pay ₹ 50,000 to B if it rains, and B promises to pay a like amount to A if it does not rain, the agreement will be by way of wager. But if one of the parties has control over the event, agreement is not a wager.

Essentials of a Wager

1. There must be a promise to pay money or money's worth.
2. Promise must be conditional on an event happening or not happening.
3. There must be uncertainty of event.
4. There must be two parties, each party must stand to win or lose.
5. There must be common intention to bet at the timing of making such agreement.
6. Parties should have no interest in the event except for stake.

Transactions similar to Wager (Gambling)

(i) Lottery transactions:

- A lottery is a game of chance and not of skill or knowledge. Where the prime motive of participant is gambling, the transaction amounts to a wager. Even if the lottery is sanctioned by the Government of India it is a wagering transaction.
- The only euect of such sanction is that the person responsible for running the lottery will not be punished under the Indian Penal Code. Lotteries are illegal and even collateral transactions to it are tainted with illegality (Section 294A of Indian Penal Code).

(ii) 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 `1,000.

(iii) Speculative transactions:

- an agreement or a share market transaction where the parties intend to settle the difference between the contract price and the market price of certain goods or shares on a specified day, is a gambling and hence void.

(iv) Horse Race Transactions:

- A horse race competition where prize payable to the bet winner is less than ₹500, is a wager.

Example:

A and B enter into an agreement in which A promises to pay ` 2,00,000 provided'Chetak'wins the horse race competition. This is a wagering transaction.

- However, Section 30 is not applicable in an agreement to contribute toward plate, prize or sum of money of the value of `5,00,000 or above to be awarded to the winner of a horse race.

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.

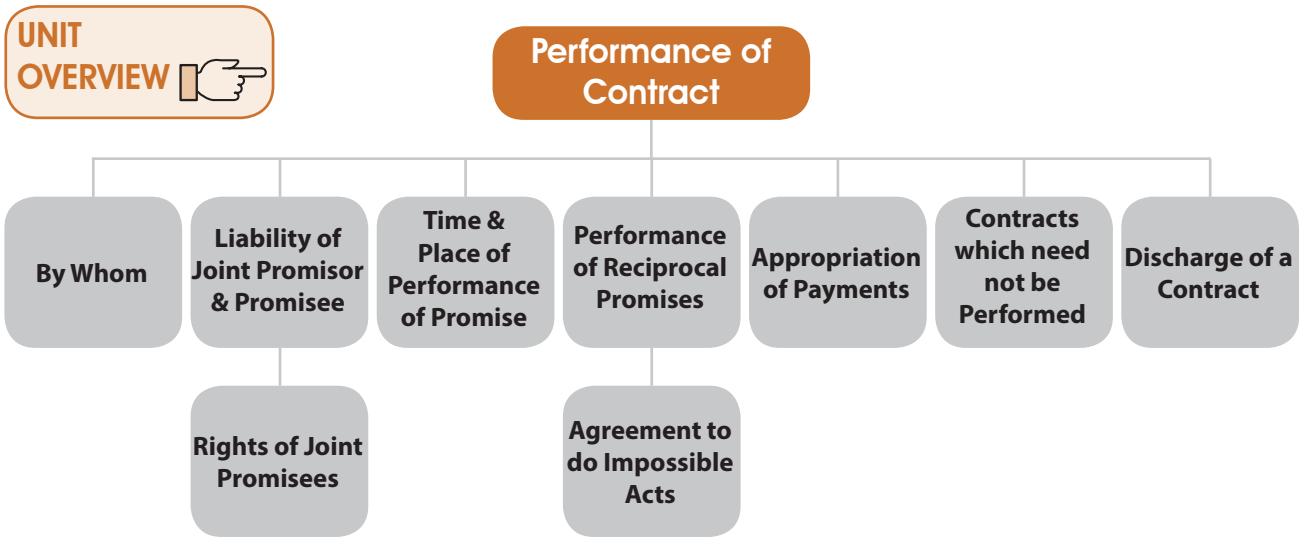
(iv) A contract of insurance:

- A contract of insurance is a type of contingent contract and is valid under law and these contracts are different from wagering agreements.

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 of Indemnity	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.**

UNIT IV - PERFORMANCE OF A CONTRACT



- This unit explains- who must perform his obligation, what should be the mode of performance, and what shall be the consequences of non- performance.

4.1 OBLIGATIONS OF PARTIES TO CONTRACTS-(SECTION 37)

- The parties to a contract must either perform, or offer to perform, their respective promises unless such performance is dispensed with or excused under the provisions of the Contract Act or of any other law.
- Promises bind the representatives of the promisor in case of death of such promisor before performance, unless a contrary intention appears from the contract.

Example 1:

A promises to deliver goods to B on a certain day on payment of ₹1,00,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay ₹ 1,00,000 to A's representatives.

Example 2:

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 because it involves use of personal skill. It is a contract of personal nature.

I. Analysis of Section 37

- A contract being an agreement enforceable by law, creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge.
- The basic rule is that the promisor must perform exactly what he has promised to perform. The obligation to perform is absolute.Thus, it may be noted that it is necessary for a party who wants to enforce the promise made to him, to perform his promise for himself or offer to perform his promise. Only after that he can ask the other party to carry out his promise.
- This is the principle which is enshrined in Section 37.Thus, it is the primary duty of each party to a

contract to either perform or offer to perform his promise.

- He is absolved from such a responsibility only when under a provision of law or an act of the other party to the contract, the performance can be dispensed with or excused.
- Thus, from above it can be drawn that performance may be actual or offer to perform.
- Actual Performance: Where a party to a contract has done what he had undertaken to do or either of the parties have fulfilled their obligations under the contract within the time and in the manner prescribed.

Example:

X borrows ₹ 5,00,000 from Y with a promise to be paid after 1 month. X repays the amount on the due date. This is actual performance.

- Offer to perform or attempted performance or tender of performance: It may happen sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promisee refuses to accept the performance.

Example:

P promises to deliver certain goods to R. P takes the goods to the appointed place during business hours but R refuses to take the delivery of goods. This is an attempted performance as P the promisor has done what he was required to do under the contract.

4.2 BY WHOM A CONTRACT MAY BE PERFORMED (SECTION 40, 41 AND 42)

I. Person by whom promise is to be performed-Section 40

- If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Example 1:

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

Example 2:

A promises to paint a picture for B and this must be performed by the promisor himself.

II. Analysis of Section 40

- The promise under a contract may be performed, as the circumstances may permit, by the promisor himself, or by his agent or his legal representative.

1. Promisor himself:

- If there is something in the contract to show that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor.
- This means contracts which involve the exercise of personal skill or diligence, or which are founded on personal confidence between the parties must be performed by the promisor himself.

Example:

A promises to paint a picture for B and this must be performed by the promisor himself.

2. Agent:

- Where personal consideration is not the foundation of a contract, the promisor or his representative may employ a competent person to perform it.

3. Legal Representatives:

- A contract which involves the use of personal skill or is founded on personal consideration comes to an end on the death of the promisor. As regards any other contract the legal representatives of the deceased promisor are bound to perform it unless a contrary intention appears from the contract (Section 37, para 2). But their liability under a contract is limited to the value of the property they inherit from the deceased.

Example 1:

A promises to B to pay ₹ 100,000 on delivery of certain goods. A may perform this promise either himself or causing someone else to pay the money to B. If A dies before the time appointed for payment, his representative must pay the money or employ some other person to pay the money. If B dies before the time appointed for the delivery of goods, B's representative shall be bound to deliver the goods to A and A is bound to pay ₹100,000 to B's representative.

Example 2:

A promises to paint a picture for B for a certain price.

A is bound to perform the promise himself. He cannot ask some other painter to paint the picture on his behalf. If A dies before painting the picture, the contract cannot be enforced either by A's representative or by B.

4. Third persons:

- Effect of accepting performance from third person- Section 41
- When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.
- That is, performance by a stranger, if accepted by the promisee, this results in discharging the promisor, although the latter has neither authorised not ratified the act of the third party.

Example:

A received certain goods from B promising to pay ₹ 100,000/-. Later on, A expressed his inability to make payment. C, who is known to A, pays ₹ 60,000/- to B on behalf of A. However, A was not aware of the payment. Now B is intending to sue A for the amount of ₹100,000/-.

- As per Section 41 of the Indian Contract Act, 1872, when a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.
- That is, performance by a stranger, accepted by the promisee, produces the result of discharging the promisor, although the latter has neither authorised nor ratified the act of the third party.
- Therefore, in the present instance, B can sue only for the balance amount i.e., ₹ 4000/- and not for the whole amount.

5. Joint promisors: (Section 42)

- When two or more persons have made a joint promise, then unless a contrary intention appears by the contract, all such persons must jointly fulfill the promise.
- If any of them dies, his legal representatives must, jointly with the surviving

promisors, fulfill the promise. If all of them die, the legal representatives of all of them must fulfill the promise jointly.

Example:

'A', 'B' and 'C' jointly promised to pay ₹ 6,00,000 to 'D'. Here 'A', 'B' and 'C' must jointly perform the promise. If 'A' dies before performance, then his legal representatives must jointly with 'B' and 'C' perform the promise, and so on. And if all the three (i.e. 'A', 'B' and 'C') die before performance, then the legal representatives of all must jointly perform the promise.

4.3 DISTINCTION BETWEEN SUCCESSION AND ASSIGNMENT

- Distinction between two legal concepts, viz., succession and assignment may be noted carefully. When the benefits of a contract are succeeded to by process of law, then both burden and benefits attaching to the contract, may sometimes devolve on the legal heir.
- Suppose, a son succeeds to the estate of his father after his death, he will be liable to pay the debts and liabilities of his father owed during his life-time.
- But if the debts owed by his father exceed the value of the estate inherited by the son then he would not be called upon to pay the excess.
- In other words, the liability of the son will be limited to the extent of the property inherited by him.
- In the matter of assignment, however the benefit of a contract can only be assigned but not the liabilities thereunder. This is because when liability is assigned, a third party gets involved therein.
- Thus a debtor cannot relieve himself of his liability to creditor by assigning to someone else his obligation to repay the debt.
- On the other hand, if a creditor assigns the benefit of a promise, he thereby entitles the assignee to realise the debt from the debtor but where the benefit is coupled with a liability or when a personal consideration has entered into the making of the contract then the benefit cannot be assigned.

4.4 EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE

- According to Section 38 of the Act - where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, then the promisor is not responsible for non performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill certain conditions which are as follows, namely:

(i) it must be unconditional;

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

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

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

4.5 EFFECT OF A REFUSAL OF PARTY TO PERFORM PROMISE

- According to Section 39, when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Example:

A, singer, enters into a contract with B, the Manager of a theatre, to sing at his theatre two nights in every week during next two months, and B engages to pay her ` 1,00,000 for each night's performance. On the sixth night, A willfully absents herself from the threatre. B is at liberty to put an end to the contract.

Analysis of Section 39

- From language of Section 39 it is clear that in the case under consideration, the following two rights accrue to the aggrieved party, namely, (a) to terminate the contract; (b) to indicate by words or by conduct that he is interested in its continuance.
- In case the promisee decides to continue the contract, he would not be entitled to put an end to the contract on this ground subsequently. In either case, the promisee would be able to claim damages that he suffers as a result on the breach.

4.6 LIABILITY OF JOINT PROMISOR & PROMISEE

I. Devolution of joint liabilities (Section 42)

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

II. Analysis of Section 42

- If two or more persons have made a joint promise, ordinarily all of them during their life-time must jointly fulfill the promise. After death of any one of them, his legal representative jointly with the survivor or survivors should do so. After the death of the last survivor the legal representatives of all the original co- promisors must fulfil the promise.

Example :

X, Y and Z who had jointly borrowed money must, during their life-time jointly repay the debt. Upon the death of X his representative, say, S along with Y and Z should jointly repay the debt and so on.

- This rule is applicable only if the contract reveals no contrary intention.
- We have seen that Section 42 deals with voluntary discharge of obligations by joint promisors. But if they do not discharge their obligation on their own volition, what will happen? This is what Section 43 resolves.

III. Any one of joint promisors may be compelled to perform – Section 43

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

(a) Each promisor may compel contribution

- Each of two or more joint promisors may compel every other joint promisor to contribute equal-

ly with himself to the performance of the promise, unless a contrary intention appears from the contract.

- In other words, if one of the joint promisors is made to perform the whole contract, he can call for a contribution from others.

(b) Sharing of loss by default in contribution

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

(c) Explanation to Section 43

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

Example 1:

A, B and C jointly promise to pay D ₹3,00,000. D may compel either A or B or C to pay him ₹ 3,00,000.

Example 2:

A, B and C are under a joint promise to pay D ₹ 3,00,000. C is unable to pay anything A is compelled to pay the whole. A is entitled to receive ₹1,50,000 from B.

- We thus observe that the effect of Section 43 is to make the liability in the event of a joint contract, both joint & several, in so far as the promisee may, in the absence of a contract to the contrary, compel anyone or more of the joint promisors to perform the whole of the promise.

IV. Effect of release of one joint promisor- Section 44

- The effect of release of one of the joint promisors is dealt with in Section 44 which is stated below:
- Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors.

Example:

'A', 'B' and 'C' jointly promised to pay ₹9,00,000 to 'D'. 'D' released 'A' from liability. In this case, the release of 'A' does not discharge 'B' and 'C' from their liability. They remain liable to pay the entire amount of ₹9,00,000 to'D'. And though'A' is not liable to pay to'D', but he remains liable to pay to'B' and'C' i.e. he is liable to make the contribution to the other joint promisors.

(a) Rights of Joint Promisees

- The law relating to Devolution of joint rights is contained in Section 45 which is reproduced below:
- "When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly".

Example: :

A, in consideration of ₹ 5,00,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a specified day but B dies. In such a case right to demand payment shall rest with B's legal representatives, jointly with C during C's life-time, and after the death of C, with the legal representatives of B and C jointly.

4.7 TIME AND PLACE FOR PERFORMANCE OF THE PROMISE

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 promise, 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 ouered 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.

4.8 PERFORMANCE OF RECIPROCAL PROMISE

- The law on the subject is contained in Sections 51 to 58. The provisions thereof are summarized below:

(1) Promisor not bound to perform, unless reciprocal promise ready and willing to perform- Section 51

- When a contract consists of reciprocal promises to be simultaneously performed, no promisor need

to perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Example:

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

(a) Analysis of Section 51

Simultaneous performance of reciprocal promises:

- Reciprocal promises may have to be performed simultaneously, or one after the other.
- Where A promises to deliver rice and B promises to pay the price on delivery, both the promises are to be performed simultaneously, and both A and B must be ready and willing to perform their respective promises.
- Such promises constitute concurrent conditions and the performance of one of the promises is conditional on the performance of the other. If one of the promises is not performed the other too need not be performed.
- If A, in the above-mentioned example, is unwilling to deliver the rice on payment, A will be guilty of breach of promise and the breach would relieve B of the obligation to perform his promise and would enable B to treat the contract as at an end.

(2) Order of performance of reciprocal promises- Section 52

- When the order of performance of the reciprocal promises is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Example:

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

(a) Analysis of Section 52 -

- The order of performance may sometimes be indicated not expressly, but by the nature of the transaction. For example, A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the price.
- A's promise to make over his stock need not be performed, until the security is given by , for the nature of the transaction requires that A should have the security from B before he delivers his stock.

(3) Liability of party preventing event on which the contract is to take effect – Section 53

- When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented ; and he is entitled to compensation from the other party for any loss he may sustain in consequence of the non- performance of the contract.

Example 1:

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

Example 2:

In a contract for the sale of standing timber, the seller is to cut and cord it, whereupon buyer is to take it away and pay for it. The seller cords only a part of the timber and neglects to cord the rest.

In that event the buyer may avoid the contract and claim compensation from the seller for any loss which he may have sustained for the non-performance of the contract.

(4) Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises (Section 54)

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

Analysis of Section 54

- Section 54 applies when the promises are reciprocal and dependent. If the promisor who has to perform his promise before the performance of the other's promise fails to perform it, he cannot claim performance of the other's promise, and is also liable for compensation for his non- performance.

Example:

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

(5) Effects of Failure to Perform at a Time Fixed in a Contract in which Time is Essential(- Section 55)

- The law on the subject is contained in Section 55 which is reproduced below:
- "When a party to a contract promises to do certain thing at or before the specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract".

Effect of such failure when time is not essential

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

Effect of acceptance of performance at time other than agreed upon -

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

Analysis of Section 55

- But ordinarily, from an examination of a contract, it is difficult to ascertain whether time is intended to be of essence by the parties at the time of its formation. In every case, the intention is to be gathered from the terms of the contract.
- In a mercantile contract, the general rule in this regard is that stipulations as to time, except as to time for payment of money, are essential conditions, since punctuality is of the utmost importance in the business world.

- Thus, on a sale of goods that are notoriously subject to rapid fluctuation of market price, e.g. gold, silver, shares having a ready market the time of delivery is of the essence of the contract. But in mortgage bond, the time fixed for the repayment of the mortgage money can by no means be regarded as an essential condition; consequently, the mortgaged property can be regained even after the due date.
- Similarly, in a contract to sell land any clause limiting the time of completion is not strictly enforced. But even in a contract for the sale of land, time can be made the essence of the contract by express words.

Contract cannot be avoided where time is not essential:

- Where time is not essential, the contract cannot be avoided on the ground that the time for performance has expired, there the promisee is only entitled to compensation from the promisor for any loss caused by the delay.
- But it must be remembered that even where time is not essential it must be performed within a reasonable time; otherwise it becomes voidable at the option of the promisee.

Effect of acceptance of performance out of time:

- Even where time is essential the promisee may waive his right to repudiate the contract, when the promisor fails to perform the promise within the stipulated time. In that case, he may accept performance at any time other than that agreed.
- In such an event, he cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of acceptance of the performance he has given a notice to the promisor of his intention to claim compensation.

(6) Agreement to do Impossible Act

- Section 56 contemplates various circumstances under which agreement may be void, since it is impossible to carry it out. The Section is reproduced below:

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

(A) Contract to do act afterwards becoming impossible or unlawful:

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

(B) Compensation for loss through non-performance of act known to be impossible or unlawful:

- where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not 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.

Example :

A agrees with B to discover treasure by magic. The agreement is void.

(C) Analysis of Section 56

- The impossibility of performance may be of the two types, namely (a) initial impossibility, and

(b) Subsequent impossibility.

(1) Initial Impossibility (Impossibility existing at the time of contract):

- When the parties agree upon doing of something which is obviously impossible in itself the

agreement would be void. Impossible in itself means impossible in the nature of things. The fact of impossibility may be and may not be known to the parties.

Example:

'A', a Hindu, who was already married, contracted to marry 'B', a Hindu girl. According to law, 'A' being married, could not marry 'B'. In this case, 'A' must make compensation to 'B' for the loss caused to her by the non-performance of the contract.

(i) If known to the parties:

- It would be observed that an agreement constituted, quite unknown to the parties, may be impossible of being performed and hence void.

Example:

- B promises to pay a sum of ₹ 5,00,000 if he is able to swim across the Indian Ocean from Mumbai to Aden within a week. In this case, there is no real agreement, since both the parties are quite certain in their mind that the act is impossible of achievement. Therefore, the agreement, being impossible in itself, is void.

(ii) If unknown to the parties:

- Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void.

(iii) If known to the promisor only:

- Where at the time of entering into a contract, the promisor alone knows about the impossibility of performance, or even if he does not know though he should have known it with reasonable diligence, the promisee is entitled to claim compensation for any loss he suffered on account of non-performance.

(2) Subsequent or Supervening impossibility (Becomes impossible after entering into contract):

- When performance of promise become impossible or illegal by occurrence of an unexpected event or a change of circumstances beyond the contemplation of parties, the contract becomes void e.g. change in law etc.
- In other words, sometimes, the performance of a contract is quite possible when it is made. But subsequently, some event happens which renders the performance impossible or unlawful. Such impossibility is called the subsequent or supervening.
- It is also called the post- contractual impossibility. The effect of such impossibility is that it makes the contract void, and the parties are discharged from further performance of the contract.

Example:

'A' and 'B' contracted to marry each other. Before the time fixed for the marriage, 'A' became mad. In this case, the contract becomes void due to subsequent impossibility, and thus discharged.

(vii) Reciprocal promise to do certain things that are legal, and also some other things that are illegal- Section 57-

- Where persons reciprocally promise, first to do certain things which are legal and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a valid contract, but the second is a void agreement.

Example:

A and B agree that A will sell a house to B for ₹ 500,000 and also that if B uses it as a gambling house, he will pay a further sum of ₹ 750,000. The first set of reciprocal promises, i.e. to sell the house

and to pay ₹ 500,000 for it, constitutes a valid contract. But the object of the second, being unlawful, is void.

(viii)'Alternative promise' one branch being illegal:- Section 58

- The law on this point is contained in Section 58 which says that "In the case of the alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced".

Example:

A and B agree that A shall pay B ₹1,00,000, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

4.9 APPROPRIATION OF PAYMENTS

- Sometimes, a debtor owes several debts to the same creditor and makes payment, which is not sufficient to discharge all the debts.
- In such cases, the payment is appropriated (i.e. adjusted against the debts) as per Section 59 to 61 of the Indian Contract Act.

(i) Application of payment where debt to be discharged is indicated (Section 59):

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

(ii) Application of payment where debt to be discharged is not indicated (Section 60):

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

(iii) Application of payment where neither party appropriates (Section 61):

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

4.10 CONTRACTS, WHICH NEED NOT BE PERFORMED – WITH THE CONSENT OF BOTH THE PARTIES

- Under this heading, we shall discuss the principles of Novation, Rescission and Alteration. The law is contained in Sections 62 to 67 of the Contract Act.

I. Effect of novation, rescission, and alteration of contract (Section 62)

- "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed"

Analysis of Section 62

(a) Effect of novation:

- The parties to a contract may substitute a new contract for the old. If they do so, it will be a case of novation. On novation, the old contract is discharged and consequently it need not be performed.
- Thus, it is a case where there being a contract in existence some new contract is substituted for it either between the same parties or between different parties the consideration mutually being the discharge of old contract. Novation can take place only by mutual agreement between the parties.

Example:

A owes B ₹100,000. A, B and C agree that C will pay B and he will accept ₹100,000 from C in lieu of the sum due from A. A's liability thereby shall come to an end, and the old contract between A and B will be substituted by the new contract between B and C.

(b) Effect of rescission:

- A contract is also discharged by rescission. When the parties to a contract agree to rescind it, the contract need not be performed. In the case of rescission, only the old contract is cancelled and no new contract comes to exist in its place. It is needless to point out that novation also involves rescission. Both in novation and in rescission, the contract is discharged by mutual agreement.

(c) Effect of alteration of contract:

- As in the case of novation and rescission, so also in a case where the parties to a contract agree to alter it, the original contract is rescinded, with the result that it need not be performed. In other words, a contract is also discharged by alteration. The terms of contract may be so altered by mutual agreement that the alteration may have the effect of substituting a new contract for the old one. In other words, the distinction between novation and alteration is very slender.

Novation and alteration:

- The law pertaining to novation and alteration is contained in Sections 62 to 67 of the Indian Contract Act. In both these cases the original contract need not be performed. Still there is a difference between these two.

1. Novation means substitution of an existing contract with a new one. Novation may be made by changing in the terms of the contract or there may be a change in the contracting parties. But in case of alteration the terms of the contract may be altered by mutual agreement by the contracting parties but the parties to the contract will remain the same.
2. In case of novation there is altogether a substitution of new contract in place of the old contract. But in case of alteration it is not essential to substitute a new contract in place of the old contract. In alteration, there may be a change in some of the terms and conditions of the original agreement.

II. Promisee may waive or remit performance of promise:

- Section 63 -"Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit". In other words, a contract may be discharged by remission.

Example:

A owes B ₹5,00,000. A pays to B, and B accepts, in satisfaction of the whole debt, ₹ 2,00,000 paid at the time and place at which the ₹ 5,00,000 were payable. The whole debt is discharged.

III. Restoration of Benefit under a Voidable Contract(Section 64)

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

1. Analysis of Section 64

- Such a contract can be terminated at the option of the party who is empowered to do so. If he has received any benefit under the contract, he must restore such benefit to the person from whom he has received it.

Example:

- An insurance company may rescind a policy on the ground that material fact has not been disclosed. When it does so, the premium collected by it in respect of the policy reduced by the amount of expenses incurred by it in this connection must be repaid to the policy holder.

IV. Obligations of Person who has Received Advantage under Void Agreement or contract that becomes void (Section 65)

- "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."

2. Analysis of Section 65

- From the language of the Section, it is clear that in such a case either the advantage received must be restored back or a compensation, suflcient to put the position prior to contract, should be paid.

Example:

A pays B ₹1,00,000, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A ₹1,00,000.

- In a case, the plaintiff hired a godown from the defendant for twelve months and paid the whole of the rent in advance. After about seven months the godown was destroyed by fire, without any fault or negligence on the part of the plaintiff and the plaintiff claimed a refund of a proportionate amount of the rent. Held, the plaintiff was entitled to recover the rent for the unexpired term, of the contract.
- The Act requires that a party must give back whatever he has received under the contract. The benefit to be restored under this section must be benefit received under the contract (and not any other amount).
- A agrees to sell land to B for ` 400,000. B pays to A ` 40,000 as a deposit at the time of thecon-tract, the amount to be forfeited by A if B does not complete the sale within a specified period.
- B fails to complete the sale within the specified period, nor is he ready and willing to c omplete the sale within a reasonable time after the expiry of that period.
- A is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received under the contract, it is a security that the purchaser would fulfill his contract and is ancillary to the contract for the sale of the land.

V. Communication of rescission (Section 66):

- You have noticed that a contract voidable at the option of one of the parties can be rescinded; but rescission must be communicated to the other party in the same manner as a proposal is communicated under Section 4 of the Contract Act. Similarly, a rescission may be revoked in the same manner as a proposal is revoked.

VI Effects of neglect of promisee to afford promisor reasonable facilities for performance (Section 67):

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

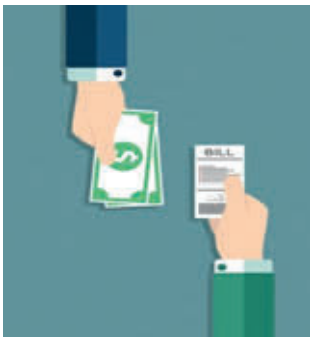
Example:

If an apprentice refuses to learn, the teacher cannot be held liable for not teaching.

Example:

A contracts with B to repair B's house. B neglects or refuses to appoint out to A the places in which his house requires repair. A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

4.11 DISCHARGE OF A CONTRACT



A contract is discharged when the obligations created by it come to an end. A contract may be discharged in any one of the following ways:

(i) Discharge by performance:

- It takes place when the parties to the contract fulfil their obligations arising under the contract within the time and in the manner prescribed. Discharge by performance may be

(1) Actual performance; or

(2) Attempted performance.

- Actual performance is said to have taken place, when each of the parties has done what he had agreed to do under the agreement. When the promisor offers to perform his obligation, but the promisee refuses to accept the performance, it amounts to attempted performance or tender.

Example:

A contracts to sell his car to B on the agreed price. As soon as the car is delivered to B and B pays the agreed price for it, the contract comes to an end by performance.

(ii) Discharge by mutual agreement:

- Section 62 of the Indian Contract Act provides if the parties to a contract agree to substitute a new contract for it, or to rescind or remit or alter it, the original contract need not be performed. The principles of Novation, Rescission, Alteration and Remission are already discussed.

Example:

A owes B ₹ 1,00,000. A enters into an agreement with B and mortgage his (A's), estates for ₹50,000 in place of the debt of ₹1,00,000. This is a new contract and extinguishes the old.

Example:

A owes B ₹5,00,000. A pays to B ₹3,00,000 who accepts it in full satisfaction of the debt. The whole is discharged.

(iii) Discharge by impossibility of performance:

- The impossibility may exist from the very start. In that case, it would be impossibility ab initio. Alternatively, it may supervene. Supervening impossibility may take place owing to:

(a) an unforeseen change in law;

(b) the destruction of the subject-matter essential to that performance;

(c) the non-existence or non-occurrence of particular state of things, which was naturally contemplated for performing the contract, as a result of some personal incapacity like dangerous malady;

(d) the declaration of a war (Section 56).

Example 1:

A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility.

Example 2:

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

Example 3:

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.

(iv) Discharge by lapse of time:

- A contract should be performed within a specified period as prescribed by the Limitation Act, 1963. If it is not performed and if no action is taken by the promisee within the specified period of limitation, he is deprived of remedy at law.

Example:

If a creditor does not file a suit against the buyer for recovery of the price within three years, the debt becomes time-barred and hence irrecoverable.

(v) Discharge by operation of law:

- A contract may be discharged by operation of law which includes by death of the promisor, by insolvency etc.

(vi) Discharge by breach of contract:

- Breach of contract may be actual breach of contract or anticipatory breach of contract. If one party defaults in performing his part of the contract on the due date, he is said to have committed breach thereof.
- When on the other hand, a person repudiates a contract before the stipulated time for its performance has arrived, he is deemed to have committed anticipatory breach.
- If one of the parties to a contract breaks the promise the party injured thereby, has not only a right of action for damages but he is also discharged from performing his part of the contract.

(vii) Promisee may waive or remit performance of promise:

- Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfac-

tion which he thinks fit. In other words, a contract may be discharged by remission. (Section 63)

Example:

A owes B ₹5,00,000. C pays to B ₹1,00,000 and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(viii) Effects of neglect of promisee to afford promisor reasonable facilities for performance:

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

(ix) Merger of rights:

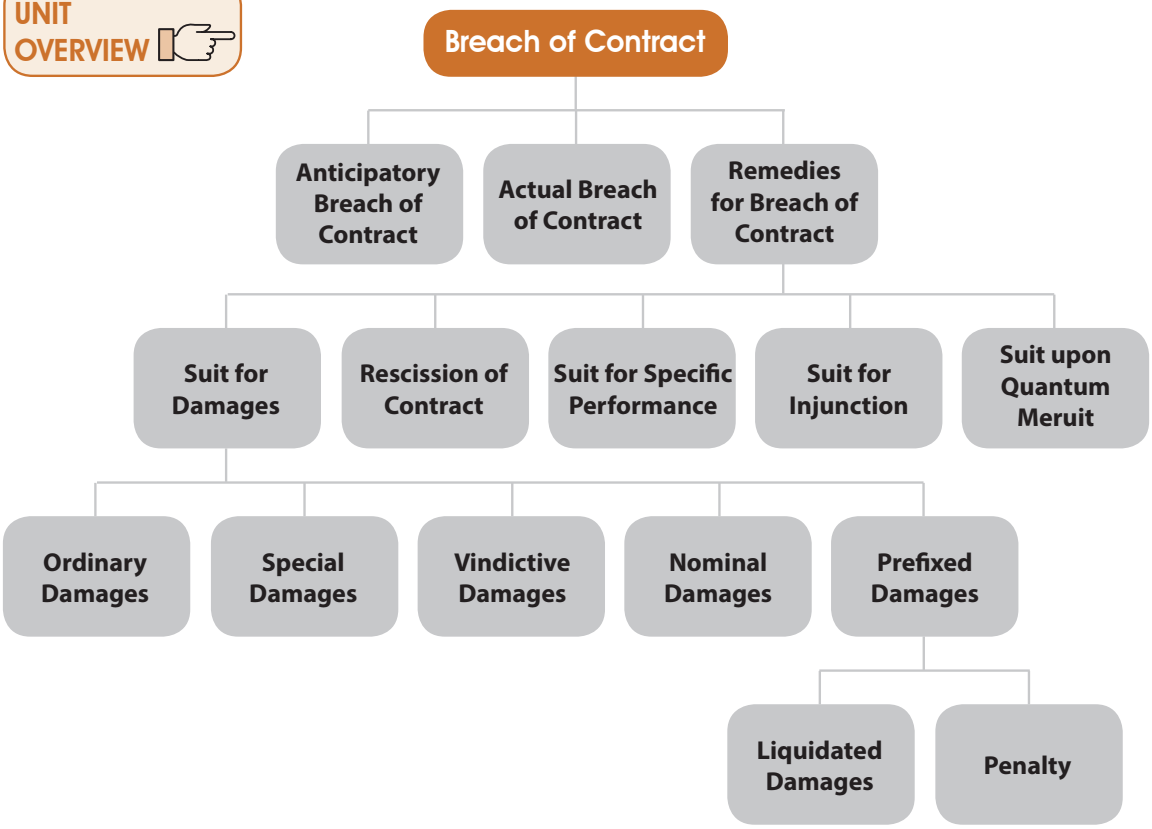
- Sometimes, the inferior rights and the superior rights coincide and meet in one and the same person. In such cases, the inferior rights merge into the superior rights. On merger, the inferior rights vanish and are not required to be enforced.

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.

UNIT - V
BREACH OF CONTRACT AND ITS REMEDIES

UNIT OVERVIEW



- We have so far seen how a contract is made, the essential of a valid contract and also how a contract is to be performed as well as how a contract may be put an end.
- We shall now discuss about the breach of contract and also the mode in which compensation for breach of contract is estimated.
- Breach means failure of a party to perform his or her obligation under a contract. Breach of contract may arise in two ways:

(1) Actual breach of contract

(2) Anticipatory breach of contract

5.1 ANTICIPATORY BREACH OF CONTRACT

- An anticipatory breach of contract is a breach of contract occurring before the time fixed for performance has arrived. When the promisor refuses altogether to perform his promise and signifies his unwillingness even before the time for performance has arrived, it is called Anticipatory Breach.

Anticipatory breach of a contract may take either of the following two ways:

(a) Expressly by words spoken or written, and

(b) Impliedly by the conduct of one of the parties.

Example 1:

Where A contracts with B on 15th July, 2016 to supply 10 bales of cotton for a specified sum on 14th August, 2016 and on 30th July informs B, that he will not be able to supply the said cotton on 14th August, 2016, there is an express rejection of the contract.

Example 2:

Where A agrees to sell his white horse to B for ₹50,000/- on 10th of August, 2016, but he sells this horse to C on 1st of August, 2016, the anticipatory breach has occurred by the conduct of the promisor.

- Section 39 of the Indian Contract Act deals with anticipatory breach of contract and provides as follows: "When a party to a contract has refused to perform or disable himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, but words or conduct, his acquiescence in its continuance."

I. Effect of anticipatory breach:

- The promisee is excused from performance or from further performance. Further he gets an option:

(1) To either treat the contract as rescinded and sue the other party for damages from 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 this 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 re-consideration, 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.

5.2 ACTUAL BREACH OF CONTRACT

- In contrast to anticipatory breach, it is a case of refusal to perform the promise on the scheduled date. The parties to a lawful contract are bound to perform their respective promises.
- But when one of the parties breaks the contract by refusing to perform his promise, he is said to have committed a breach. In that case, the other party to the contract obtains a right of action against the one who has refused to perform his promise.

Actual breach of contract may be committed-

1. At the time when the performance of the contract is due.

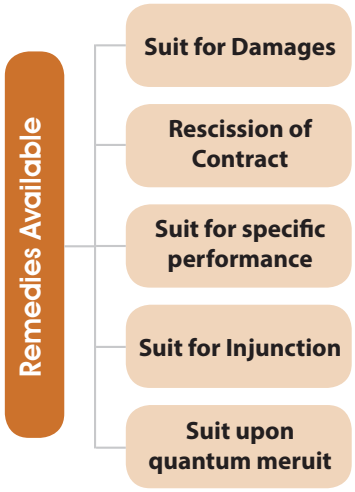
Example:

A agrees to deliver 100 bags of sugar to B on 1st February 2016. On the said day, he failed to supply 100 bags of sugar to B. This is actual breach of contract. The breach has been committed by A at the time when the performance becomes due.

2. 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.

Remedies for Breach of Contract



5.3 SUIT FOR DAMAGES

1. Compensation for loss or damage caused by breach of contract (Section 73)

- When a contract has been broken, the party who sues by such a 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.
- Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

2. Compensation for failure to discharge obligation resembling those created by contract:

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

3. Explanation to Section 73

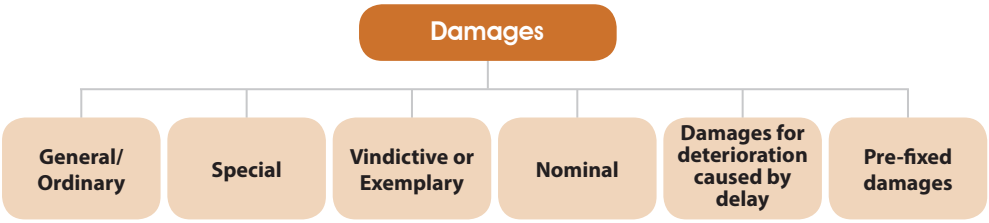
- In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Analysis of Section 73

- The Act, in Section 73, has laid down the rules as to how the amount of compensation is to be determined. On the breach of the contract, the party who sues from such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him by breach.
- Compensation can be claimed for any loss or damage which naturally arises in the usual course of events.
- A compensation can also be claimed for any loss or damage which the party knew when they entered into the contract, as likely to result from the breach.
- That is to say, special damage can be claimed only on a previous notice. But the party suffering from the breach is bound to take reasonable steps to minimize the loss.
- No compensation is payable for any remote or indirect loss.

4. Remedy by way of Damages or Kind of Damages

- Remedy by way of damages is the most common remedy available to the injured party. This entitles the injured party to recover compensation for the loss suffered by it due to the breach of contract, from the party who causes the breach. Section 73 to 75 of the Contract Act incorporate the provisions in this regard. The damages which may be awarded to the injured party may be of the following kinds:



(i) Ordinary damages:

- When a contract has been broken, the party who suffered by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage cause to him thereby, which naturally arose in the usual course of things from such breach, or which the parties know, when they made the contract, to be likely to result from the breach of it:
- Such compensation is not to be given for any remote and indirect loss or damage sustained by reasons of the breach. (Section 73 of the Contract Act and the rule in Hadley vs. Baxendale).

HADLEY vs. BAXENDALE- Facts

- The crankshaft of P's flour mill had broken. He gives it to D, a common carrier who promised to deliver it to the foundry in 2 days where the new shaft was to be made. The mill stopped working, D delayed the delivery of the crankshaft so the mill remained idle for another 5 days. P received the repaired crankshaft 7 days later than he would have otherwise received. Consequently, P sued D for damages not only for the delay in the delivering the broken part but also for loss of profits suuered by the mill for not having been worked. The count held that P was entitled only to ordinary damages and D was not liable for the loss of profits because the only information given by P to D was that the article to be carried was the broken shaft of a mill and it was not made known to them that the delay would result in loss of profits.

Example:

A agrees to sell to B bags of rice at ₹ 5,000 per bag, delivery to be given after two months. On the date of delivery, the price of rice goes up to₹5,500 per bag. A refuses to deliver the bags to B. B can claim from A `500 as ordinary damages arising directly from the breach.

(ii) Special damages:

- Where a party to a contract receives a notice of special circumstances affecting the contract, he will be liable not only for damages arising naturally and directly from the breach but also for special damages.

Example:

'A' delivered a machine to 'B', a common carrier, to be conveyed to 'A's mill without delay. 'A' also informed 'B' that his mill was stopped for want of the machine. 'B' unreasonably delayed the delivery of the machine, and in consequence 'A' lost a profitable contract with the Government. In this case, 'A' is entitled to receive from 'B', by way of compensation, the average amount of profit, which would have been made by running the mill during the period of delay. But he cannot recover the loss sustained due to the loss of the Government contract, as 'A's contract with the Government was not brought to the notice of 'B'.

(iii) Vindictive or Exemplary damages

These damages may be awarded only in two cases -

(a) for breach of promise to marry because it causes injury to his or her feelings; and

(b) for wrongful dishonour by a banker of his customer's cheque because in this case the injury due to wrongful dishonour to the drawer of cheque is so heavy that it causes loss of credit and reputation to him. A business man whose credit has suffered will get exemplary damages even if he has sustained no pecuniary loss. But a non-trader cannot get heavy damages in the like circumstances, unless the damages are alleged and proved as special damages. (Gibbons v West Minister Bank)

(iv) Nominal damages:

- Nominal damages are awarded where the plaintiff has proved that there has been a breach of contract but he has not in fact suffered any real damage. It is awarded just to establish the right to decree for the breach of contract. The amount may be a rupee or even 10 paise.

(v) Damages for deterioration caused by delay:

- In the case of deterioration caused to goods by delay, damages can be recovered from carrier even without notice. The word 'deterioration' not only implies physical damages to the goods but it may also mean loss of special opportunity for sale.

(vi) 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.

5.4 PENALTY AND LIQUIDATED DAMAGES (SECTION 74)

- The parties to a contract may provide before hand, the amount of compensation payable in case of failure to perform the contract. In such cases, the question arises whether the courts will accept this figure as the measure of damage.

1. English Law:

- According to English law, the sum so fixed in the contract may be interpreted either as liquidated damages or as a penalty.
- If the sum fixed in the contract represents a genuine pre-estimate by the parties of the loss, which would be caused by a future breach of the contract it is liquidated damages.
- It is an assessment of the amount which in the opinion of the parties will compensate for the breach. Such a clause is effective and the amount is recoverable. But where the sum fixed in the contract is unreasonable and is used to force the other party to perform the contract; it is penalty. Such a clause of disregarded and the injured party cannot recover more than the actual loss.

2. Indian Law:

- Indian law makes no distinction between 'penalty' and liquidated damages'. The Courts in India award only a reasonable compensation not exceeding the sum so mentioned in the contract. Section 74 of the Contract Act lays down if the parties have fixed what the damages will be, the courts will never allow more.
- But the court may allow less. A decree is to be passed only for reasonable compensation not exceeding the sum named by the parties.
- Thus, Section 74 entitles a person complaining of breach of contract to get reasonable compensation and does not entitle him to realise anything by way of penalty.

3. 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.

Example 1:

A contracts with B, that if A practices as a surgeon in Kolkata, he will pay B ₹50,000. A practices as a surgeon at Kolkata, B is entitled to such compensation not exceeding ₹50,000 as the court considers reasonable.

Example 2:

A borrows ₹ 10,000 from B and gives him a bond for ₹ 20,000 payable by five yearly instalments of ₹ 4,000 with a stipulation that in default of payment, the whole shall become due. This is a stipulation by way of penalty.

Example 3:

A undertakes to repay B, a loan of ₹ 10,000 by five equal monthly instalments with a stipulation that in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty and the contract may be enforced according to its terms.

4. Distinction between liquidated damages and penalty

- Penalty and liquidated damages have one thing in common that both are payable on the occurrence of a breach of contract. It is very difficult to draw a clear line of distinction between the two but certain principles as laid down below may be helpful.

1. If the sum payable is so large as to be far in excess of the probable damage on breach, it is certainly a penalty.
2. Where a sum is expressed to be payable on a certain date and a further sum in the event of default being made, the latter sum is a penalty because mere delay in payment is unlikely to cause damage.
3. The expression used by the parties is not final. The court must find out whether the sum fixed in the contract is in truth a penalty or liquidated damages. If the sum fixed is extravagant or exorbitant, the court will regard it is as a penalty even if, it is termed as liquidated damages in the contract.
4. The essence of a penalty is payment of money stipulated as a terrorem of the offending party. The essence of liquidated damages is a genuine pre-estimate of the damage.
5. English law makes a distinction between liquidated damages and penalty, but no such distinction is followed in India. The courts in India must ascertain the actual loss and award the same which amount must not, however exceed the sum so fixed in the contract. The courts have not to bother about the distinction but to award reasonable compensation not exceeding the sum so fixed.

- Besides claiming damages as a remedy for the breach of contract, the following remedies are also available:

(i) Rescission of contract:

- When a contract is broken by one party, the other party may treat the contract as rescinded. In such a case he is absolved of all his obligations under the contract and is entitled to compensation for any damages that he might have suffered.

Example:

A promises B to deliver 50 bags of cement on a certain day. B agrees to pay the amount on receipt of the goods. A failed to deliver the cement on the appointed day. B is discharged from his liability to pay the price.

(ii) 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.

Example 1:

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.

Example 2:

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 first installment but failed to supply the second. B must pay for 50 bags.

(iii) Suit for specific performance:

Where damages are not an adequate remedy in the case of breach of contract, the court may in its discretion on a suit for specific performance direct party in breach, to carry out his promise according to the terms of the contract.

(iv) Suit for injunction:

- Where a party to a contract is negating the terms of a contract, the court may by issuing an 'injunction orders', restrain him from doing what he promised not to do.

Example:

N, a film star, agreed to act exclusively for a particular producer, for one year. During the year she contracted to act for some other producer. Held, she could be restrained by an injunction.

Party rightfully rescinding contract, entitled to compensation (Section 75)

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

Example:

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