

PERFORMANCE OF CONTRACT

Obligation of Parties to Contract: (Sec.37)

“The parties to a contract **must either perform or offer to perform**, their respective promises, **unless** the performance is dispensed with or excused under the provisions of this Act or any other law.”

Thus, each party under a contract is bound to perform his obligation under the contract unless the performance is excused under the provisions of the Indian Contract Act or any other law.

The parties may actually perform their contract, or make an offer to perform it. This is clear from the words “the parties must either perform or offer to perform.”

Thus, the performance of contract may be by:

1. Actual Performance of the promise.
2. Offer of performance of the promise (i.e. tender of performance).

Types of Performance:

1. **Actual Performance:** Where under a contract a party has done what he had undertaken to do and nothing remains to be done by him, the promise is said to have been actually performed and the liability of such party comes to an end. This is known as the actual performance of the contract.

For example: ‘A’ borrows ₹ 10,000 from ‘B’ to be repaid after two months. ‘A’ repays the amount on the due date. This is actual performance.

2. **Attempted Performance or Tender of Performance:** When the promisor offers to perform his obligations under the contract but the promisee refuses to accept the performance, it is known as ‘attempted performance’ or ‘tender of performance’. A valid offer of performance is equivalent to actual performance.

For example: ‘A’ promises to deliver certain goods to ‘B’. ‘A’ takes the goods to the agreed place during business hours but ‘B’ refuses to take the delivery of goods.

In the above example, ‘A’ has done what he was required to do under the contract. It is an attempted performance. In case of attempted performance, the promisor shall not be liable for non-performance nor does he lose his rights under the contract because an attempted performance is as good as actual performance of the contract.

Essentials of a Valid Tender of Performance (Sec. 38)

- (a) The tender must be unconditional i.e. it should be in accordance with the terms of the contract.
- (b) The tender must be of the whole quantity contracted for and not only a part of it.
- (c) The tender must be made at the proper time and place.
- (d) The tender must provide a reasonable opportunity to the other party to ascertain that the person making the tender is able and willing to perform the whole promise.
- (e) The tenderor must provide a reasonable opportunity to the other party to see that the things offered are the same as agreed.

Effect of a Refusal of Party of Perform Promise: (Sec.39)

When a party to a contract has refused to perform, or disabled himself from performing his promise, the following two rights accrue to the aggrieved party, namely,

- (a) to terminate the contract;
- (b) to indicate by words or by conduct that promisee is interested in its continuance.

Example: Arijit, a singer, enters into a contract with Bhushan, the Manager of a theatre, to sing at his theatre two nights every week during next two months, and B engages to pay him ₹ 1,00,000 for each night's performance. On the sixth night, Arijit willfully absents himself from the theatre. Bhushan is at liberty to put an end to the contract or even Bhushan may continue the contract and wait for the next performance by Arijit.

When the promisee decides to continue the contract, he will not be entitled to put an end to the contract on this ground subsequently.

But, in both the above case, the promisee would be able to claim damages that he suffers as a result on the breach.

By Whom a Contract may be Performed [Sec. 40, 41 & 42]:

The promise under a contract may be performed, as the circumstances may permit, by

1. **Promisor himself:** If there is something in the contract to show that there was an intention of the parties that the performance should be made personally, such promise must be performed by the promisor himself (Sec. 40). Such contracts involve personal skill or diligence.
2. **Agent:** Where personal consideration is not required, the promisor or his representative may employ a competent person to perform (Sec. 40).
3. **Legal Representatives:** Except the contracts which involve personal skill and diligence all contracts may be performed by the legal representatives of the deceased promisor unless a contrary intention appears from the contract (Sec. 37). But their liability under a contract is limited to the value of the property they inherit from the deceased.
4. **Third Persons:** When the promisee accepts performance from a third person, he cannot afterwards enforce it against the promisor (Sec. 41).
5. **Joint Promisors:** 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 lost survivor, the representatives of all must jointly fulfil the promise (Sec. 42).

Distinguish between Succession and Assignment:

<u>Succession</u>	<u>Assignment</u>
Transfer of rights and liabilities of a deceased person to his legal representative is called succession.	Transfer of rights by a person to another person is called assignment.
It takes place on death of a person	It takes place during the lifetime of a person.
It may take place even without a written document.	It requires execution of assignment deed.
All rights and liabilities of a person are transferred.	Only rights of a person are transferred.
No notice is required to be given to any person.	Notice must be given to creditor.

Performance of Joint Promises:

Liability of Joint Promisors [Devolution of Joint Liabilities] [Sec. 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 fulfill the promise.

Any one of joint promisor may be compelled to perform [Sec. 43]

When two or more persons make a joint promise, the promisee may, in the absence of an express agreement to the contrary, compel any one or more of such joint promisors to perform the whole promise. Thus, **the liability of joint promisors is joint as well as several.**

Where a joint promisor has been compelled to perform the whole promise, he may compel every other joint promisor to contribute equally with himself to the performance of the promise (unless a contrary intention appears from the contract). If any one of the joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

For Example,

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.

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

Release of one of the joint promisors [Sec. 44]

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 promisors; neither does it free him from responsibility to the other joint promisors.

For 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.

Right to claim performance of Joint Promisees [Devolution of Joint Rights] [Sec. 45]

When a person has made promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the **right to claim performance rests with all the joint promisees** and after the death of any of them with the representatives of such deceased promisee jointly with the survivor or survivors and after the death of the survivors also, with the representatives of all jointly.

The **right of the joint promisee is only joint** and thus any of them cannot enforce performance unless so agreed.

Time and Place for the performance of the Promise:

Sec. 46 to 50 of the Indian Contract Act, 1872 are relevant regarding time and place for the performance of the promise which are as follows:

1. If no time is specified; the promise must be performed **within a reasonable time**. The expression 'reasonable' time is interpreted having regard to the facts and circumstances of a particular case. (Sec. 46)

2. If a promise is to be performed on a specified date but hour is not mentioned, the promisor may perform it **at any time during the usual hours of business, on such day**. Moreover, the delivery must be made at the usual place of business. (Sec. 47)
3. Where no place is fixed, it is the duty of the **promisor to ask the promisee to fix a reasonable place** for the performance of the promise. In all cases the promisor must apply to the promisee; here no distinction is made between an obligation to pay money and obligation to deliver goods or discharge any other obligation. (Sec. 49)

The foregoing rules regarding the time and place for the performance of promise apply, only when the promisor undertakes to perform the promise without an application being made by the promisee.

4. Where the promisor has not undertaken to perform the promise without an application by the promisee, and the promise is to be performed on a certain day it is the **duty of the promisee to apply for performance at a proper place and within the usual hours of business** (Sec. 48). Generally, the performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Appropriation of Payments:

The term ‘appropriation of payment’ means the application of payment. Where 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 under:

1. **Application of payment where debt to be discharged is indicated (Sec. 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.
2. **Application of payment where debt to be discharged is not indicated (Sec. 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.
3. **Application of payment where neither party appropriates (Sec. 61):** Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they time barred or not by the law in force. If the debts are of equal standing, the payments shall be applied in discharge of each proportionately.