

## Indian Contract Act, 1872

### Unit - 4; Performance of Contract

#### \* Performance of Contract :-

**Meaning :-** Performance of contract means carrying out the obligations.

#### **Types :-**

(i) **Actual (Sec. 37) :-** When all the parties fulfilled their obligation under the contract.

**Example 1 :-** X agrees to sell his watch to Y for Rs. 50,000. X delivers the watch and Y makes the payment.

(ii) **Tender Performance (Sec. 38) :-** Promisor offers to perform his obligation under the contract at the proper time and place but the promisee refuses to accept the performance.

**Example 2 :-** 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.

\* Condition To Be Satisfied for A valid Performance:—

1. must be unconditional.

Example 3:- X offers to Y the principal amount of the loan. This is not a valid tender since the whole amount of principal and interest is not offered.

2. It must be made at proper time and place.

Example 4:- If the promisor wants to deliver the goods at 1 a.m., this is not a valid tender unless if was so agreed.

3. Reasonable opportunity to examine goods.

Example 5:- A Contract's to deliver B at his warehouse, on 1<sup>st</sup> march 2021, 1000 bales of cotton of a particular quality. A must bring the cotton to B's warehouse on the appointed day, under such circumstances that

B may have reasonable opportunity to satisfy himself that the thing offered is cotton of the quality contracted for, and that there are 1000 bales.

4. It must be for whole obligation.

Example 6: A promises to deliver 100 bags of rice on a certain day. If on the agreed day and place 'A' offers to deliver 80 bags only. This is not a valid tender.

5. It must be made to the promisee or his duly authorized agent, However a tender may be made to any one of the joint promisee.

6. Tender must be of exact amount and must be in legal tender :-

⇒ It should not be in any other form such as Cheque or foreign currency, except the person to whom it is made is ready and willing to accept it.

\* By whom contract may be performed?

1. **Promisor himself** :- Where the contract involve personal skills / consideration.

Example 7 :- A promises to paint a picture for B. A must perform this promise personally.

2. **Agent** :- Where the contract does not involve personal skill / consideration, the promisor may employ a competent person to perform it.

Example 8 :- A promises to deliver 100 kgs of rice to B. A may personally deliver it or he may employ some person to deliver the same.

3. **Legal Representative** :- In case of death of the promisor, the legal representative must perform the promise unless a contrary intention appears from the contract.

However, a contract which involves personal skill or personal consideration comes to an end with the death of the promisor.

Example 9:- A promises to paint a picture for B by a certain day. A ~~de~~ dies before that day. The contract cannot be enforced either by A's representatives or by B.

4. Third Person (sec. 41):- When a promisee accepts performance of the promise from a third person, he cannot afterward enforce it against the promisor.

Example 10:- A owes B Rs. 5,000. C pays to B Rs. 1,000 and B accepts them, in satisfaction of his claim on A. This payment is discharge of the whole claim.

5. Joint Promisors:- When two or more persons have made a joint promise, then unless a contrary intention appears from the contract, all such person must jointly fulfill the promise. If any of them dies, his legal representatives must, jointly with the surviving surviving promisors, fulfill the promise. If all of them die, the legal representatives of all of them must

fulfill the promise jointly. (Sec. 42.)

Example 12:- A promises to B to pay Rs. 1,000 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 Rs. 1,000 to B's representative.

### \* Performance of Joint Promises.

(i) Devolution of joint liabilities (obligation to perform joint promises):-

⇒ Devolution means passing over from one person to another.

⇒ When two or more person have made a joint promise, they are

Known as joint promisors. Unless a contrary intention appears from the contract, all joint promisors must jointly fulfill the promise.

If any of them dies, his legal representative must, jointly with the surviving promisors, fulfill the promise. If all of them die, the legal representative of all of them must fulfill the promise jointly.

\* The rules regarding performance of joint promises are :-

(a) Anyone of the joint promisors may be compelled to perform

Example 12:- A, B and C jointly promise to pay D Rs. 3,000. D may compel C either A or B or C or any two of them to pay him Rs. 3,000.

(b) Right of contribution.

Example 13:- A, B and C are under a joint promise to pay Rs. 3,000. A is compelled to pay the whole. A can recover Rs. 1,000 each from B and C.

NOTE:- If any one of the joint promisors make default in such contribution, the remaining joint promisors must bear the loss arising from such defaulting in equal share.

### (c) Release of joint promisor:-

⇒ Where two or more person have made a joint promise, a release of one such joint promisor by the promisee does not discharge the other joint promisor or promisors from liability. The released joint promisor is responsible to the other joint promisor or promisors.

Example 14:- A, B and C jointly promised to pay Rs. 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 Rs. 9,00,000 to D. And though A is not liable to pay



to D but he remains liable to B and C i.e. he is liable to make the contribution to the other joint promisors.

(iii) Devolution of joint rights:- When a person has made a promise to two or more persons jointly, these persons are known as joint promisees.

Unless a contrary intention appears from the contract, the right to claim performance rests with all the joint promisees, when one of the joint promisee dies, the right to claim performance rests with his legal representatives jointly with the ~~survivor~~ surviving joint promisees. When all the joint promisees die, the right to claim performance rest with their legal representative jointly.

Example 15:- A, in consideration of Rs. 5000 lent to him by B and C, promises B and C jointly repay the 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 his life-time, and after the death of C, with the legal representatives of B and C jointly.

\* Time, place & manner of Performance.

(1) 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 time.

(2.) 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 at any time during the usual hours of business, on such day and the place at which the promise ought to be performed.

Example 16:- A promise to deliver goods to B at his warehouse on 15<sup>th</sup> April. But goods could not be received since A offered after 8.30 pm, the promisee may refuse to accept delivery for the usual business hours are over.

3. 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 promisee to apply for performance at a proper place and within the usual hours of business.

NOTE:- "What is the proper time and place". depends on the facts of each ~~state~~ case.

(1.) 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 duty of the promisee 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 17:- A undertakes to deliver a thousand Kgs 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.

(5) Performance in manner or at time prescribed or sanctioned by promise  
- Section 50.

⇒ Where the promisee has prescribed or sanctioned any manner or time of performance, it must be performed only in such manner and such time.

Example 181: B owes A Rs. 2000. A delivers B to pay the amount to A's account with C, a banker. B who also banks with C, orders the amount to be transferred from his account to A's credit and this is done by C. Afterwards and before A knows of the transfer, C the banker fails. There has been good payment by B.

## \* Performance of Reciprocal Promises:-

= meaning:-

- ⇒ Reciprocal promise means a promise in return for a promise.
- ⇒ Thus, where a contract consists of promise by one party (to do or not to do something in future) in consideration of a similar promise by other party, it will be called a case of reciprocal promises.

## \* Types and Rules:-

### (I) Mutual and Dependent:-

- ⇒ In such a case, the performance of one party depends upon the prior performance of the other party. Thus, if the promisor who must perform, fails to perform it, he cannot claim the performance of the reciprocal promise. On the other hand, he 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.

Example 19: A contracts with B to execute certain builder's work for a fixed price. B supplying the necessary timber for the work. B refuses to furnish any timber and the work cannot be executed. A need ~~to~~ not execute the work and B is bound to make compensation to A for any loss caused to him by the non-performance of the Contract.

## (2) Mutual and Independent :-

⇒ In such cases, each party must perform his promise without waiting for the performance or readiness to perform on the part of the other.

Example 20 :- X promises Y to deliver him goods on 10<sup>th</sup> July and Y in turn promises to pay the price on 6<sup>th</sup> July. Y's paying

the price is independent of X's delivering the goods and even if Y does not pay the price on 6<sup>th</sup> July, X must deliver the good, on 10<sup>th</sup> July. He can of course, sue Y for compensation.

### (3) Mutual and Concurrent :-

⇒ In such cases the promises have to be simultaneously performed. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Example 21 :- Sale of goods for cash.

### (4) Reciprocal promises to do things legal and also other thing illegal (Sec. 57) :-

⇒ Where persons reciprocally promise, firstly, to do certain things which are legal and secondly, under specified circumstances, to do



Certain thing which are illegal, the set of promises is a contract but second is a void agreement.

Example 22:- A and B agree that A shall sell B a house for Rs. 10,000 but that if B uses it as a gambling house, he shall ~~be~~ pay A 50,000 rupees for it. The first set of reciprocal promises, to sell the house and pay 10,000 rupees for it is a contract. The second set is for unlawful object and is a void agreement.

\* Appropriation of Payments (Sec. 59 to 61):-

Meaning:-

⇒ When 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.

## Rule # 1. Appropriation by Debtor:-

⇒ Where a debtor owing several distinct debts to one person, makes a payment to him with express intimation that the payment is to be applied to the discharge of some particular debts, the payment, if accepted, must be applied to that debt.

Example 23:- X sold goods to Y on different dates.

10.03.2018	—	Rs. 10,000 (time barred)
01.01.2023	—	Rs. 15,000
03.01.2023	—	Rs. 8,000
05.01.2023	—	Rs. 10,000

Y made a payment of Rs. 30000 on 08.01.2023.

from which bill payment will be adjusted?

## Rule # 2. Appropriation by Creditor:-

⇒ Where the debtor does not intimate

and there are no 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, including a time-barrred debt. However, it cannot be applied to a disputed debt.

Rule #3. Where ~~neither~~ neither party appropriates:-

⇒ Where neither party makes any appropriation the payment is to be applied in discharge of the debts in order of time, including time-barrred debts. However, it cannot be applied to a disputed debt.

If the debts are equal the payment is to be applied proportionately.

\* Distinction Between Succession And Assignment:-

\* Succession :- 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 ~~hai~~ heir.

Example 24:- 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 owned during his life-time. But if the debts owned by his father exceed the value of 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; thus far and no further.

★ Assignment, however the benefit of a contract can only be assigned, not the liabilities thereunder.

Why this is so?

⇒ This is because when the liability is assigned, a third party gets involved therein. Thus a debtor cannot relieve himself of his liability to creditors 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 proposal personal consideration has entered into the making of the contract then the benefit cannot be assigned.

\* Impossibility of performance :- (Sec. 56).

(1) 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. The fact of impossibility may be and may not be known to the parties.

(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 25 :- B promised to pay a sum

of Rs. 5,000 if he is able to swim across the Indian Ocean from Bombay 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 ~~impr~~ 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.

Example 26:- A contracted B to sell his ~~best~~ brown horse for Rs. 50,000 both unaware that the horse was dead a day before the agreement.

(iii) If ~~known~~ 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 ~~det.~~ diligence, the promisee is entitled to claim compensation for any loss he ~~be~~ suffered on account of non-performance.

## (2) Supervening Impossibility :-

⇒ When performance of promise become impossible or illegal by occurrence of an unexpected event or a change of circumstances beyond the ~~form~~ contemplation of parties, the contract becomes void eg. change in law etc.

Example 27:- '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 discharge.

## \* Discharge of Contracts :-

⇒ Discharge of contract means termination of the contractual relationship between the parties. In the other words, a contract is said to be discharged

When either of the parties in no more liable to contract.

### \* Modes of Discharge of Contracts:-

#### (1) By Performance:-

Where the parties have done whatever was contemplated under the contract.

- (a) Actual performance,
- (b) Tender performance.

#### (2) By Mutual Consent or Agreement:-

(a) Novation :- Substitution of a new contract for the original one. The new contract may be substituted either between the same parties or between different parties. But Novation should take place before the expiry of the time of the performance of the original contract.

Example 28:- X borrowed Rs. 1000 from Y. X, Y and Z agreed that the debt will be discharged by Z. Now, a new contract between Y and Z is formed and old contract



Between X and Y comes to end.

(b) Rescission:- Cancellation of all or some of the terms of the contract by mutual understanding of parties.

Example 29:- A contracted with B for supply of 100 Kgs of rice. Later on, they agree that no rice need to be supplied. The contract is rescinded by mutual agreement.

(c) Alteration:- If the parties mutually agree to change certain terms of the contract, it has effect of terminating the original contract. There is, however, no change in the parties.

Example 30:- A agrees to supply cotton of grade 1 to B. Before delivery, A and B agree that in place of grade 1, the cotton of grade 2 will be supplied. There is an alteration in contract.

(d) Remission:- Acceptance of lesser sum than what was contracted for or a lesser fulfillment of promise made.

Example 31:- A has borrowed Rs. 1000 from B at interest of Rs. 100. B agrees not to demand the amount of interest from A. This is remission.

(e) Waiver:- Relinquishment or abandonment of a right. Where a party waives his rights under the contract, the other party is released of his obligations.

Example 32:- In the above example if B agrees not to demand the whole amount of loan. This is waiver.

(f) Merges:- A contract is said to have been discharged by way of 'merges' where an inferior right possessed by a person merges with a superior right of the same person.

Example 33:- A holds a property under a lease. He later buys the property. His rights as a tenant leasee merges into his right as an owner.

(3) By Impossibility:-

=> Impossibility in a contract may either

be inherent in the transaction or it may be introduced later by the change of certain circumstances material to the contract.

Inherent impossibility: Known to the parties.

Example 34:- A agrees with B to discover treasure by magic.

Subsequent impossibility:- A contract is deemed to have become impossible of performance and thus void under the following circumstances:

(a) Destruction of subject matter of the contract:-

Example 35:- A music hall was agreed to be let out on certain date, but before date it was destroyed by fire. Held that the owner was absolved from liability to let the building as promised.

(b) By death or disablement of the parties:-

=> Where the performance must be executed personally.

(c) Subsequent Illegality.

(d) Declaration of war subsequent to the making of contract.

(e) Non-existence of State of things.

⇒ ~~but~~ When certain things necessary for performance cease to exist, the contract become void on the ground of impossibility.

Example 38:- X and Y contract to marry each other. Before the time fixed for marriage, X goes mad. The contract becomes void.

\* Exceptions to Impossibility:-

⇒ Difficulty of possibility does not amount to impossibility.

⇒ Commercial impossibility does not render a contract void.

⇒ strikes, lock-outs and civil disturbances.

⇒ Non-performance by the third party does not absolve the promisor from his liability.

#### (4) By Operation of law:-

##### (a) By death of promisor:-

⇒ Death of the promisor results in termination of the contract in cases involving personal skill or ability.

(b) By insolvency:- Where an order of discharge is passed by an insolvency court, the insolvent stands discharged of liabilities of all debts incurred prior to his adjudication.

(c) By merger:- refer discussed before in this chapter.

(d) By the unauthorized alteration of terms of a written document.

#### (5) By Breach of Contract:-

⇒ When a party repudiates it before the time fixed for performance.

Example 37:- A contracts to marry B. Before the agreed date of marriage he marries C. B is entitled to sue A for breach of promise.

## Consequences of Anticipatory Breach:-

- ⇒ The promise may either :-
- (a) rescinded the contract and treat contract as at an end, and at once sue for damages, or
  - (b) he may elect not to rescind but to treat contract operative and wait for the time of performance and then hold the party liable for the consequences for non-performance.

Example 38:- X agrees to sell to Y a certain quantity of wheat at Rs. 100/- per quintal to be delivered on the 3<sup>rd</sup> March. on the 2<sup>nd</sup> February, X gives notice expressing his unwillingness to sell wheat; and the price of wheat on the date is Rs. 110/- per quintal. If Y repudiates the contract ~~forthwith~~ (which he is entitled to do at his option), he would be able to recover damages @ Rs. 10/- per quintal. If instead of taking action forthwith,

he keeps the contract alive till the 3<sup>rd</sup> march and in the mean time, the price increases to Rs. 125/- per quintal on the date. Y would be able to recover damages @ Rs. 25/- per quintal.

⇒ If, on the other hand, during the intervening period between 2<sup>nd</sup> february and 3<sup>rd</sup> march, private sale of wheat is prohibited by the govt., the contract would become void, and Y would not be able to recover any damages whatever.

(b) Actual breach of contract. It may take place.

⇒ at the time when performance is due ~~for~~

⇒ during the performance of contract.

Example 39:- A agrees to deliver 100 bags of sugar to B on 1<sup>st</sup> Feb. 2024. 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.

## (6) 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 not action is taken by the promisee within the specified period of limitation, he is deprived of remedy of law.

Example 40:- 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.

## \* Contracts which need not be performed:-

(1) If the parties mutually agree to substitute the original contract by a new or to rescind or alter it.

(2) If the promisee dispenses with or remits, wholly or in part the performance of the promise made



to or extends the time for such performance or accepts any satisfaction for it.

(3) If the person, at whose option the contract is voidable, rescinds it.

(4) If the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise.

(5) If it is illegal.