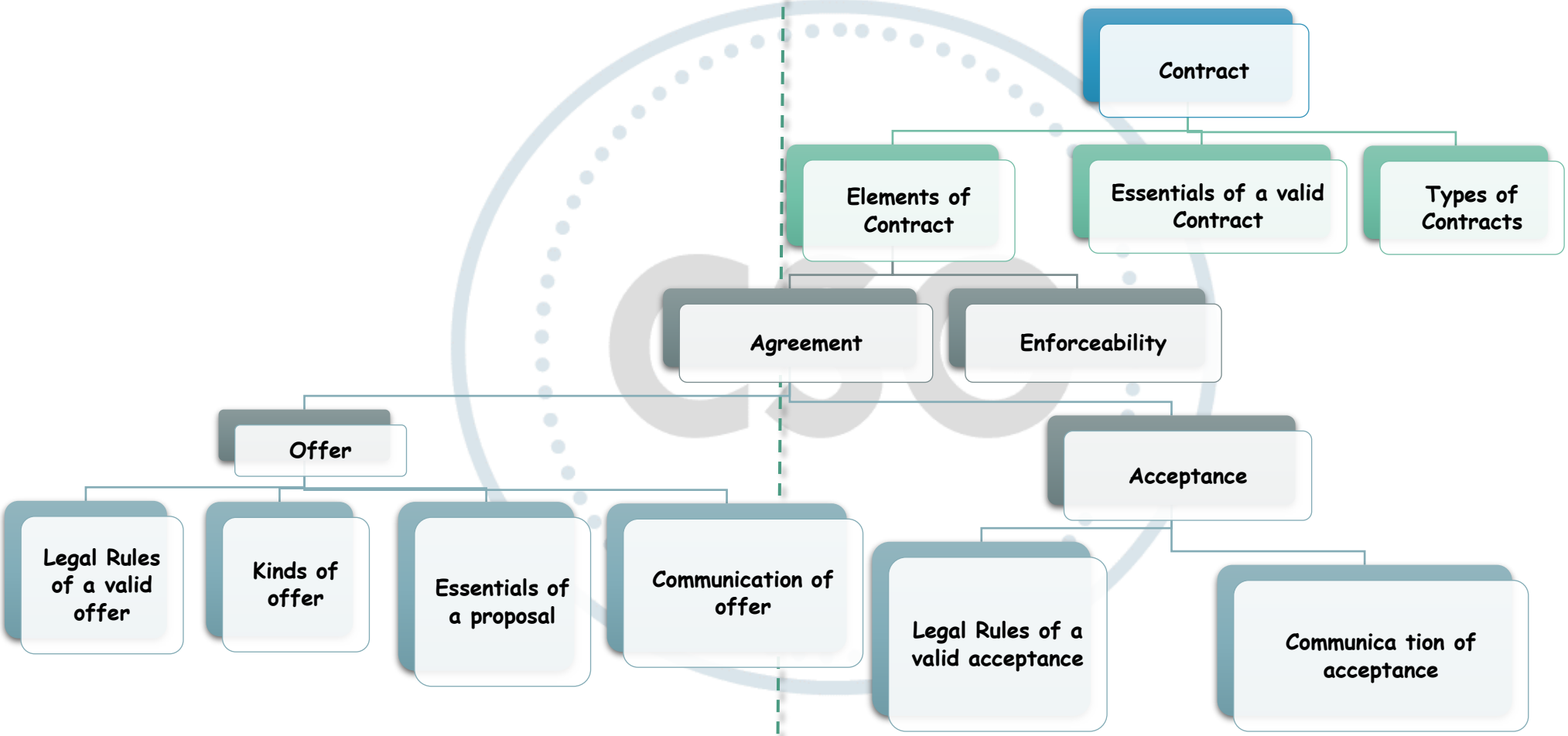
2 Indian Contract Act, 1872

Unit – 1: Nature of Contracts



Contract Law before Indian Contract Act, 1872

To understand the Contract Law before the Indian Contract Act, 1872, we should understand the journey of contract law during different time periods. In the ancient and medieval time, there was no specific law for contracts. For this purpose, generally, different sources of Hindu law like; Vedas, Dharam shastras, Smritis, Shrutis etc. were referred which gave a vivid description of the law similar tocontracts in those times. During the period of Mauryas, contracts were in the form of **"Bilateral transactions"** which were based on free consent on all the terms and conditions involved.

During the Mughal rule in India, contracts were governed by Mohammedan Law of Contract. In this law, the Arabic word 'Aqd' is known for contract which means a conjunction. In the same way, word 'Ijab' was used for proposal and 'Qabul' was used for acceptance. The formation of a contract according to Islamic law does not require any kind of formality; the only requirement is the express consent of both parties on the same thing in the same sense.

Hindu law is basically different from that of English law. Hindu law is actually the compilation of numerous customs and works of Smritikaras, who interpreted and analysed Vedas to develop the various aspect of Hindu law. According to Hindu law, minor, intoxicated person, old man or handicapped cannot enter into a valid contract. According to Narada smriti, someone of age up to 8 years is considered as an infant. Age from 8 years to 16 years is considered as boyhood and after 16 years the person is competent to enter into a contract.

During British period; before the advent of the Indian Contract Act, the English Law was applied in the Presidency Towns of Madras, Bombay and Calcutta under the Charter of 1726 issued by king George to the East India Company. If one of the parties of contract is from either of the religion and other is from other religion then the law of the defendant is to be used. This was followed in the presidency towns, but in cities outside the presidency towns, the matters were solved on the basis of justice, equity and good conscience. This procedure was followed till the Indian Contract Act was implemented in India.

The Law of contract: Introduction

The Law of Contract constitutes the most important branch of mercantile or commercial law. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the civilized world. The law relating to contract is governed by the Indian Contract Act, 1872. It was formed on April 25, 1872 and came into force on September 01, 1872. The preamble to the Act says that it is an Act "to define and amend certain parts of the law relating to contract". It extends to the whole of India including the state of Jammu and Kashmir after removal of Article - 370 of Indian Constitution.

The Act mostly deals with the general principles and rules governing contracts. The Act is divisible into two parts. The first part **(Section 1-75)** deals with the general principles of the law of contract, and therefore applies to all contracts irrespective of their nature. The second part **(Sections 124-238)** deals with certain special kinds of contracts, e.g., Indemnity and guarantee, bailment, pledge, and agency.

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 aspect. It does not prescribe so many rights and duties, which the law will protect or enforce; instead, 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. It basically defines the circumstances in which promises made by the parties to a contract shall be legally binding on them.

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.

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

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 + Consideration**
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 = 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 capable 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.

Example: Father promises his son to pay him pocket allowance of Rs. 500 every month. But he refuses to pay later. The son cannot recover the same in court of law as this is a social agreement. This is not created with an intention to create legal relationship and hence it is not a contract.

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	Agreement	Contract
Meaning	Every promise and every set of promises, forming the consideration for each other. (Promise + Consideration)	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.

Basis	Agreement	Contract
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.

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

As given by Section 10 of Indian Contract Act, 1872	Not given by Section 10 but are also considered essential
Agreement	Two parties
Free consent	Intention to create legal relationship
Competency of the parties	Fulfilments of legal formalities
Lawful consideration	Certainty of meaning
Legal object	Possibility of performance
Not expressly declared to be void [as per Section 24 to 30 and 56]	-

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 other sections which also contains requirements for an agreement to be enforceable. **Thus, in order to create a valid contract, the following elements should be present:**

Two Parties → **Parties must intend to create legal obligations** → **Other Formalities to be complied with in certain cases** → **Certainty of meaning** → **Possibility of performance of an agreement**

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.

Two Parties	**Example:** To constitute a contract of sale, there must be two parties- seller and buyer. The seller and buyer must be two different persons, because a person cannot buy his own goods. In **State of Gujarat vs. Ramanial S & Co.** when on dissolution of a partnership, the assets of the firm were divided among the partners, the sales tax officer 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.
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 a 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)
	Example: Mr. Lekhpal promises to pay 5 lakhs to his son if the son passes the CA exams. On passing the exams, the son claims the money. Here, the son could not recover as it was a social agreement. **Example:** A sold goods to B on a condition that he must pay for the amount of goods within 30 days. Here A intended to create legal relationship with B. Hence the same is contract. On failure by B for making a payment on due date, A can sue him in the court of law.
Other Formalities to be complied with in certain cases	A contract may be written or spoken. As to legal effects, there is no difference between a written contract and contract made by word of mouth. But in the interest of the parties the contract must be written. In case of certain contracts some other formalities have to be complied with to make an agreement legally enforceable. **For 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. Thus, where there is any statutory requirement that any contract is to be made in writing or in the presence of witness, or any law relating to the registration of documents must be complied with. 

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. **Example:** XYZ Ltd. agreed to lease the land to Mr. A for indefinite years. The contract is not valid as the period of lease is not mentioned.
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.

Now, 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 for consideration.

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 consent must be free.

Consent would be considered as free consent if it is not caused by coercion undue influence, fraud, misrepresentation or mistake.

Example: A, who owns two cars is selling red car to B. B thinks he is purchasing the black car. There is no consensus ad idem and hence no contract. To determine consensus and idem the language of the contract should be clearly drafted. Thus, if A says B "Will you buy my red car for 3,00,000?". B says "yes" to it. There is said to be consensus ad idem i.e., the meaning is taken in same sense by both the parties.

Example: A threatened to shoot B if he (B) does not lend him 2,00,000 and B agreed to it. Here the agreement is entered into under coercion and hence not a valid contract.

(Students may note that the terms coercion, undue influence, fraud, misrepresentation, mistake is explained in the Unit-3)

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 for being 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, suffered 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. 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.

Example: A agrees to sell his house to B against 100 kgs of cocaine (drugs). Such agreement is illegal as the consideration is unlawful.

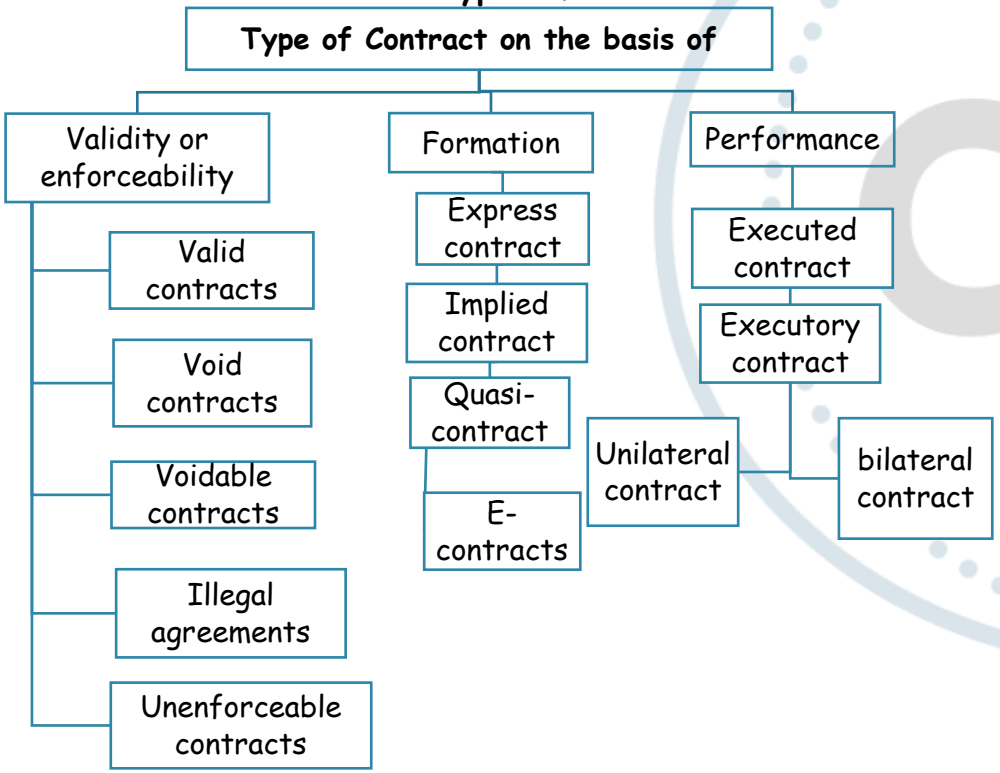
VI. Not expressly declared to be void: The agreement entered into must not be which the law declares to either illegal or void.

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.

Types Of Contracts

Now let us discuss various types of contracts.



I. On the basis of the validity

Valid Contract | Void Contract | Voidable Contract | Illegal Contract | Unenforceable Contract

1. Valid Contract: An agreement which is binding and enforceable is a valid contract. It contains all the essential elements of a valid contract

Example: A ask B if he wants to buy his bike for 50,000. B agrees to buy bike. It is agreement which is enforceable by law. Hence, it is 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. Such contract is valid. But after few days, X dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract. Thus, a valid contract when cannot be performed because of some uncalled happening becomes void.

Example: A contracts with B (owner of the factory) for the supply of 10 tons of sugar, but before the supply is affected, 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.

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.
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 avoidable 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.

Following are the situations where a contract is voidable:

(i) When the consent of party is not free is caused by coercion, undue influence, misrepresentation or fraud.

Example: X promise to sell his scooter to Y for 1 Lac. However, the consent of X has been procured by Y at a gun point. X is an aggrieved party, and the contract is voidable at his option but not on the option of Y. It means if X accepts the contract, the contract becomes a valid contract then Y has no option of rescinding the contract.

(ii) When a person promises to do something for another person, but the other person prevents him from performing his promise, the contract becomes voidable at the option of first person.

Example: There is a contact between A and B to sell car of A to B for 2,00,000. On due date of performance, A asks B that he does not want to sell his car. Here contract is voidable at the option of B.

(iii) When a party to a contract promise to perform a work within a specified time, could not perform with in that time, the contract is voidable at the option of promise.

Example: A agrees to construct a house for B up to 31-3-2022 but A could not complete the house on that date. Here contract is voidable at the option of B.

At this juncture it would be desirable to know **the distinction between a Void Contract and a Voidable Contract.** These are elaborated hereunder:

Basis	Void Contract	Voidable Contract
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.
Enforceability	A void contract cannot be enforced at all.	It is enforceable only at the option of aggrieved party and not at the option of other party.
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.

Basis	Void Contract	Voidable Contract
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.
Rights	A void contract does not grant any legal remedy to any party	The party whose consent was not free has the right to rescind the contract within a reasonable time. If so rescinded, it becomes a void contract. If it is not rescinded it becomes a valid 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. Despite this, there is similarity between them is that in both cases they are void ab initio and cannot be enforced by law.

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. The illegal and void agreement differ from each other in the following respects:

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.

Example: A bought goods from B in 2018. But no payment was made till 2022. B cannot sue A for the payment in 2022 as it has crossed three years and barred by Limitation Act. A good debt becomes unenforceable after the period of three years as barred by Limitation Act.

Similarly, an agreement for transfer of immovable property should be written for being enforceable.

II. On the basis of the formation of contract

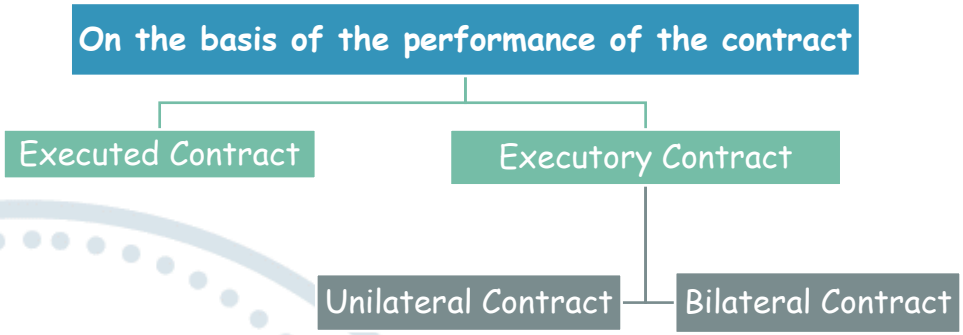
Express Contracts → **Implied Contracts** → **Quasi-Contract** → **E-Contracts**

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? 20 lacs and B in reply informs A that he accepts the offer, this is an express contract.
2. **Implied Contracts**	Implied contracts in contrast come into existence by implication. Most often the implication is by action or conduct of parties or course of dealings between them. **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. **Example:** A drinks a coffee in restaurant. There is an implied contract that he should pay for the price of coffee

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.

3. 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. **Example:** T, a tradesman, leaves goods at C's house by mistake. C treats the goods as his own. C is bound to pay for the goods.
4. 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 award of 50,000 to anyone 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 10 lacs cash down, but B pays only 2,50,000 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. Such Executory contracts are also known as Bilateral contracts.

Example: A promises to sell his plot to B for 10 lacs cash down, but B pays only 2,50,000 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. Such Executory contracts are also known as Bilateral contracts.

Proposal / Offer [Section 2(A) Of the Indian Contract Act, 1872]

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".

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':** There must be an expression of willingness to do or not to do some act by the offeror.

Example: A willing to sell his good at certain price to B.

Example: A is willing to not to dance in a competition if B pays him certain sum of money.

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

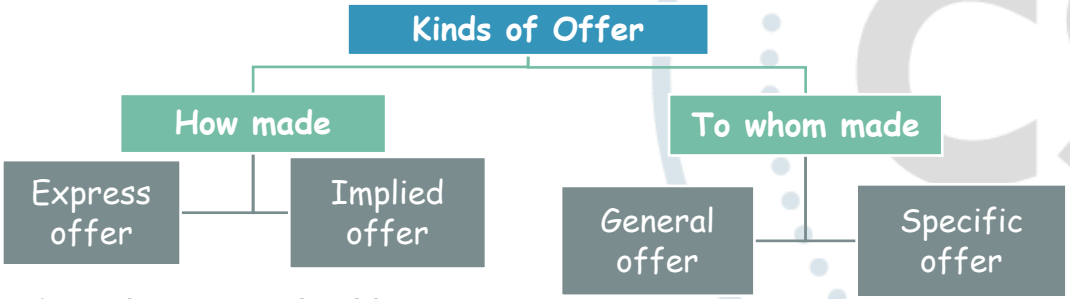
Example: Where 'A' tells 'B' that he desires to marry by the end of 2022, it does not constitute an offer of marriage by 'A' to 'B'.

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.

4. 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 effect 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.

Example: 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.



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 Vs. 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 withdrawn, 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 Ball Co. according to printed directions. One lady, Mrs. Carlill, used the smoke balls as per the directions of company and even then, suffered 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 Vs. 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 8 was not aware of proposal made by A. It is only cross proposal (cross offer). And when two persons make offer to each other, it cannot be treated as mutual acceptance. There is no binding contract in such a case.

(d) **Counter offer:** 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 will result in the termination of the offer of 'A'. 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.

(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 8 was not aware of proposal made by A. It is only cross proposal (cross offer). And when two persons make offer to each other, it cannot be treated as mutual acceptance. There is no binding contract in such a case.

(d) **Counter offer:** 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 will result in the termination of the offer of 'A'. 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.

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.

Example: A invited B on his birthday party. B accepted the proposal but when B reached the venue, he (8) found that A was not there. He filed the suit against A for recovery of travelling expenses incurred by him to join the birthday party. Held, such an invitation did not create a legal relationship. It is a social activity. Hence, B could not succeed.

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.

Example: 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.
If in the above example, A is a dealer in mustard oil only, it shall constitute a valid offer.

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 vs. 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: Offeror 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. **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 traffic 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.

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

(i) **A statement of intention and announcement.**

Example: A father wrote his son about his wish of making him the owner of all his property is mere a statement of intention.

Example: An announcement to give scholarships to children scoring more than 95% in 12th board is not an offer.

(ii) **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 plaintiffs through a telegram asked the defendants two questions namely,

(i) Will you sell us Bumper Hall Pen? and

(ii) Telegraph lowest cash price.

The defendants replied through telegram that the "lowest price for Bumper Hall Pen is £ 900". The plaintiffs sent another telegram stating "we agree to buy Bumper Hall Pen at £ 900". However, the defendants refused to sell the property at the price.

The plaintiffs sued the defendants contending that they had made an offer to sell the property at £ 900 and therefore they are bound by the offer.

However, the Privy Council did not agree with the plaintiffs on the ground that while plaintiffs had asked two questions, the defendant replied only to the second question by quoting the price but 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.

(iii) **A statement of price is not an offer:** Quoting the price of a product does not constitute it as offer. (refer case of **Harvey Vs. Facie** as discussed above)

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.

(iv) 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.

When goods are sold through auction, the auctioneer does not contract with anyone who attends the sale. The auction is only an advertisement to sell but the items are not put for sale though persons who have come to the auction may have the intention to purchase. Similar decision was given in the case of **Harris vs. Nickerson (1873).**

Similarly, Prospectus issued by a company, is only an invitation to the public to make an offer to subscribe to the securities of the company.

10. A statement of price is not an offer

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.

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:

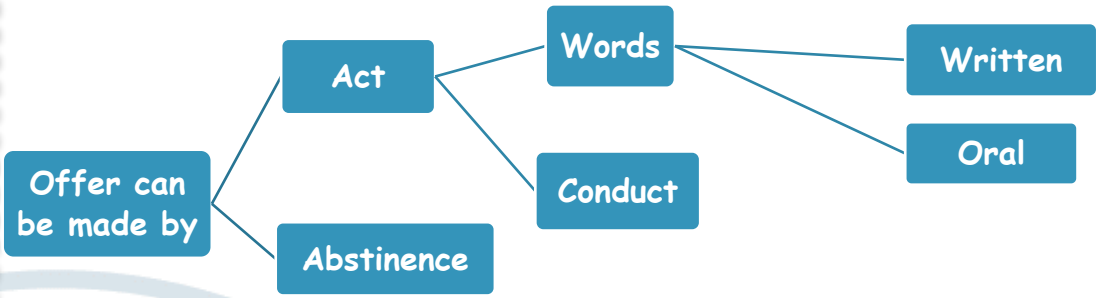
(i) A Prospectus by a company to the public to subscribe for its shares.

(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.

Basis	Offer	Invitation to offer
Meaning	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.	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.
Intention of the parties	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.	If a person has the intention of negotiating on terms it is called invitation to offer.
Sequence	An offer cannot be an act precedent to invitation to offer.	An invitation to offer is always an act precedent to offer.



Acceptance

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 2,00,000. 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 consent on that 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.

Relationship between offer and acceptance: **According to Sir William Anson "Acceptance is to offer what a lighted match is to a train of gun powder".**

The effect of this observation is that what acceptance triggers cannot be recalled or undone. But there is a choice to the person who had the train to remove it before the match is applied. It in effect means that the offer can be withdrawn just before it is accepted. Acceptance converts the offer into a promise and then it is too late to revoke it. This means as soon as the train of gun powder is lighted it would explode. Train of Gun powder [offer] in itself is inert, but it is the lighted match [the acceptance] which causes the gun powder to explode. The significance of this is an offer in itself cannot create any legal relationship but it is the acceptance by the offeree which creates a legal relationship. Once an offer is accepted it becomes a promise and cannot be withdrawn or revoked. An offer remains an offer so long as it is not accepted but becomes a contract as soon as it is accepted.

Legal Rules regarding a valid acceptance

(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 Brocklehurst'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 Boulton for the goods because by entering into the contract with Brocklehurst, he intended to set off 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.

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 instalments 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].**

An offer to sell his house to B for 30,00,000/-. B replied that, "I can pay 24,00,000 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 30,00,000/-. This is also treated as counter offer and it is up to A whether to accept it or not. **[Union of India v. Bahulal AIR 1968 Bombay 294].**

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 50,000/-, 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:

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.

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)**

A mere variation in the language not involving any difference in substance would not make the acceptance ineffective. **[Heyworth vs. Knight [1864] 144 ER 120].**

Example: A proposed B to marry him. B informed A's sister that she is ready to marry him. But his sister didn't inform A about the acceptance of proposal. There is no contract as acceptance was not communicated to A.

(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 offeror 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.

Example: A offered to sell B 50 kgs of bananas at Rs. 500. B communicated the acceptance after four days. Such is not a valid contract as bananas being perishable items could not stay for a period of week. Four days is not a reasonable time in this case

Example: A offers B to sell his house at Rs. 20,00,000. B accepted the offer and communicated to A after 4 days. Held the contract is valid as four days can be considered as reasonable time in case of sell of house

(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 constitute the offer, which has been accepted by the trades man subsequently by sending the goods. It is a case of acceptance by conduct.

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 offers 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.

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".

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.

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 effect 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'.

Example: A offers 50,000 to B if he does not arrive before the court of law as evidence to the case. B does not arrive on the date of hearing to the court. Here omission of doing an act amounts to acceptance.

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 against 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, i.e., 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's acceptance, 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 affect 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.

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

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.

Example: 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 Airlines office, which passengers may not have cared to read.

The question here is whether these conditions can be considered to have been communicated to the passengers of the Airlines and can the passengers be treated as having accepted the conditions. The answer to the question is in the affirmative and was so held in **Mukul Datta vs. Indian Airlines [1962] AIR cal. 314** where the plaintiff had travelled from Delhi to Kolkata by air and the ticket bore conditions in fine print. But such terms and condition should be reasonable.

Example: 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.
Standard forms of contracts: It is well established that a standard form of contract may be enforced on another who is subjectively unaware of the contents of the document, provided the party wanting to enforce the contract has given notice which, in the circumstances of a case, is sufficiently reasonable.

But the acceptor will not incur any contractual obligation, if the document is so printed and delivered to him in such a state that it does not give reasonable notice on its face that it contains certain special conditions. In this connection, let us consider a converse situation. A transport carrier accepted the goods for transport without any conditions. Subsequently, he issued a circular to the owners of goods limiting his liability for the goods. In such a case, since the special conditions were not communicated prior to the date of contract for transport, these were not binding on the owners of goods **[Raipur transport Co. vs. Ghanshyam [1956] A. Nag.145].**

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:

from the viewpoint of proposer and

the other from the viewpoint of acceptor himself

From the viewpoint of proposer, when the acceptance is put into 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.

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.

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 8 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.

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.

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.

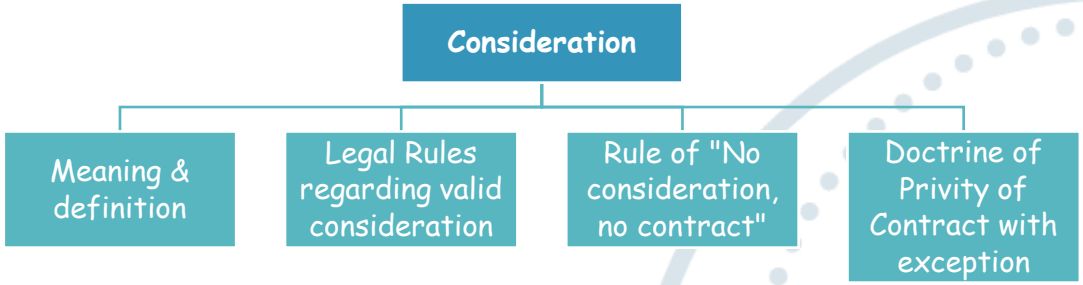
Revocation of proposal otherwise than by communication: When a proposal is made, the proposer may not wait indefinitely for its acceptance. The offer can be revoked otherwise than by communication or sometimes by lapse.

Modes of revocation of offer

(i) By notice of revocation	**Example:** A offered B to sell goods at Rs. 5,000 through a post but before B could accept the offer A received highest bid for the goods from C. So, A revoked the offer to B by informing B over the telephone and sold goods to C.
(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 Prem Ji** 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-fulfilment of condition precedent:	Where the acceptor fails to fulfil 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.	

2 Indian Contract Act, 1872

Unit-2: 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.

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, suffered or undertaken by the other (i.e., the promisee)."

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".

(1) Consideration is an act- doing something.

Example: Ajay guarantees Bhuvan for 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.

Example: A college promises students, who will score above 95% for the job in MNC. Consideration need not to be monetary. Here the promise for recruitment of candidate will be considered as consideration for the act of students scoring above 95%.

(2) Consideration is abstinence abstain from doing something.

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

Example: ABC has a shop of electric items. XYZ wishes to open another electric shop next to his shop. ABC offers Rs 2,00,000 to XYZ for shifting the same away from 1 km of ABC's shop. Here, consideration is given for abstaining XYZ from opening his shop nearby.

(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.

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 promis 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 (plaintiff) 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 anot person does

something such an act is consideration. In other words, there can be a stranger to a consideration but no 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 sufficient 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 passed, 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 past consideration and A can sue B for recovering the promised money.

Example: A cash sale of goods is an example of present consideration. The consideration is immediately made against delivery of goods.

(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 evidence in support of this allegation.

Example: X promises to sell a house worth 360 lacs for 10 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:

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.

Example: A promise to pay 2,000 to a doctor over the fees is invalid as it is the duty of a doctor to give a treatment for his normal fees.

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

Example: A man promises to discover treasure by magic, bringing the dead person to live again. 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: ABC Ltd. promises to give job to Mr. X in a Government bank against payment of * 50,000 is void as the promise is opposed to public policy.

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 off 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 is reduced into writing, the members of family who originally had not been parties to the settlement may enforce the agreement.

Example: Two brothers X and Y agreed to pay an allowance of 20,000 to mother on partition of joint properties. But later they denied to abide by it. Held their mother although stranger to contract can require their sons for such allowance in the court of law.

(3) **In the case of certain marriage contracts / 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.

Example: Mr. X's wife deserted him for ill-treating her. Mr. X promised his wife's father Mr. Puri that he will treat her properly or else pay her monthly allowance. But she was again ill-treated by her husband. Held, she has all right to sue Mr. X against the contract made between Mr. X and Mr. Puri even though she was stranger to contract.

(4) **In the case of assignment of a contract,** when the benefit under a contract has been assigned, the assignee can enforce the contract but such assignment should not involve any personal skill.

Example: Mr. Ankit Sharma has assigned his insurance policy to his son. Now son can claim even if he was not a party to contract.

(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

Example: If L gives to M 720,000 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.

Example: One owner of the land having two land adjacent to each other. One was agricultural land. He sold the other land containing a condition that it can never be used for Industrial purpose so as to protect the other agricultural land from pollution. Such condition is attached with the land so who so ever is the successor of land has to abide by it. Such are called restrictive covenants and all successor are bind to it.

(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

Example: Prashant appoints Abhinav as his agent to sell his house. Abhinav sells house to Tarun. Now Prashant has right to recover the price from Tarun.

Validity Of Consideration Agreement Without

The general nude 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.

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 (eg, 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.

Example: A out of natural love and affection promises to give his newly wedded daughter-in-law a golden necklace worth 5,00,000. 'A' made the promise in writing and signed it and registered. The agreement is 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 bind, **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 wallet and gives it to him. R promises to give P ₹0,000. This is a valid contract.

Example: Mr. X had helped his nephew Mr. Y to fight a case in the court of law using his knowledge and intellect. After Mr. Y won the case, he promised Mr. X to pay Rs. 10,000. Held, this is a valid contract as it is compensation to past services.

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 sign a written promise now to pay ₹50,000 in final settlement of the debt. This is a contract without consideration, but enforceable for $50,000 only.

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

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 done, of any gift actually made." Thus, gifts do not require any consideration.

6. Bailment:

No consideration is required to affect the contract of bailment. **Section 148** of the Indian Contract Act, 1872, defines bailment as the delivery of goods from one person to another for some purpose. This delivery is made upon a contract that post accomplishment of the purpose, the goods will either be returned or disposed of, according to the directions of the person delivering them. No consideration is required to affect a contract of bailment.

Example: Mr. A hand over the keys of his godown to Mr. Y as Mr. Y had deposited his goods in the same. Mr. Y gets possession of godown but not the ownership. As soon as Mr. Y lifts his goods from godown he is liable to hand over the keys back to Mr. A.

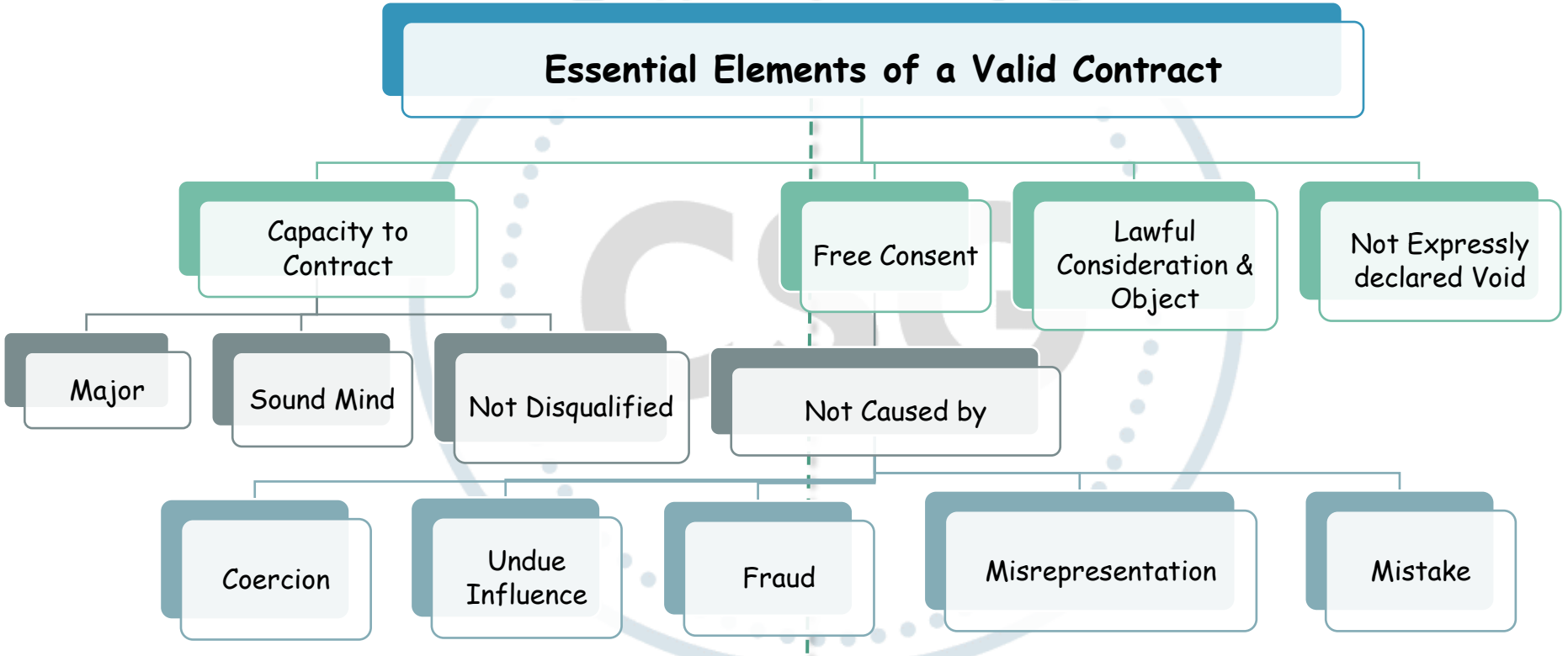
7. **Charity:** If a promisee undertakes the liability on the promise of the person to contribute to charity, there the contract shall be valid.

(Kadarnath v. Gorie Mohammad)

Example: Mr. G promised Mr. K, the secretary of committee of temple to donate *1,00,000 for renovation of that temple. On the faith of his promise, secretary has incurred some cost for renovation. Now secretary can claim from Mr. G even the contract was without consideration.

2 Indian Contract Act, 1872

Unit-3: Other Essential Elements of a Contract



It has already been discussed that an agreement results from a proposal by one party and its acceptance by the other party. We have already discussed offer, acceptance and consideration in detail. We shall now discuss in detail the elements which constitute a valid contract enforceable in law.

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.

Capacity To Contract

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

Who is competent to contract (Section 11)

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.

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),** ""Mr. D a minor, mortgaged his house for Rs. 20,000 to money lender, but the mortgagee i.e., money lender has paid him Rs. 8,000. Subsequently the minor filed a suit for cancellation of contract. Held the contract is void as Mr. D is minor and therefore he is not liable to pay anything to lender."
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 favour 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 the minor from making the other party bound to him. 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 plead his minority in defence. **Example:** A, a minor has falsely induced himself as major and contracted with Mr. X for loan of 20,000. When Mr. X asked for the repayment A denied to pay. He pleaded that he was a minor so cannot enter into any contract.
	Held, A cannot be held liable for repayment of amount. However, if he has not spent the same, he may be asked to repay it but the minor shall not be liable for any amount which he has already spent even though he received the same by fraud. Thus, a minor can always plead minority and is not estopped from doing so even where he had produced a loan or entered into some other contract by falsely representing that he was of full age, when in reality he was a minor.
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 supplied 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. **Example:** Shruti being a minor purchased a laptop for her online classes of 70,000 on credit from a shop. But her assets could pay only * 20,000. The shop keeper could not hold Shruti personally liable and could recover only amount recoverable through her assets i.e., up to 20,000.
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 shall never be held 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. **Example:** A minor can have an account in the bank. He can draw a cheque for his purchases. But he shall not be liable for cheque bounces nor can he be sued under court of law for any fraud done from his account.
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. **Example:** Richa a minor entered into contract of buying a scotty from the dealer and mentioned that her parents will be liable for the payment of scotty.

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 purchasers, 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 (Guarantor) 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. **Example:** Mr. X guaranteed for the purchase of a mobile phone by Krish, a minor. In case of failure for payment by Krish, Mr. X will be liable to make the payment.
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 judgement 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: A patient in a lunatic asylum, who is at intervals, of sound mind, may contract during those intervals.

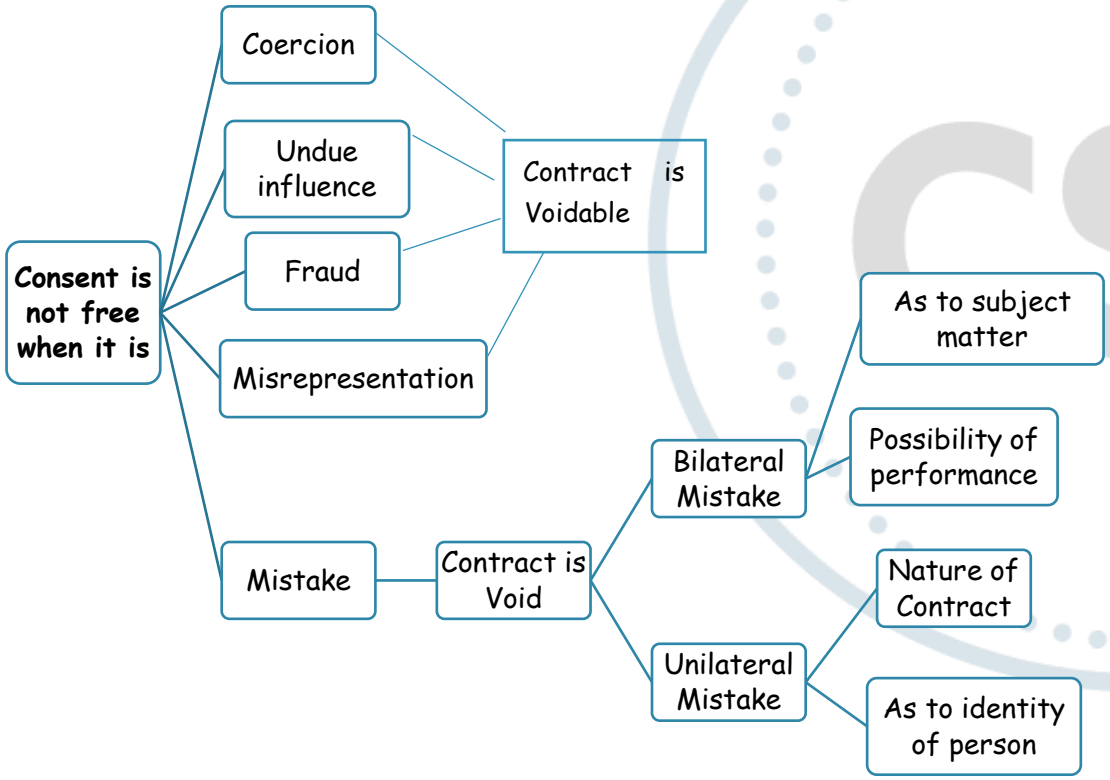
Example: A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgement as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

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 Sovereigns and Ambassadors, Alien enemy, Corporations, Convicts, Insolvent etc.

Free Consent



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.

Elements Vitiating Free Consent

We shall now explain these elements one by one.

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." 
	It is to be noted that 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.

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) A person to whom money has been paid or anything delivered under coercion must repay or return it. (Section 72)

Threat to commit suicide - Whether is it coercion?

Suicide though forbidden by Indian Penal Code is not punishable, as a dead man cannot be punished. But Section 15 declares that committing or threatening to commit any act forbidden by Indian Penal Code is coercion. Hence, a threat to commit suicide will be regarded as coercion.

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.

	Example: An agent refused to give books of accounts to the principal unless he frees him from all his liabilities. The principal had to give the release deed. Held, the contract was under coercion by unlawful detaining of the principal's property.
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".  **Example:** A having advanced money to his son, B, during his minority, upon 8'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. An employs undue influence. **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. **Example:** A spiritual guru induced his devotee to gift to him the whole of his property in return of a promise of salvation of the devotee. Held, the consent of the devotee was given under undue influence. Here, the relationship was fiduciary relationship between Guru and devotee and Guru was in a position to dominate the will of devotee. (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 temporarily 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, 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:** 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. **(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. **Example:** A teacher asks her daughter to get marry to one of his brilliant students. Both the girl and boy were smart, settled and intelligent. Here the teacher had a relation which can have influence on both of them. But as no undue advantage of such influence was taken such contract of marriage is said to be made by free consent.
	(4) Burden of proof: When a party to contract decides to avoid the contract on the ground of undue influence, he has to prove that- (a) The other party is in position to dominate his will, (b) the other party actually used his position to obtain his consent, (c)transaction is unfair or unconscionable. **Effect of undue influence- (Section 19A)** **(i)** 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. **(ii)** 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:** 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.
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.

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.

Whether Silence is fraud or not?

As per explanation of section 17, silence is fraud in following situations:

(a)**There is duty to speak.**

Example: A sell, 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: In the above example, B is A's daughter. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(b)**When silence is equal to speech.**

Example: 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. A says nothing. Here A's silence is equivalent to speech.

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

Example: 'A' who is about to sell goods says that goods cost him Rs. 50,000. This is statement of fact. But if he says the goods are worth Rs. 50,000, it is a statement of opinion.

(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.

Example: 'A' bought shares in a company on the faith of a prospectus which contained an untrue statement that 'B' was a director of the company. 'A' had never heard of 'B' and, therefore, the statement was immaterial from his point of view. A's claim for damages in this case was dismissed because the untrue statement had not induced 'A' to buy the shares.

(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. **Exception:** In the following cases, contract is not voidable: **(i)**If the party whose consent was caused by silence which amounting to fraud, had the means of discovering the truth with ordinary diligence. **(ii)** A fraud which did not cause the consent of the party to agreement.
IV. Misrepresen-tation (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:** 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:** '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. **Example:** A while selling his mare to B, tells him that the mare is thoroughly sound. A genuinely believes the mare to be sound although he has no sufficient ground for the belief. Later on, B finds the mare to be unsound. The representation made by A is a misrepresentation. **Example:** A buy an article thinking that it is worth? 1000 when in fact it is worth only 500. There has been no misrepresentation on the part of the seller. The contract is valid.

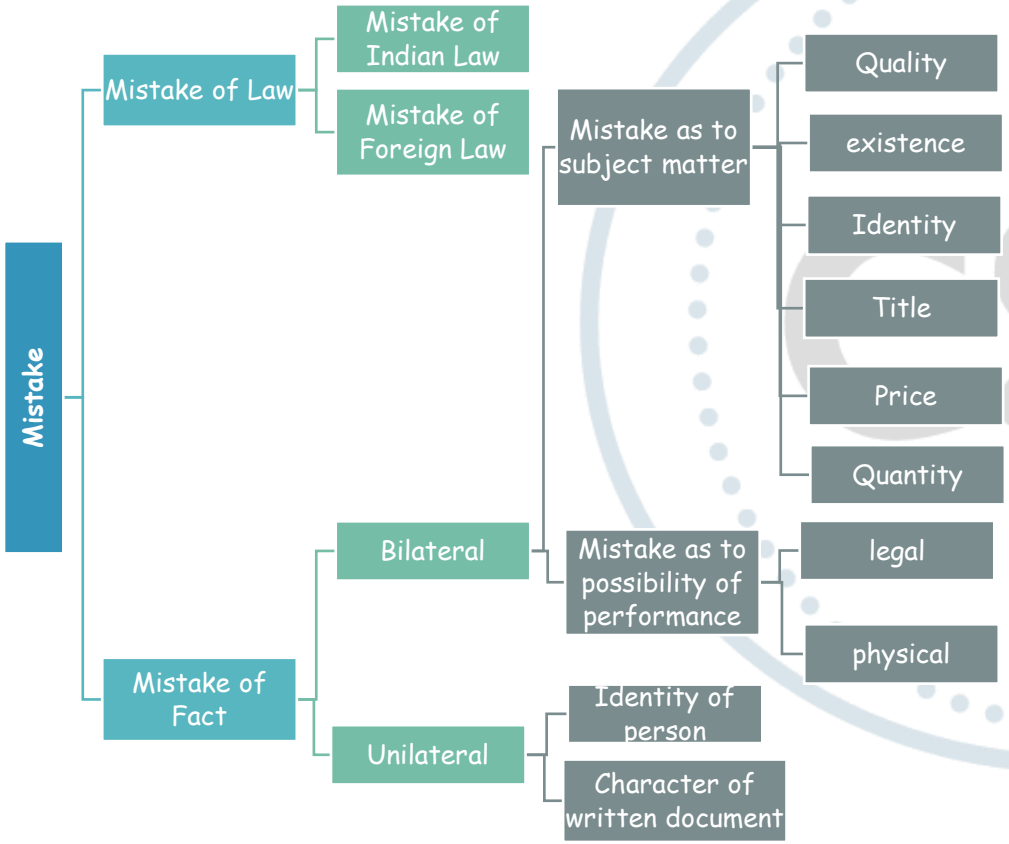
Difference Between Coercion and Undue Influence:

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 design 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, Section 64, any as per 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.



Mistake: Mistake may be defined as innocent or erroneous belief which leads the party to misunderstand the others. Mistake may be either mistake of law or mistake of fact.

Mistake of Law: Mistake of law is further classified as mistake of Indian law or mistake of foreign law.

(i) Mistake of Indian Law: A person cannot be allowed to get any relief on the ground that it had done a particular act in ignorance of law.

Example: A and B enter into a contract on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. This contract is not voidable.

(ii) Mistake of foreign law: Such a mistake is treated as mistake of fact and the agreement in such a case is void.

Mistake of fact: Mistake of fact are of two types –
(i) Bilateral Mistake, (ii) Unilateral Mistake

(i) Bilateral mistake: Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, there is a bilateral mistake. In such a case, the agreement is void (Section 20).

Cases of Bilateral Mistakes

(i) Mistake as to the quality of the subject-matter.
(ii) Mistake as to the existence of the subject-matter.

(iii) Mistake as to the identity of the subject-matter.
(iv) Mistake as to the title of the subject-matter.
(v) Mistake as to the price of the subject-matter.
(vi) Mistake as to the quantity of the subject-matter.

(ii) Unilateral Mistake: According to Section 22, a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

Legality Of Object and Consideration

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

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 is 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 father had arranged for marriage of his 17 years boy and took dowry from the girl's parents. Such marriage contract cannot take place as in India the minimum age for boy marriage is 21 years and dowry are not permissible in Indian law. Such is not a valid contract as the consideration and object both are forbidden by law.

(ii) When consideration or object are of such a nature that if permitted it would defeat the provisions of law:

If the consideration or the object of an agreement is of such a nature that not directly but indirectly, it would defeat the provisions of the law, the agreement is void.

Example: A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B. upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which 8 has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(iii) When it is fraudulent: Agreements which are entered into to promote fraud is void.

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

(iv) 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.

Example: 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

Example: 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 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

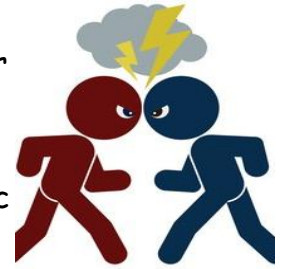
(v)When consideration is immoral: The following are the examples of agreements where the object or consideration is unlawful, being immoral.

Example: 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.

Example: A asks B, "If you arrange a girl for marriage with me, I will give Rs. 50,000." Here contract is void as it is immoral.

(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

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 offends against the public policy by tending to prejudice the interest of the State in times of war.  **Example:** India entered in war like situation with China, Mr. A from India entered into contract with China for import of toys Such contract is void as China is allen enemy of India. The contract if made before such war like situation may be suspended or dissolved. Like India felt apps like tik tok and PUBG will provide some internal information of the country, hence such apps were banned and any contract with them were dissolved
(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 at any public offence is generally illegal.

	Under the Indian Criminal Procedure Code, there is however, a statutory list of compoundable offences and an agreement to drop proceeding relating to such offences 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 8 abstaining from taking criminal proceeding against A with respect to an offence which is compoundable, the agreement is not opposed to public policy But, it is otherwise, if the offence is uncompoundable.
(3) **Maintenance and Champerty:**	Maintenance is an agreement in which a person promises to maintain suit in which he has no interest  **Example**: A offer B 2000, it he sues C for a case which they could have settled mutually under provisions of law, just to annoy C. Such agreements maintenance agreement. 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. **Example:** A agrees to pay expenses to B if the sues C and B agrees to pay half of the amount received from result of such suit. This is an agreement of champerty. 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) **Trafficking relating to Public Offices and titles:**	An agreement to trafficking in public office 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 office in which the pubic is interested. The following are the examples of agreements that are void: **since they are tantamount to sale of public offices** (1) An agreement to pay money to a public servant in order to induce him to retire from his office so that another person may secure the appointment is void (2) An agreement to procure a public recognition like Padma Vibhushan for reward is void **Example:** Harsh paid 15000 to the officer to give his son the job in the Forest department of India on failure by officer he couldn't recover the amount as such contract amounts to trafficking in public office which is opposed to public policy

(5) **Agreements tending to create monopolies:**	Agreements having for their object the establishment of monopolies are opposed to public policy and therefore void **Example:** XYZ and ABC were only the manufactures of oxygen cylinders in West Bengal. They both entered into contract of supplying the same at very high rates and enjoy the monopoly rates during the covid period in the country. Such contract is opposed to public policy as they intended to create monopolies.
(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:** Manage 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 officer 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.
(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.
(9) **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.

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

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

An agreement in restraint of legal proceedings 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 a hundred tons of all 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 of because in such a case it smarting 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 have legitimate interest.

Example: A agrees to pay 50,000 to B if it rains, and B promises to pay a like amount to an 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

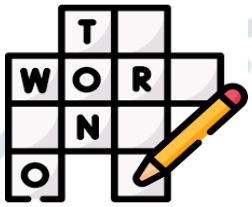
1. There must be a promise to pay money or money's worth.
2. Promise must be conditional on an event happening or not happening.
3. There must be uncertainty of event
4. There must be two parties each party must stand to win or lose.
5. There must be common intention to bet at the timing of making such 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. Were 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 effect 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 2944 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. Chamarhangwala 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 200,000 provided 'Chetak' wins the horse race competition. This is not 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 500 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 is valid. According to the Prize Competition Act, 1955 prize competition in games of skill is not wagers provided the prize money does not exceed ₹1,000.

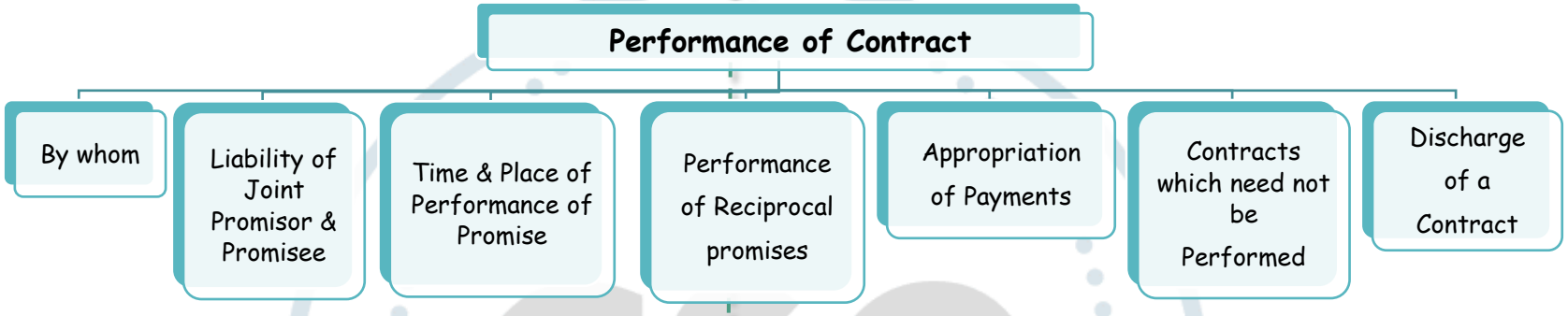
(iv) A contract of insurance: A contract of insurance is a type of contingent contract and is valid under law and these contracts are different from wagering agreements.

Distinction between Contract of Insurance and Wagering Agreement

Basis	Contracts of Insurance	Wagering Agreement
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.
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
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.
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.
Enforceability	It is valid and enforceable	It is void and unenforceable agreement.
Premium	Calculation of premium is based on scientific and actuarial calculation of risks	No such logical calculations are required in case of wagering agreement.
Public Welfare	They are beneficial to the society.	They have been regarded as against the public welfare.

2 Indian Contract Act, 1872

Unit-4: Performance of 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.

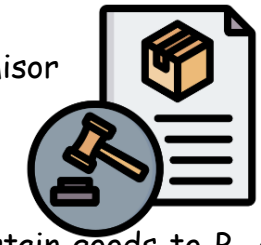
Performance Of Contract

Meaning: "Performance of Contract" means fulfilment of obligations to the contract. According to **Section 37**, the parties to a contract must either perform, or offer to perform, them respective promises unless such performance is dispensed with or excused under the provisions of the Contract Act or of any other law.

Types: On the basis of **Section 37,** "Performance of Contract" may be actual or attempted.

Actual Performance → **Offer to perform or attempted performance or tender of performance**

(a) **Actual Performance**	Where a party to a contract has done what he had undertaken to do or either of the parties has 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.

(b) **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 promise refuses to accept the performance.  **Example:** A promises to deliver certain goods to B. A takes the goods to the appointed place during business hours but B refuses to take the delivery of goods. This is an attempted performance as A the promisor has done what he was required to do under the contract.

Conditions To Be Satisfied for A Valid Tender or Attempted Performance

(i) It must be unconditional

- **Example:** A offers to B to repay only the principal amount of the loan. This is not a valid tender since the whole amount of principal and interest is not offered.

(ii) It must be made at proper time and place

- **Example:** If the promisor wants to deliver the goods at 2 a.m., this is not a valid tender unless it was so agreed.

(iii) Reasonable opportunity to examine goods.

- **Example:** A contracts to deliver B at his warehouse 1000 Kgs of wheat on certain date. A must bring the wheat to B's warehouse on the appointed day, under such circumstances that B may have reasonable opportunity of satisfying himself that the thing offered is wheat of the quality contracted for, and that there are 1000 Kgs.

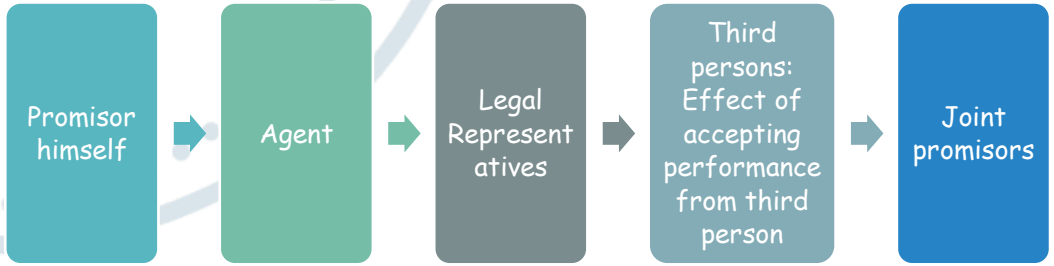
(iv) It must be for whole obligation

- **Example:** X, a singer enters into a contract with Y, the manager of a theatre to sing at his theatres two nights in every week during the next two months, and Y engaged to pay her 10,000 for each night's performance. On the sixth night, X wilfully absents herself from the theatre. Y is at liberty to put an end to the contract.

- **Example:** A promises to deliver 100 bales of cotton on a certain day. On the agreed day and place 'A' offers to deliver 80 bales only. This is not a valid tender.

By Whom a Contract May Be Performed (Section 40, 41 And 42):

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.



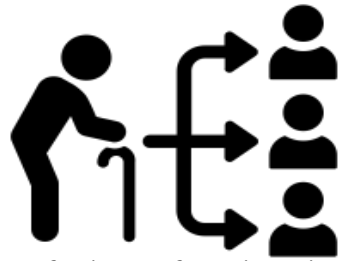
1.Promisor himself	If there is something in the contract to show that it was the intention of the parties that the promise should be performed by the promisor himself, such promise must be performed by the promisor. This means contracts which involve the exercise of personal skill or diligence, or which 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: 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:** 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/-. Therefore, in the present instance, B can sue only for the balance amount i.e., 40,000/- 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 fulfil the promise. If any of them dies, his legal representatives must, jointly with the surviving promisors, fulfil the promise. If all of them die, the legal representatives of all of them must fulfil the promise join **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.

Distinction Between Succession and Assignment

Distinction between two legal concepts, viz., succession and assignment may be noted carefully.

When the benefits of a contract is 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.

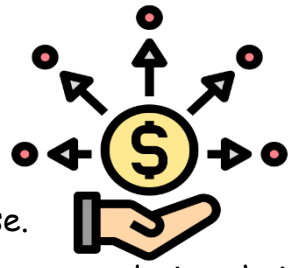
On the other hand, if a creditor assigns the benefit of a promise, he thereby entitles the assignee to realise the debt from the debtor but where the benefit is coupled with a liability or when a personal consideration has entered into the making of the contract then the benefit cannot be assigned.

Liability Of Joint Promisor & Promisee

Devolution of joint liabilities (Section 42)

If two or more persons have made a joint promise, ordinarily all of them during their life- time must

jointly fulfil 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. If in an accident all the borrowers X, Y and Z dies then their legal representatives must fulfil the promise and repay the borrowed amount. 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.

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.

Each promisor may compel contribution - Each of two or more joint promisors 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.

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

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.

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: 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: 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.

Example: X, Y and Z jointly promise to pay ₹ 6,000 to A. A may compel either X or Y or Z to pay the amount. If Z is compelled to pay the whole amount; X is insolvent but his assets are sufficient to pay one-half of his debts. Z is entitled to receive 1,000 from X's estate and 2,500 from Y.

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.

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.

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.

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 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 offered say after 8.30 pm, 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.

Performance Of Reciprocal Promise

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

(i) **Promisor not bound to perform, unless reciprocal promisee ready and willing to perform- Section 51:** When a contract consists of reciprocal promises to be simultaneously performed, no promisor needs 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.

(ii) **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.

(iii) **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: 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: 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.

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

Example: A hires B to make a shoe rack. A will supply the plywood, fevicol and other items required for making the shoe rack. B arrived on the appointed day and time but A could not arrange for the required materials. 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.

(v) 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.

(vi) Agreement to do Impossible Act (Section 56)

The impossibility of performance may be of the ***two types, namely***

(a) initial impossibility, and

(b) subsequent impossibility.

(a) 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.

(1) 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.

(2) If unknown to the parties: Where both the promisor and the promisee are ignorant of the impossibility of performance, the contract is void.

Example: A contracted B to sell his brown horse for 2,50,000 both unaware that the horse was dead a day before the agreement.

(3) 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.

(b) 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 50,00,000 and also that if B uses it as a gambling house, he will pay a further sum of 75,00,000. The first set of reciprocal promises, i.e., to sell the house and to pay 50,00,000 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.

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. However, he cannot apply the payment to the disputed debt.
(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.

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 pay 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".

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."

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, sufficient 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 the contract, 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 complete 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 fulfil 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.

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.

Example: A contracted to supply certain quantity of timber to B. B made the supply of timber at appointed time and place but A refused to accept the delivery. This is called as attempted 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 B5,00,000. A pay 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: A agrees with B to discover a treasure by magic. The agreement is void due to initial impossibility

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

Example: 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.

Example: X agrees to sell his horse to Y for 5,000 but the horse died in an accident. Here, it become impossible to perform the contract due to destruction of the subject. Thus, a valid contract changes into void contract because of impossibility of performance.

(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.

Example: A contracted with B to supply 100 kgs of rice on 1st June. But A failed to deliver the same on said date. This is actual breach of contract. If time is not essential essence of contract B can give him another date for supply of goods and he will not be liable to claim for any damages if prior notice for the same is not given to A while giving another date.

(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 satisfaction 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.

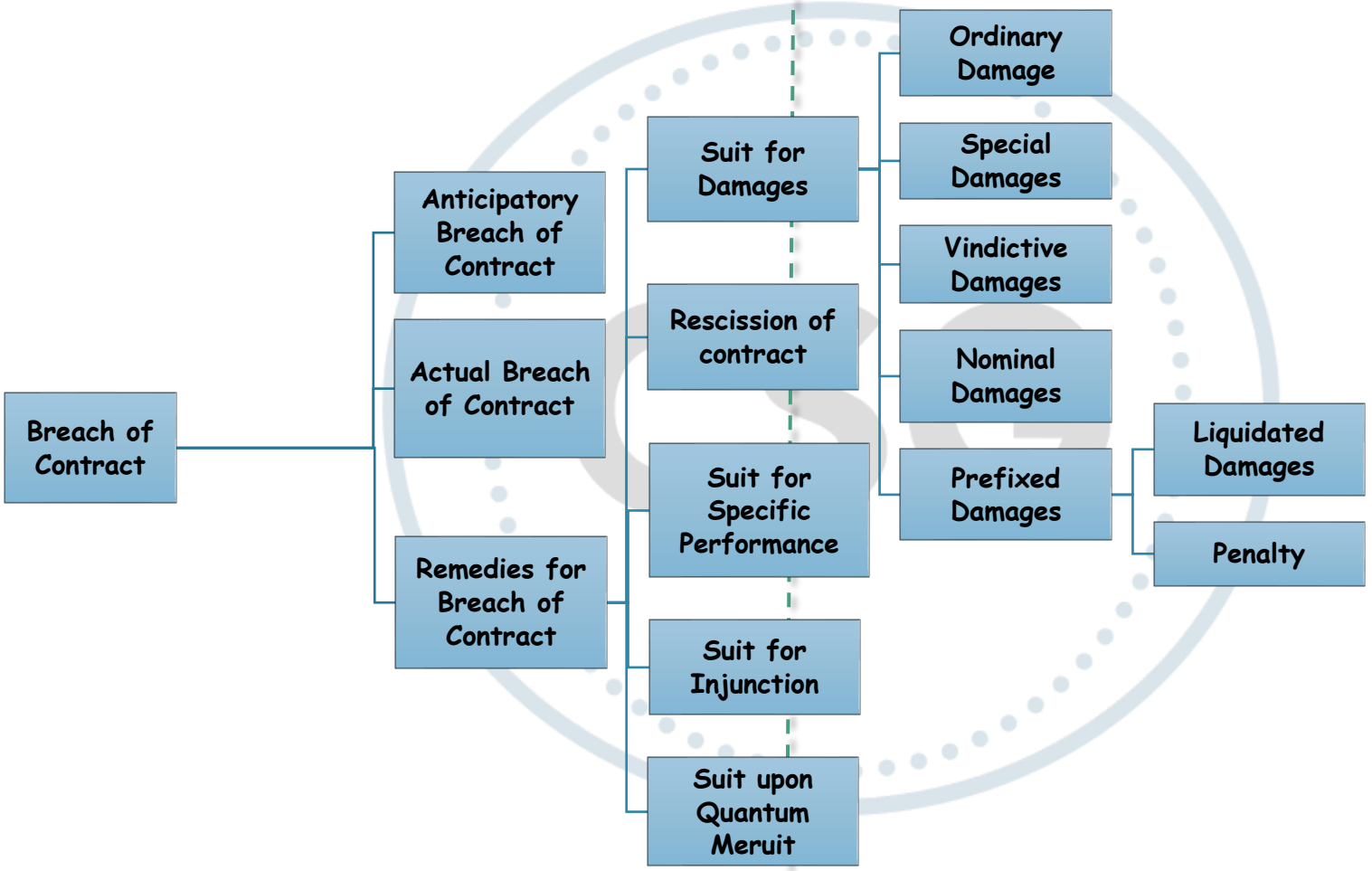
(viii) **Effects of neglect of promisee to afford promisor reasonable facilities for performance:** If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused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

2

Indian Contract Act, 1872

Unit – 5: Breach of Contract and Its Remedies



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

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: Where A contracts with B on 15th July, 2022 to supply 10 bales of cotton for a specified sum on 14th August, 2022 and on 30th July informs B, that he will not be able to supply the said cotton on 14th August, 2022, there is an express rejection of the contract.

Example: Where A agrees to sell his white horse to B for 50,000/- on 10th of August, 2022, but he sells this horse to C on 1st of August, 2022, the anticipatory breach has occurred by the conduct of the promisor.

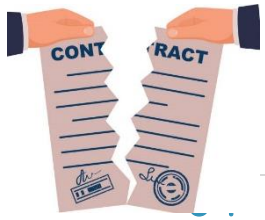
Section 39 of the Indian Contract Act deals with anticipatory breach of contract and provides as follows: "When a party to a contract has refused to perform or disable himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, but words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

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.

Actual Breach of Contract



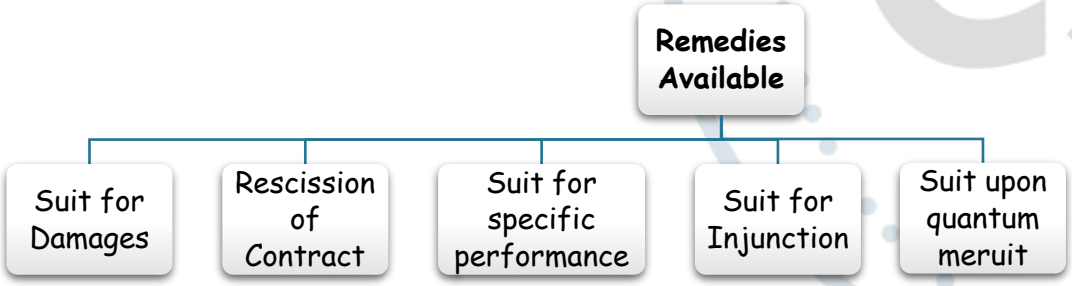
In contrast to anticipatory breach, it is a case of refusal to perform the promise on the scheduled date. The parties to a lawful contract are bound to perform their respective promises.

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-

(a) **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 2022. 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.
(b) **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



Suit For Damages

The Act in **Section 73**, has laid down the rules as to how the amount of compensation is to be determined.

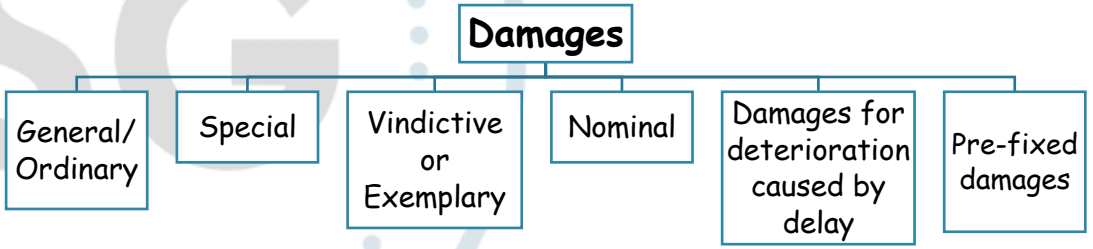
On the breach of the contract, the party who suffers from such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him by breach.

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 minimise the loss.

No compensation is payable for any remote or indirect loss.



(i)Ordinary damages:	When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage 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 suffered by the mill for not having been worked. The court 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 refuse 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. **Example:** X promised Y, a priest, to pay 10,000 as charity.
	The priest on X's promises incurred certain liabilities towards the repairing of the temple to the extent of Rs. 7,500. Y, the priest, can recover from X ₹7,500.

Penalty (Section 74) And Liquidated Damages

The parties to a contract may provide beforehand, 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.

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.

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.

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

Example: 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: 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.

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 only 12 bottles of a whiskey from a wine merchant but also receives 2 bottles 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 deduction for bad work.

Example: 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: 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 instalments of 50 each. A delivered the first instalment 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.

Example: A, a singer, agreed with B to perform at his theatre for two months, on a condition that during that period, he would not perform anywhere. In this case, B could move to the Court for grant of injunction restraining A from performing in other places.

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 10000 for each night's performance. On the sixth night, A wilfully 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.

2 Indian Contract Act, 1872

Unit – 6: Contingent and Quasi Contracts

- Contingent Contracts
  - Rules Relating to Enforcement of Contingent Contracts
  - Difference between Contingent & Wagering Contract
- Quasi-Contracts
  - Cases deemed as Quasi-Contracts

Contingent Contracts

In this unit, we shall briefly examine what is called a 'contingent contract', its essentials and the rules regarding enforcement of this type of contracts.

The Contract Act recognises certain cases in which an obligation is created without a contract. The Contract Act recognises certain cases in which an obligation is created without a contract. Such obligations arise out of certain relations which cannot be called as contracts in the strict sense. There is no offer, no acceptance, no consensus ad idem and in fact neither agreement nor promise and yet the law imposes an obligation on one party and confers a right in favour of the other. We shall have a look on these cases of 'Quasi-contracts.

A contract may be absolute or a contingent. An Absolute contract is one where the promisor undertakes to perform the contract in any event without any condition.

Definition of 'Contingent Contract' (Section 31)

"A contract to do or not to do something, if some event, collateral to such contract, does or does not happen".

Contracts of Insurance, indemnity and guarantee fall under this category.

Example: A contracts to pay B 10,00,000 if B's house is burnt. This is a contingent contract.

Example: A makes a contract with B to buy his house for 50,00,000 if he is able to secure to bank loan for that amount. The contract is contingent contract.

Meaning of collateral Event: **Pollock and Mulla** defined collateral event as "an event which is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise".

Example: A contracts to pay B 10,00,000 if B's house is burnt. This is a contingent contract. Here the burning of the B's house is neither a performance promised as part of the contract nor it is the consideration obtained from B. The liability of A arises only on the happening of the collateral event.

Example: A agrees to transfer his property to B if her wife C dies. This is a contingent contract because the property can be transferred only when C dies.

Essentials of a contingent contract

(a) The performance of a contingent contract would depend upon the happening or non-happening of some event or condition. The condition may be precedent or subsequent

Example: 'A' promises to pay 50,000 to 'B' if it rains on first of the next month.

(b) The event referred to as collateral to the contract. The event is not part of the contract. The event should be neither performance promised nor a consideration for a promise.

Thus,

(i) where A agrees to deliver 100 bags of wheat and B agrees to pay the price only afterwards, the contract is a conditional contract and not contingent;

because the event on which B's obligation is made to depend is part of the promise itself and not a collateral event.

(ii) Similarly, where A promises to pay B 1,00,000 if he marries C, it is not a contingent contract.

(iii) 'A' agreed to construct a swimming pool for 'B' for 20,00,000. And 'B' agreed to make the payment only on the completion of the swimming pool. It is not a contingent contract as the event (i.e. construction of the swimming pool) is directly connected with the contract.

(c) The contingent event should not be a mere 'will' of the promisor. The event should be contingent in addition to being the will of the promisor.

Example: If A promises to pay B 100,000, if he so chooses, it is not a contingent contract. (In fact, it is not a contract at all). However, where the event is within the promisor's will but not merely his will, it may be contingent contract

Example: If A promises to pay B $100,000 if it rains on 1st April and A leave Delhi for Mumbai on a particular day, it is a contingent contract, because going to Mumbai is an event no doubt within A's will, but raining is not merely his will.

(d) The event must be uncertain. Where the event is certain or bound to happen, the contract is due to be performed, then it is a not contingent contract.

Example: 'A' agreed to sell his agricultural land to 'B' after obtaining the necessary permission from the collector.

As a matter of course, the permission was generally granted on the fulfilment of certain formalities. It was held that the contract was not a contingent contract as the grant of permission by the collector was almost a certainty.

Rules Relating to Enforcement

The rules relating to enforcement of a contingent contract are laid down in **sections 32, 33, 34, 35 and 36 of the Act.**

(a)Enforcement of contracts contingent on an event happening:	**Section 32** says that "where a contingent contract is made to do or not to do anything if an uncertain future event happens, it cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void".  **Example:** A contracts to pay B a sum of money when B marries C. C dies without being married to B. The Contract becomes void.
(b)Enforcement of contracts contingent on an event not happening:	**Section 33** says that "Where a contingent contract is made to do or not do anything if an uncertain future event does not happen, it can be enforced only when the happening of that event becomes impossible and not before". **Example:** Where 'P' agrees to pay 'Q' a sum of money if a particular ship does not return, the contract becomes enforceable only if the ship sinks so that it cannot return. Where A agrees to pay sum of money to B if certain ship does not return however the ship returns back. Here the contract becomes void.
(c) A contract would cease to be enforceable if it is contingent upon the conduct of a living person when that living person does something to make the 'event' or 'conduct' as impossible of happening.	**Section 34** says that "if a contract is contingent upon as to how a person will act at an unspecified time, the event shall be considered to have become impossible when such person does anything which renders it impossible that he should so act within any definite time or otherwise than under further contingencies". **Example:** Where 'A' agrees to pay 'B' a sum of money if 'B' marries 'C'. 'C' marries 'D'. This act of 'C' has rendered the event of 'B' marrying 'C' as impossible; it is though possible if there is divorce between 'C' and 'D'. **In Frost V. Knight,** the defendant promised to marry the plaintiff on the death of his father. While the father was still alive, he married another woman. It was held that it had become impossible that he should marry the plaintiff and she was entitled to sue him for the breach of the contract.
(d) Contingent on happening of specified event within the fixed time	**Section 35** says that Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible. 

	Example: A promises to pay B a sum of money if certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes ship is burnt within the year.
(e) Contingent on specified event not happening within fixed time:	**Section 35** also void if the says that "Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired, and such event has not happened or before the time fixed has expired, if it becomes certain that such event will not happen". **Example:** A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.
(f) Contingent on an impossible event (Section 36):	Contingent agreements to do or not to do anything, if an impossible event happens are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. **Example:** 'A' agrees to pay 'B' one lakh if sun rises in the west next morning. This is an impossible event and hence void. **Example:** X agrees to pay Y 1,00,000 if two straight lines should enclose a space. The agreement is void.

Difference between a contingent contract and a wagering contract

Basis of difference	Contingent contract	Wagering contract
Meaning	A contingent contract is a contract to do or not to do something with reference to a collateral event happening or not happening.	A wagering agreement is a promise to give money or money's worth with reference to an uncertain event happening or not happening.
Reciprocal promises	Contingent contract may not contain reciprocal promises.	A wagering agreement consists of reciprocal promises.
Uncertain event	In a contingent contract, the event is collateral.	In a wagering contract, the uncertain event is the core factor.
Nature of contract	Contingent contract may not be wagering in nature.	A wagering agreement is essentially contingent in nature.
Interest of contracting parties	Contracting parties have interest in the subject matter in contingent contract.	The contracting parties have no interest in the subject matter.
Doctrine of mutuality of lose and gain	Contingent contract is not based on doctrine of mutuality of lose and gain.	A wagering contract is a game, losing and gaining alone matters.
Effect of contract	Contingent contract is valid.	A wagering agreement is void.

Quasi Contracts

A valid contract must contain certain essential elements, such as offer and acceptance, capacity to contract, consideration and free consent. But sometimes the law implies a promise imposing obligations on one party and conferring right in favour of the other even when there is no offer, no acceptance, no genuine consent, lawful consideration, etc. and in fact neither agreement nor promise. Such cases are not contract in the strict sense, but the Court recognises them as **relations resembling those of contracts** and enforces them as if they were contracts. Hence the term **Quasi-contracts (i.e. resembling a contract).** Even in the absence of a contract, certain social relationships give rise to certain specific obligations to be performed by certain persons. These are known as quasi contracts as they create the same obligations as in the case of regular contract.

Quasi contracts are based on principles of equity, justice and good conscience.

A quasi or constructive contract rest upon the maxims, "No man must grow rich out of another person's loss".

Example: T, a tradesman, leaves goods at C's house by mistake. C treats the goods as his own. C is bound to pay for the goods.

Example: A pays some money to B by mistake. It is really due to C. B must refund the money to A.

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

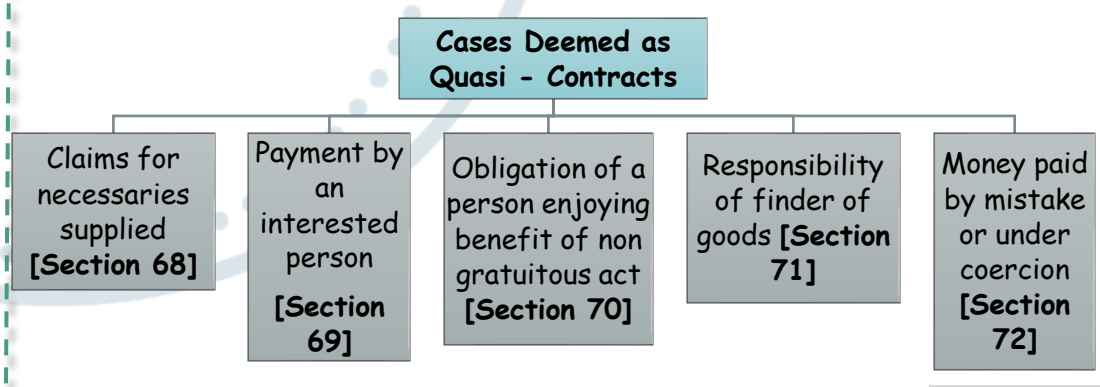
These relations are called as quasi-contractual obligations. In India it is also called as 'certain relation resembling those created by contracts.

Salient features of quasi contracts:

(a) In the first place, such a right is always a right to money and generally, though not always, to a liquidated sum of money.

(b) Secondly, it does not arise from any agreement of the parties concerned, but is imposed by the law; and

(c) Thirdly, it is a right which is available not against all the world, but against a particular person or persons only, so that in this respect it resembles a contractual right.



Under the provisions of the Indian Contract Act, the relationship of quasi contract is deemed to have come to exist in five different circumstances which we shall presently dilate upon. But it may be noted that in none of these cases there comes into existence any contract between the parties in the real sense. Due to peculiar circumstances in which they are placed, the law imposes in each of these cases the contractual liability.

(a) Claim for necessaries supplied to persons incapable of contracting (Section 68)	If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.  **Example:** A supplies B, a lunatic, or a minor, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. To establish his claim, the supplier must prove not only that the goods were supplied to the person who was minor or a lunatic but also that they were suitable to his requirements at the time of the sale and delivery.
(b) Payment by an interested person (Section 69):	A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, entitled to be reimbursed by the other.  **Example:** B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of the sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the government the sum due from A. A is bound to make good to B the amount so paid.
(c) Obligation of person enjoying benefits of non-gratuitous act (Section 70):	In term of **section 70** of the Act "where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the thing so done or delivered".  **It thus follows that for a suit to succeed, the plaintiff must prove:** **(i)** that he had done the act or had delivered the thing lawfully; **(ii)** that he did not do so gratuitously; and **(iii)** that the other person enjoyed the benefit. The above can be illustrated by a case law where 'K' a government servant was compulsorily retired by the government. He filed a writ petition and obtained an injunction against the order. He was reinstated and was paid salary but was given no work and, in the meantime, government went on appeal.

	The appeal was decided in favour of the government and 'K' was directed to return the salary paid to him during the period of reinstatement. **[Shyam Lal vs. State of U.P. A.I.R (1968) 130]** **Example:** A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.
(d) Responsibility of finder of goods (Section 71):	A person who finds goods belonging to another and takes them into his custody is subject to same responsibility as if he were a bailee'.  Thus, a finder of lost goods has: (i) to take proper care of the property as man of ordinary prudence would take (ii) no right to appropriate the goods and (iii) to restore the goods if the owner is found. **In Hollins vs. Howler L. R. & H. L.,** 'H' picked up a diamond on the floor of 'F's shop and handed over the same to 'F' to keep till the owner was found. In spite of the best efforts, the true owner could not be traced. After the lapse of some weeks, 'H' tendered to 'F' the lawful expenses incurred by him and requested to return the diamond to him. 'F' refused to do so. Held, 'F' must return the diamond to 'H' as he was entitled to retain the goods found against everybody except the true owner. **Example:** 'P' a customer in 'D's shop puts down a brooch worn on her coat and forgets to pick it up and one of 'D's assistants finds it and puts it in a drawer over the weekend. On Monday, it was discovered to be missing. 'D' was held to be liable in the absence of ordinary care which a prudent man would have taken.
(e) Money paid by mistake or under coercion (Section 72):	"A person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it". Every kind of payment of money or delivery of goods for every type of 'mistake' is recoverable.  **[Shivprasad Vs Sirish Chandra A.I.R. 1949 P.C. 297]** **Example:** A payment of municipal tax made under mistaken belief or because of mis-understanding of the terms of lease can be recovered from municipal authorities. The above law was affirmed by Supreme Court in cases of **Sales tax officer vs. Kanhaiyalal A. I. R. 1959 S. C. 835** Similarly, any money paid by coercion is also recoverable. The word coercion is not necessarily governed by **section 15** of the Act. The word is interpreted to mean and include oppression, extortion, or such other means **[Seth Khanjelek vs National Bank of India].** In a case where 'T' was traveling without ticket in a tram car and on checking he was asked to pay ₹5/- as penalty to compound transaction. T filed a suit against the corporation for recovery on the ground that it was extorted from him. The suit was decreed in his favour. **[Trikamdas vs. Bombay Municipal Corporation A. I. R.1954]**

	In all the above cases the contractual liability arose without any agreement between the parties.

Difference between quasi contracts and contracts

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

2 Indian Contract Act, 1872

Unit – 7: Contract of Indemnity and Guarantee

Contract of Indemnity and Guarantee

- Contract of Indemnity
- Contract of Guarantee
- Nature of Surety's Liability
- Continuing Guarantee
- Discharge of Surety
- Rights of Surety

Contract of Indemnity and Guarantee are the specific types of contracts provided under **sections 124 to 147** of the Indian Contract Act, 1872. In addition to the specific provisions (i.e. **Section 124 to Section 147** of the Indian Contract Act, 1872), the general principles of contracts are also applicable to such contracts. Even though both the contracts are modes of compensation based on similar principles, they

In this unit, the law relating to indemnity and guarantee are discussed in detail.

Contract Of Indemnity

The term **"Indemnity"** literally means **"Security against loss"** or **"to make good the loss"** or "to compensate the party who has suffered some loss".

The term **"Contract of Indemnity"** is defined under **Section 124** of the Indian Contract Act, 1872. It is "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person."

Example: Mr. X contracts with the Government to return to India after completing his studies (which were funded by the Government) at University of Cambridge and to serve the Government for a period of 5 years. If Mr. X fails to return to India, he will have to reimburse the Government. It is a contract of indemnity.

Parties:

a. The party who promises to indemnify/ save the other party from loss- **"indemnifier",**

b. The party who is promised to be saved against the loss- "indemnified" or **"indemnity holder".**

Example: A may contract to indemnify B against the consequences of any proceedings which C may take against B in respect of a sum of 5000/- advanced by C to B. In consequence, when B who is called upon to pay the sum of money to C fails to do so, C would be able to recover the amount from A as provided in **Section 124.**

Example: X may agree to indemnify Y for any loss or damage that may occur if a tree on Y's neighbouring property blows over. If the tree then blows over and damages Y's fence, X will be liable for the cost of fixing the fence.

However, the above definition of indemnity restricts the scope of contracts of indemnity in as much as it covers only the loss caused by:
(i) the conduct of the promisor himself, or
(ii) the conduct of any other person.
Thus, loss occasioned by an accident not caused by any person, or an act of God/ natural event, is not covered.
In case of **Gajanan Moreshwar v/s Moreshwar Madan (1942),** decision is taken on the basis of English Law. As per English Law, Indemnity means promise to save another harmless from the loss. Here it covers every loss whether due to negligence of promise or by natural calamity or by accident.
Mode of contract of indemnity: A contract of indemnity like any other contract may be express or implied.

a. A contract of indemnity is said to be express when a person expressly promises to compensate the other from loss.
b. A contract of indemnity is said to be implied when it is to be inferred from the conduct of the parties or from the circumstances of the case. A contract of indemnity is like any other contract and must fulfil all the essentials of a valid contract.
Example: A asks B to beat C promising to indemnify him against the consequences. The promise of A cannot be enforced. Suppose, B beats C and is fined 1000, B cannot claim this amount from A because the object of the agreement is unlawful.

A contract of Fire Insurance or Marine Insurance is always a contract of indemnity. But there is no contract of indemnity in case of contract of Life Insurance.

Rights of Indemnity-holder when sued (Section 125): The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor/ indemnifier-
(a) all damages which he may be compelled to pay in any suit
(b) all costs which he may have been compelled to pay in bringing/ defending the suit and
(c) all sums which he may have paid under the terms of any compromise of suit.

When does the liability of an indemnifier commence?

Although the Indian Contract Act, 1872, is silent on the time of commencement of liability of indemnifier, however, on the basis of judicial pronouncements it can be stated that the liability of an indemnifier commences as soon as the liability of the indemnity-holder becomes absolute and certain. This principle has been followed by the courts in several cases.

Example: A promises to compensate X for any loss that he may suffer by filling a suit against Y. The court orders X to pay Y damages of 10000. As the loss has become certain, X may claim the amount of loss from A and pass it to Y.

Contract Of Guarantee

"Contract of guarantee", "surety", "principal debtor" and "creditor" [Section 126]

Three parties are involved in a contract of guarantee

- **Surety-** person who gives the guarantee
- **Principal debtor-** person in respect of whose default the guarantee is given
- **Creditor-** person to whom the gurantee is given

Contract of guarantee: A contract of guarantee is a contract to perform the promise made or discharge the liability, of a third person in case of his default.

Example: When A requests B to lend 10,000 to C and guarantees that C will repay the amount within the agreed time and that on C falling to do so, he (A) will himself pay to B, there is a contract of guarantee.
Here, B is the creditor, C the principal debtor and A the surety.

Example: X and Y go into a car showroom where X says to the dealer to supply latest model of Wagon R to Y, and agrees that if Y fails to pay, he will. In case of Y's failure to pay, the car showroom will recover its money from X.

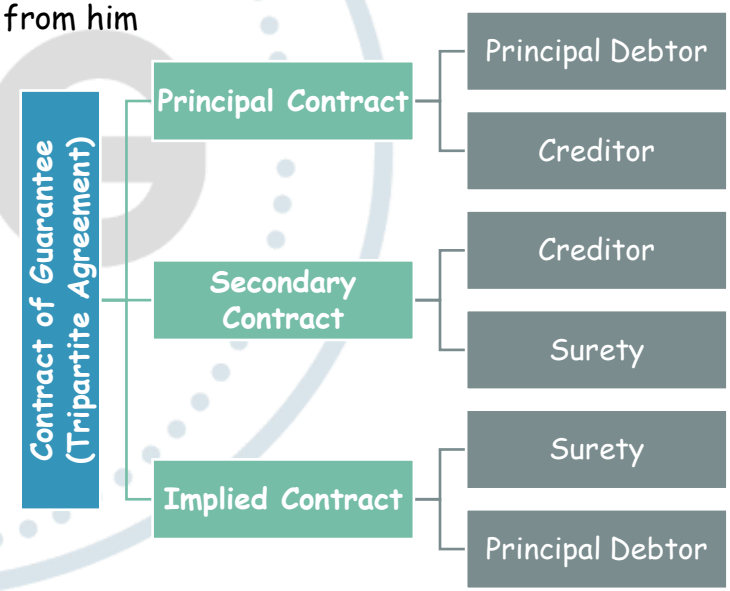
This is a contract of guarantee because X promises to discharge the liability of Y in case of his defaults.

A contract of guarantee is a tripartite agreement between principal debtor, creditor and surety.

There are, in effect three contracts-

(i) A principal contract between the principal debtor and the creditor.
(ii) A secondary contract between the creditor and the surety
(iii) An implied contract between the surety and the principal debtor whereby principal debtor is under an obligation to indemnify the surety; if the surety is made to pay or perform.

The right of surety is not affected by the fact that the creditor has refused to sue the principal debtor or that he has not demanded the sum due from him



Essential Features of a Guarantee

The following are the requisites of a valid guarantee: -

1. Purpose:	The purpose of a guarantee being to secure the payment of a debt, the existence of recoverable debt is necessary. If there is no principal debt, there can be no valid guarantee.
2.Consideration:	Like every other contract, a contract of guarantee should also be supported by some consideration. A guarantee without consideration is void, but there is no need for a direct consideration between the surety and the creditor. As per **Section 127** consideration received by the principal debtor is sufficient consideration to the surety for giving the guarantee, but past consideration is no consideration for the contract of guarantee. Even if the principal debtor is incompetent to contract, the guarantee is valid. But, if surety is incompetent to contract, the guarantee is void. **Example:** B requests A to sell and deliver to him goods on credit. A agrees to do so provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A 's promise to deliver the goods. As per **Section 127**, there is a sufficient consideration for C's promise. Therefore, the guarantee is valid.
	Example: A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.
3.Existence of a liability:	There must be an existing liability or a promise whose performance is guaranteed. Such liability or promise must be enforceable by law. The liability must be legally enforceable and not time barred.
4.No misrepr-esentation or concealment (Section 142 and 143)	Any guarantee which has been obtained by the means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid **(section 142)** Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid **(section 143).** **Example:** A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C, with his previous conduct. B afterwards make default. The guarantee is invalid. **Example:** A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay rupee five per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

5.Writing not necessary:	Section 126 expressly declares that a guarantee may be either oral or written.
6. Joining of the other co-sureties (Section 144):	Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join. That implies, the guarantee by a surety is not valid if a condition is imposed by a surety that some other person must also join as a co-surety, but such other person does not join as a co-surety.

Types Of Guarantees

Guarantee may be classified under two categories:

A. Specific Guarantee-	A guarantee which extends to a single debt/ specific transaction is called a specific guarantee. The surety's liability comes to an end when the guaranteed debt is duly discharged or the promise is duly performed. **Example:** A guarantees payment to B of the price of the five bags of rice to be delivered by B to C and to be paid for in a month. B delivers five bags to C. C pays for them. This is a contract for specific guarantee because A intended to guarantee only for the payment of price of the first five bags of rice to be delivered one time **[Kay v/s Groves]**
B. Continuing Guarantee [Section 129] -	A guarantee which extends to a series of transaction is called a continuing guarantee. A surety's liability continues until the revocation of the guarantee.
	The essence of continuing guarantee is that it applies not to a specific number of transactions but to any number of transactions and makes the surety liable for the unpaid balance at the end of the guarantee. **Example:** On A's recommendation B, a wealthy landlord employs C as his estate manager. It was the duty of C to collect rent on 1st of every month from the tenant of B and remit the same to B before 5th of every month. A, guarantee this arrangement and promises to make good any default made by C. This is a contract of continuing guarantee. **Example:** A guarantees payment to B, a tea-dealer, to the amount of 10,000, for any tea he may from time-to-time supply to C. B supplies C with tea to above the value of 10,000, and C pays B for it. Afterwards B supplies C with tea to the value of 20,000. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of 10,000.

Distinction Between a Contract of Indemnity and A Contract of Guarantee

Point of distinction	Contract of Indemnity	Contract of Guarantee
Number of party /parties to the contract	There are only two parties namely the indemnifier [promisor] and the indemnified [promisee]	There are three parties- creditor, principal debtor and surety.

Nature of liability	The liability of the indemnifier is primary and unconditional.	The liability of the surety is secondary and conditional as the primary liability is that of the principal debtor.
Time of liability	The liability of the indemnifier arises only on the happening of a contingency.	The liability arises only on the non-performance of an existing promise or non-payment of an existing debt.
Time to Act	The indemnifier need not act at the request of indemnity holder.	The surety acts at the request of principal debtor.
Right to sue third party	Indemnifier cannot sue a third party for loss in his own name as there is no privity of contract. Such a right would arise only if there is an assignment in his favour.	Surety can proceed against principal debtor in his own right because he gets all the right of a creditor after discharging the debts.
Purpose	Reimbursement of loss	For the security of the creditor
Competency to contract	All parties must be competent to contract.	In the case of a contract of guarantee, where a minor is a principal debtor, the contract is still valid.

Nature And Extent of Surety's Liability [Section 128]

(i) The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. **[Section 128]**
(ii)Liability of surety is of secondary nature as he is liable only on default of principal debtor.
(iii)Where a debtor cannot be held liable on account of any defect in the document, the liability of the surety also ceases.
(iv) A creditor may choose to proceed against a surety first, unless there is an agreement to the contrary.

Example: A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Liability of Two Persons, Primarily Liable, Not Affected by Arrangement Between Them That One Shall Be Surety on Other's Default

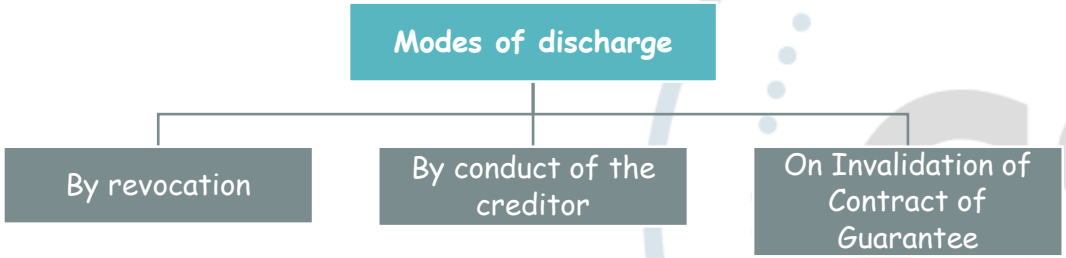
Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence. **(Section 132)**

Example: A and B make a joint and several promissory notes to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

Discharge Of a Surety

A surety is said to be discharged when his liability as surety comes to an end. **The various modes of discharge of surety is discussed below:**

(i) By revocation of the contract of guarantee.
(ii) By the conduct of the creditor, or
(iii) By the invalidation of the contract of guarantee.



By revocation of the Contract of Guarantee

(a)Revocation of continuing guarantee by Notice (Section 130):	The continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditors. Once the guarantee is revoked, the surety is not liable for any future transaction however he is liable for all the transactions that happened before the notice was given. A specific guarantee can be revoked only if liability to principal debtor has not accrued.
	Example: Arun promises to pay Rama for all groceries bought by Carol for a period of 12 months if Carol fails to pay. In the next three months, Carol buys 2000/- worth of groceries. After 3 months, Arun revokes the guarantee by giving a notice to Rama. Carol further purchases ₹1000 of groceries. Carol fails to pay. Arun is not liable for ₹1000/- of purchase that was made after the notice but he is liable for 2000/- of purchase made before the notice.
(b) Revocation of continuing guarantee by surety's death (Section 131):	In the absence of any contract to the contrary, the death of surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety. However, the surety's estate remains liable for the past transactions which have already taken place before the death of the surety. **Example:** 'S' guarantees 'C' for the transaction to be done between 'C' & 'P' for next month. After 5 days 'S' died. Now guarantee is revoked for future transactions but 'S's estate is still liable for transactions done during previous five days.
(c) By novation [Section 62]:	The surety under original contract is discharged if a fresh contract is entered into either between the same parties or between the other parties, the consideration being the mutual discharge of the old contract. **Examples**: 'S' guarantees 'C' for the payment of the supply of wheat to be done by 'C' & 'P' for next month. After 5 days, the contract is changed.

	Now 'S' guarantees 'C' for the payment of the supply of rice to be done by 'C' & 'P' for rest of next month. Here, guarantee is revoked for supply of wheat. But 'S' is still liable for supply of wheat done during previous five days.

By conduct of the creditor

(a) By variance in terms of contract (Section 133):	Where there is any variance in the terms of contract between the principal debtor and creditor without surety's consent, it would discharge the surety in respect of all transactions taking place subsequent to such variance.  **Example:** A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent and is not liable to make good this loss.
(b) By release or discharge of principal debtor (Section 134):	The surety is discharged if the creditor: i. Enters into a fresh/ new contract with principal debtor; by which the principal debtor is released, or  ii. does any act or omission, the legal consequence of which is the discharge of the principal debtor. **Example:** A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship. **Example:** A gives a guarantee to C for goods to be delivered to B. Later on, B contracts with C to assign his property to C in lieu of the debt. B is discharged of his liability and A is discharged of his liability.
(c) Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor [Sector 135]:	A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or promises not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.  i. **Composition:** If the creditor makes a composition with the principal debtor, without consulting the surety, the latter is discharged. Composition inevitably involves variation of the original contract, and, therefore, the surety is discharged. ii. **Promise to give time:** When the time for the payment of the guaranteed debt comes, the surety has the right to require the principal debtor to pay off the debt.

Accordingly, it is one of the duties of the creditor towards the surety not to allow the principal debtor more time for payment.

iii. Promise not to sue: If the creditor under an agreement with the principal debtor promises not to sue him, the surety is discharged. The main reason is that the surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt when it is due and this right is positively violated when the creditor promises not to sue the principal debtor

Cases where surety not discharged:

i. **Surety not discharged when agreement made with third person to give time to principal debtor [Section 136]:** Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Example: C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

ii. **Creditor's forbearance to sue does not discharge surety [Section 137]:** Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not in the absence of any provision in the guarantee to the contrary, discharge the surety.

Example: B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

(d)Discharge of surety by creditor's act or omission impairing surety's eventual remedy [Section 139]:	If the creditor does any act which is inconsistent with the rights of the surety or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. In a case before the Supreme Court of India, "A bank granted a loan on the security of the stock in the godown. The loan was also guaranteed by the surety. The goods were lost from the godown on account of the negligence of the bank officials. The surety was discharged to the extent of the value of the stock so lost." **[State bank of Saurashtra v/s Chitranjan Rangnath Raja (1980) 4 SCC 516)** **Example:** A puts M as apprentice to B and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see that M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

By the invalidation of the contract of guarantee

(a) Guarantee obtained by misrepresentation [Section 142]:	Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

	Example: 'C' sells AC to 'P' on misrepresenting that it is made of copper while it is made of aluminium. 'S' guarantees for the same as surety without the knowledge of fact that it is made of aluminium. Here, 'S' will not be liable.
(b) Guarantee obtained by concealment [Section 143]: 	Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid. **Example:** A engages B as a clerk to collect money for him, B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid. **Example:** A guarantees to C payment for iron to be supplied by him to B for the amount of 2,00,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.
(c) Guarantee on contract that creditor shall not act on it until co-surety joins (Section 144):	Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join. 
	Example: 'S1' guarantees 'C' for payment to be done by 'P' to 'C' on the condition that 'S1' will be liable only if 'S2' joins him for such guarantee. 'S2' does not give his consent. Here, '51' will not be liable.

Rights Of a Surety

The surety enjoys the following rights against the creditor:

(a) Rights against the creditor,
(b) Rights against the principal debtor,
(c) Rights against co-sureties.

Right against the principal debtor:

(a)Rights of subrogation [Section 140]:	Where, a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. This right is known as right of subrogation. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of the creditor. **Example:** 'Raju' has taken a housing loan from Canara Bank. 'Pappu' has given guarantee for repayment of such loan. Besides, there was a condition that if 'Raju' does not repay the loan within time, the bank can auction his property by giving 15 days' notice to 'Raju'. On due date 'Raju' does not repay, hence Pappu being a surety has to repay the loan.

	Now 'Pappu' can take the house from bank and has a right to auction the house by giving 15 days' notice to 'Raju'.
(b) Implied promise to indemnify surety [Section 145]:	In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety. The surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not sums which he paid wrongfully.  **Example:** B is indebted to C and A is surety for the debt. Upon default, C sues A. A defends the suit on reasonable grounds but is compelled to pay the amount. A is entitled to recover from B the cost as well as the principal debt. In the same case above, if A did not have reasonable grounds for defence, A would still be entitled to recover principal debt from B but not any other costs.

Right against the Creditor

(a) Surety's right to benefit of creditor's securities [Section 141]:	A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. **Example:** C advances to B, his tenant, 2,00,000 rupees on the guarantee of A.
	C has also a further security for the 2,00,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.
(b) Right to set off:	If the creditor sues the surety, for payment of principal debtor's liability, the surety may have the benefit of the set off, if any, that the principal debtor had against the creditor **Example:** 'X' took a loan of 50,000 from 'Y' which was guaranteed by 'Z'. There was one another contract between 'X' and 'Y' in which 'Y' had to pay 10,000 to 'X'. On default by 'X', 'Y' filed suit against 'Z'. Now 'Z' is liable to pay 40,000 (50,000- 10,000).
(c) Right to share reduction:	The surety has right to claim proportionate reduction in his liability if the principal debtor becomes insolvent. **Example:** 'X' took a loan of 50,000 from 'Y' which was Guaranteed by 'Z'. 'X' became insolvent and only 25% is realised from his property against liabilities. Now 'Y' will receive 12,500 from 'X' and Now 'Z' is liable to pay 37,500 (50,000-12,500).

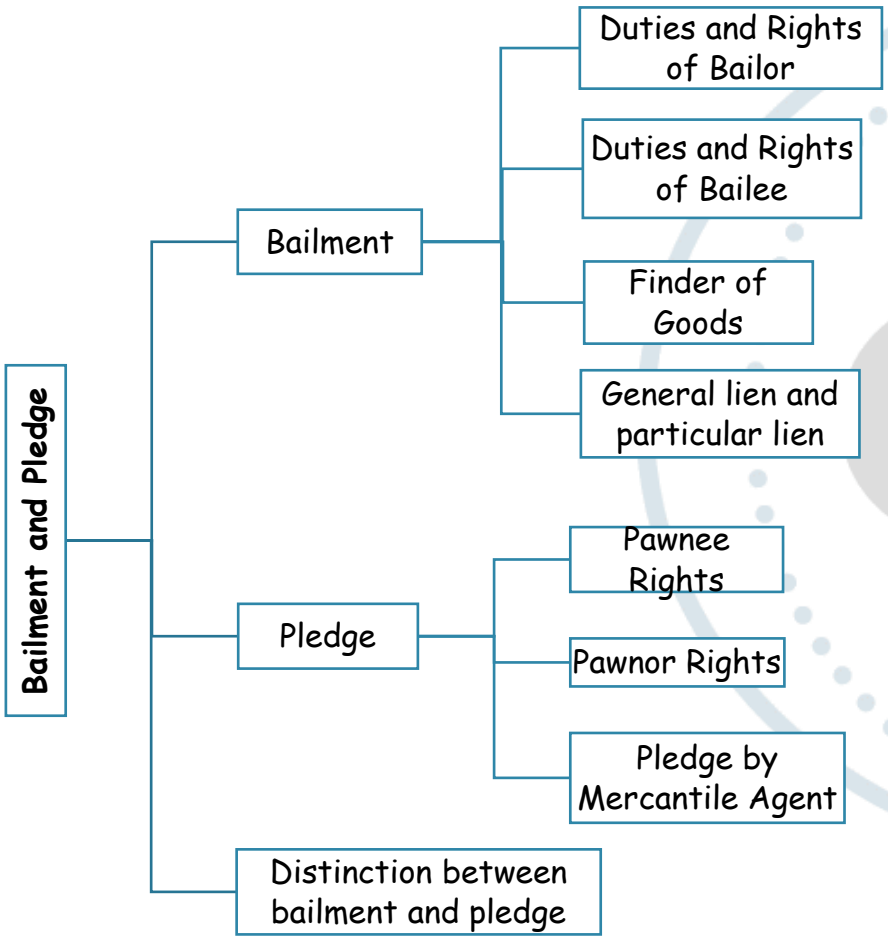
Rights against co-sureties

"Co-sureties (meaning)- When the same debt or duty is guaranteed by two or more persons, such persons are called co-sureties"

(a)Co-sureties liable to contribute equally (Section 146):	Unless otherwise agreed, each surety is liable to contribute equally for discharge of whole debt or part of the debt remains unpaid by debtor. **Example:** A, B and C are sureties to D for the sum of 3,00,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,00,000 rupees each. **Example:** A, B and C are sureties to D for the sum of 1,00,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 25,000 rupees, B 25,000 rupees, and C 50,000 rupees.
(b)Liability of co-sureties bound in different sums (Section 147):	The principal of equal contribution is, however, subject to the maximum limit fixed by a surety to his liability. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit. **Example:** A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 3,00,000 rupees. A, B and C are each liable to pay 1,00,000 rupees.
	Example: A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 4,00,000 rupees; A is liable to pay 1,00,000 rupees, and B and C 1,50,000 rupees each. **Example:** A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 7,00,000 rupees. A, B and C have to pay each the full penalty of his bond.

2 Indian Contract Act, 1872

Unit-8: Bailment and Pledge



What Is Bailment?

The word "Bailment" has been derived from the French word "ballier" which means "to deliver". Bailment etymologically means 'handing over' or 'Change of possession'.

As per **Section 148** of the Act, bailment is the delivery of goods by one person to another for some purpose, upon a contract, that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

Parties to bailment:

(a) Bailor: The person delivering the goods.

(b) Bailee: The person to whom the goods are delivered.

Example: Where 'X' delivers his car for repair to 'Y', 'X' is the bailor and 'Y' is the bailee.

Example: X delivers a piece of cloth to Y, a tailor, to be stitched into a suit. It is contract for bailment.

Example: Goods given to a friend for his own use, without any charge.

Example: X delivers goods to blue dart for carriage

Essential Elements:

The essential elements of a contract of bailment are-

(a) Contract	Bailment is based upon a contract. The contract may be express implied. No consideration is necessary to create a valid contract of bailment.
(b) Delivery of goods	It involves the delivery of goods from one person to another some purposes. Bailment is only for moveable goods and never for immovable go or money. The delivery of the possession of goods is of the following kinds:  i. **Actual Delivery:** When goods are physically handed over to the bailee by bailor. **Eg:** delivery of a car for repair to workshop ii. **Constructive Delivery:** Where delivery is made by doing anything that the effect of putting goods in the possession of the bailee or of any per authorized to hold them on his behalf. **Eg:** Delivery of the key of car t workshop dealer for repair of the car.
(c) Purpose	The goods are delivered for some purpose. The purpose may be express implied.
(d)Possession	In bailment, possession of goods changes. Change of possession happen by physical delivery or by any action which has the effect of placing goods in the possession of bailee. The change of possession does not lead to change of ownership.
	In bailment, bailor continues to be the owner of goods. Where person is in custody without possession, he does not become a bailee. For example, servant of a master who is in custody of goods of the master does become a bailee. Similarly, depositing ornaments in a bank locker is not bailment, because or name are kept in a locker whose key are still with the owner and not with the bank. ornaments are in possession of the owner though kept in a locker at the bank.
(e) Return of goods	Bailee is obliged to return the goods physically to the bailor. The goods should be returned in the same form as given or may be altered as per bailor's direction. It should be noted that exchange of goods should not be allowed. The bailee cannot deliver some other goods, even not those of higher value.  Deposit of money in a bank is not bailment since the money returned by the bank would not be identical currency notes.

Types of bailments

1. **On the basis of benefit, bailment can be classified into three types:**

a. For the exclusive benefit of bailor:

Example: The delivery of some valuables to a neighbour for safe custody, without charge.

b. For the exclusive benefit of bailee:

Example: The lending of a bicycle to a friend for his use, without charge.

C. For mutual benefit of bailor and bailee:

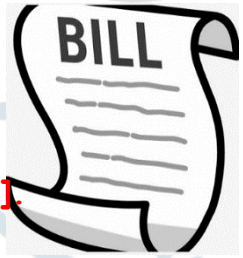
Example: Giving of a watch for repair.

2. On the basis of reward, bailment can be classified into two types:

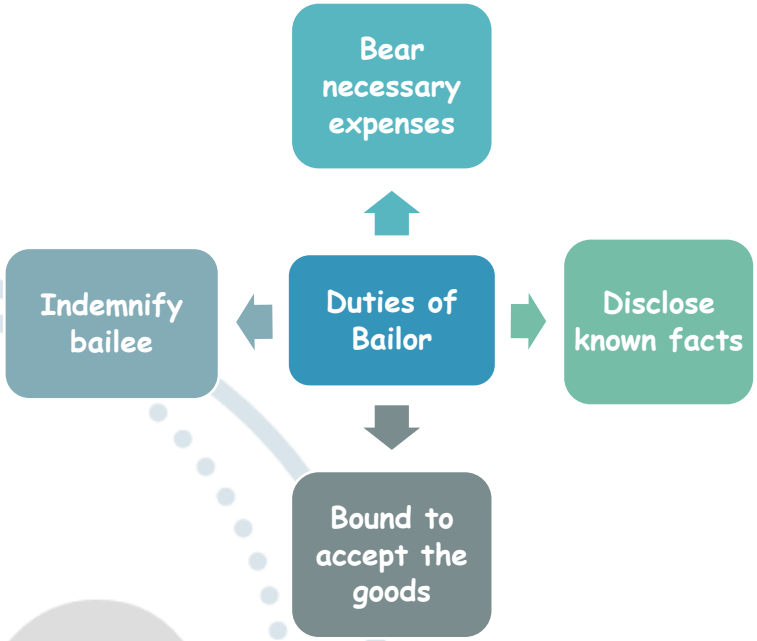
a. Gratuitous Bailment: The word gratuitous means free of charge. So, a gratuitous bailment is one when the provider of service does it gratuitously i.e. free of charge. Such bailment would be either for the exclusive benefits of bailor or bailee.

b. Non-Gratuitous Bailment: Non gratuitous bailment means where both the parties get some benefit i.e. bailment for the benefit of both bailor & bailee

Duties Of a Bailor



Duties of Bailor: The duties of bailor are spelt out in a number of **Sections [Section 150, 158, 159, 164]**. These are categorized under the following headings:



These are enumerated hereunder:

(i) Bailor's duty to disclose faults in goods bailed [Section 150]:

a. In case of gratuitous bailment: The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Example: A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

b. In case of non- gratuitous bailment: If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Example: A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

In Hyman & Wife v. Nye & Sons (1881), A hired from B a carriage along with a pair of horses and a driver for a specific journey. During the journey a bolt in the under-part of the carriage broke away. As a result of this, the carriage became upset and A was injured. *It was held that 8 was liable to pay damages to A for the injury sustained by him. The court observed that it was the bailor's duty to supply a carriage fit for the purpose for which it was hired.*

Sometimes, the goods bailed are of dangerous nature (e.g., explosives). In such cases it is the duty of the bailor to disclose the nature of goods. **[Great Northern Ry' case (1932)]**

(ii) Duty to pay necessary expenses [Section 158]:

a. In case of Gratuitous bailment: Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration (gratuitous bailment), the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

b. In case of non-gratuitous bailment: the bailor is liable to pay the extraordinary expenses incurred by the bailee.

Example: A hired a taxi from B for the purpose of going to Gurgaon from Noida. During the journey, a major defect occurred in the engine. A had to pay 5000 as repair charges. These are the extraordinary expenses and it is the bailor's duty to bear such expenses. However, the usual and ordinary expenses for petrol, toll tax etc. are to be borne by the bailee itself.

(iii) Duty to indemnify the Bailee for premature termination [Section 159]: The bailor must compensate the bailee for the loss or damage suffered by the bailee that is in excess of the benefit received, where he had lent the goods gratuitously and decides to terminate the bailment before the expiry of the period of bailment.

(iv) Bailor's responsibility to bailee [Section 164]: The bailor is responsible to the bailee for the following:

a. Indemnify for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them (defective title in goods).

b. It is the duty of the bailor to receive back the goods when the bailee returns them after the time of bailment has expired or the purpose of bailment has been accomplished. If the bailor refuses to take delivery of goods when it is offered at the proper time the bailee can claim compensation for all necessary expenses incurred for the safe custody.

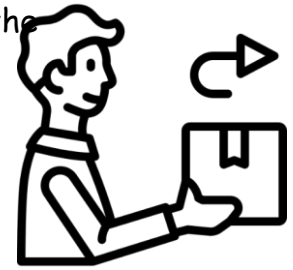
Example: X delivered his car to S for five days for safe keeping. However, X did not take back the car for one month. In this case, S can claim the necessary expenses incurred by him for the custody of the car.

Duties Of a Bailee

Take reasonable care of goods bailed | No unauthorized use of goods | No mixing of bailor's goods with his own | Return the goods | To return any extra profit accruing from goods bailed.

1. Take reasonable care of the goods (Section 151 & 152):	In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take care of his own goods of the same bulk, quality and value, as the goods bailed.  **Example:** If X bails his ornaments to 'Y' and 'Y' keeps these ornaments in his own locker at his house along with his own ornaments and if all the ornaments are lost/stolen in a riot 'Y' will not be responsible for the loss to 'X'. If on the other hand 'X' specifically instructs 'Y' to keep them in a bank, but 'Y' keeps them at his residence, then 'Y' would be responsible for the loss caused on account of riot. **Example:** A deposited his goods in B's warehouse. On account of unprecedented floods, a part of the goods was damaged. It was held that, B is not liable for the loss **(Shanti Lal Vs Takechand).** **Exception: Bailee when not liable for loss, etc., of thing bailed [Section 152]:** The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken reasonable care as required under **section 151**.
2. Not to make inconsistent use of goods (section 153 & 154):	As per **Section 154**, if the bailee makes any use of the goods bailed, which is not according to the terms and conditions of the bailment, he is liable to compensate the bailor for any loss or destruction of goods. **Example:** A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse. **Example:** 'A' hires a horse in Kolkata from B expressly to march to Varanasi. 'A' ride with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. 'A' is liable to make compensation to B for the injury to the horse. As per **Section 153**, a contract of bailment is voidable at the option of the bailor, if the bailee does not use the goods according to the terms and conditions of bailment. **Example:** A lends to B, a horse for his own riding. B gives the horse to C for riding. This contract is voidable at the option of A, bailor.
3. Not to mix the goods (Section 155, 156 and 157):	**i.** If the Bailee, mixes the goods bailed with his own goods, with the consent of the bailor, both the parties shall have an interest in proportion to their respective shares in the mixture thus produced **(Section 155).**

	ii. If the bailee, without the consent of the bailor, mixes the goods bailed with his own goods and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division and any damage arising from the mixture **(Section 156).** **Example:** A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage. iii. If the bailee, without the consent of the bailor mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and to deliver them back, the bailor is entitled to be compensated by the bailee for loss of the goods **(Section 157).** **Example:** A bails a barrel of Cape flour worth 4500 to B. B, without A's consent, mixes the flour with country flour of his own, worth only * 2500 a barrel. B must compensate A for the loss of his flour.
4.Return the goods (Section 160 & 161):	It is the duty of bailee to return, or deliver according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed, has expired, or the purpose for which they were bailed has been accomplished.

	[Section 160] If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. **[Section 161]**  **Example:** X delivered books to Y to be bound. Y promised to return the books within a reasonable time. X pressed for the return of the book. But Y, failed to deliver them back even after the expiry of reasonable time. Subsequently the books were burnt in an accidental fire at the premises of Y. In this case Y was held liable for the loss.
5.Return an accretion from the Goods [Section 163]:	In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed. **Example:** A leaves a cow in the custody of B. The cow gives birth to a calf. B is bound to deliver the calf along with the cow, to A.
6.Not to setup Adverse Title:	Bailee must not set up a title adverse to that of the bailor. He must hold the goods on behalf of and for the bailor. He cannot deny the title of the bailor.

Rights Of a Bailor

Rights of Bailor: The following are the rights of bailor: -

- Right to terminate the bailment
- Right to demand back the goods at any time
- Right to file a suit against any wrong doer
- Right to file a suit for enformcement of duties imposed upon a bailee.
- Right to claim compensation

(i) Right to terminate the bailment [Section 153]: A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Termination of bailment has been discussed in next pages.

(ii) Right to demand back the goods (Section 159): When the goods are lent gratuitously, the bailor can demand back the goods at any time even before the expiry of the time fixed or the achievement of the object.

Example: A, while going out of station delivered his ornaments to B for safe custody for one month. But A returned to station after one week. He may demand the return of his ornaments even though the time of one month has not expired.

However, due to the premature return of the goods, if the bailee suffers any loss, which is more than the benefit actually obtained by him from the use of the goods bailed, the bailor has to compensate the bailee.

(iii) Right to file a suit against a wrong doer [Section 180 and section 181] (discussed in next pages)

(iv) Right to sue the bailee: The bailor has a right to sue the bailee for enforcing all the liabilities and duties of him.

(v) Right to compensation: If any damage is caused to the goods bailed because of the unauthorized use of the goods or unauthorized mixing of the goods, the bailor has a right to claim compensation for the same.

Rights Of a Bailee

Rights of bailee: The following are the rights of the bailee: -

1. **Right to Deliver the Goods to any one of the joint bailors [Section 165]:** If several joint owners bailed the goods, the bailee has a right to deliver them to any one of the joint owners unless there was a contract to the contrary.

Example: A, B and C are the joint owners of a harvesting combine. They delivered it on hire to D for one month. After the expiry of one month, D may return the "combine" to any one of the joint owners namely, A, B or C.

2. **Right to indemnity (Section 166):** Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give directions in respect to them.

If the bailor has no title to the goods, and the bailee in good faith, delivers them back to, or according to the directions of the bailor, the bailee shall not be responsible to the owner in respect of such delivery. Bailee can also claim all the necessary expenses incurred by him for the purpose of gratuitous bailment.

3. **Right to claim compensation in case of faulty goods (Section 150):** A bailee is entitled to receive compensation from the bailor or any loss caused to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.

4. **Right to claim necessary expenses (Section 158):** In case of gratuitous bailment, the bailor shall repay to the bailee the necessary expenses incurred by him and any extraordinary expenses incurred by him for the purpose of the bailment.

5. **Right to Apply to Court to Decide the Title to the Goods [Section 167]:** If the goods bailed are claimed by the person other than the bailor, the bailee may apply to the court to stop its delivery and to decide the title to the goods.

Example: A, a dealer in T.V. delivered a T.V. to B for using in summer vacation. Subsequently, C claimed that the T.V. belonged to him as it was delivered only for repairs, to A and thus, B should deliver it to him. In this case, B may apply to the Court to decide the question of ownership of the T.V. so that he may deliver it to the right owner.

6. **Right of particular lien for payment of services [Section 170]:**

7. **Right of general lien (Sec. 171):**

Rights Of Bailor and Bailee Against Any Wrong Doer (Third Party)

Suit by bailor & bailee against wrong doers [Section 180]: If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Apportionment of relief or compensation obtained by such suits [Section 181]: Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Termination Of Bailment

A contract of bailment shall terminate in the following circumstances:

1. **On expiry of stipulated period:** If the goods were given for a stipulated period, the contract of bailment shall terminate after the expiry of such period.

Example: X gives his motorcycle to Y for a month. The bailment terminates after 1 month.

2. **On fulfilment of the purpose:** If the goods were delivered for a specific purpose, a bailment shall terminate on the fulfilment of that purpose.

Example: X hires certain tents and crockery on marriage of his daughter. The bailment terminates after marriage.

3. By Notice:

(a) Where the bailee acts in a manner which is inconsistent with the terms of the bailment, the bailor can always terminate the contract of bailment by giving a notice to the bailee.

(b) A gratuitous bailment can be terminated by the bailor at any time by giving a notice to the bailee. However, the termination should not cause loss to the bailee in excess of the benefit derived by him. In case the loss exceeds the benefit derived by the bailee, the bailor must compensate the bailee for such a loss **(Sec. 159).**

4. By death: A gratuitous bailment terminates upon the death of either the bailor or the bailee.

5. Destruction of the subject matter: A bailment is terminated if the subject matter of the bailment is destroyed or there is a change is in the nature of goods which makes it impossible to be used for the purpose of bailment.

Example: X gives his cycle to Y on hire. Cycle damaged beyond repairs. Bailment ends.

Expiry of fixed period → Fulfilment of the purpose → By death of bailor or bailee → Inconsistent use of goods → Destruction/modification of the subject matter

Finder Of Lost Goods

Right of finder of lost goods- may sue for specific reward offered [Section 168]: A person who finds some goods which do not belong to him, is called the finder of the goods.

It is the duty of the finder of goods to find the true owner and surrender the goods to him. However, the finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him in finding the owner and preserving the goods found. But he has a right to retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward on the lost goods, the finder may sue the owner for such reward, and may retain the goods until then.

When finder of thing commonly on sale may sell it [Section 169]: When a thing which is commonly the subject of sale if lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it-

1. when the thing is in danger of perishing or of losing the greater part of its value, or
2. when the lawful charges of the finder in respect of the thing found amount to two- thirds of its value.

Right Of Lien

Right Of Lien

Lien is the right of a person

- to retain the goods belonging to another
- until his claim is satisfied or some debt due to him is repaid.
- some debt due to him is repaid.

a. Particular Lien
b. General Lien

Particular Lien: It is a right to retain only the particular goods in respect of which the claim is due.

Section 170 provides, where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services, he has rendered in respect of them.

Example: 'A' gives cloth to 'B', a tailor, to make into a coat. 'B' is entitled to retain the coat until he is paid.

Example: If in the above example, 'B' takes 15 days' time to make the coat, right of lien will be applicable after 15 days.

Example: A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

General Lien: It is a right to retain the goods not only for demands arising out of the goods retained but for a general balance of account in favour of certain persons (in the absence of a contract to the contrary). **Section 171** provides this right is available to Bankers, factors, wharfingers, policy brokers and attorneys of law.

Example: 'A' borrows 500/- from the bank without security and subsequently again borrows another 1000/- but with security of say certain jewellery. In this illustration, even where 'A' has returned 1000/- being the second loan, the banker can retain the jewellery given as security to the second loan towards the first loan which is yet to be repaid

Under the right of general lien, the goods cannot be sold but can only be retained for dues. The right of lien can be waived through a contract.

Difference Between Bailee's General and Particular Lien

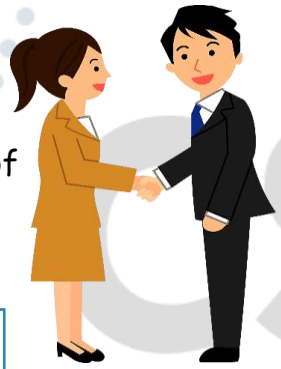
General lien	Particular lien
Section 171 of the Indian Contract Act, 1872 confer on Bailee the right of General Lien.	**Section 170** of the Indian Contract Act, 1872 confers on the Bailee, the right of particular lien.
General lien alludes to the right to keep possession of goods belonging to other against general balance of account.	Particular lien implies a right of the bailee to retain specific goods bailed for non-payment of amount.
A general lien is not automatic but is recognized through on agreement. It is exercised by the bailee only by name.	It is automatic.
It can be exercised against goods even without involvement of labor or skill.	It comes into play only when some labor or skill is involved has been expended on the goods, resulting in an increase in value of goods.
Only such persons as are specified under **section 171**, e.g., Bankers, factors, wharfingers, policy brokers etc. are entitled to general lien.	Bailee, finder of goods, pledgee, unpaid seller, agent, partner etc. are entitled to particular lien.

Pledge

"Pledge", "pawnor" and "pawnee" defined [Section 172]: The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee". **Section 172 to 182** of the Indian Contract Act, 1872 deal with the contract of pledge.

Example: A lends money to B against the security of jewellery deposited by B with him. This bailment of jewellery is a pledge as security for lending the money. B is a pawnor/ a pawnee/ pledgee.

Essentials Of Contract of Pledge: Since pledge is a special kind of bailment, pledger and A is therefore all the essentials of bailment are also the essentials of the pledge. Apart from that, the other essentials of the pledge are:



There shall be a bailment for security against payment or performance of the promise,	**The subject matter of pledge is goods,**
Goods pledged for shall be in existence,	**There shall be the delivery of goods from pledger to pledgee**

Rights of a Pawnee/Pledgee: Rights of Pawnee can be classified as under the following headings:

(a) Right to retain the pledged goods [Section 173]: The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest, of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Example: Where 'M' pledges stock of goods for certain loan from a bank, the bank has a right to retain the stock not only for adjustment of the loan but also for payment of interest.

(b) Right to retention of subsequent debts [Section 174]: The Pawnee can retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged. But he can exercise this right only when there is a contract to this effect. i.e. a right to retain goods for subsequent debts can be exercised only when it has been provided for in a contract to this effect.

(c) Pawnee's right to extraordinary expenses incurred [Section 175]: The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged. For such expenses, however, he does not have the right to retain the goods, but he can sue the pawnor for such expenses.

(d) Pawnee's right where pawnor makes default [Section 176]: If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee has the following rights:

i. the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or
ii. he may sell the thing pledged on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Rights of a Pawnor

As the bailor of goods, pawnor has all the rights of the bailor. Along with that he also has the right of redemption to the pledged goods which is enumerated under **section 177** of the Act.

Right To Redeem [Section 177]: If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Note: Redemption means to recover back the goods by making of the payment of debt or performance of promise.

Duties of the Pawnee

Pawnee has the following duties:

a. Duty to take reasonable care of the pledged goods.
b. Duty not to make unauthorized use of pledged goods.
c. Duty to return the goods when the debt has been repaid or the promise has been performed.
d. Duty not to mix his own goods with goods pledged.
e. Duty not to do any act which is inconsistent with the terms of the pledge.
f. Duty to return accretion to the goods, if any.

Duties of a Pawnor

Pawnor has the following duties:

a. The pawnor is liable to pay the debt or perform the promise as the case may be.
b. It is the duty of the pawnor to compensate the pawnee for any extraordinary expenses incurred by him for preserving the goods pawned.
c. It is the duty of the pawnor to disclose all the faults which may put the pawnee under extraordinary risks.
d. If loss occurs to the pawnee due to defect in pawnor's title to the goods, the pawnor must indemnify the pawnee.
e. If the pawnee sells the good due to default by the pawnor, the pawnor must pay the deficit.

Pledge By Non-Owners

Ordinarily, it is the owner of the goods, or any person authorized by him in that behalf, who can pledge the goods. But in order to facilitate mercantile transactions, the law has recognised certain exceptions. These exceptions are for Bonafede pledges made by those persons who are not the actual owners of the goods, but in whose possession the goods have been left.

a. **Pledge by mercantile agent [Section 178]:**	A mercantile agent, who is in the possession of goods or document of title, with the consent of owner, can pledge them while acting in the ordinary course of business as a Mercantile Agent.

	Such Pledge shall be valid as if were made with the authority of the owner of goods. Provided, Pawnee acted in good faith and had no notice that Pawnor has no authority to pledge.
b. **Pledge by person in possession under voidable contract [Section 178A]:**	When the pawnor has obtained possession of the goods pledged by him under a contract voidable under **section 19 or section 19A** (contracts where consent has been obtained by fraud, coercion, misrepresentation, undue influence), but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.
c. **Pledge where pawnor has only a limited interest [Section 179]:**	Where a person pledges goods in which he has only a limited interest i.e. pawnor is not the absolute owner of goods, the pledge is valid to the extent of that interest. **Example:** Mr. X finds a defective mobile phone lying on the road. He picks it up, gets it repaired for 5000. He later pledges the mobile phone for 2,000. The true owner can recover the mobile phone only on paying * 5,000. **Example**: 'A' pledges his jewellery worth 1,00,000 with 'B' for a advance of 70,000. 'B' pledges the same for 90,000 with 'C'. Now this pledge is valid up to 70,000 plus interest due thereon.
d. **Pledge by a co-owner in possession:**	Where the goods are owned by many persons and with the consent of other owners, the goods are left in the possession of one of the co-owners. Such a co-owner may make a valid pledge of the goods in his possession.
e. **Pledge by seller or buyer in possession:**	A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, can make a valid pledge, provided the pawnee acts in good faith and he has no knowledge of the defect in title of the pawnor. **Example:** A buys a cycle from B. But leaves the cycle with the seller. B then pledges the cycle with C, who does not know of sale to A, and acted in good faith. This is valid pledge.

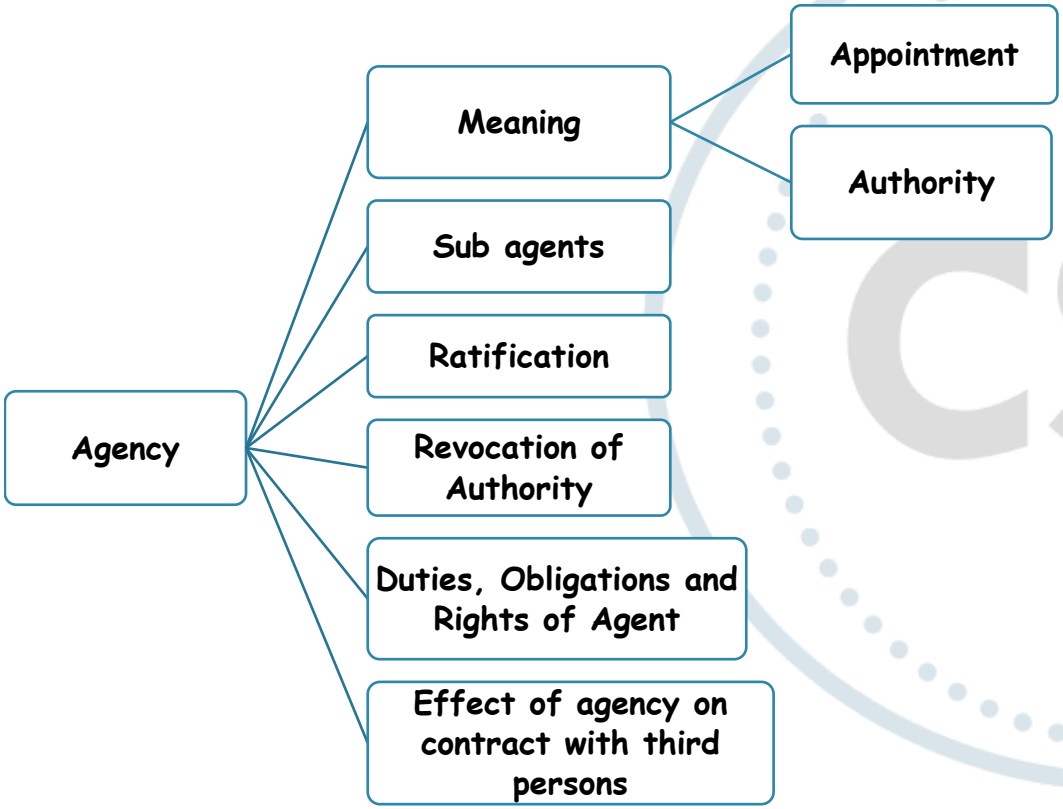
Distinction Between Bailment and Pledge

Basis of Distinction	Bailment	Pledge
Meaning	Transfer of goods by one person to another for some specific purpose is known as bailment.	Transfer of goods from one person to another as security for repayment of debt is known as the pledge.
Parties	The person delivering the goods under a contract of bailment is called as "Bailor". The person to whom the goods are delivered under a contract of bailment is called as "Bailee".	The person who delivers the good as security is called the "Pawnor". The person to whom the goods are delivered as security is called the "pawnee".

Purpose	Bailment may be made for any purpose (as specified in the contract of bailment, eg: for safe custody, for repairs, for processing of goods).	Pledge is made for the purpose of delivering the goods as security for payment of a debt, or performance of a promise.
Consideration	The bailment may be made for consideration or without consideration.	Pledge is always made for a consideration.
Right to sell the goods	The bailee has no right to sell the goods even if the charges of bailment are not paid to him. The bailee's rights are limited to suing the bailor for his dues or to exercise lien on the goods bailed.	The pawnee has right to sell the goods if the pawnor fails to redeem the goods.
Right to use of goods	Bailee can use the goods only for a purpose specified in the contract of bailment and not otherwise.	Pledgee or Pawnee cannot use the goods pledged.

2 Indian Contract Act, 1872

Unit-9: Agency



A relationship of agency is established when one party (agent) is authorized by another party (principal) to act on his/ her behalf. Such relationships are initiated when one party desires to extend his/her activities beyond his/her present limits or capacity. In modern life, it would be impossible for a man to do everything by himself. Thus, he needs agents, to perform activities. A relationship of agency is commonly visible in all business transactions.

These include hiring employees or retaining the services of other professionals such as an attorney, design professional, software developer etc. An agent has the potential to form contracts on behalf of the principal and in doing so, will bind the principal. As a result, the relationship of agency is one of trust and confidence and an agent must perform his/her activities in a capable and conscientious manner. The law of agency is contained in **sections 182 to 238** of the Indian Contract Act, 1872.

What Is Agency?

The Indian Contract Act, 1872 does not define the word 'Agency'. However, **section 182** of the Indian Contract Act, 1872 defines Agent and Principal as:

Agent means a person employed to do any act for another or to represent another in dealing with the third persons and

The principal means a person for whom such act is done or who is so represented.

Test of Agency

(a) Whether the person has the capacity to bind the principal and make him answerable to the third party.

(b) Whether he can establish privity of contract between the principal and third parties.

If the answer to these questions is in affirmative (Yes), then there is a relationship of agency.

Thus, 'Agency' is a comprehensive word used to describe the relationship between one person and another, where the first mentioned person brings the second mentioned person into legal relation with others.

The Rule of Agency is based on the maxim ***"Qui facit per alium, facit per se"*** i.e., he who acts through an agent is himself acting.

Qui facit per alium, facit per se

Appointment And Authority of Agents

Who may employ an agent: According to **Section 183**, "any person who has attained majority according to the law to which he is subject, and who is of sound mind, may employ an agent." Thus, a minor or a person of unsound mind cannot appoint an agent.

Person qualified to appoint agent must be	• Major • Sound mind

Who may be an agent: According to **Section 184** of the Act any person may become an agent i.e. even a minor or a person of unsound mind may become an agent and the principal shall be bound by his acts. But as a rule of caution, a minor or a person of unsound mind should not be appointed as an agent because he is incompetent to contract and in case of his misconduct or negligence, the principal shall not be able to proceed against him.

Example: P appoints Q, a minor, to sell his car for not less than 2,50,000. Q sells it for 2,00,000. P will be held bound by the transaction and further shall have no right against Q for claiming the compensation for having not obeyed the instructions, since Q is a minor and a contract with a minor is 'void-ab-initio'.

Consideration not necessary: According to **Section 185,** no consideration is necessary to create an agency. The acceptance of the office of an agent is regarded as a sufficient consideration for the appointment.

Creation Of Agency

In the words of Desai J, of the Supreme Court of India "The relation of agency arises whenever one person called the agent has the authority to act on behalf of another called the principal and consents to act. The relationship has genesis in a contract".

The relationship of the principal and the agent may be created in any of the following ways-

The authority may be express or implied: According to **Section 186,** the authority of an agent may be express or implied.

1. **Definitions of express and implied authority [Section 187] Express Authority:** An authority is said to be express when it is given by words, spoken or written.

Example: A is residing in Delhi and he has a house in Kolkata. A authorizes B under a power of attorney, as caretaker of his house. Agency is created by express agreement.

Example: If a customer of a bank wishes to transact his banking business through an agent, the bank will require written evidence of the appointment of the agent and will normally ask to see the registered power of attorney appointing the agent.

2. **Implied Authority:** An authority is said to be implied when it is to be inferred from the circumstances of the case, conduct of the parties and things spoken or written, or the ordinary course of dealing, may be accounted from the circumstances of the case. If a person realises rent and gives it to the landlord, he impliedly acts for the landlord as an agent.

Example: A owns a shop in Selampur, living himself in Kolkata and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

Implied Agency includes: -

a. **Agency by Estoppel [Section 237]:** Where the principal by his conduct or statement wilfully induces another person to believe that a certain person is his agent, he is subsequently prevented or estopped from denying the fact of agency.

According to **section 237** of the Contract Act, an agency by estoppel may be created when following essentials are fulfilled:

1. the principal must have made a representation;
2. the representation may be express or implied;
3. The representation must state that the agent has an authority to do certain act although really, he has no authority;
4. The principal must have induced the third person by such representation; and
5. The third person must have believed the representation and made the contract on the belief of such representation.

Example: A consigns goods to B for sale and gives him instructions not to sell below a fixed price. C being ignorant of B's instruction enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract. A cannot plead that he had given instructions to B to not sell the goods below certain price. An agency by estoppel is, consequently, deemed between A and B.

Example: If Piyal (the principal) has for several months permitted Sunil to buy goods on credit from Prasad and has paid for the goods bought by Sunil, Piyal cannot later refuse to pay Prasad who had supplied goods on credit to Sunil in the belief that he was Piyal's agent and was buying the goods on behalf of Piyal. Piyal is estopped from now asserting that Sunil is not his agent because on earlier occasions he permitted Prasad to believe that Sunil was his agent and Prasad had acted in that belief.

b. **Agency by Necessity:** An agency of necessity arises due to some emergent circumstances. In emergency a person is authorised to do what he cannot do in ordinary circumstances. Thus, where an agent is authorised to do certain act, and while doing such an act, an emergency

arises, he acquires an extra-ordinary or special authority to prevent his principal from loss.

Example: Raja has a large farm on which Shyam is the caretaker. When Raja is in Canada, there is a huge fire on the farm. Shyam becomes an agent of necessity for Raja so as to save the property from being destroyed by fire. Raja (the principal) will be liable for any expenses Shyam (his agent of necessity) incurred to put out the fire and save the farm from destruction during Raja's absence from the country.

3. Agency by Operation of Law: When law treats one person as an agent of other. For example, a partner is the agent of the firm for the purposes of the business of the firm.

4. Rights of person as to acts done for him without his authority. Effect of ratification [Section 196]: Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratifies them, the same effects will follow as if they had been performed by his authority. In simple words, "Ratification" means approving a previous act or transaction. Ratification may be express or implied by the conduct of the person on whose behalf the act was done.

Example: X who is Y's agent has on 10th January 2022 purchases goods from Z on credit without Y's permission. After the purchase, on 20th January 2022, Y tells X that he will accept responsibility to pay for the purchases although at the time of purchase the agent had no authority to buy on credit. Y's subsequent statement on 20th January 2022 amounts to a ratification of the agent's (X's) purchase of goods on 10th January 2022.

Essentials of a valid Ratification

a. Ratification may be expressed or Implied [Section 197]: Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Example: A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

Example: A, without B's authority, lends B's money to C. Afterwards B accepts interests on the money from C. B's conduct implies a ratification of the loan.

b. Knowledge requisite for valid ratification [Section 198]: No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Example: A has an authority from P to buy certain goods at the market rate. He buys at a higher rate but P accepts the purchase. Afterwards P comes to know that the goods purchased by A for P belonged to A himself. The is not binding on P.

c. ratification whole transaction must be ratified [Section 199]: There can be ratification of an act in entirely or its rejection in entirely. The principal cannot ratify a part of the transaction which is beneficial to him and reject the rest.

d. Ratification cannot injure third person [Section 200]: When the interest of third parties is affected, the principle of ratification does not apply. Ratification cannot relate back to the date of contract if third party has in the intervening time acquired rights.

Example: A, not being authorized thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

Example: A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

e. Ratification within reasonable time: Ratification must be made within a reasonable period of time.

f. Communication of Ratification: Ratification must be communicated to the other party.

g. Act to be ratified must be valid: Act to be ratified should not be void or illegal, for e.g. payment of dividend out of capital, forgery of signatures, any other criminal offence, or anything which is not permitted under law.

Extent Of Agent's Authority

The agent's authority is governed by two principles, namely **(a)** in normal circumstances and **(b)** in emergency.

(a) **Agent's authority in normal circumstances [Section 188]:**	An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.  An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business. **Example:** A is employed by B, residing in London, to recover at Mumbai a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same. **Example:** A constitutes B as his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen, for the purposes of carrying on the business.
(b) **Agent's authority in an emergency [Section 189]:**	An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.  **To constitute a valid agency in an emergency, following conditions must be satisfied.** (i) Agent should not be a in a position or have any opportunity to communicate with his principal within the time available. (ii) There should have been actual and definite commercial necessity for the agent to act promptly. (iii) the agent should have acted bonafide and for the benefit of the principal. (iv) the agent should have adopted the most reasonable and practicable course under the circumstances, and (v) the agent must have been in possession of the goods belonging to his principal and which are the subject of contract.

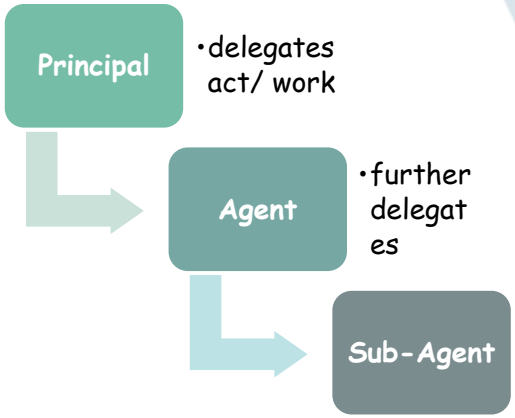
	Example: An agent who has authority for sale of goods may repair it if necessary. **Example:** A consigns perishable goods to B at Srinagar, with directions to send them immediately to C at Tamandu. B may sell the good if they begin to perish before reaching its destination.

Sub-Agents

When agent cannot delegate [Section 190]: An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub- agent must, be employed.

"Sub-agent" defined [Section 191]: A "Sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

Analysis: Sub agency refers to case where an agent appoints another agent. The appointment of sub agent is not lawful, because the agent is a delegate and a delegate cannot further delegate. This is based on the Latin principle ***"delegatus non potest delegare".***



A contract of agency is of a fiduciary character. It is based on the confidence reposed by the principal in the agent and that is why a delegatee cannot further delegate.

Exception where an agent can appoint Sub-agent:

(1) The appointment of a sub agent would be valid if the terms of appointment originally contemplated it.

(2) Sometimes customs of the trade may provide for appointment of sub agents.

In both these cases the sub agent would be treated as the agent of the principal.

(3) Where in the course of the agent's employment, unforeseen emergency arises making it necessary for him to delegate the authority that was given to him by the principal.

Representation of principal by sub-agent properly appointed

[Section 192]: Where a sub-agent is properly appointed,

(1) Principal is liable to third parties for the acts of the sub-agent.

(2) **Agents' responsibility for sub agents:** The agent is responsible to the principal for the acts of the sub-agent.

(3) **Sub-agents' liability to principal:** The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Agent's responsibility for sub-agent appointed without authority [Section 193]:

Where an agent, without having authority to do so, has appointed a person to act as a sub-agent,

(1) the agent is responsible for his acts both to the principal and to third persons;

(2) the principal is responsible for the acts of the sub agent,

(3) the sub agent is not responsible to the principal at all. He is answerable only to the agent.

Example: A, a carrier, agreed to carry 60 bags of cotton waste from Morvi to Bhavnagar by a truck. A asked B, another carrier, to carry the goods. The goods were damaged in transit. Held, A was liable even though it was proved that B was the carrier.

Substituted Agent

Substituted Agent is a person appointed by the agent to act for the principal, in the business of agency, with the knowledge and consent of the principal. Substituted agents are not subagents. They are agents of the principal.

Relation between principal and person duly appointed by agent to act in business of agency [Section 194]: Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Example: A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a subagent, but is A's agent for the conduct of the sale.

Example: A authorizes B, a merchant in Kolkata, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is a solicitor for A.

Agent's duty in naming such person [Section 195]: In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Example: A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

Example: A consigns goods to B, a merchant, for sale. B in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Difference Between a Sub-Agent and a Substituted Agent

Both a sub-agent and a substituted agent are appointed by the agent. But, however, the following are the points of distinction between the two.

Sub-Agent	Substituted Agent
A sub-agent does his work under the control and directions of agent.	A substituted agent works under the instructions of the principal.
The agent not only appoints a sub-agent but also delegates to him a part of his own duties.	The agent does not delegate any part of his task to a substituted agent.
There is no privity of contract between the principal and the sub- agent.	Privity of contract is established between a principal and a substituted agent.

The sub-agent is responsible to the agent alone and is not generally responsible to the principal.	A substituted agent is responsible to the principal and not to the original agent who appointed him
The agent is responsible to the principal for the acts of the sub-agent.	The agent is not responsible to the principal for the acts of the substituted agent.
The sub-agent has no right of action against the principal remuneration due to him. for	The substituted agent can sue the principal for remuneration due to him.
Sub-agents may be improperly appointed.	Substituted agents can never be improperly appointed.
The agent remains liable for the acts of the sub-agent as long as the sub- agency continues.	The agent's duty ends once he has named the substituted agent.

Duties And Obligations of An Agent

(i) **Duty to follow instructions or customs:** According to **Section 211** an agent is bound to conduct the business of his principal according to the direction given by the principal, or, in the absence of any such directions, according to the customs which prevails in doing business of the same kind at the place were the agent conducts such business. When the agent acts otherwise and any loss is sustained by the principal, he must indemnify him, and, if any profit accrues, he must account for it.

Example: A, an agent is engaged for managing the business of B, in which it is a custom to invest money at hand for interest. If A omits to make such investment, he must indemnify B for the losses i.e. for the interest B would have obtained for such investment.

Example: B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C. C, before payment, becomes insolvent. B will have to indemnify A for the losses.

(ii) **Duty of reasonable care and skill:** According to **section 212,** an agent is bound to conduct the business of the principal with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill.

The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss of damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Example: A, a merchant in Kolkata, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss- e.g. by variation of rate of exchange-but not further.

Example: A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale is insolvent. A must compensate his principal for the loss sustained by him.

Example: A, an insurance-broker, employed by B to affect an insurance on a ship, omits to see that the "usual clauses" are inserted in the policy. The ship is afterwards lost. In consequence of the omission nothing can be recovered from the underwriters. A is bound to make good the loss to B.

Example: A, a merchant in England, directs B, his agent at Mumbai, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

(iii) **Duty to render proper accounts [Section 213]:** An agent is bound to render proper accounts to his principal on demand. Rendering accounts does not mean showing the accounts but the accounts supported by vouchers. **(Anandprasad vs. Dwarkanath)**

(iv) **Agent's duty to communicate with principal [Section 214]:** It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

(v) **Duty not to deal on his own account:** Agent should not deal on his own account without first obtaining the consent of the principal, otherwise the principal may—

(a) repudiate the transaction, **(Section 215)**

(b) claim from the agent any benefit which may have resulted to him from the transaction. **(Section 216)**

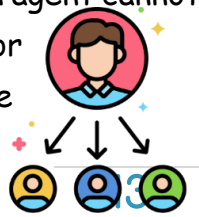
Example: A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

Example: A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allow B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or accept the sale at his option.

Example: A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

(vi) **Duty not to make secret profits:** It is the duty of an agent not to make any secret profit in the business of agency. His relationship with the principal is of fiduciary nature and this require absolute good *faith in the conduct of agency*. Secret Profit means any advantage obtained by the agent over and above his agreed remuneration and which he would not have been able to make but for his position as agent.

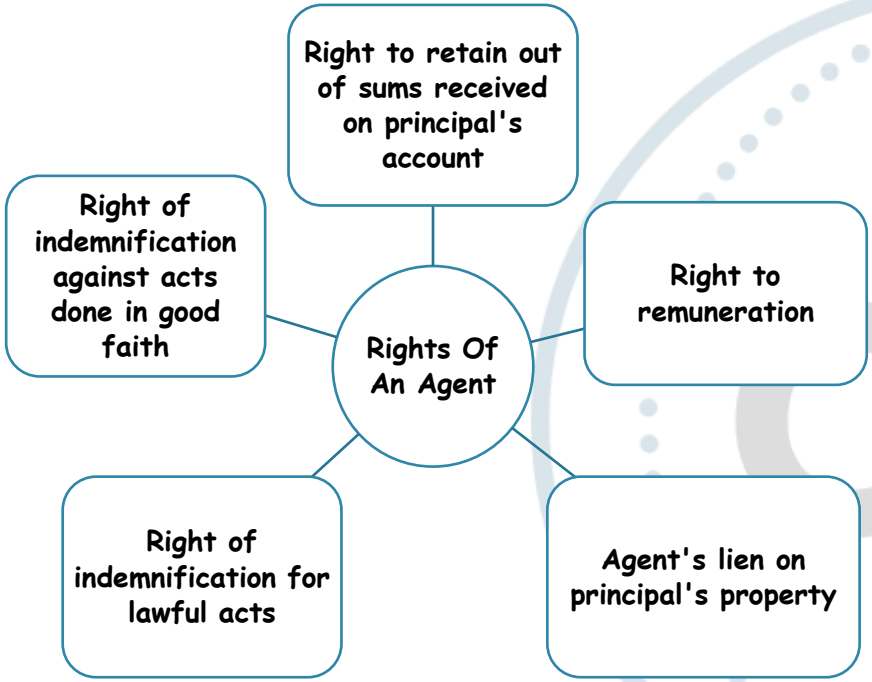
(vii) **Duty not to delegate:** According to **section 190**, an agent cannot lawfully employ to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of agency, a sub- agent, must be employed.



(viii) **Agent's duty to pay sums received for principal [Section 218]:** Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

(ix) **Duty not to use any confidential information received in the course of agency against the principal.**

Rights Of an Agent



(i) Right of retain out of sums received on principal's account [Section 217]:	This section empowers the agent to retain, out of any sums received on account of the principal in the business of the agency for the following payments: (a)all moneys due to himself in respect of advances made (b) in respect of expenses properly incurred by him in conducting such business (c) such remuneration as may be payable to him for acting as agent. The right can be exercised on any sums received on account of the principal in the business of agency.
(ii) Right to remuneration [Section 219]:	The agent in the normal course is entitled for remuneration as per the contract. In the absence of any agreed amount of remuneration, he is entitled for usual remuneration which is customary in the business.  However, an agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted [Section 220]. **Example:** A employs B to recover ₹1,00,000 from C, and invest it in securities that give good returns. B recovers the amount and lays out 90,000 on good securities but lays out 10,000 on securities which he ought to provide poor returns, whereby A loses 2,000. B is entitled to remuneration for recovering the 1,00,000 and for investing the 90,000. He is not entitled to any remuneration for investing the 10,000, and he must indemnify A for 2000. **Example:** A employs B to recover 1,00,000 from C. Because of B's misconduct the money is not recovered. B is entitled to no remuneration for his services and must make good the loss.

(iii) Agent's lien on principal's property [Section 221]:	In the absence of any contract to the contrary, an agent is entitled to retain the goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for him. **The conditions of this right are:** **a.** The agent should be lawfully entitled to receive from the principal a sum of money by way of commission earned or disbursement made or services rendered in the proper execution of the business of agency. **b.** The property over which the lien is to be exercised should belong to the principal and it should have been received by the agent in his capacity and during the course of his ordinary duties as an agent. If the agent obtains possession of the property by unlawful means, he cannot exercise particular lien. *The agent's right to lien is lost in the following cases:* (a) When the possession of the property is lost. (b) When the agent waives his right. Waiver may arise out of agreement express or implied. (c) The agent's lien is subject to a contract to the contrary.
(iv) Right to indemnity:	**a. Right of indemnification for lawful acts [Section 222]:** The principal is bound to indemnify the agent against all consequences of lawful acts done in exercise of his authority.

	Example: 'A' residing in Delhi appoints 'B' from Mumbai as an agent to sell his merchandise. As a result, 'B' contracts to deliver the merchandise to various parties. But A fails to send the merchandise to B and B faces litigations for non-performance. Here, A is bound to protect B against the litigations and all costs, expenses arising of that. **b. Right of indemnification against acts done in good faith [Section 223]:** Where the agent acts in good faith on the instruction of principal, agent is entitled for indemnification of any loss or damage from the principal. **Example:** Where P appoints A as his agent and directs him to sell certain goods which in fact turned out to be not those belonging to P and if third parties sue A for this act, A is entitled for reimbursement and indemnification for such act done in good faith. However, the agent cannot claim any reimbursement or indemnification for any loss etc. arising out of acts done by him in violation of any penal laws of the country. **c. non-liability of employer of agent to do a criminal act:** According to **section 224,** where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act. **Example:** A employs B to beat C and agrees to indemnify him against all consequences of the act.

	B thereupon beats C and has to pay damages to C for so doing. A is not liable to indemnify B for those damages. **Example:** B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to indemnify B.
(v) Right to compensation for injury caused by principal's neglect [Section 225]:	**Section 225** provides that the principal must compensate his agent in respect of injury caused to such agent due to principal's neglect or want of skill. Thus, every principal owes to his agent the duty of care, and not to expose him to unreasonable risks. **Example:** A employs B as a bricklayer in building a house and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must compensate B.

Principal's Liability to Third Parties

An agent does all acts on behalf of the principal but incurs no personal liability. The liability remains that of the principal unless there is a contract to the contrary. This is because there is no privity of contract and passing of consideration between the agent and third party. An agent also cannot personally enforce contracts entered into by him on behalf of the principal

(i) Principal's liability for the Acts of the Agent [Section 226]: Principal liable for the acts of agents which are within the scope of his authority.

Example: A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

Example: A, being B's agent with authority to receive money on his behalf, receives from C, a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

(ii) Principal's liability when agent exceeds authority [Section 227]: When an agent does more than he is authorised to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Example: A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,00,000 on the ship. B procures a policy for 4,00,000 on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

Principal not bound when excess of agent's authority is not separable [Section 228]: Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Example: A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,00,000. A may repudiate the whole transaction.

Example: A authorizes B to draw bills to the extent 200 each. B draws bills in the name of A for 1,000 each. A may repudiate the whole transaction.

Exception: Liability of principal inducing belief that agent's unauthorized acts were authorized [Section 237]: When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Example: A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

Example: A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

(iii) Consequences of notice given to agent [Section 229]: Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Example: A is employed by B to buy from C certain goods of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods. Thus, the knowledge of the agent is treated as the knowledge of the principal.

(iv) Principal's liability for the agent's fraud, misrepresentation or torts [Section 238]: Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made, or committed, by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Example: A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

Example: A, the captain of B's ship, signs bill of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Personal Liability of Agent to Third Parties

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal [Section 230]:

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. He can neither sue nor be sued on contracts made by him on his principal's behalf.

Exceptions: In the following exceptional cases, the agent is presumed to have agreed to be personally bound:

(1) **Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad/foreign principal:** – When an agent has entered into a contract for the sale or purchase of goods on behalf of a principal resident abroad, the presumption is that the agent undertakes to be personally liable for the performances of such contract.

(2) **Where the agent does not disclose the name of his principal or undisclosed principal; (Principal unnamed):** when the agent does not disclose the name of the principal then there arises a presumption that he himself undertakes to be personally liable.

(3) **Non-existent or incompetent principal:** Where the principal, though disclosed, cannot be sued, the agent is presumed to be personally liable.

Example: An agent who contracts for a minor, the minor being not liable, the agent becomes personally liable. This result, may not, however, follow where the other party already knows that the principal is a minor.

(4) **Pretended agent** – if the agent pretends but is not an actual agent, and the principal does not rectify the act but disowns it, the pretended agent will be himself liable **(Section 235).**

(5) **When agent exceeds authority-** When the agent exceeds his authority, misleads the third person in believing that the agent he has the requisite authority in doing the act, then the agent can be made liable personally for the breach of warranty of authority.

Rights Of Third Parties

i. Rights of parties to a contract made by undisclosed agent [Section 231]:

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same right as he would have had as against the agent if the agent had been the principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Example: SS bought for himself a ticket of IPL match at Wankhede Stadium through AB because on personal grounds Stadium management would not have issued the ticket to SS. Stadium management may repudiate the contract and refuse SS to enter the stadium.

ii. Performance of contract with agent supposed to be principal [Section 232]:

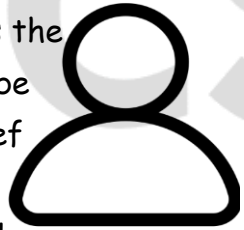
When agent does not disclose that he is acting as an agent and the principal requires the performance of the contract then the principal can obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Example: A, who owes 50,000 rupees to B, sells 1,00,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

iii. Option to Third Person- sue the Agent or the principal:

a. Right of person dealing with agent personally liable [Section 233]: In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Example: A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

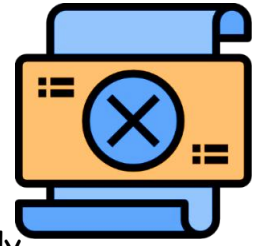


b. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable [Section 234]: When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Revocation Of Authority

Termination of agency [Section 201]: Termination of agency means putting an end to the legal relationship between principal and agent. **Section 201** provides for the following modes of termination:

Revocation	Renunciation by agent	Completion of business	Death of Principal or the agent
Principal or agent becoming of unsound mind	Insolvency of principal	Expiry of time	



a. Revocation: An agency may be terminated by the principal revoking the authority of the agent. Principal may revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal **[Section 203].**
However, the principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise for acts already done in the agency. **[Section 204]**

Example: A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

Example: A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so **as** not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Compensation for revocation by principal [Section 205]: If there is premature revocation of agency without sufficient cause, the principal must compensate the agent, for such revocation.

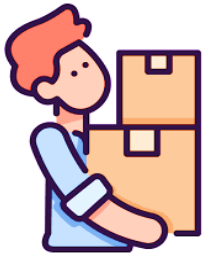
Notice of revocation [Section 206]: When the principal, having justification to do so, revokes the authority, he must give reasonable notice of such revocation to the agent, otherwise, he can be liable to pay compensation for any damage caused to the agent **(Section 206).**

Revocation and renunciation may be expressed or implied [Section 207]: Revocation of agency may be expressed or implied in the conduct of the principal.

Example: A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

b. Renunciation by agent [Section 206]: An agent may renounce the business of agency in the same manner in which the principal has the right of revocation.

In the first place, if the agency is for a fixed period, the agent would have to compensate the principal for any premature renunciation without sufficient cause. **[Section 205]**



Secondly, a reasonable notice of renunciation is necessary. Length of notice (time period of notice) is to be determined by the same principles which apply to revocation by the principal. If the agent renounces without proper notice, he shall have to make good any damage thereby resulting to the principal. **[Section 206]**

c. Completion of business: An agency is automatically and by operation of law terminated when its business is completed. Thus, for example, the authority of an agent appointed to sell goods ceases to be exercisable when the sale is completed

d. Death or insanity: An agency is determined automatically on the death or insanity of the principal or the agent. Winding up of a company or dissolution of partnership has the same effect. Act done by agent before death would remain binding.

e. Principal's insolvency: An agency ends on the principal being adjudicated insolvent.

f. On expiry of time: Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of agency has been accomplished or not. An agency comes to an automatic end on expiry of its term.

When the agency is irrevocable?

When the agent is personally interested in the subject matter of agency the agency becomes irrevocable. **Section 202** states that "where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest."

Example: A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

Example: A consigns 1000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor it is terminated by his insanity or death.

Effects of Termination [Section 208]

When termination of agent's authority takes effect as to agent, and as to third persons [Section 208]: The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Example: A directs B to sell goods for him and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it sells the goods for 1,00,000. The sale is binding on A, and B is entitled to 5,000 as his commission.

Example: A, at Chennai, by letter directs B to sell for him some cotton lying in a warehouse in Mumbai, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Chennai. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

Example: A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Agent's duty on termination of agency by principal's death or insanity [Section 209]: When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Termination of sub-agent's authority [Section 210]: The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.